

January 1999

Giving the Haves a Little More: Considering the 1998 Discovery Proposals

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Recommended Citation

Elizabeth G. Thornburg, *Giving the Haves a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229 (1999)
<https://scholar.smu.edu/smulr/vol52/iss1/19>

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GIVING THE “HAVES” A LITTLE MORE: CONSIDERING THE 1998 DISCOVERY PROPOSALS

*Elizabeth G. Thornburg**

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IN August of 1998, the Standing Committee on Rules of Practice and Procedure published for public comment a package of amendments to the discovery rules developed by the Advisory Committee on Civil

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Rules.¹ Like virtually all of the discovery rule amendments since the 1980s, the probable impact of these changes, if adopted, will be to curtail discovery.² Why is more change proposed, and why always in the same direction? Some would undoubtedly argue that we are heading toward a perfectly efficient, totally neutral set of discovery rules that will create a world in which an optimal amount of information is exchanged without any waste and without any claims of "abuse." Alas, such a world will never come to be. Whether we like it or not, whether we admit it or not, the harsher reality is that procedural rules allocate power and advantage.³ Even when written with an intent to be neutral, the Federal Rules of Civil Procedure inevitably contain political and distributional consequences.⁴ Discovery in particular is an area in which decisions about the scope of discovery and the process for undertaking it create predictable advantages and disadvantages for predictable types of litigants. And so the Advisory Committee can never expect to arrive at discovery Nirvana when the lobbying of various interested groups will finally cease because everyone is satisfied.⁵

It is not surprising that organized forces have united to argue in favor of cutbacks in discovery. By limiting discovery, they do not merely strive to decrease disliked litigation costs. More importantly, their efforts to limit discovery are intimately tied to efforts to circumscribe enforcement of disliked substantive law. "Court reform" becomes part of the package with "tort reform."⁶ This group consists in large part of repeat corporate defendants and their insurers.⁷ Casting their pleas as arguments for "effi-

1. The 1998 discovery proposals can be found at <<http://www.uscourts.gov>>. A hard copy can be obtained from the Rules Committee Support Office by calling 202-273-1820. The period for public comment on the proposals extends through February 1, 1999. The title of this Article is based on Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y REV. 95 (1974).

2. See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 747-48 (1998) ("[S]ince 1976, proposals for amendment to the rules have generally involved retreats from the broadest concept of discovery—in essence to try to contain the genie of broad discovery without killing it.").

3. See Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2219 (1989) ("I believe we cannot and should not ignore the political content and consequences of procedural rules.").

4. This does not imply that the rulemakers are motivated by hidden agendas or are blind to those of others. It just means that any decision about the rules—to amend them or to leave them alone—will have political consequences whether those consequences are addressed or ignored, desired or undesired. Cf. Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 775-76 (1993) ("[A] sensible approach would call for consideration of the likely effects of a change, including possible gains and losses for identifiable groups. But a neutral approach also implicitly accepts the possibility that uneven impact will be the outcome of certain reforms, so long as it is not the principal objective.").

5. See Marcus, *supra* note 2, at 784.

6. See Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 53 (1997).

7. See, e.g., Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 306, 308 (1994) (noting opposition to automatic disclosure rule from products liability defense interests); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1400-24 (1994) (tracing sources and history of groups urging curtailment of discovery); Judith Resnik, *Failing Faith: Adjudicatory*

ciency,” and even defenses of American productivity, these organizations have lobbied the Advisory Committee for further restrictions on discovery. Perhaps more significantly, they have threatened to go to Congress for relief, circumventing the usual rules amendment process and further politicizing the entire world of federal civil procedure.⁸

Faced with these pressures, with a desire to do *something*, and with growing concerns about disuniformity,⁹ the Advisory Committee has recommended limiting automatic disclosure in particular and the scope of discovery generally. This Article argues that the proposals are unwise and should be withdrawn by the Committee. Taken together, they would create new problems in the vast majority of cases in which there currently are no problems. They would create one-sided advantage, tending to favor defendants over plaintiffs. And they would not eliminate “abuse” in the small percentage of problematic cases¹⁰ that tend to generate concern about discovery; the causes of those discovery disputes stem from the incentive structure within the adversary system and the current role of attorneys in litigation. There is no rule amendment that the Advisory Committee, no matter how well-intentioned, can implement to eliminate discovery controversies. The proposed changes are not neutral; they are not even efficient, and they should be rejected.

I. THE 1998 PROPOSALS IN CONTEXT

The 1938 Federal Rules of Civil Procedure created a system characterized by notice pleading, liberal amendment practices, party-controlled discovery, and broad joinder of claims and parties. During the first few decades of practice under the rules, the discovery provisions were broad-

Procedure in Decline, 53 U. CHI. L. REV. 494, 538 (1986) (“many defendants (and their attorneys) in products liability and antitrust cases have championed the curtailment of discovery”); Resnik, *supra* note 3, at 2219-20; Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 89 (1997) (referring to “intensive lobbying efforts of segments of the business community”); Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of “Tort Reform”: Has the Case Been Made?*, 42 AM. U. L. REV. 1465, 1479 (1993) (identifying President’s Council on Competitiveness as source of proposals to limit discovery).

8. See, e.g., Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified at 15 U.S.C.A. § 77z-1 (West 1997)). The Civil Justice Reform Act of 1990 (CJRA) can also be seen as the result of organized interests going to Congress when they were unsatisfied with the results of the rulemaking process. The CJRA constitutes Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) and is codified as amended in scattered sections of 28 U.S.C.

9. See, e.g., Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 10-11 (1994) (local rules, 1983 amendments to Rule 16, Civil Justice Reform Act of 1990 experiments, and opt-out provisions of Rule 26(a) all contributed to increasing non-uniformity in federal practice); Daniel J. Meador, *A Perspective on Change in the Litigation System*, 49 ALA. L. REV. 7, 11 (1997).

10. Empirical research indicates that discovery operates smoothly in most cases and that those cases with a significant number of discovery disputes are a very small percentage (generally estimated at about 5%) of large, contentious cases. See generally Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683 (1998).

ened. In 1948, document production was freed of the requirement that documents to be discovered must constitute or contain evidence "material to any matter involved in the action."¹¹ In 1970, the discovery rules were rearranged and broadened: documents were discoverable without the need for a motion and showing of "good cause"; insurance policies were made discoverable; interrogatories and requests for admission were expanded to include matters of opinion; and the sanctions provisions were tightened somewhat.¹² Those 1970 revisions, however, were the last to broaden rather than constrict discovery.

Beginning in the 1970s, most notably with the Pound Conference of 1976,¹³ forces critical of discovery as it existed, or was perceived to exist, began to mobilize. This repeated expression of concern spurred what Professor Rick Marcus has identified as two "rounds" of discovery containment.¹⁴ The first round, in the 1980s, led to a mandate for increased case management, a requirement that discovery requests be signed to certify compliance with the rules, and a specific provision allowing judges to limit discovery to an amount proportionate to the dispute involved in the lawsuit.¹⁵ The second round resulted in the 1993 amendments to the discovery rules. These amendments created automatic disclosure provisions as to facts alleged with particularity, required an early conference to develop a discovery plan, and created new presumptive limits on interrogatories and depositions.¹⁶

11. 8A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 2201 (2d ed. 1994).

12. Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, in *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 487-88 (1970).

13. The Pound Conference was convened on the seventieth anniversary of Roscoe Pound's famous speech at the 1906 ABA Convention. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. OF THE A.B.A. 395 (1906). For an overview of the concerns expressed at the 1976 Conference, see Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976), in 70 F.R.D. 79 (1976).

14. See Marcus, *supra* note 2, at 753-68. Professor Marcus is currently Special Reporter to the Discovery Subcommittee of the Rules Advisory Committee and drafter of the proposed amendments.

15. See Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 90 F.R.D. 451 (1981). For a general discussion of the 1983 changes, see Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363 (1983).

16. For the Committee's proposals as of 1991, see Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53, 87-135 (1991) [hereinafter 1991 Draft]. For a discussion of the rules as ultimately adopted and the surrounding controversy, see Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing,"* 46 HASTINGS L.J. 679 (1995). See also Marcus, *supra* note 2, at 783 (summarizing the changes in the discovery rules beginning in 1980). The ultimate rule changes are reprinted at 146 F.R.D. 401 (1993).

We are now faced with a third round¹⁷ of proposed discovery cutbacks. This part of the Article sets out the significant changes that have been proposed.¹⁸ These proposals would cut back on automatic disclosure but eliminate the local opt-out provision, redefine (and narrow) the scope of discovery generally, and impose a new presumptive time limit on each deposition.

A. AUTOMATIC DISCLOSURE

1. *The 1993 Disclosure Rules*

The Advisory Committee began to address, once again, concerns about the “abuse” of discovery in 1990. In an effort to decrease cost and increase information flow, the first version of an automatic disclosure requirement aimed to “materially reduce the cost of discovery before trial” by reducing the reliance on discovery devices to obtain information.¹⁹ The Committee, like the sub-committee’s Reporter, may have realized “that in too many instances parties play hide-the-ball with basic information despite broad discovery.”²⁰ The initial proposal required the parties to disclose the names of “persons known to have personal knowledge of any fact alleged in any pleading” and information on documents “bearing on any fact alleged in any pleading filed,” evidence on which damage claims are based, and information on insurance coverage.²¹ By August 1991, the proposal had been narrowed to require basic disclosure only of persons or documents “likely to . . . bear[] significantly on any claim or defense.”²² The Committee Notes accompanying the draft indicated that automatic disclosure was not intended to change the scope of discovery. Rather, the rule was intended to “accelerate the exchange of *basic* information . . . and to eliminate the paperwork involved in requesting such information.”²³ The disclosure requirements were said to be the “functional equivalent of standing interrogatories.”²⁴

Nevertheless, the proposal generated a flood of opposition, the bulk of which came from the defense side.²⁵ The Advisory Committee reacted to the complaints by limiting the disclosure requirement still further. As sent to the Supreme Court and Congress for approval, the rule requires

17. Or maybe the 1998 proposals are more properly considered as a continuation of round two. However we label it, the Committee is again proposing that discovery be constricted.

18. The proposals also include several technical changes.

19. Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 803 (1991); see also *id.* at 858-61 (reprinting March 8, 1980, Reporter’s Draft Rule 25.1 with Reporter’s Note and Advisory Committee Note).

20. Marcus, *supra* note 4, at 805.

21. Mullenix, *supra* note 19, at 858-59.

22. 1991 Draft, *supra* note 16, at 87-88. The provisions regarding damages and insurance were retained.

23. *Id.* at 99 (emphasis added).

24. *Id.* at 100.

25. See Marcus, *supra* note 4, at 808. The proposal was also opposed by plaintiffs’ lawyers and by academics. See *id.* at 808-09.

disclosure only of information and documents "relevant to disputed facts alleged with particularity in the pleadings."²⁶ The amended proposal continued to draw opposition through the remainder of the rulemaking process. The Supreme Court sent the proposal to Congress with tepid support,²⁷ and the House Judiciary Committee immediately held hearings during which opponents urged Congress to eliminate the mandatory disclosure requirements. The House passed such a bill,²⁸ but the Senate ran out of time and did not. The mandatory disclosure rules therefore became effective on December 1, 1993.²⁹ Also part of the package, the Committee adopted presumptive limits on the number of interrogatories (twenty-five, including subparts) and number of depositions (ten per side, including third-party defendants) that could be used by the parties absent agreement or court order.

Why the intense opposition to a rule that the Committee represented as a minor change in timing and paperwork? On the one hand, the disclosure provisions were opposed by the insurance and corporate defense lawyers³⁰ who feared that the disclosure regime would force them to disclose too much. No longer would lawyers trying to evade discovery be able to rely on their opponent's failure to draft requests with unavoidable specificity. One AT&T in-house lawyer complained that disclosure eliminates the ability to benefit from an opponent's mistakes: "You're giving up chips that would never have been put on the table. There's no substitute for good lawyering, and this helps bad lawyers who don't have the discipline or competence to draft appropriate requests."³¹ At bottom, the requirement of automatic disclosure seemed to them incompatible with litigator culture, an understanding of the "adversary system," including discovery, as a process in which the only operative value is aggressive assertion of the interests of the client. At least some lawyers believe that they are entitled to receive the benefits of good lawyering at the expense of reaching a just result. Discovery is *not* an island of cooperation in a

26. 1993 Amendments, 146 F.R.D. 401, 431 (1993).

27. Chief Justice Rehnquist's transmittal letter to Speaker Foley states that the transmittal indicates that "the Court is satisfied that the required procedures have been observed" but notes that "this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted." H.R. Doc. No. 103-74 (1993), *reprinted in* 146 F.R.D. 401, 403 (1993). Justice Scalia wrote a dissent to the amendments, joined by Justices Thomas and Souter, principally on the ground that automatic disclosure would require attorneys to produce information damaging to their clients.

By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side.

Id. at 511.

28. See H.R. 2814, 103d Cong. (1993).

29. See Randall Samborn, *Rules for Discovery Uncertain*, NAT'L L.J., Dec. 20, 1993, at 1.

30. See Sorenson, *supra* note 16, at 726 n.170.

31. Melinda Thayer, *quoted in* Ron Coleman, *Civil Disclosure*, 81 A.B.A. J. 76, 78 (Oct. 1995).

sea of adversariness, but a part of the adversarial tide. Any rule that requires cooperation instead is not going to be welcomed by those who benefit from a lack of disclosure.

The automatic disclosure rules were also opposed by segments of the plaintiffs' bar, but for different reasons. Again reflecting the adversarial culture, the plaintiffs' bar tended to oppose automatic disclosure because they feared it would result in *less* information being discovered. First, since the rule as adopted limits the automatic disclosure duty to facts pleaded with particularity, plaintiffs will be provided information only in areas in which they are able to allege specific facts before filing suit. For information-poor plaintiffs, this may not be much help. Such plaintiffs will not be able to plead facts with particularity, will therefore not get related initial disclosures, and will nevertheless have seen their access to formal discovery tools limited in number. Second, plaintiffs' lawyers fear that disclosure *by* plaintiffs may allow evasive defendants to shape formal discovery so as to further avoid disclosing information to plaintiffs.

Another plaintiffs' concern is the opportunity provided by automatic disclosure for an additional opportunity for disputes and delay. Those who benefit by delaying discovery could find themselves with a new source of delay—disputes over disclosures. On the whole, delay tends to benefit defendants rather than plaintiffs.³²

Further anxiety relates to the long-run shape of civil litigation. "One fear is that this proposal is an ice-breaker for the abolition of discovery. Some judges seem willing to reinforce that fear."³³ Some lawyers see initial disclosure by plaintiffs as a disguised return to fact pleading and a world in which lawsuits can only be brought by those with pre-filing access to all important facts.³⁴ These concerns are also supported by suggestions that the disclosure rules will work together with Rule 11 and lead to the dismissal (with sanctions) of lawsuits when plaintiffs lack adequate evidence before filing.³⁵

Lawyers and clients unhappy with the 1993 rules urged federal district courts to exercise their right to "opt out" of the automatic disclosure rules.³⁶ Numerous districts have done so or have adopted automatic disclosure rules that differ from the Rule 26(a) model. This has added a

32. See Galanter, *supra* note 1, at 121 (delay favors the party in possession); THOMAS W. CHURCH, JR. ET AL., *PRETRIAL DELAY: A REVIEW AND BIBLIOGRAPHY* 12-13 (1978) (defendants can benefit from delay by postponing necessity to pay and by increasing chances that the passage of time will impair the quality of evidence and make it more difficult for plaintiff to meet burden of proof).

33. Marcus, *supra* note 4, at 811, (citing *Wauchop v. Domino's*, 143 F.R.D. 199, 200 (N.D. Ind. 1992)).

34. See, e.g., *Transcript of the "Alumni" Panel on Discovery Reform*, 39 B.C. L. REV. 809, 813 (1998) [hereinafter *Alumni Panel*].

35. See *id.* (quoting Judge Schwarzer, an influential rule reformer); see also William W. Schwarzer, *New Discoveries for the Discovery Process*, LEGAL TIMES, NOV. 25, 1991, at 25.

36. See, e.g., Denis F. McLaughlin, *Your Guide to Amended Rules of Civil Procedure*, N.J. LAW., Jan. 10, 1994, at 1 (describing pressures for district to opt out or modify rule); Jaret Seiberg, *Rule Wrangling*, CONN. L. TRIB., Jan. 24, 1994, at 3 (pressure by lawyers for district to opt out or modify rule); Daniel Wise, *3 Bar Groups Seek Delay in Federal Dis-*

problem of non-uniformity on the national level (information must be disclosed in some districts but not in others) in addition to the benefits or burdens associated with the disclosure rule itself.

2. *The Proposed 1998 Disclosure Limitations*

The same pressures that caused controversy to flow around the 1993 proposal, along with the concerns about disuniformity, have led the Advisory Committee to once again take up the issue of disclosure and its relationship to formal discovery. After two academic conferences³⁷ and other input from interested groups such as the Defense Research Institute,³⁸ the Committee has proposed the following redefinition of the disclosure requirement (with changes indicated):

(1) INITIAL DISCLOSURES. Except in categories of proceedings specified in subparagraph (E),³⁹ or 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 supporting its claims or defenses, unless solely for impeachment 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 that are in the possession, custody, or control of the party and that support its claims or

covery Changes, N.Y. L.J., June 9, 1994, at 1 (defense bar organizations try to get New York area federal courts to postpone automatic disclosure).

37. One was at the University of Alabama and one in San Francisco. The ABA Section on Litigation also sponsored a conference at the University of Alabama, and the Advisory Committee held a meeting there. Some of the papers and proceedings are reprinted in 49 ALABAMA LAW REVIEW number 1 (1997) and 39 BOSTON COLLEGE LAW REVIEW number 3 (1998).

38. The DRI is a national organization of defense lawyers. See *Alumni Panel*, *supra* note 34, at 835 (1998) (DRI proposal for limiting discovery characterized as "not plaintiff friendly"). The conference also heard from the ABA Section of Litigation, the American College of Trial Lawyers, the American Trial Lawyers Association (a national organization of plaintiffs' lawyers), Trial Lawyers for Public Justice (a non-profit, public interest law firm), and the Products Liability Advisory Council. See Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?* 39 B.C. L. REV. 517, 522 (1998). For information about the various entities, see *ENCYCLOPEDIA OF ASSOCIATIONS* at 555, 588 (32d ed. 1997) and *The Product Liability Advisory Council: Who We Are and What We Do*, MET. CORP. COUNSEL (Jan. 1998).

39. Subparagraph (E) exempts from initial disclosure certain categories of cases thought to involve little or no discovery: an action for review on an administrative record; a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence; an action brought without counsel by a person in the custody of the United States, a state, or a state subdivision; an action to enforce or quash an administrative summons or subpoena; an action by the United States to recover benefit payments; an action by the United States to collect on a student loan guaranteed by the United States; a proceeding ancillary to proceedings in other courts; and an action to enforce an arbitration award. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, Request for Comment, 36-37 (Rule 26, lines 38-52) (1998) <<http://www.uscourts.gov>> [hereinafter 1998 Discovery Proposals]. Collectively, these cases represent a large proportion of the civil caseload of federal district courts.

defenses, unless solely for impeachment ~~that are relevant to disputed facts alleged with particularity in the pleadings.~~⁴⁰

Courts' ability to opt out by local rule or standing court order is eliminated. However, parties in individual cases can ask for special treatment. The disclosures are to be made within fourteen days after the initial conference (absent stipulation or court order) unless "a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the subdivision (f) discovery plan. In ruling on the objection, the court must determine what disclosures—if any—are to be made, and set the time for disclosure."⁴¹

The Committee Notes cite the importance of ending the opt out experiment and adopting a uniform national rule. On the merits, the Notes emphasize that under the proposed rule a party "is no longer obligated to disclose witnesses or documents that would harm its position" and that "[b]ecause the disclosure obligation is limited to supporting material, it is no longer tied to particularized allegations in the complaint."⁴²

B. SCOPE OF DISCOVERY

1. Background to the 1998 Proposals

The kind of concern about broad discovery expressed at the Pound Conference also led to the creation of a Special Committee on Abuse of Discovery by the American Bar Association (ABA) Section of Litigation.⁴³ This Special Committee issued a report, which was officially approved by the ABA Board of Governors in December, 1977.⁴⁴ Among these proposals was a redefinition of the scope of discovery, narrowing it to material "relevant to the issues raised by the claims or defenses of any party."⁴⁵ In 1978 the Advisory Committee initially proposed an amendment to so restrict the scope provisions, but substituted language that the Committee thought would be somewhat clearer: "relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party."⁴⁶ After facing significant opposition, including Professor Charles Alan Wright's comment that the proposals were "hasty solutions to what may or may not be problems,"⁴⁷ the Advisory Committee withdrew its proposal to narrow the scope of the discovery. This proposal did

40. *Id.* at 34-35 (Rule 26, lines 3-22).

41. *Id.* at 37-38 (Rule 26, lines 59-64).

42. *Id.* at 50.

43. See Marcus, *supra* note 2, at 753-54.

44. See *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137 (1977).

45. Marcus, *supra* note 2, at 754 n.38.

46. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 623 (1978). Professor Bernard Ward, the Reporter at the time, opposed the change and also did not like the term "issues." Marcus, *Redux*, *supra* note 2, at 756 n.47.

47. Marcus, *supra* note 2, at 759. The Advisory Committee also abandoned the proposed revision because a 1978 empirical study by the Federal Judicial Center demonstrated that discovery activity was limited in most cases. See Mullenix, *supra* note 7, at 1435.

not die, however. In 1989 a section of the New York Bar Association resurrected the concept.⁴⁸ The Committee again rejected it. Some Committee members thought that the change would make no real difference. Some thought that it might require fact pleading, and it was noted that the original proposal was strongly opposed by the plaintiffs' and civil rights' bars. The proposal to change to "claims and defenses" language had no supporters.⁴⁹ The current version of the scope limitation proposal comes from the American College of Trial Lawyers (ACTL).⁵⁰ The very persistence of the suggestion is sometimes taken as an indication that Rule 26's current language, "relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party," is in fact the source of discovery problems.⁵¹

2. *The 1998 Proposals*

The 1998 proposed amendments would signal a narrowing of discovery in three ways. First, the basic definition of relevance is changed. Discovery would be available for matters "relevant to the claim or defense of any party."⁵² The language referring to "subject matter involved in the pending action" is omitted.⁵³ "Subject matter" discovery is available only if a party can show "good cause."⁵⁴ Second, the provision for discovery of non-admissible information is re-drafted to suggest limits. It would be revised as follows: "Relevant ~~The information sought~~ need not be admissible at the trial if the discovery information sought appears reasonably calculated to lead to the discovery of admissible evidence."⁵⁵ This amendment was prompted by the Committee's concern that the "reasonably calculated to lead to the discovery of admissible evidence" standard of the current rule "might swallow any other limitation on the scope of discovery."⁵⁶ Therefore, the proposed amendment emphasizes that the non-admissible information must itself be "relevant" as defined. Third, in

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

49. Advisory Committee on the Civil Rules, Civil Rules Committee Minutes 9 (Nov. 17-18, 1989), *quoted in* Marcus, *supra* note 2, at 776 n.153.

50. See Niemeyer, *supra* note 38, at 519. Judge Niemeyer sits on the Fourth Circuit Court of Appeals and is currently Chair of the Civil Rules Advisory Committee. The ACTL was apparently invited to submit the proposal by former Advisory Committee Chair and Fifth Circuit Judge Patrick Higginbotham. See *Federal Rules Committee Plans to Review Discovery Quagmire*, FEDERAL DISCOVERY NEWS, Nov. 1996, available in LEXIS, Legnew Library, Allnws File. (Higginbotham asked the ACTL to address the subject of "tightening up the scope and sweep of discovery relevancy under Rule 26(b)") [hereinafter *Quagmire*].

51. Niemeyer, *supra* note 38, at 520 ("[I]t is the persistence of complaints and questions about the merit of broad discovery and its expense that, at bottom, has caused the Committee to take another look.").

52. 1998 Discovery Proposals, *supra* note 39, at 41-42 (Rule 26, lines 122-26).

53. *Id.* at 41 (Rule 26, lines 123-24).

54. *Id.* at 42 (Rule 26, lines 130-32). "Good cause" is not defined, and the Committee Notes indicate that the good cause standard is meant to be "flexible." *Id.* at 56.

55. *Id.* at 42 (Rule 26, lines 132-36).

56. *Id.* at 56.

case judges did not already realize that these amendments are intended to limit discovery, the proposal adds a gratuitous cross-reference to the proportionality requirements already contained in the very next section of Rule 26(b)(2) stating that “[a]ll discovery is subject to the limitations imposed by subdivision (b)(2)(i), (ii), and (iii).”⁵⁷ The Committee Notes indicate that the Committee has been “told repeatedly”⁵⁸ that the proportionality limits have not been used with sufficient “vigor” and cite a Supreme Court case noting that Rule 26 as it exists “vests the trial judge with broad discretion to tailor discovery narrowly.”⁵⁹ The Committee therefore recommends what it knows to be a “redundant” cross reference.⁶⁰

C. 1998 PROPOSALS LIMITING SPECIFIC DISCOVERY DEVICES

As noted above, the 1998 proposals keep in place and make mandatory the presumptive limits on numbers of depositions and numbers of interrogatories imposed in 1993. This is done despite the original tie between automatic disclosure and discovery limits.⁶¹

The new package of proposed amendments also contains new limits on depositions and document production. The deposition limit revives a proposal that failed in the past—a presumptive time limit for depositions. The Advisory Committee had initially proposed in 1991 that depositions be limited to six hours.⁶² That limit was later deleted, although the Committee did add limitations on obstructionist conduct during depositions.⁶³ The 1998 proposal states that “[u]nless otherwise authorized by the court or stipulated by the parties and the deponent, a deposition is limited to one day of seven hours.”⁶⁴ The court retains its authority to allow additional time “if needed for a fair examination of the deponent” or if something “impedes or delays the examination.”⁶⁵ The Committee Notes indicate that the party seeking a court order to extend a deposition or

57. *Id.* at 42 (Rule 26, lines 136-38).

58. *Id.* at 57. The Note does not indicate by whom it has been told, although it cites the Wright & Miller treatise.

59. *Crawford-El v. Britton*, ___ U.S. ___, 118 S. Ct. 1584, 1597, 140 L.Ed. 2d 759, 779 (1998).

60. In order to further national uniformity, Rule 26(b)(2) would also be amended to remove the previous permission for local rules or standing orders that establish different presumptive limits on number of depositions and interrogatories than those contained in Rules 30, 31, and 33. Thus local districts cannot establish local rules allowing either greater or smaller numbers of interrogatories or depositions without orders directed to specific cases. Rule 26(b)(f) would be amended to remove the prior authority to exempt cases by local rule or standing order from the discovery conference requirement.

61. The limits were justified on the ground that the information provided in initial disclosures would make more extensive formal discovery generally unnecessary. See Carington, *supra* note 7, at 305; Sugarman, *supra* note 7, at 1478; *Alumni Panel*, *supra* note 34, at 835 (quoting Magistrate Brazil).

62. See 1991 Draft, *supra* note 16, at 68.

63. These provisions are now contained in Rule 30(d). For a discussion of the earlier Committee's reasons for rejecting the time limit proposal, see Marcus, *supra* note 2, at 767 n.111.

64. 1998 Discovery Proposals, *supra* note 39, at 60 (Rule 30, lines 11-13).

65. FED. R. CIV. P. 30(d)(2). Permission for variants by local rule is again eliminated.

otherwise alter the limits "is expected to show good cause to justify such an order" and optimistically note that "[p]reoccupation with timing is to be avoided."⁶⁶

The proposed amendment to document production rules also parallel an earlier request from portions of the bar. The Council on Competitiveness suggested that the cost of document production after initial disclosure should be borne by the requesting party.⁶⁷ The 1998 amendments would not be so severe, but would make clear the trial court's authority to condition document production on payment by the party seeking discovery of part or all of the costs of the production.⁶⁸ Specifically, the Committee proposes adding the following sentence to Rule 34(b): "On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall—if appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii)—limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party."⁶⁹

II. "ABUSE" AS A TWO WAY STREET: WHAT THE COMMITTEE HAS NOT PROPOSED

All of the 1998 proposed amendments assume that the source of "discovery abuse" is over-discovery: parties trying to extract from their opponents more than they are entitled, or more than a cost/benefit analysis would warrant. Nowhere in the proposals are changes designed to limit abusive *resistance* to discovery, even though empirical research has consistently identified resistance as a bigger problem than overbroad requests.⁷⁰ For example, the empirical research commissioned by the Advisory Committee and done by the Federal Judicial Center reported that the most common problems in document production were failure to respond adequately and failure to respond in a timely fashion.⁷¹ Nevertheless, it is *doing* discovery rather than *resisting* discovery that the Committee proposes to limit. This part of the Article briefly examines roads that the Committee has not taken.

66. 1998 Discovery Proposals, *supra* note 39, at 63.

67. See Sugarman, *supra* note 7, at 1479 (citing President's Council on Competitiveness, Agenda for Civil Justice Reform in America 17 (1991)).

68. The Committee Notes suggest that authority to shift costs to the party seeking discovery is already implicit in Rule 26(b)(2).

69. 1998 Discovery Proposals, *supra* note 39, at 65-66 (Rule 34, lines 23-28).

70. See, e.g., Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 829 (1980); Joseph L. Ebersole & Barlow Burke, *DISCOVERY PROBLEMS IN CIVIL CASES* 44-47 (1980) (defendant's opposition to discovery often unfounded); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 800 (1998) (citing Columbia Project for Effective Justice).

71. See Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 540 (1998).

A. DISCOVERY SHARING

Some situations, such as single-accident mass disasters, products that are alleged to injure large numbers of people, or insurance policies or other investments that are alleged to be fraudulently sold, lead to large numbers of lawsuits that revolve around the same set of facts. These multiple lawsuits, if not joined or coordinated, will result in multiple overlapping sets of discovery requests. Under the present rules, plaintiffs are required to formulate their own discovery requests, have their own discovery disputes, and independently acquire their own information. In settling a case, a plaintiff and defendant can bargain for the return and confidentiality of the discovery materials.⁷² Professor Carrington proposed to the Advisory Committee a rule limiting such redundant discovery by creating discovery rules that “generally obligate parties to produce discovery materials produced in other like cases even if those cases were resolved short of trial.”⁷³ Carrington structures his proposal as part of the automatic initial disclosures, which he converts to standard interrogatories.⁷⁴

This kind of discovery rule would cut discovery costs and delay by eliminating duplication of effort. It would limit the ability of parties who seek to avoid or prolong discovery to require their opponents to repeatedly file motions to compel discovery that other courts have already ordered. It would generally result in the production of “core” information early on and without the need for formal discovery requests. It is likely that such a rule would therefore favor plaintiffs rather than defendants, at least in mass tort, securities, and consumer litigation.⁷⁵ Yet the Advisory Committee has not recommended this change.

B. RULINGS AND SANCTIONS

Another consistent theme in lawyer responses to empirical research is the lawyers’ desire for judges to rule promptly on discovery disputes and to impose sanctions on offending parties more often.⁷⁶ The most recent study by the Federal Judicial Center, done specifically for the Advisory Committee, is no exception. When given a list of thirteen changes that might reduce litigation costs, attorneys most often chose increasing the

72. See, e.g., *Short v. Western Elec. Co.*, 566 F. Supp. 932 (D.N.J. 1982).

73. Carrington, *supra* note 6, at 72.

74. See *id.* at 75 (Appendix, proposed Rule 26(a)(3)(C)): “Are there documents, data, compilations, or tangible things in your possession, custody, or control that are relevant to disputed facts alleged with particularity in the pleadings? If so, provide a copy or a description by category and location.”).

75. See Carol M. Rice, *The Civil Justice Reform Act Conference: A Reporter's View*, 49 ALA. L. REV. 265, 275 (1997). Professor Carol Rice reports in her summary of breakout sessions in the CJRA Conference that defense counsel in particular opposed a rule that would prohibit agreements to destroy discovery materials on settlement. See *id.*

76. See Marcus, *supra* note 2, at 781-82 (“the [e]nduring [a]llure of [a]dult [s]upervision”).

availability of judges to resolve discovery disputes.⁷⁷ Imposing sanctions more frequently and severely placed third, with forty-two percent of attorneys responding that such action might reduce litigation costs.⁷⁸ This suggestion is echoed by experienced federal judges such as Patrick Higginbotham, immediate former Chair of the Advisory Committee: "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 . . . disputes, a lot of those problems will go away."⁷⁹ Similarly, Paul Carrington, a former Advisory Committee Reporter, has recommended prompt judicial rulings as a cure for discovery ills.

[T]he Rules might wisely provide that motions respecting discovery shall, unless otherwise specifically ordered, be made orally and ruled upon "forthwith." Judges who effectively and promptly enforce rights with respect to discovery are much less likely to be burdened with frequent interruptions of their work by frivolous discovery disputes than those who take such motions under advisement and await opportunities to read briefs and transcripts of depositions.⁸⁰

More judges ruling on (as opposed to managing)⁸¹ discovery disputes faster seems to be an evenhanded reform, desired by the bar and recommended by eminent proceduralists. It could cut down on unfounded resistance to discovery as well as overdiscovery. But no such amendment to the Rules was proposed by the Advisory Committee, either in the form of a provision for oral motions or a deadline for judicial action. Nor were the sanction rules amended.⁸² This kind of approach, which would address abusive evasion, was not what the Committee was looking for.

77. Fifty-four percent of attorneys responding chose this option. Nor was there a statistically significant difference in the number of plaintiff and defense lawyers finding this attractive. See Willging, *supra* note 71, at 542. The choices they were given were: adopting a uniform national rule requiring initial disclosure; deleting initial disclosure from the national rules; narrowing the definition of what is discoverable; narrowing the definition of what documents are discoverable; limiting or further limiting the time within which to complete discovery; limiting or further limiting the number of depositions; limiting or further limiting the maximum hours for a deposition; limiting or further limiting the number of interrogatories; increasing court management of discovery; increasing availability of district or magistrate judges to resolve discovery disputes; imposing fee-shifting sanctions more frequently and/or imposing more severe sanctions for violations of discovery rules or orders; adopting a civility code for attorneys; and others. In fact, the desire for greater availability of judges was the *only* proposed change to have as much as 50% support. See *id.*

78. See *id.* at 585.

79. *Alumni Panel*, *supra* note 34, at 817.

80. Carrington, *supra* note 6, at 64-65. ("Because delays in ruling create incentives for counsel to bicker over trifling discovery issues, judges who do not rule quickly make more work for themselves while imposing costs on the parties.")

81. The Federal Judicial Center study found that judges were more likely to have helped to plan discovery than to have decided discovery motions or ruled on sanctions. See Willging, *supra* note 71, at 580.

82. It is true that the authority to sanction already exists in Rule 37, and arguably no change is necessary. But the same was true of the proportionality limits on the scope of discovery in Rule 26, and the Committee's recommendation re-emphasizes those limits several times.

This, then, is a summary of what the Advisory Committee did and did not recommend. Taken together, it aims to force trial judges to limit discovery more than has been the case. The proposals cut back on initial disclosure, cut back on the scope of discovery, cut back on the availability of individual discovery devices, and do nothing to address the problem of discovery avoidance. The remainder of this Article will analyze the proposed amendments. Who wants them? What does empirical research tell us about the need for them? What is their likely effect?

III. WANTING, NEEDING, AND THE PROPOSED AMENDMENTS

A. WHO WANTS TO LIMIT DISCOVERY?

As Professor Marcus has recently reminded us, “in a world in which proposals do emanate from interest groups and some players are focused on their private advantage, it would be foolish to disregard motivation as a hint about both the desirability and likely impact of proposals for change.”⁸³ While this is not the only question to ask,⁸⁴ it is important to consider which groups have been lobbying (literally)⁸⁵ for limits on the extent of civil discovery.

It is no secret that the anti-discovery pressure has come from defendants, especially defendants in product liability, securities, and antitrust cases.⁸⁶ The most recent push for limits resembles the proposals of then-Vice-President Quayle and the President’s Council on Competitiveness.⁸⁷ In a 1991 speech to the American Bar Association, Vice-President

83. Marcus, *supra* note 4, at 773. As he explains:

In some instances those who seek to advance their interests through civil litigation reform are overt about what they are doing, but many who seek advantage through reform proposals do not act so transparently. Thus, skepticism about hidden agendas sharpens our antennae as we scrutinize arguments phrased as neutral [T]he real objective . . . may be to become a winner, not to achieve whatever loftier goals are invoked to justify the change.

Id. at 772-73.

84. See *infra* Parts III(B) and IV.

85. Over the last decade, a variety of powerful “repeat players” have sought, sometimes openly, to influence “court reform” efforts. By and large, that work has been done not by letters written to the Advisory Committee on Civil Rules, but rather by lobbying efforts directed towards legislatures and the public, . . . and by support for conferences and meetings to address and describe the “litigation crisis.”

Resnik, *supra* note 3, at 2219-20.

86. See Resnik, *supra* note 7, at 538.

The clients, particularly corporate clients, are demanding [constraint] as a matter of costs, and Congress, concerned with the public outcry of excess (although the facts do not support the extreme excess claims that are often made) and reacting to the intensive lobbying efforts of segments of the business community, has already acted.

Subrin, *supra* note 7, at 89.

87. The membership of the Council is not entirely clear. The Council’s Civil Justice Reform Working Group was chaired by then-Solicitor General Kenneth Starr. See Mullenix, *supra* note 7, at 1422 n.151.

Quayle announced the Council's recommendations for changing the civil litigation system, with a focus on discovery.⁸⁸ The Council's Report, called *Agenda for Civil Justice Reform in America*, attacked discovery, conflating tort liability and procedural issues, claiming that the decline of the American economy was caused by the tort and products liability system, which was caused by litigation transaction costs, which were caused by the failings of the procedural rules.⁸⁹ The *Agenda* "proposed revamping tort litigation and procedural rules in order to provide advantages to business and the insurance industry. The agenda expressed little concern with whether or not potential claims might be meritorious; rather, it embodied a blatant attempt to modify the rules in order to frustrate plaintiffs' litigation."⁹⁰

Meanwhile, back in Congress, a crisis-slanted opinion poll conducted by Louis Harris became the basis for the Brookings-Biden Report.⁹¹

Underwritten by business and insurance concerns, neither the Harris survey nor the Brookings-Biden report considered alternative views of the purposes of the federal justice system; instead, both concentrated on portraying procedural rules as mere adjuncts to the concerns of American businessmen and insurance companies seeking to secure the position of the United States within the global economy.⁹²

The business community then appeared to testify in support of the Civil Justice Reform Act (CJRA).⁹³ When the CJRA was passed by Congress, pilot district advisory groups were directed to study discovery abuse and were provided with copies of the Council's *Agenda*.

The Advisory Committee's current interest in discovery is a reflection of the continued complaints from corporate constituents. Judge Paul V. Niemeyer, of the Fourth Circuit Court of Appeals, chaired his first meeting of the Advisory Committee in October of 1996.⁹⁴ Judge Niemeyer made review of discovery the highest priority for the Committee.⁹⁵ He

88. See *id.* at 1401.

89. See *id.* at 1423.

90. *Id.* at 1424.

91. See *id.* at 1415. The problems with the methodology of the Harris opinion survey are discussed generally in Mullenix, *supra* note 7, at 1410-15.

92. *Id.* at 1416-17.

93. See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 389-92, 397-98 (1992).

94. See *Quagmire*, *supra* note 50.

95. See *id.* Judge Niemeyer was appointed to the District Court bench in 1988 and to the Fourth Circuit in 1990. From his graduation from law school through his appointment to the district court, Niemeyer worked for the Baltimore firm of Piper & Marbury. See *Niemeyer Gets Bush Nod for 4th Circuit*, UPI, Aug. 8, 1990, available in LEXIS, News Library, UPI file; Terence Moran, *Bush Judge Appointments: White, Male and Cautious*, CONN. L. TRIB., Feb. 4, 1991, at 2. Piper & Marbury describes itself in Martindale-Hubbell as a "business law firm" whose clients include "many Fortune 500 industrial and service companies; manufacturing and financial services companies; major investment banks and investment advisers; venture capital organizations and emerging companies; overseas banking and financial interests; regional and local businesses and commercial banks; closely-held enterprises; and state and local governments." MARTINDALE-HUBBELL, PIPER & MARBURY L.L.P. (1998). Its litigation specialties include commercial litigation, interna-

acted in response to "longstanding concerns" about discovery abuse.⁹⁶ Judge Niemeyer also "spoke eloquently about the depth of dissatisfaction with discovery" and repeated the claim that discovery "accounts for 80 percent of litigation costs."⁹⁷ Reflecting on his own experience as an attorney, Niemeyer reported that he "knew all the tricks" and that "we used to shuffle the documents."⁹⁸

At a conference at Boston College Law School in the fall of 1997, the Committee had the chance to consider reports from various groups on the issue of discovery reform. The plaintiff-based Association of Trial Lawyers of America reported that discovery abuse is "rare" and recommended against changes in the rules,⁹⁹ and Trial Lawyers for Public Justice asserted that "there is no serious, scholarly empirical work to justify system-wide restrictions upon discovery."¹⁰⁰ The American College of Trial Lawyers,¹⁰¹ on the other hand, proposed narrowing the scope of discovery in the way that the Committee has recommended.¹⁰² This proposal was backed by the Defense Research Institute, which also called for replacing automatic disclosure with an exchange of information such as a narrative of the incident that led to the suit, legal claims and defenses, and associated documents.¹⁰³

The kinds of amendments proposed by the Advisory Committee, then, are those sought by groups that tend to appear in court as defendants and

tional trade litigation, labor and employment, products liability and toxic torts, securities and business litigation, and white collar and public law litigation. *See id.*

96. Marcia Coyle, *Discovery Rules to Be Re-Examined*, NAT'L L.J., Mar. 10, 1997, at A9. Alfred Cortese, a Philadelphia lawyer who represented "a broad coalition of business groups opposed to mandatory pre-discovery disclosure in 1993," reacted favorably to the Advisory Committee's announcement: "We are at a point where anything you ask for [during discovery], you can get. It's terribly costly and unfair. Ultimately, the Rules Committee can do a lot of things that will help." *Id.*

97. *Quagmire*, *supra* note 50. This "80%" claim, for which there is no empirical support, is in fact contradicted by numerous empirical studies. *See infra* Part III(B). In his introduction to the Boston College symposium, Judge Niemeyer reports the claim that over 80% of the time and cost of lawsuits involves discovery. He goes on to note,

While I am not aware of any empirical data to support this claim, the fact that the claim was made and is often repeated by others, many of whom are users of the discovery rules, raises a question of whether the system pays too high a price for the policy of full disclosure in civil litigation.

Niemeyer, *supra* note 38, at 518.

98. *Quagmire*, *supra* note 50. His personal anecdote thus reflects a practice of resistance to discovery rather than one of overbroad discovery abuse.

99. *See* Rex Bossert, *Many Suggest Changing the Nature of Discovery*, NAT'L L.J., Oct. 13, 1997, at A12.

100. *Id.* "Paul Bland, a staff attorney at the Washington D.C.-based group, said the biggest problem in discovery is 'stonewalling' by defendants who make lengthy and groundless objections in depositions of witnesses or hide and even destroy documents." *Id.*

101. At least some commentators characterize the ACTL as dominated by defense interests in civil cases. *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1418 (1993); Lisa M. Agrimonti, Note, *The Limitations of Daubert and its Misapplication to Quasi-Scientific Experts, A Two-Year Case Review of Daubert v. Merrell Dow Pharmaceuticals*, 35 WASHBURN L.J. 134, 153 n.93 (1995).

102. *See* Memorandum from Paul V. Niemeyer to Hon. Alicemarie H. Stotler (June 30, 1998), *reprinted in* 1998 Discovery Proposals, *supra* note 39, at 1.

103. *See id.*; *see also Quagmire*, *supra* note 50.

by their lawyers. It is, however, possible that "a given proposal could, regardless of its origin and its supporters, actually be justified on more neutral grounds."¹⁰⁴ The remainder of this Article therefore focuses on the necessity for and probable effect of the proposed amendments.

B. EMPIRICAL DATA AND THE NEED FOR CHANGE

Outcry about the cost and abuses of discovery is intimately connected with outcry about the "litigation explosion." The notion that we are experiencing a crisis in civil caseload was popularized by Walter K. Olson's 1991 book,¹⁰⁵ politicized by the President's Council on Competitiveness and fed by the media and by lawyers themselves.¹⁰⁶ Careful empirical analysis, particularly that of Professor Marc Galanter, has demonstrated that no such crisis exists.¹⁰⁷ This scholarly rebuttal, however, does not seem to have made a dent in public perception. The same seems to be true of concerns about problems with discovery. Public outcry and media coverage continue to send the message that discovery is a gigantic and pervasive problem. This part of the Article examines what empirical research in fact indicates about discovery and the need, if any, for rule changes.

The most recent study by the Federal Judicial Center succinctly summarizes the findings of empirical researchers: "[T]he typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation, and . . . discovery generally—but with notable exceptions—yields information that aids in the just disposition of cases."¹⁰⁸ This conclusion is supported by numerous studies going back thirty years. The Columbia Project for Effective Justice, working in the 1960s, deliberately chose cases to maximize the likelihood of finding discovery activity. Even within this group, only two-thirds of attorneys reported using formal discovery.¹⁰⁹ The researchers further concluded that "the costs of discovery were not oppressive, either in relation to ability to pay or to the stakes of litigation."¹¹⁰ Ten years later, the Federal Judicial

104. Marcus, *supra* note 4, at 773. Professor Marcus defines "neutrality" as "a perspective that is not driven by the self-interest of the observer (or of those the observer 'represents') and in which 'the choice is made on a basis of society-wide benefits.'" *Id.* at 773-74.

105. WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991).

106. See Mullenix, *supra* note 7, at 1398-1409.

107. See generally Marc S. Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Marc S. Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 2 (1983).

108. Willing, *supra* note 71, at 527.

109. See McKenna, *supra* note 70, at 790 n.13. The Columbia researchers also found that the percentage of litigation time spent on discovery was 43% for heavy discovery cases but only 28-31% in the average case. See WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 71, 73, 196 (1968).

110. McKenna, *supra* note 70, at 787.

Center (FJC) completed a significant study of discovery practices. This project studied 3,000 federal civil cases from six metropolitan districts.¹¹¹ The FJC found that in 52% of the cases, there was *no discovery at all*. In 72% of the cases, there were no more than *two* discovery events.¹¹² At about the same time, the Civil Litigation Research Project (CLRP) at the University of Wisconsin studied "ordinary litigation": cases in which more than \$1,000 is in controversy but excluding "mega" cases. The CLRP found that "relatively little discovery occurs in the ordinary lawsuit. We found no evidence of discovery in over half our cases. Rarely did the records reveal more than five separate discovery events."¹¹³

These studies were consistent but dated. The Advisory Committee therefore wisely looked to the RAND Institute for Civil Justice¹¹⁴ and the Federal Judicial Center¹¹⁵ for information about the current discovery environment. The findings of both groups were consistent with the older studies. The RAND study was based on 5222 cases filed in 1992-93 in twenty federal districts.¹¹⁶ RAND excluded from its sample cases that usually involve little or no discovery or management.¹¹⁷ In cases that closed before issue was joined (28% of the sample), there was no discovery at all. In cases that closed after issue was joined but in 270 days or less (27% of the sample), the median lawyer work hours on discovery per litigant was a whopping three hours. Even in cases that closed more than 270 days after filing (45% of the sample), lawyers worked a median of twenty hours on discovery per litigant. Fifty-five percent of the RAND sample, then, involved little or no discovery.¹¹⁸ For 38% of general civil cases, lawyer work hours for discovery were zero.¹¹⁹

The FJC studied 1000 cases closed in the last quarter of 1996 and strove to sample cases likely to involve discovery.¹²⁰ The FJC focused on costs as reported by the attorneys in the cases studied. They found that the median cost of discovery was about \$6,500 per client (about half of median litigation costs). Relative to stakes, the FJC found that discovery expenses were quite low. The median percentage was 3% of the

111. See generally PAUL R. CONNOLLY ET AL., FEDERAL JUDICIAL CENTER, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978).

112. See *id.* at 28-29.

113. David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 90 (1983). The study found that discovery occupied 16.7% of total lawyer time or a little more than five hours. There were discovery events in 46.1% of the cases. See *id.* at 89-91. The CLRP study included both state and federal cases. See *id.* at 75.

114. See James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 615 (1998).

115. See Willging, *supra* note 71 (reporting the FJC findings).

116. See Kakalik, *supra* note 114, at 618.

117. They excluded prisoner cases, administrative review of social security cases, bankruptcy appeals, foreclosures, forfeiture and penalty cases, and debt recovery. See *id.* at 620 n.7. Such cases make up a substantial proportion of the federal courts' civil docket.

118. See *id.* at 635-36.

119. See *id.* at 636.

120. The FJC study excluded social security appeals, student loan collections, foreclosures, default judgments, and cases terminated within sixty days of filing. See Willging, *supra* note 71, at 528. This excludes about 55% of the civil docket. See *id.* at 595.

stakes.¹²¹

Despite consistent findings of low discovery cost and a functioning system, however, the studies are also consistent in finding a small percentage of cases in which there is a larger volume of discovery activity and discovery disputes. The 1978 FJC study concluded that a few cases—less than five percent—had more than ten discovery requests.¹²² The two modern studies also discovered a large amount of discovery concentrated in a small number of cases. For example, in the RAND study, the median number of discovery hours in the top 10% of cases was 300—fifteen times the median for discovery of the active cases.¹²³ In the FJC study, while the median percentage of discovery expenses to stakes was quite low (3%), about 5% of attorneys estimated discovery expenses at 32% or more of the amount at stake.¹²⁴ As the Director of the American Bar Foundation reminds us, “[a] rather small number of cases thus generated a very large amount of discovery.”¹²⁵

At least at a level of generality, the research has also identified characteristics that tend to be associated with this small percentage of problematic cases. These include amount at stake, case complexity, case contentiousness, subject matter of the lawsuit, size of law firm, number of parties, and number of claims, with the amount at stake having the strongest correlation with discovery problems.¹²⁶ The consistency of these findings led the RAND researchers to recommend special attention to the small number of problem cases:

These findings suggest that policymakers should consider focusing discovery rule changes and discovery management on the types of cases likely to have high discovery costs, and the discovery practices that are likely to generate those high costs. More attention and research is clearly needed on how to identify those high discovery cost cases early in their life, and how best to manage discovery on those cases.¹²⁷

Similarly, the FJC researchers were led by their data to theorize that “there may be problem cases rather than isolated problems with each

121. See *id.* at 531.

122. See CONNOLLY, *supra* note 111, at 28.

123. See Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597, 600 (1998). For this top ten percent, as in all the groups, the mean number is even higher—601 hours for discovery. See *id.*

124. See Willging, *supra* note 71, at 531.

125. Garth, *supra* note 123, at 600.

126. See Willging, *supra* note 71, at 552, 555, 577, 582; Kakalik, *supra* note 114, at 668; CONNOLLY, *supra* note 111, at 28-29. While the 1978 FJC study identified product liability, patent, and franchise contract litigation as being the most likely to produce a high volume of discovery, the 1998 FJC study results show antitrust, patent, securities, and trademark cases to be most likely to generate large amounts of discovery. The new studies showed the strongest predictor of discovery problems to be high stakes. The FJC researchers further theorize that “[h]igh stakes cases may have more problems simply because they offer more discovery activity and, hence, more opportunities for problems to arise.” Willging, *supra* note 71, at 555.

127. Kakalik, *supra* note 114, at 636-37.

separate form of discovery.”¹²⁸

What we do *not* know is why these particular cases generate a large volume of discovery and discovery disputes. What exactly are the problems? And are the problems caused by the rules or by forces outside the rules? What are the incentives for lawyers, clients, and judges that cause problems to arise and to have persisted over time? Can these situations be addressed by rule changes? The next section of this article evaluates the proposed discovery rule amendments in light of this knowledge and this ignorance.

IV. EVALUATING THE PROPOSALS: BEYOND THE POWER OF RULES

As noted in Part I above, the Advisory Committee has recommended a set of rule changes that would universalize but restrict initial disclosures, redefine the scope of discovery, re-emphasize the existing proportionality limits, retain numerical limits on discovery devices, and introduce a new time limit for depositions. These changes apply across the board, except that certain kinds of predictably low-discovery cases are exempted from automatic disclosure requirements. The Committee hopes that these amendments would result in full disclosure of relevant information at less cost, help the courts target problematic cases, and keep Congress out of rulemaking. I fear that the actual impact would be the opposite: less adequate disclosure of information, greater cost, problematic cases still problematic, and Congress still lurking.

A. DECREASED INFORMATION EXCHANGE

All of the proposed changes have the potential to limit the total amount of information available to litigants through the disclosure and discovery process. Disclosure of less information is not an explicit goal of reform, however. Empirical research indicates that attorneys generally believe that discovery generates about the right amount of information or even too little information.¹²⁹

The first change likely to decrease the information flow comes in the automatic disclosure rules. The proposals eliminate the requirement that information be automatically disclosed under Rule 26(a) unless it supports the discloser's claim or defense. While this is a politically understandable response to the vehement opposition of the defense bar to automatic disclosure, it is also apt to result in the disclosure of less information both initially and after formal discovery.

The proposed amendments retain many of the features of which plaintiffs complained: the tie to possible Rule 11 sanctions, the specificity

128. Willging, *supra* note 71, at 553.

129. See Willging, *supra* note 71, at 531 (80% thought discovery generated about the right amount of information, 10% that it generated too little information, and 10% that it generated too much).

about damage calculations, the strategic value to an obstructionist defendant of advance knowledge of the limits of plaintiff's pre-suit information, and the limits on other formal discovery.¹³⁰ Conversely, the proposals delete the feature of initial disclosure that defendants most opposed: the need to disclose information that undermined claims or defenses.¹³¹

One could argue that the limitation on initial disclosure merely shifts the revelation of *unfavorable* information back to the formal discovery process. But remember that the 1993 introduction of the disclosure rules came with a trade-off—limits on formal discovery. As Professor Carrington notes, "disclosure requirements . . . justif[ied] presumptive limits on the amount of discovery that would be allowed."¹³² Without disclosure, the limits

posed a threat to meritorious claims and defenses that are dependent on extensive use of discovery. Earlier disclosure of the most obviously pertinent information facilitated intelligent setting of those limits and made it less likely that meritorious contentions would be lost as a result of premature and arbitrary limits on discovery.¹³³

Magistrate Brazil, in some sense the parent of automatic disclosure, urged the Advisory Committee not to limit disclosure to supporting documents only:

[I]f 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.¹³⁴

130. The amendments do, however, eliminate the tie between pleading with particularity and the availability of disclosure. This change should work in favor of plaintiffs to the extent that it broadens the subjects on which defendants will have a duty to disclose. However, it limits that disclosure to information in support of the defendant's position. And while this theoretically puts defendants without a sufficient basis for a denial at risk of a Rule 11 sanction, this seems statistically unlikely based on past practices and based on the courts' probable forgiveness of defendants who have had a short time to investigate and prepare an answer and disclosures.

131. To be fair, the plaintiffs' bar was not crazy about this requirement either as applied to them. At least where defendants' denial or affirmative defenses were specifically pleaded, the current version of Rule 26(a)(1) could require plaintiffs to disclose documents or witnesses who could show the plaintiff's claim to be unavailing. For a discussion of attorneys' general aversion to disclosing information harmful to a client, see Sorenson, *supra* note 16.

132. Carrington, *supra* note 7, at 305. This tie was made clear in the Committee Notes to the 1993 amendments. For example, the new limit on number of interrogatories was specifically justified by the disclosure requirements: "Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it." 1991 Draft, *supra* note 16, at 124.

133. Carrington, *supra* note 7, at 305.

134. *Alumni Panel*, *supra* note 34, at 835.

The re-definition of relevance in Rule 26(b)(2) might also lead to a decrease in the flow of information through discovery. It is possible that the change could be innocuous. Some procedure experts have opined that, on its face, the deletion of the "subject matter" language makes no difference because the "subject matter" language is not a source of discovery problems.¹³⁵ It seems more likely, though, that the changes, particularly when considered as a package, send a strong message to district judges that the rulemakers want judges to exercise their discretion to restrict discovery. The Committee, after all, is recommending deleting the "subject matter" language *and* limiting the last sentence about "reasonably calculated to lead to the discovery of admissible evidence" *and* adding a cross reference to a section limiting discovery.¹³⁶ Further, the Committee Notes demonstrate that the Committee intends to signal "the court that it has the authority to confine discovery."¹³⁷ It seems unlikely that district judges will fail to get their cue. As Professor Arthur Miller pointed out to the Advisory Committee:

[R]atcheting 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.¹³⁸

The amended rule turns current presumptions on their head. Instead of assuming that any matter relevant to the subject matter is discoverable, with the burden on the party opposing discovery to show non-relevance, burden, or privilege, the presumption is that information beyond "claims and defenses" is *not* discoverable. The burden is newly placed on the party seeking discovery either to convince the judge that the information sought falls within the core definition of relevance or to make an unde-

135. See, e.g., Edward Cooper, *The Discovery Reform Proposals 5-7* (Oct. 1996) (on file with author); Paul Carrington, *quoted in Alumni Panel, supra* note 34, at 832. The same skepticism met the original scope proposal. Professor Charles Alan Wright argued that "[n]either the Section [of Litigation] nor the Advisory Committee offers a scintilla of proof that the term 'subject matter' does in fact persuade courts to err on the side of expansion of discovery." Marcus, *supra* note 2, at 758. Lacking any reliable empirical evidence that the "subject matter" language causes problems, the Committee Notes merely assert that the Committee has "heard" that in some instances the language has supported sweeping requests. If in fact the changed language makes little difference, the Committee will have increased the likelihood of disputes without any offsetting benefit. See *infra* Part IV(B).

136. 1998 Discovery Proposals, *supra* note 39, at 41-42 (Rule 26, lines 121-138).

137. *Id.* at 56. Even passing the changes must lead to the conclusion that some kind of limit was the goal. Rule 26(b)(2) as amended would create a basic discovery standard of relevant to the pleaded claims and defenses, with "subject matter" a different standard, accessible only through motion and showing of good cause. Clearly some difference between the two standards is intended. Presumably the difference is meant to limit discovery into related but unpleaded claims. However, as Professor Cooper has pointed out, this would involve a major change in the philosophy of discovery. "Discovery is designed not only to support or refute issues defined in the pleadings, but to continue the process of refining the issues framed by the pleadings, discarding some of these issues, and adding new issues." Cooper, *supra* note 135, at 6.

138. *Alumni Panel, supra* note 34, at 833.

finer and "flexible" showing that there is good cause to allow further discovery. The matter must go to the judge, and it must go to the judge with a presumption against discovery. Further, these decisions about relevance are extremely discretionary and virtually unreviewable.¹³⁹ Denials of discovery may be consciously or unconsciously shaped by the political views of those federal district judges who have been chosen specifically for their conservative views and are probably unreceptive to certain kinds of lawsuits.¹⁴⁰

Parties with incentives to resist discovery will also likely get their cue. For example, products liability defendants now have added reasons to read requests narrowly. Perhaps they will interpret the plaintiff's discovery request in light of the "claims and defenses" language and, without an overt objection, simply produce less information. There is little sanction for a party withholding information that hurts that party so long as it is never discovered. Inability to introduce the information at trial, Rule 37's answer, does not hurt the party who never wanted the information revealed to begin with.

Finally, the new presumptive limit on length of depositions is, on its face, a way of limiting discovery. While many depositions may already be less than seven hours long, the Federal Judicial Center study found that a six-hour limit (proposed but withdrawn in 1993) would have affected 30% of the cases studied.¹⁴¹ Absent party agreement, then, a party seeking discovery through depositions faces the prospect of less information or, at minimum, the increased cost and delay of filing a motion to allow a longer deposition, justified by a vague good cause standard.¹⁴² In the kind of case in which problems occur, that party's opponent has also just been handed an incentive to subtly run out the clock to further restrict the time allowed.

The Committee's proposal leaves the information-poor litigant in this box: (1) provided through the disclosure process only with information that helps her opponent;¹⁴³ (2) provided with a shrunken set of formal discovery tools to force the disclosure of information that helps her, but

139. For a discussion of review of discovery orders generally, see Elizabeth Thornburg, *Interlocutory Review of Discovery Orders: An Idea Whose Time Has Come*, 44 Sw. L.J. 1045 (1990).

140. See generally Thomas E. Shakow, Book Note, *Picking Moderate Judges*, 107 YALE L.J. 2333 (1998) (reviewing SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997)); Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257. See also Andrew I. Gavil, *Attitudinal Discretion and the Prospects for Reinvigorating Antitrust: A Look at the New Federal Rules*, 39 ANTITRUST BULL. 27 (1994) (arguing that assigning discretion to conservative trial judges under the federal rules renders it likely that such discretion will work to plaintiffs' detriment in antitrust cases).

141. See Willging, *supra* note 71, at 571.

142. Nor were the researchers able to document any benefit resulting from a deposition time limit. See *id.* at 571 n.58.

143. The disclosing party will have to identify neither persons nor documents supporting an opponent's contentions. Formal discovery will still be needed for those tasks. Given the trial bar's propensity to read interrogatories and document requests narrowly so as to avoid identifying such people or producing such documents, the presumptive limits

hurts her opponent; (3) required, at a minimum, to spend more money and time, in the form of motions to show good cause, to get that information;¹⁴⁴ and (4) required to show good cause about information she cannot concretely describe because she does not know precisely what it is, who has it, or if it, in fact, exists. If that information-poor litigant has the burden of proof in the lawsuit, she may also find herself on the losing end of a summary judgment motion.¹⁴⁵ If the case goes to trial, it may do so without important information.¹⁴⁶

When considering the probability of a limited information exchange, it is important to note that the Committee is not dealing with an isolated procedural issue. Rather, the level of discovery is inextricably related to the level of enforcement of various substantive legal norms. Much of the regulation of conduct in America is done not by government agencies but indirectly, through a series of private lawsuits or the fear of those lawsuits:

We should keep clearly in mind that discovery is the American alternative to the administrative state. We have by means of Rules 26-37 . . . privatized a great deal of our law enforcement, especially in such fields as antitrust and trade regulation, . . . civil rights, and intellectual property. Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy. Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum

may create a real barrier to full disclosure of information. This is especially likely where initial disclosure will have demonstrated the limits of an opponent's existing knowledge.

144. The discovering party must file a motion and show good cause both to seek discovery that her opponent believes is beyond the "claims and defenses" limit and to undertake discovery in excess of the presumptive limits on number and duration. She may also have to contend with a motion to shift the cost of document production to her if her opponent claims that the cost of such production exceeds a suitable limit under Rule 26(b)(2).

145. See Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1927 (1998) ("The most obvious ways in which courts can deploy Rule 56 to intercept cases before trial are first by setting a vigorous standard for permitting plaintiffs discovery before summary judgment, and then, at summary judgment, by using a tough standard for establishing the existence of a genuine issue of material fact."); see also *Alumni Panel*, *supra* note 34, at 833 (quoting Professor Miller):

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.

Id.

146. See, e.g., Cooper, *supra* note 135, at 3 ("The alternative to complex trials based on overwhelming discovery may be complex trials based on overwhelmingly incomplete and misleading information.").

of forbidden conduct.¹⁴⁷

The tie between discovery and enforcement is no coincidence, and assuredly not a surprise to those groups seeking change.¹⁴⁸ Business groups seek to limit discovery precisely *because* those limits will make it more difficult for plaintiffs to prevail in products liability suits.¹⁴⁹ Having failed to pass substantive tort reform legislation, these groups seek procedural advantage; if the law cannot be changed, maybe it can be made unenforceable.¹⁵⁰ There may also be a specific tie to notice pleading and discovery, a feeling that only the most egregious and easily-discovered violations of substantive law should be prevented or remedied: "it is better for society that obscure and well-buried wrongs lie undisturbed."¹⁵¹ If the Advisory Committee does not share this view, it should be deeply concerned about the possible impact of the proposed rule amendments.

B. CONTINUED AND INCREASED TRANSACTION COSTS

If taken as a philosophical signal by trial judges, the discovery amendments might result in the exchange of less information. It is unlikely, however, that they will result in meaningfully decreased costs. First, there will continue to be a large quantity of discoverable information in the very kinds of cases that lead to controversy about discovery. "[T]here can be no inexpensive way to investigate and decide complex issues of fact such as those entailed in fixing moral responsibility for misfortunes and assessing damages tailored to individual circumstances."¹⁵² In these

147. Carrington, *supra* note 6, at 54; see also Geoffrey C. Hazard, Jr., *quoted in* Cooper, *supra* note 135, at 18 ("Civil claims are an integral part of law enforcement in this country. . . . Liberal discovery is an integral part of effective enforcement Hence, the scope of discovery determines the scope of effective law enforcement in many fields regulated by law."); see also Patrick Higginbotham, *Foreward*, 49 ALA. L. REV. 1, 4-5 (1997).

148. For a discussion of the sources of pressure to limit discovery, see *supra* Part III(A).

149. For a discussion of the reasons that limits on discovery tend to disadvantage plaintiffs as compared to defendants, see Elizabeth Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1561-71 (1991) and authorities cited therein. See also Marcus, *supra* note 2, at 749 ("It seems undeniable that broad discovery has benefitted plaintiffs attempting to prove certain types of claims by enabling them to obtain both 'smoking guns' and less inflammatory but critical evidence. The great importance of discovery to some plaintiffs is obvious.").

150. Carrington, *supra* note 6, at 53 ("Much of the hoopla about litigation costs may be traceable to those whose real complaint is that they or their clients are exposed to liabilities that they would prefer to avoid. Theirs is a disguised outcry for tort reform."); Sugarman & Perlin, *supra* note 7, at 1468-69.

In its broadest sense, . . . the tort reform movement seeks a reexamination of what its proponents believe to be an unfair burden imposed on American industry by injured consumers. With that in mind, it is not surprising that most of the Council [on Competitiveness]'s proposals seek to limit or impede, through the judicial process, a plaintiff's recovery in product liability cases and as such are enthusiastically endorsed by the American Tort Reform Association.

Id.

151. Cooper, *supra* note 135, at 3 ("These views do not seem a promising foundation for discovery reform.").

152. Carrington, *supra* note 7, at 303. Actually, you could cut down considerably on transaction costs by substituting a coin flip and a damages dart board for civil litigation, but I doubt that such a trade-off would be acceptable to anyone.

days of computers, printers, and copiers there is simply a lot of paper created and stored. We have only seen the tip of the iceberg in terms of the procedural consequences of electronic storage and retrieval of data.¹⁵³ Nor is non-documentary discovery easily confined. Litigation involving large business or government entities requires sifting through large numbers of potential witnesses to locate the ones with relevant information, especially information helpful to the discovering party.¹⁵⁴ In addition, the breadth of the rules of trial evidence means that a large quantity of information is going to be relevant in the trial sense and therefore admissible.¹⁵⁵ The need for the evidence at trial creates the need for the information during discovery. It may be that the reason the Rule 26(b)(2) proportionality limits have not been cited often is that proportionality principles are not often violated; certain kinds of civil litigation simply require large quantities of discovery, and these amounts are not disproportionate to the stakes involved and not unnecessarily duplicative or burdensome.¹⁵⁶

Second, the forces that currently lead to misunderstandings and disputes about discovery still exist. I will take a product liability case as an example because that is likely to be an area on which litigants' hopes and fears about these proposals focus. One ongoing source of disputes is a difference in fundamental outlook between the plaintiff and defense bars. These differences will be reflected in disagreements about relevance even under the proposed amended Rule 26(b)(1). For example, assume a lawsuit that grows out of personal injury caused by some particular product. The plaintiffs' bar is likely to believe that information surrounding that product and similar products, including numerous prior and subsequent model years, including many different types of injuries, and including many possible design or manufacturing defects in that product, are all covered by the "claims and defenses" language of the discovery relevance rule. Defense lawyers, on the other hand, are likely to interpret "relevant to the claims and defenses" to mean that they need disclose information only about the particular product causing the particular kind of harm. While we may have eliminated fights about totally unrelated products, the new rules do not answer this kind of question and will not stop the disputes.

Third, this difference in outlook is fueled by the parties' strategic needs: plaintiff wants to get as much information as possible in order to

153. See, e.g., Geanne Rosenberg, *Electronic Discovery Proves an Effective Legal Weapon*, N.Y. TIMES, Mar. 31, 1997, at D5.

154. And more businesses are suing each other all the time. See Marc Galanter, *The Life and Times of the Big Six*; or, *The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 942-46 (discussing growth of commercial litigation in federal courts between 1960 and 1986).

155. See Cooper, *supra* note 135, at 3.

156. This is likely to be particularly true in that small percentage of cases that generates significant amounts of discovery and discovery disputes. Also, in some of these cases involving large amounts of intangible, non-market damages, it may be hard to estimate what the "stakes" are when trying to make decisions about the costs of discovery.

meet her burden of proof, and defendant wants to keep plaintiff from getting it. Plaintiffs draft discovery requests that are of necessity somewhat broad and somewhat vague;¹⁵⁷ they do not know specifically what documents exist, and they fear narrow and evasive responses. Defendants resent what they see as overbroad, expensive, and irrelevant requests. Both sides may have something to gain from the stereotypical "abusive" practices. Plaintiffs may get settlement leverage out of creating litigation expenses for defendants, who settle to minimize out of pocket costs. Defendants, in turn, may get settlement leverage out of creating expense and delay for plaintiffs who settle because they (and/or their lawyers) cannot afford the costs of the discovery disputes or the delay in payment.¹⁵⁸ To make matters worse, there is an extremely high level of distrust between the two groups of lawyers. Professor Tom Rowe, a member of the Advisory Committee, noted after listening to the groups at the Boston College symposium that "the levels of mistrust and antagonism between them even among elite lawyers are distressingly high. (I came away wondering if those people were at the point of trying to prevent intermarriage among their children!)"¹⁵⁹ These attitudes make it likely that plaintiffs' lawyers will continue to try to draft broad requests that are impervious to evasion through narrow interpretation, and that defendants' lawyers will continue to resist producing what they see as a mountain of marginally relevant information.

The very existence of rule amendments will create *new* opportunities for discovery disputes. We now have years of case law about the meaning of "relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."¹⁶⁰ We do not know, however, the meaning of "relevant to the claim or defense of any party," especially as contrasted with "information relevant to the subject matter of the action."¹⁶¹ The Committee Notes concede that this new distinction is vague: "[t]he dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision."¹⁶²

It seems likely that this necessary lack of clarity will foster exactly the kinds of disputes discussed above. For example, in a lawsuit about post-crash injuries following a head-on collision and allegedly caused by the design of a 1990 Chevrolet, do inquiries about the 1989 model relate to

157. Cf. Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1675 (1998) ("[T]he clues that can be sifted from a set of documents cannot be predicted without seeing the set of documents.").

158. For a good example of the parties' differing diagnoses of the causes of problem discovery, see David Wagner, *Lawyers "Discover" How to Beat the Rap*, INSIGHT ON THE NEWS, Dec. 15, 1997, at 31 (discussing DRI conference on discovery).

159. Email from Tom Rowe to Law Faculty Discussion List of Civil Procedure, CivPro@law.wisc.edu (Sept. 10, 1997) (on file with author).

160. FED. R. CIV. P. 26(b)(1).

161. 1998 Discovery Proposals, *supra* note 39, at 41-42 (Rule 26, lines 123-26, 131-32).

162. *Id.* at 56.

the claims and defenses in the lawsuit? What about crash tests involving side collisions? What about an almost-identical Oldsmobile?

There will also be uncertainty about discovery sought for purposes such as impeachment. As attorney Gregory Joseph asked the Alumni Panel at Boston College: "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?"¹⁶³ Arthur Miller, responding without answering the question, as all good law professors do, predicted that questions such as this "might breed a hell of a lot of motion practice."¹⁶⁴

Beyond the question of the line between "claim or defense" and "subject matter" lies the next step in the proposed process: showing good cause. What, exactly, is good cause to go beyond whatever its "claims and defenses" are? These decisions are likely to be highly discretionary and extremely case-specific. The Committee Notes state that the standard is "meant to be flexible."¹⁶⁵ They further explain that "the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested."¹⁶⁶ This non-standard layers uncertainty on top of uncertainty and is begging to be repeatedly litigated. Further, it is not likely to generate caselaw over time that provides guidance to litigants and decreases the flow of disputes.

To the new uncertainty, add incentives to litigate. The new rules create additional incentives for defendants to resist discovery.¹⁶⁷ First, they may correctly deduce that discovery requested is no longer available. Second, even if it turns out that the material was discoverable after all, they have forced the plaintiff to invest greater time and money in acquiring the information. At minimum, the plaintiff had to file a motion to compel discovery. The motion may have required a hearing, possibly even an evidentiary hearing. And there may have been considerable delay between the filing of the motion and the court's ruling. Finally, the uncertainty of the new rules' meaning may lead the court to conclude that the defendant's resistance to discovery was substantially justified¹⁶⁸ and so no

163. *Alumni Panel*, *supra* note 34, at 832.

164. *Id.* at 833; *see also id.* at 813 (quoting John Frank: "[W]e'll simply be starting a whole new war over what does it mean and what is the change. And it's just going to cost money and not do much good.").

165. 1998 Discovery Proposals, *supra* note 39, at 56.

166. *Id.*

167.

[Y]ou 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.

Wayne Brazil, *quoted in Alumni Panel*, *supra* note 34, at 834.

168. *See* FED. R. CIV. P. 37(c)(1).

sanctions will be forthcoming to offset the cost of the discovery dispute.

The proposed amendments also do not, and probably cannot, address incentives to misuse the discovery process that exist outside of the litigation process itself. We do not, at this point in time, have reliable information about what those forces are.¹⁶⁹ There seem to be some likely candidates, however. One source of pressure to over-do or resist discovery, to cooperate or to wage all out war,¹⁷⁰ may come from clients. Discovery, especially extensive discovery, is not pleasant for any client and those clients may resist discovery or not try very hard to locate all relevant information.¹⁷¹ More intractable, some clients may *want* discovery disputes. "[T]here are still cases . . . where businesses are willing to invest in full-scale warfare, and for those cases they turn to the elite litigators who are now very well-trained and well-armed."¹⁷² While clients may be deluded,¹⁷³ it is more likely that sophisticated clients are deliberately choosing lawyers who fight rather than cooperate.¹⁷⁴ If there are in fact client incentives to create disputes,¹⁷⁵ these incentives remain untouched by the amended rules. Until we know why these clients make these choices, we will not know what kind of change in the rules, if any, can help force changed behavior.

A similar problem exists with regard to lawyers themselves. Some disputes may be due to simple incompetence or misunderstanding of the rules. Others may be an outgrowth of adversary culture. Empirical data seems to link problematic behavior with larger law firms. The FJC study, for example, found that costs were higher when one of the law firms involved in the case had more than eleven lawyers.¹⁷⁶ Is there something

169. Bryant Garth, Director of the American Bar Foundation, has suggested that questions such as this are crucial to dealing with the issue of highly contentious lawsuits.

[W]e can only gain limited insights from research that starts with the questions of cost and delay and ends with the same questions. . . . The reasons for the external pressures must also be studied. . . . The best way to save judicial cost and time, in fact, may be to look at incentives for behavior outside the courts.

Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 128-29 (1997).

170. The very use of war and sports metaphors may reinforce attitudes that lead to unnecessary discovery disputes. See Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225 (1995).

171. See, e.g., Wagner, *supra* note 158 (describing attitude of engineer caught up in discovery).

172. Garth, *supra* note 123, at 607.

173. And if so, then improved client education may accomplish more than rule changes. See Kakalik, *supra* note 114, at 633.

174. See Garth, *supra* note 123, at 608-09.

175. Brazil's study of Chicago lawyers found that among the lawyers who specialized in larger, more complex cases, clients were more likely to play an active role in discovery decisions, to pressure lawyers to resist discovery, and to use discovery tools to harass opponents. See Brazil, *supra* note 70, at 859-60; see also McKenna, *supra* note 70, at 803-04.

176. See Willging, *supra* note 71, at 552.

about the economics¹⁷⁷ or culture¹⁷⁸ of law firms that contributes to discovery disputes? If so, it is again unlikely that the proposed discovery amendments will make any difference.

C. TARGETING THE BAD CASE

There is some indication that the Advisory Committee hopes that this package of changes will result in directing judicial attention toward that small percentage of cases with significant discovery problems. The Committee Notes to the relevance restrictions, for example, state that "the amendment is designed to involve the court more actively in regulating the breadth of discovery in cases involving sweeping or contentious discovery."¹⁷⁹ Judge Niemeyer, the Chair of the Advisory Committee, similarly expressed his intention to head toward a process that would

substantially leave in place, subject to attorney management, the present discovery practice used for the vast majority of cases, and would commit customized discovery to a procedure by which the parties would have to develop a plan and submit it to the court for approval. This would have the beneficial effect of engaging the court in management over complex discovery where that management is most needed.¹⁸⁰

The Committee's impulse to urge greater judicial involvement is a good one.¹⁸¹ Unfortunately, they have chosen a perverse way to get there. Empirical research has demonstrated time and again that the ordinary cases have few discovery disputes and work well. Yet the Committee has proposed across-the-board amendments that change the rules in those very situations that should be left alone. Apparently, the hope is that the restricted scope of discovery and limited discovery tools will cause the more difficult cases to pop themselves out of the stack and call themselves to the judge's attention.¹⁸² I find it very hard to believe, however, that the most horrific five percent of cases are not already characterized by multiple motion filings. Those cases are already screaming for help in the form of grown-up judicial supervision, which can be provided under the broad powers of Rule 16 without making any changes to the rules. The amendments seem more likely to increase the number of cases char-

177. For example, could the profitability of hourly billing coupled with pressure to maximize billable hours reward attorneys who engage in lengthy disputes rather than shorter compliance? Could the need to train associates by assigning multiple lawyers to the same tasks itself be a significant factor in costs? See also McKenna, *supra* note 70, at 802-03.

178. Do certain firms foster a reputation for scorched-earth litigation tactics? One article, for example, contends that Williams & Connolly has and deserves such a reputation and represented President Clinton accordingly. See Nancy Gibbs & Michael Duffy, *The Cost of It All*, TIME, Aug. 24, 1998, at 36, 42 ("[T]hey litigate every case the same way, and that's hardball. Give 'em nothing, tell 'em nothing, delay, fight at every turn.").

179. 1998 Discovery Proposals, *supra* note 39, at 55.

180. Niemeyer, *supra* note 38, at 524.

181. See *supra* Part II(B) (regarding support for increased judicial supervision).

182. See *Alumni Panel*, *supra* note 34, at 826. "I think what you can do is to create a presumptive limit across all discovery, and then the parties themselves will self-select." *Id.* (quoting Higginbotham).

acterized by disputes and thereby *decrease* the amount of time that a diligent district judge has to spend on any of them. It would be far better to commission research to try to identify the factors that would help judges, lawyers, and litigants predict in advance which cases are likely to cause disputes and whether there is anything a rule amendment can do to help. "[T]argeted problems call for targeted responses. If complex litigation is the source of more problematic discovery practice, then rule reform ought to be tailored to the universe of this particular litigation that inspires complaint."¹⁸³

In the meantime, courts already have plenty of tools to deal with high-dispute cases. They can experiment with asking lawyers to designate their cases as complex and request early planning and expedited rulings. They can treat the first or second discovery motion as a clue that more intensive judicial involvement will be required for a particular case. Once difficult cases are identified, the discovery rules themselves provide authority to make decisions about proportionality, compliance, and sanctions. In addition, as noted above, Rule 16 allows significant flexibility in regulating, conducting, and controlling discovery.¹⁸⁴ Additional suggestions can be gleaned from sources such as the Manual on Complex Litigation.¹⁸⁵ The Committee can urge judges to use these methods on complex, high stakes litigation, handled by big firms with corporate clients while seeking to discern whether anything else *within the power of the rulemakers* is needed or likely to help.

D. AVOIDING CONGRESSIONAL INTERFERENCE

Despite empirical research, the advice of committee alumni, and their own misgivings,¹⁸⁶ the Advisory Committee has proposed global changes to the discovery rules. Part of the answer may be the judicial branch's well-founded desire to hang on to control of rulemaking. Political forces seeking changes in the procedure rules have already demonstrated their willingness to go to Congress when they find the rules committee insufficiently responsive. And Congress has already demonstrated its willingness to oblige.

183. Mullenix, *supra* note 10, at 686; see also Garth, *supra* note 123, at 605 ("The obvious danger . . . is that reforms designed for the relatively few cases will impose burdens on the more ordinary cases."); *Alumni Panel*, *supra* note 34, at 812. "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." *Id.* (quoting John Frank).

184. See Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1915 (1989) ("[W]ith attentive and firm management by a judge or magistrate, it is my experience and belief that almost all discovery abuse can be controlled or prevented.").

185. FEDERAL JUDICIAL CENTER, *MANUAL ON COMPLEX LITIGATION* (3d ed. 1995).

186. See Marcus, *supra* note 2, at 784 ("Given the scope of the changes to date, it suggests that rule revisions may never solve all discovery problems, or perhaps even most of those that remain.").

In the midst of the Alumni Panel discussion at the Boston College conference came this chilling reminder from Mark Gitenstein, who was Chief Counsel of the Senate Judiciary Committee when the CJRA was adopted:

I think the awkward position this Committee is in . . . is if you tinker you always run the risk that Congress will totally ignore you and take on the reform and procedural issues itself 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 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 . . . 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 . . . or you're going to face that I think on the Hill [W]hen 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 . . . [b]ut because people outside the Hill are going to be sure they do.¹⁸⁷

The prospect of congressional intervention is definitely on the minds of procedure scholars. Professor Marcus, Reporter to the discovery subcommittee and drafter of these proposals, has pointed out that "ultimately the principal question is whether Congress will respect the process. If it does not, a variety of winners in the legislative influence game may begin to exercise considerable influence over rules they care about, a development that would seem likely to make losers of us all."¹⁸⁸ Professor Linda Mullenix has warned that congressional involvement may result in the Advisory Committee going "the way of the French aristocracy."¹⁸⁹

The Committee, therefore, may be willing to make at least symbolic or incremental changes, hoping to keep Congress at bay. For example, former Reporter Paul Carrington was willing to recommend the changes in the scope proposal, which he thought to be ineffectual, "to buy a little peace with people who care deeply about these things."¹⁹⁰ Former Reporter Arthur Miller commented to the Advisory Committee: "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."¹⁹¹ Judge Niemeyer, the Advisory

187. *Alumni Panel*, *supra* note 34, at 824-26.

188. Marcus, *supra* note 4, at 818.

189. Mullenix, *supra* note 19, at 802.

190. *Alumni Panel*, *supra* note 34, at 831.

191. *Id.* at 837.

Committee's Chair, closed the Boston College conference by looking toward the political: "I think we have to recognize that . . . 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."¹⁹²

The proposed amendments go part of the way toward giving the business lobby what it asked for. They adopt the ACTL limits on the definition of scope. They cut back on the content of initial disclosure. They remind the courts of their power to limit discovery and shift costs. Maybe it will buy peace. But I doubt it. The proposals still require some automatic disclosure without the ability to capitalize on an opponent's ineptness. They limit the basic scope of discovery but still allow a party to go to the judge and ask for more. They allow cost shifting in document production but only for production that violates the Rule 26(b)(2) proportionality limits. They leave notice pleading alone,¹⁹³ and without a requirement that parties plead all causes of action with factual specificity, the scope limits will not satisfy defendants who dislike expensive discovery.¹⁹⁴ If the 1998 proposals fend off Congress for now, they will only have provided a fragile and temporary protection from future onslaughts.

Rather than offering partial capitulation, the Committee might defend its turf and its beliefs. "The Advisory Committee is not entirely helpless. In the past it has fought for its work product."¹⁹⁵ It can do so again, and support its efforts with empirical research and educational programs.

V. CONCLUSION: WHAT'S A COMMITTEE TO DO?

The Advisory Committee is in a very hard place. Despite empirical evidence to the contrary, its members are constantly besieged by complaints about discovery. They are faced with Congress threatening to meddle in rulemaking. And federal civil procedure has fallen into a disuniformity that few would have imagined. The pressure to do something, and do it now, must be unbearable. Nevertheless, my advice is to reconsider what that "something" should be. Now is not the time for rule change, especially not uni-directional anti-discovery rule change.

The disuniformity created by the 1993 amendments is a serious problem. It has apparently even led districts to "opt out" of rules containing no opt out clause. Differences in district rules have created new opportu-

192. *Id.* at 840.

193. And the Advisory Committee has shown itself willing to at least discuss changes to the pleading rules. See Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1751 n.18 (1998).

194. Cf. Mark Gitenstein, *quoted in Alumni Panel*, *supra* note 34, at 824 ("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."); Cooper, *supra* note 135, at 7 ("A potentially more effective approach would be to limit discovery to matters relevant to the issues framed by the pleadings. Since notice pleading often does not identify issues with much clarity, thorough pursuit of this alternative would require a complete reworking of notice pleading as well as discovery.").

195. Marcus, *supra* note 4, at 818.

nities for forum shopping. Differences in duties and expectations must frustrate clients and lawyers alike. Sixty percent of the attorneys surveyed by the FJC reported that nonuniformity across districts creates moderate to serious problems.¹⁹⁶ Keep in mind, however, that disuniformity was already a problem prior to the 1993 amendments. Local rules had created significant differences in practice and requirements.¹⁹⁷ Further, the very discretionary nature of the federal rules themselves has always meant that uniformity was something of an illusion.¹⁹⁸ It is important to act to increase uniformity, but not before there is adequate information on which to act. Painful though it may be, the Committee would be better advised to commission further empirical research before choosing a procedure to make uniform.

The nature and feasibility of such research would, of course, have to be formulated in consultation with social scientists. A few areas, however, naturally suggest themselves:

Initial Disclosure. The RAND and FJC studies, considering different kinds of disclosure at different time periods, arrived at inconsistent results even about questions as fundamental as whether disclosure saved time. More research is needed about how disclosure works in terms of efficiency and in terms of information exchange. It is also not clear whether these provisions have been genuinely implemented at the case level and whether they have, or will, make an impact on lawyer behavior. While there is a strong interest in creating a uniform rule, there is a complete lack of consensus about what form that uniform rule should take. More reliable and more nuanced information is needed before the Advisory Committee is in a position to choose the direction for change. What kind of information is being exchanged? How many disputes are there, and about what? How does it affect formal discovery? Is there a tie to Rule 11 motions by either plaintiffs or defendants? Is it producing satellite litigation? Is it merely substituting for certain standard interrogatories and document production requests? In what kinds of cases does it save time or expense and in what kinds of cases does it increase them? Is it interfering with discovery privileges or with the duty of zealous representation?

196. See Willging, *supra* note 71, at 542. Attorneys who practiced in four or more districts were more likely to see the problems as serious.

197. See, e.g., Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757 (1995); A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991); David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537 (1985); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989).

198. See Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988). "Federal Rules that avoid policy choices and that in essence chart ad hoc decision-making by trial judges are uniform and hence trans-substantive in only the most trivial sense." *Id.*

Discovery Limits. Where presumptive limits exist, what has been their effect on discovery devices? Is there an impact on the number or intensity of disputes? Is there an impact on the quantity or quality of information available through discovery? Is there an impact on settlement or case outcomes? In districts without the limits, with what frequency are the various discovery devices used and to what effect? How often, and under what circumstances, do the parties agree to waive the limits?

Scope of Discovery. Are there cases in which parties undertake discovery clearly outside the scope of the pleadings? If so, how often? Is this broad discovery tied to the "subject matter" language of Rule 26? What kinds of disputes occur concerning the strength of the link between the information requested and the claims to be proved? What is the impact of the discoverability of information "reasonably calculated to lead to the discovery of admissible evidence"?¹⁹⁹ Is the quantity of discovery linked to the shift in focus of civil litigation from pleadings to discovery, coupled with the rules of evidence for trials, coupled with the requirements of substantive law?

Subject-Specific Rules. Does there exist, in certain areas, a degree of consensus about what constitutes clearly discoverable information, evidenced by problem-free discovery in repeated cases? If so, could standard interrogatories or document production requests be formulated for those substantive areas and used as an initial disclosure requirement?

The Problem Cases. Do they share characteristics so that they can be identified in advance? Can judges or attorneys accurately pre-select such cases? What exactly are the problems—sheer quantity; overbroad discovery; unfounded resistance to discovery; cost relative to stakes? Are the problems caused or exacerbated by the procedure rules or by forces outside the discovery process?²⁰⁰

The Ordinary Case. What makes the discovery process work in those cases that do not encounter problems? Do these cases have shared characteristics in terms of stakes, subject matter, attorneys, clients, or other dispute resolution methods?

Attorneys. Looking outside the rules themselves is also necessary. Are there characteristics of law firms, practice specialties, billing methods, or attorneys that tend to breed disputes? Are there provisions in rules of professional responsibility that encourage non-cooperation? Are there informal facets of legal culture that encourage abuses and, if so, where do they come from? What incentives encourage attorneys to be particularly adversarial? What incentives encourage them to cooperate? Does legal education contribute to any of these forces?

Clients. Is there something about the incentive structure for clients that causes them to choose non-cooperative litigation or to retain attor-

199. FED. R. CIV. P. 26(b)(1).

200. Such research would have to avoid the difficulties encountered by the FJC in trying to study discovery abuse in Baltimore. Those problems are described in Mullenix, *supra* note 7, at 1436-40.

neys known to be “warriors”? Are there social or economic forces that encourage clients to resist discovery, to undertake overly-broad discovery, and to fight about discovery at every opportunity? What is the impact of in-house counsel? How accurate is client information about litigation? Do certain industries have informal rules that encourage contentious litigation?

Judges. What are their incentives and disincentives to involve themselves in discovery and discovery disputes? Why have they not responded to repeated requests from attorneys for more aggressive involvement? Do they have sufficient resources? What *are* they spending their time on? Are there constraints on their allocation of priorities? Are there some judges who handle discovery matters better than others and, if so, do they share certain characteristics? How are district judges using magistrate judges and special masters in the discovery area?

When the Advisory Committee has received the answers to these, or other, questions, it will be in a far better position to recommend changes, if there are problems and if those identified problems can be addressed by a rule.²⁰¹ It will also know more about ways to encourage litigants and judges to use the tools that are already available in order to help everyone progress toward a just resolution of the lawsuit. More reliable information about the roots of discovery abuse may indicate that, where problems exist, they are the result of larger systemic problems such as adversary system incentives and litigant resources. Such problems are beyond the power of the Advisory Committee.

In the meantime, hard as it is, the Committee should leave the rules alone.

201. If the Advisory Committee has a particular rule change in mind, it would also be wise to encourage empirical research on that very issue *before* going forward with the change.

Speeches

