2002

A Civil Discovery Dilemma for the Arizona Supreme Court

Carl W. Tobias
University of Richmond, ctobias@richmond.edu

A CIVIL DISCOVERY DILEMMA FOR THE ARIZONA SUPREME COURT

Carl Tobias*

I. INTRODUCTION

The growing balkanization of federal civil procedure has received considerable critical commentary. Numerous members of Congress and the federal judiciary, lawyers and legal scholars have lamented the fate of the national procedure code. The drafters of the 1938 Federal Rules of Civil Procedure hoped to establish those rules as a model that the states could adopt, thus fostering national and intrastate procedural uniformity. This objective was not realized generally or by very many specific jurisdictions. Observers of the increasingly fractured procedural regime in the federal arena have voiced concerns about the mounting numbers of strictures, the accelerating pace of procedural change and the growing inconsistency of the requirements imposed. Illustrative are the major 1983 and 1993 federal discovery amendments, which new discovery provisions further revised in December 2000. The Civil Justice Reform Act of 1990 concomitantly encouraged all ninety-four federal districts to prescribe local procedures for reducing expense and delay in civil litigation, and these measures conflicted with the Federal Rules. The fragmentation described above is most clearly manifested in the area of discovery, which is a critical feature of many modern civil lawsuits.

The precise effects of this federal procedural activity on state civil process over the last two decades are unclear. However, numerous jurisdictions have declined to adopt either the substantial 1983 or 1993 federal rules amendments, a situation that the new set of federal modifications promises to exacerbate. Rule revisors in a significant number of state systems might have wisely chosen to await a period of quiescence in federal procedural change before undertaking additional reform. In any event, the federal developments described above may have adversely affected state civil process, or at least made civil procedure in the United

---

* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I wish to thank Patricia Carney, Mary Berkheiser, Patience T. Huntwork and Peggy Sanner for valuable suggestions, Angeline Garbett for processing this piece and Jim Rogers for generous, continuing support. Errors that remain are mine.

States much more inconsistent than the 1938 drafters contemplated. Although Congress, judges, attorneys and legal academicians have devoted considerable attention to federal procedure, these observers have essentially ignored the impacts of federal developments on state civil process. The comparatively limited comment those effects have received is unfortunate, because the individuals and entities with responsibility for state procedural reform often have derived helpful guidance from activities at the federal level.

In this increasingly byzantine world of civil procedure, there is one bastion of uniformity: Arizona civil procedure. The Arizona Supreme Court, which has authority for amending the Arizona Rules of Civil Procedure, has steadfastly attempted to maintain consistency between Arizona state civil procedure and the Federal Rules. The Justices' efforts may even suggest that members of the court found it preferable to be uniform rather than right. Indeed, Arizona has occasionally surpassed the federal rule revisors by instituting changes which they had not adopted or had merely proposed. Illustrative is the 1992 imposition of presumptive temporal limitations on depositions, strictures that those responsible for altering the Federal Rules have only recently decided to implement. Another example is Arizona's provision for mandatory pre-discovery disclosure promulgated approximately two years before the federal proviso that required disclosure took effect.

In September 1999, the Judicial Conference of the United States, the policymaking arm of the federal courts, approved a comprehensive package of amendments to the Federal Rules of Civil Procedure governing discovery. The United States Supreme Court promulgated the set of discovery revisions during April 2000 and the amendments became applicable in December 2000 because Congress did not reject or modify the package in the subsequent seven months. This group of federal rules amendments constitutes the fourth substantial change in the federal discovery provisions over the last two decades.

Arizona now confronts a dilemma. The Arizona Supreme Court must decide whether it should continue to honor the longstanding tradition of preserving consistency between the Federal Rules of Civil Procedure and the Arizona Rules of Civil Procedure. This difficulty is complicated because Arizona has recently participated in considerable discovery reform, which differs somewhat from the federal discovery regime. Moreover, the Arizona bench and bar may believe that their discovery system is superior to the existing federal scheme in that it better serves the needs of the Arizona judiciary, lawyers, parties and citizens. Furthermore, the patience

of Arizona judges, attorneys and litigants for discovery reform may well have been exhausted. This article analyzes the convergence of federal and Arizona civil discovery regimes and the implications of recent federal discovery amendments.

Section II examines the origins and development of the civil discovery systems of the federal and Arizona trial courts and the important issue of procedural uniformity. It specifically scrutinizes the current situation in the federal sphere and in Arizona with emphasis on the federal provisions that the United States Supreme Court recently prescribed and the reform of Arizona discovery throughout the 1990s. This section concludes that the new federal amendments present a conundrum for Arizona.

Section III of the paper offers suggestions for resolving this dilemma. The Arizona Supreme Court must essentially decide whether it is preferable to be consistent or correct. The determination will require the Justices to undertake a finely-calibrated analysis which involves a complex constellation of relevant factors. The Arizona Supreme Court must consider, for instance, the benefits and disadvantages of uniformity, the efficacy of new federal revisions and recently-instituted modifications in the Arizona discovery regime, and the tolerance of the Arizona bench and bar for additional change in the discovery scheme.

II. THE DEVELOPMENT OF THE FEDERAL AND ARIZONA CIVIL DISCOVERY REGIMES

The historical background of the federal and Arizona systems of civil discovery requires comparatively limited examination here, as the origins and development of those procedural schemes have been rather thoroughly chronicled elsewhere.[1] Nonetheless, considerable exploration of the respective discovery regimes is justified because it improves understanding of modern discovery in the federal and Arizona trial courts and because of the difficulty that the new federal amendments pose for Arizona.

1. *E.g.*, Symposium, *Conference on Discovery Rules*, 39 B.C. L. REV. 517 (1998); Symposium, *Mandating Disclosure and Limiting Discovery: The 1992 Amendments to Arizona's Rules of Civil Procedure and Comparable Federal Proposals*, 25 ARIZ. ST. L.J. 1 (1993).

A. The Federal System

1. The Original Federal Rules

The original Advisory Committee on the Civil Rules (Advisory Committee), comprising nine prominent members of the legal profession and five well-respected law professors, relied on several fundamental tenets in crafting the initial Federal Rules of Civil Procedure, which became effective in 1938.[2] The drafters meant for the rules to elevate substance over form and to implement simple, non-technical approaches to procedure.[3] In fact, "[t]he concept of uniformity among federal district courts, between federal and state courts, and among the states represents a variation on the idea of simplicity."[4]

The Advisory Committee also intended to foster merits-based resolution of civil disputes after litigants and lawyers had secured discovery of the maximum possible information which was relevant to their cases.[5] The drafters correspondingly meant the discovery scheme to be rather open-ended and to accord attorneys substantial control over the pretrial process and discovery.[6] Moreover, the Advisory Committee envisioned that judges would administer discovery in a flexible, liberal manner, thereby facilitating the disclosure of all applicable material and promoting settlement or disposition on the merits.[7]

---

2. *E.g.*, Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 502–15 (1986); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter Subrin, *Equity*]; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272–77 (1989).

3. *See* CHARLES E. CLARK, PROCEDURE—THE HANDMAID OF JUSTICE (1965); *accord* James William Moore, *The New Federal Rules of Civil Procedure*, 6 I.C.C. PRACT. J. 41, 42 (1938).

4. Tobias, *supra* note 2, at 274; *accord* Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1650 (1981) [hereinafter Subrin, *New Era*].

5. *See generally* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 397 (1982).

6. Alexander Holtzhoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057 (1955); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 717–34 (1998) [hereinafter Subrin, *Fishing*]; *see also id.* at 692–701 (analyzing the history of discovery in the federal courts prior to 1938).

7. *See* Marcus, *supra* note 5, at 438–39; Subrin, *New Era*, *supra* note 4, at 1648–50.

2. The Federal Rules During the First Three Decades

This system appeared to work comparatively well for the quarter-century which following the adoption of the original Federal Rules during 1938. The procedure code functioned efficaciously, and federal district court judges successfully applied the rules to federal civil lawsuits.[8] The United States Supreme Court promulgated relatively few amendments, most of which federal court observers fairly characterized as "clarifying" revisions.[9] A significant number of states premised their civil procedure rules on the federal analogues, while additional jurisdictions modeled specific strictures or provisions governing particular procedural areas, namely discovery, on the Federal Rules.[10]

The broad, flexible system of procedure instituted by the initial rules essentially enabled plaintiffs and the litigants' counsel to employ general notice pleading, to acquire comprehensive information through discovery and to reach the merits of controversies.[11] There were, however, certain difficulties with the regime which the 1938 Federal Rules implemented. Liberal pleading and tactical exploitation of the procedures were problematic, especially in protracted and complex cases.[12] More specifically, some members of the federal bench and legal commentators claimed that the open-ended character of discovery permitted very expansive requests for material and that district judges evinced reluctance to enforce various discovery requirements with the requisite rigor.[13]

Despite these criticisms, the original Federal Rules "continued to enjoy good, albeit less glowing, press and continued to function reasonably well," even as late as the 1960s.[14] The Supreme Court prescribed a comparatively small number of changes, few of which were substantive and most of which

---

8. *See, e.g.*, Charles E. Clark, *The Federal Rules of Civil Procedure: 1938–1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 445 (1958); Resnik, *supra* note 2, at 515–17; Subrin, *Equity*, *supra* note 2, at 910.

9. *See* Charles E. Clark, *'Clarifying' Amendments to the Federal Rules?*, 14 OHIO ST. L.J. 241 (1953); Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 397, 397 n.2 (1976).

10. *See* Clark, *supra* note 8, at 435; John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 368–69 (1986).

11. *See* Marcus, *supra* note 5, at 439; Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984).

12. *See* Resnik, *supra* note 2, at 516; Subrin, *Fishing*, *supra* note 6, at 734–39.

13. *E.g.*, New Dyckman Theatre Corp. v. Radio-Keith-Orpheum Corp., 16 F.R.D. 203, 206 (S.D.N.Y. 1954); Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958); *see also* Subrin, *Fishing*, *supra* note 6, at 734–39.

14. Tobias, *supra* note 2, at 285; *accord* Resnik, *supra* note 2, at 515–16.

reflected the goals of the initial Advisory Committee.[15] Particularly significant to this article is the important 1970 package of revisions in the discovery strictures that effectively left intact the notion of lawyer control.[16]

3. The Federal Rules During the Second Three Decades

By the early 1970s, certain federal court observers—especially leaders of the bench and bar, such as Chief Justice Warren Burger—had begun raising concerns about the so-called "litigation explosion."[17] Counsel and parties allegedly pursued too many civil actions, while a large percentage of these cases purportedly lacked merit.[18] Most important, some judges, practicing lawyers and legal scholars asserted that discovery was too broad, expensive and time-consuming.[19] Concern about attorney abuse of the discovery process prompted the Supreme Court to amend the provisions governing discovery in 1980. However, Justice Lewis F. Powell, Jr., authored a dissent from this decision because he thought that the changes only "tinkered" with the existing discovery system, rather than instituted the kind of thoroughgoing reform necessary.[20] Three years thereafter, the Supreme Court adopted a comprehensive package of revisions, many involving discovery. The Justices intended to enlarge the responsibilities of counsel as officers of the court and to increase judicial case management, particularly of the pretrial process and discovery.[21] For example,

---

15. *See* Goldberg, *supra* note 9, at 397 n.2; *see also supra* note 9 and accompanying text.

16. *See* Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 748–50 (1998) [hereinafter Marcus, *Discovery*]; Miller, *supra* note 11, at 14–15; *see also supra* notes 6–7 and accompanying text.

17. *E.g.*, Nat'l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 643 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740–41 (1975); THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979) [hereinafter THE POUND CONFERENCE].

18. *E.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979); Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, *in* THE POUND CONFERENCE, *supra* note 17, at 23; Thomas B. Marvell, *Caseload Growth—Past and Future Trends*, 71 JUDICATURE 151 (1987).

19. *E.g.*, Marcus, *supra* note 5, at 441–43; Miller, *supra* note 11, at 6–11; Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579.

20. *See* Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997 (1980). "Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms." *Id.* at 1000; *see also* Marcus, *Discovery*, *supra* note 16, at 756–60 (analyzing the revisions). *But see* Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683 (1998).

21. *See* Order Amending the Federal Rules of Civil Procedure, 461 U.S. 1097 (1983). *See generally* Arthur R. Miller, The 1983 Amendments to the Federal Rules of Civil Procedure:

amendments in Federal Rules 16 and 26 narrowed the scope of discovery somewhat and accorded district judges considerably greater control over the pace and amount of discovery[22] while admonishing that judges should make discovery commensurate with the needs of individual cases.[23]

One decade later, the Supreme Court promulgated another thorough group of rule changes, several of which substantially modified discovery. The most important alteration was the controversial revision in Federal Rule 26 that prescribed mandatory pre-discovery disclosure.[24] This provision required parties to exchange specific information before commencing formal discovery.[25] The 1993 amendments also imposed presumptive limitations on the number of interrogatories.[26]

The United States Supreme Court recently promulgated a new set of discovery changes, many of which are appropriately denominated "conforming" or "technical" revisions.[27] Most significant, this package of amendments narrows the scope of discovery to which parties have traditionally been entitled.[28] Litigants will no longer be able to secure information that is "relevant to the subject matter" of the lawsuit, in the absence of a court order, but they will be entitled only to material which is "relevant to the claim."[29] The new provisions would concomitantly narrow

---

Promoting Effective Case Management and Lawyer Responsibility (Federal Judicial Center 1984) (analyzing the 1983 amendments favorably).

22. FED. R. CIV. P. 16 (1983) (amended 1993); FED. R. CIV. P. 26 (1983) (amended 2000). For analysis of the changes to Rule 16, see Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818 (1988); Subrin, *Equity*, *supra* note 2, at 978–79.

23. FED. R. CIV. P. 26(b)(1) (1983) (amended 2000). For analysis of proportionality, see Marcus, *Discovery*, *supra* note 16, at 760–64; Subrin, *Fishing*, *supra* note 6, at 744–45.

24. FED. R. CIV. P. 26(a)(1) (1993) (amended 2000); *see also* Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 576–81 (analyzing the controversial revision).

25. FED. R. CIV. P. 26(a)(1) (1993) (amended 2000). For analysis of disclosure, see Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992); Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 264–71 (1992).

26. FED. R. CIV. P. 30 (a)(2)(A) (1993) (amended 2000); FED. R. CIV. P. 33 (a); *see also* Marcus, *Discovery*, *supra* note 16, at 765–68 (analyzing the set of revisions); Elizabeth G. Thornburg, *Giving the "Haves" A Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 233–36 (1999); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1616–17 (1994) (analyzing presumptive limitations).

27. *See* Amendments to Federal Rules of Civil Procedure, 192 F.R.D. 340, 388 (2000) [hereinafter 2000 Amendments].

28. *See id.*; *see also* Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433, 1439–40 (1999) (analyzing the major changes proposed).

29. *Compare* FED. R. CIV. P. 26(b)(1) (1993) (amended 2000) *with* FED. R. CIV. P. 26(b)(1) (1993); *see also supra* 2000 Amendments, note 27, at 388; Thornburg, *supra* note 26, at 238–39 (analyzing the revision).

the scope of automatic disclosure, so that parties will have to divulge less information before undertaking formal discovery.[30] The disclosure stricture would have nationwide applicability which means that all of the ninety-four federal districts, including Arizona, cannot continue to apply disclosure requirements which differ from the Federal Rule.[31] Moreover, the revisions would limit depositions to "one day of seven hours," unless a longer period is "authorized by the court or stipulated by the parties."[32] Finally, the package includes a number of conforming or technical modifications which this article does not examine.[33]

B. The Arizona System

1. The Arizona Rules During the First Five Decades

Arizona has essentially modeled its civil procedure and discovery regimes on the Federal Rules of Civil Procedure for many years. The Arizona Supreme Court apparently chose to follow the federal provisions because doing so would make civil practice in the federal and state courts of Arizona uniform and simple, which were central objectives of the attorneys and legal academicians who drafted the 1938 Federal Rules.[34] For example, when the United States Supreme Court promulgated the significant federal discovery revisions during 1970,[35] the Arizona Supreme Court simultaneously prescribed major amendments in the Arizona rules governing discovery that effectively conformed to the federal changes.[36] Indeed, the Arizona State Bar Committee Notes, which accompanied the

30. *Compare* FED. R. CIV. P. 26(a)(1)(A), (B) (1993) (amended 2000) *with* 2000 Amendments, *supra* note 27, at 382. *See also* Tobias, *supra* note 28.

31. The 1993 revision permitted districts to reject or modify the federal requirements, but the Arizona District did neither. *Compare* FED. R. CIV. P. 26(a) (1993) (amended 2000) *with* 2000 Amendments, *supra* note 27, at 384; *see also* Thornburg, *supra* note 26, at 235–36 (discussing the opt-out provision in the 1993 rules); Tobias, *supra* note 26, at 1612–15 (same).

32. *See* 2000 Amendments, *supra* note 27, at 393 (amending Rule 30(d)(2)); *see also supra* note 26 and accompanying text (discussing earlier presumptive limitations).

33. *See* 2000 Amendments, *supra* note 27, at 382 *et seq.*; *see also* Thornburg, *supra* note 26 (affording additional analysis of the revisions).

34. Carol Campbell Cure, *Practical Issues Concerning Arizona's New Rules of Civil Procedure: A Defense Perspective*, 25 ARIZ. ST. L.J. 55, 56 n.6 (1993); *see also supra* notes 3–4 and accompanying text.

35. *See supra* note 16 and accompanying text.

36. Compare the 1970 version of the Federal Rules of Civil Procedure, Rules 26, 29–30, 33–37, with the 1970 version of the Arizona Rules of Civil Procedure, Rules 26, 29–30, 33–37.

Arizona Justices' modifications, trenchantly stated that the "1970 revision of rules is the first substantial alteration of discovery practice since the rules were first adopted in 1939."[37]

When the United States Supreme Court implemented the important package of federal amendments during 1983,[38] the Arizona Supreme Court concomitantly instituted significant revisions that narrowed the scope of discovery, accorded trial judges greater control over discovery's timing and amount, and mandated that judges tailor discovery to the requirements of specific cases.[39] The purposes and phraseology employed by the Arizona Justices show that the Arizona Supreme Court essentially modeled the 1984 changes in Arizona Rules of Civil Procedure 16 and 26 on the 1983 federal rules amendments.[40] In fact, the State Bar Committee Notes attending the 1984 revision in Rule 16(b) expressly observed that the modification was "intended to retain as much conformity with the federal rule as is consistent with the needs of the state court system."[41] The State Bar Committee Notes, which accompanied the 1984 alteration in Rule 26, concomitantly stated that the change was "aimed at preventing both excess discovery and evasion of reasonable discovery devices" and was "intended to deal directly with the problem of duplicative and needless discovery."[42] The Committee Notes correspondingly remarked that the modification "should encourage judges to identify instances of unnecessary discovery and to limit the use of the various discovery devices accordingly," while the "new provision contemplates earlier and greater judicial involvement in the discovery process" in recognition that "discovery cannot always be self-regulating."[43]

2. The Arizona Rules During the Last Decade

The Arizona and Federal Rules of Civil Procedure remained similar, if not identical, until the 1990s. At this time, judges, lawyers, litigants and members of the public in Arizona seemingly perceived the existence of phenomena—phenomena which were analogous to those developments that

37. ARIZ. R. CIV. P. 26 State Bar Comm. Notes (1970) (amended 2000); *see also infra* note 44 (suggesting that Arizona experienced "congestion and delay" in the 1950s and 1970s).

38. *See supra* notes 21–23 and accompanying text.

39. ARIZ. R. CIV. P. 26 (1984) (amended 2000); *see also supra* notes 22–23 and accompanying text (analyzing comparable federal rules revisions).

40. *Compare* FED. R. CIV. P. 16 (1983) (amended 1993) and FED. R. CIV. P. 26(a), (b) (1983) (amended 2000), *with* ARIZ. R. CIV. P. 16, 26(a), (b) (1984) (amended 2000).

41. ARIZ. R. CIV. P. 16 State Bar Comm. Notes (1984) (amended 2000).

42. ARIZ. R. CIV. P. 26 (a), (b) State Bar Comm. Notes (1984) (amended 2000).

43. *Id.*; *see also supra* notes 6, 16 and accompanying text (analyzing self-regulation).

had prompted the United States Supreme Court to promulgate the 1983 and 1993 federal rules amendments.[44] The state, and perhaps more importantly Maricopa County, were experiencing a "litigation explosion" and changes in the civil litigation process. The Arizona Supreme Court and state district judges responded with alterations of the provisions that were applicable to the pretrial process, particularly discovery. This culminated with action by the Arizona Supreme Court and the Arizona State Bar.

In March of 1990, the Supreme Court and the State Bar "appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation."[45] After this entity undertook an extensive assessment, the Committee members determined that the American civil litigation system was imposing undue expense, requiring excessive time to complete cases and threatening to limit court access for average citizens.[46] The entity concomitantly concluded that certain adjustments in the dispute resolution process and the Arizona Rules of Civil Procedure were necessary to conserve financial and temporal resources and decrease abuse "while preserving the tradition of jury trial" as a means of deciding civil lawsuits.[47]

Justice Thomas A. Zlaket of the Arizona Supreme Court elaborated and specified the concerns which the Committee and additional observers had articulated.[48] The Committee and the observers ascertained that the changing legal culture in the country, and seemingly in Arizona, fostered "'scorched earth' litigation tactics designed to wage economic 'paper wars' of attrition on opponents, a new generation of 'litigators' who do not try cases" and pre-trial discovery as an end in itself.[49] Moreover, Justice Zlaket asserted, "huge numbers of interrogatories, marathon depositions, multiple

---

44. *Supra* notes 17–19 and accompanying text. For analysis of "delay and congestion" in the 1950s and 1970s, see Heinz Hink, *Judicial Reform in Arizona*, 6 ARIZ. L. REV. 13, 14–15 (1964); Richard B. Cuatto, Note, *A Statistical Analysis of the Civil Caseload in Arizona*, 1973 LAW & SOC. ORDER 143, 162 (1973).

45. ARIZ. R. CIV. P. 26.1 Court Comment to 1991 Amendment; *see also* Tobias, *supra* note 26, at 1601 (analyzing the work of a similar entity at the federal level).

46. ARIZ. R. CIV. P. 26.1 Court Comment to 1991 Amendment; *see also* Michael A. Yarnell, *A Judicial View: Living With the New Rules of Civil Procedure*, 25 ARIZ. ST. L.J. 35, 35–38 (1993); Thomas A. Zlaket, *Encouraging Litigators to Be Lawyers: Arizona's New Civil Rules*, 25 ARIZ. ST. L.J. 1, 3–4 (1993).

47. ARIZ. R. CIV. P. 26.1 Court Comment to 1991 Amendment.

48. Zlaket, *supra* note 46, at 3–4; *see also* Symposium Conference on Discovery Rules, *supra* note 1 (several of the symposium papers also allude to these concerns).

49. *See* Zlaket, *supra* note 46, at 3; *see also supra* note 46 and accompanying text (expressing similar ideas).

experts, voluminous document requests and other similar tactics have become today's norm."[50] The jurist correspondingly contended that the abuses detected by a number of the observers "have badly distorted the proper role of the advocate in our system," while discerning an "increase in abusive, obstructive and contentious behavior by members of the bar."[51]

During September, 1990, the Committee proposed a thorough package of rule amendments, principally governing discovery.[52] The Committee intended the amendments to reduce inefficiency, cost and delay in the Arizona state courts as well as increase the public accessibility of the judicial system.[53] The Committee meant to establish a framework that would facilitate the discovery of sufficient information "to avoid litigation by ambush" and foster professionalism among attorneys while proclaiming that its ultimate objectives were enhancing voluntary cooperation and increasing information exchange.[54] The Committee concomitantly intended to eliminate "hostile, unprofessional and unnecessarily adversarial" behavior by practitioners.[55] The entity also admonished trial court judges to "deal in a strong and forthright fashion with discovery abuse and discovery abusers."[56]

The Arizona Supreme Court subjected the proposals that the Committee had proffered to experimentation in 8000 cases that counsel and litigants pursued in Maricopa County during 1990 and 1991, while the Justices afforded members of the public extensive opportunities for comment on the Committee's recommendations.[57] Justice Zlaket stated that the "new rules should not have come as any surprise [because for] several years, similar changes to the Federal Rules of Civil Procedure have been under consideration."[58]

---

50. *See* Zlaket, *supra* note 46, at 3.

51. Zlaket, *supra* note 46, at 3–4; *see also supra* notes 46–47 and accompanying text (expressing similar ideas).

52. *See* Zlaket, *supra* note 46, at 2–3.

53. ARIZ. R. CIV. P. 26.1 Court Comment to 1991 Amendment; *see also infra* note 59 and accompanying text (stating that the Arizona Supreme Court adopted the package proposed).

54. ARIZ. R. CIV. P. 26.1 Court Comment to 1991 Amendment.

55. *Id.*

56. *Id.*; *see also supra* notes 17–26 and accompanying text (suggesting that similar ideas animated the 1983 and 1993 federal rules amendments).

57. ARIZ. R. CIV. P. 26.1 Court Comment to 1991 Amendment; Zlaket, *supra* note 46, at 8; *see also* Robert D. Myers, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11, 11 (1993) (analyzing the experimentation).

58. Zlaket, *supra* note 46, at 8; *see also supra* notes 24–26 and accompanying text (analyzing the similar changes to the federal rules).

In December, 1991, the Arizona Supreme Court promulgated the comprehensive package of amendments, which the Committee had proposed during September, 1990, and on July 1, 1992, those revisions became effective.[59] The most controversial aspect of the alterations was the provision for compulsory pre-discovery disclosure in Arizona Rule of Civil Procedure 26.1.[60] This modification required litigants to divulge thoroughly and simultaneously all relevant material that was known by or available to the parties or their counsel at the beginning of cases and before the initiation of formal discovery.[61] Additional amendments imposed presumptive limitations on discovery—namely oral depositions, written interrogatories as well as requests for production and requests for admission—which could be changed by litigant stipulation or court order.[62] The revisions also enhanced judicial management of the pretrial process as a general matter and courts' control over discovery specifically. For instance, the provisions increased the authority of judges to monitor the pace and scope of discovery through pretrial conferences while mandating that trial courts impose sanctions on parties or practitioners who abuse the litigation system.[63]

In 1997, the Arizona Supreme Court implemented another reform in the civil discovery scheme.[64] The Justices altered Rule 37 to provide guidance for judicial treatment of information which parties and lawyers reveal late in

---

59. Amendments to: Arizona Rules of Civil Procedure, *reprinted in* 25 ARIZ. ST. L.J. 291 app. (1993); *see also* ARIZ. R. CIV. P. 26 State Bar Comm. Notes (1984) (amended 2000) (stating that Superior Court Uniform Rules of Practice were transferred to the Arizona Rules of Civil Procedure or the Rules of the Arizona Supreme Court).

60. ARIZ. R. CIV. P. 26.1 (amended 1991). For criticism of disclosure, see Colin Campbell & John Rea, *Civil Litigation and the Ethics of Mandatory Disclosure: Moving Toward* Brady v. Maryland, 25 ARIZ. ST. L.J. 237, 244–47 (1993); Robert J. Bruno, *The Disclosure Rule is a Mistake*, MARICOPA LAW. 1 (1992).

61. ARIZ. R. CIV. P. 26.1 (amended 1991). For analysis of disclosure, see Cure, *supra* note 34, at 57–91; Francis J. Burke, Jr. & Karen A. Potts, *Arizona's New Zlaket Rules and the Private Practitioner: Death of Rambo?*, 25 ARIZ. ST. L.J. 99, 101–14 (1993); JoJene Mills, *Practical Implications of the Zlaket Rules from a Plaintiff's Lawyer's Perspective*, 25 ARIZ. ST. L.J. 149, 156–65 (1993); *supra* note 25 and accompanying text (analyzing the federal disclosure rule).

62. ARIZ. R. CIV. P. 30(a), 33.1, 34(b), 36(b) (amended 1991). For analysis of the Arizona presumptive limitations, see Cure, *supra* note 34, at 91–95; Yarnell, *supra* note 46, at 49–50; *see also supra* note 26 and accompanying text (analyzing the federal presumptive limitations).

63. ARIZ. R. CIV. P. 16, 26 (amended 1991); *see also* Zlaket, *supra* note 46, at 8 (analyzing the Arizona provisions); Myers, *supra* note 57, at 17, 20–28 (analyzing provisions' application); Yarnell, *supra* note 46, at 38–43 (analyzing both); *supra* notes 21–23 and accompanying text (analyzing analogous federal provisions).

64. I rely in this paragraph on ARIZ. R. CIV. P. 37(c)(1) (amended 1997). Interviews with Patience T. Huntwork, Chief Staff Attorney, Ariz. Sup. Ct. (Oct. 8, 1999 & Sept. 12, 2000) (on file with author).

the process, especially material that litigants or attorneys divulge immediately before the commencement of trial. The Supreme Court apparently intended this measure to be the last fine-tuning of the reforms which the Justices had instituted in the 1990s.

3. Summary By Way of Transition

The Arizona Supreme Court maintained a discovery system closely modeled on the federal approach and essentially premised the Arizona Rules of Civil Procedure governing discovery on the federal analogues for a half-century. The Arizona Supreme Court only departed from this practice in meaningful ways during the 1990s when the Justices decided to institute significant reform of civil discovery. The decision of the United States Supreme Court to prescribe the 1993 federal discovery revisions may partially explain the determination of the Arizona Supreme Court to promulgate the discovery amendments in 1992. Nevertheless, the Arizona provisions differed somewhat from the federal changes apparently because of dissatisfaction with the federal modifications and because the Arizona Supreme Court seemingly wished to tailor the reform of discovery and the pretrial process more precisely to the perceived problems with discovery and the litigation system in the Arizona state courts.[65] Therefore, the new federal discovery revisions, which the United States Supreme Court recently promulgated and members of Congress did not modify, present a dilemma for the Arizona Supreme Court.

III. THE DILEMMA AND ITS RESOLUTION

The Arizona Justices must in essence choose whether it is better to be uniform or right. Now that the new federal alterations have become effective, if the Arizona Supreme Court decides not to include these provisos in the Arizona discovery rules, Arizona civil discovery will diverge even more substantially from the federal scheme. This development would increase disuniformity and complexity in the federal and state discovery regimes and perhaps enlarge the cost and time necessary to complete discovery.

When the Arizona Justices make the determination, the jurists should undertake a carefully-refined assessment of numerous, applicable considerations. Perhaps the most important question for the Arizona

65. ARIZ. R. CIV. P. 26.1 Court Comment to 1991 Amendment.

Supreme Court is whether consistency between the Federal and Arizona Rules of Civil Procedure is outweighed by additional factors, such as the need to calibrate discovery strictures with any circumstances particular to the Arizona state courts. The Arizona Supreme Court will probably be unable to resolve this issue conclusively, until considerable empirical data has been collected, analyzed and synthesized.

One significant factor for the court to consider will be the benefits and detriments of reinstituting uniformity between the federal and Arizona discovery systems.[66] The principal advantage of recapturing consistency would be the enhanced ability of lawyers and litigants to find, understand and satisfy one set of discovery measures that regulate practice in the federal and state courts of Arizona. Insofar as the federal and state schemes are identical or similar, these phenomena facilitate procedural compliance, make discovery simpler, and limit the expense and time which are needed to conclude discovery and complete cases. A return to uniformity should also enable the Arizona bench and bar to realize the benefits of relatively settled judicial construction of analogous provisions covering discovery and of the well-considered thinking of national experts in the area of procedure.

However, it is important to recognize that the growing proliferation of local requirements, which implicate discovery at the federal and state levels, may simply frustrate efforts to reattain complete uniformity. For example, the Local Rules of the United States District Court for the District of Arizona include discovery measures that seemingly conflict with or duplicate the Federal Rules of Civil Procedure.[67] The Local Rules of Practice for the Superior Courts in Arizona[68] correspondingly incorporate provisions which govern discovery that apparently contravene or repeat those strictures which pertain to discovery in the Arizona Rules of Civil Procedure.

The major disadvantage of making the Arizona discovery system consistent with the federal approach would be the loss of flexibility to treat special conditions that prevail in the Arizona state courts, which may differ

66. Cure, *supra* note 34, at 56 n.6; Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1422–25 (1992).

67. *See, e.g.*, D. ARIZ. R. 2.5, 2.7(c), App. A. (West 2001). *See generally* Tobias, *supra* note 66; Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533 (Feb. 2002).

68. *See, e.g.*, Local Rules of Practice for the Superior Court of Coconino County, Rule 14 (2001); Local Rules of Practice for the Superior Court of Yuma County, Rule 9 (2001). *See generally* Hink, *supra* note 44, at 22; Oakley & Coon, *supra* note 10. Certain Uniform Rules of Practice of the Superior Court of Arizona similarly contravened or repeated the strictures; however, the Court recently repealed or transferred the Uniform Rules. *See supra* note 59.

from circumstances in the ninety-four federal district courts and even the current situation in the Arizona federal district. Related concerns might be the abandonment of discovery reforms familiar to the Arizona bench and bar and the concomitant need to learn of, comprehend and apply different procedural requirements. Insofar as Arizona has applied measures that the federal courts and other states have not employed, the reestablishment of uniformity could also eliminate Arizona's valuable contribution as a laboratory for experimentation with promising mechanisms.

Another important consideration will be the relative efficacy of the new federal discovery requirements and the discovery reforms implemented by the Arizona state courts during the 1990s. The federal strictures essentially narrow the information which attorneys and litigants have been able to secure through discovery and automatic disclosure.[69] The changes, therefore, generally favor defendants more than plaintiffs, who have the burden of proving their cases, and many of whom need rather broad discovery to make this proof.[70] Of course, it is impossible to ascertain precisely what impacts the federal proposals will have, until federal district judges have actually applied the new provisions and those procedures have received careful evaluation. Nonetheless, historical experience with discovery, particularly the 1983 and 1993 amendments which were intended to contain discovery,[71] suggests that the modifications will have the consequences mentioned immediately above. The comparative effectiveness of the presumptive limitations on the number of interrogatories and depositions, which the United States Supreme Court imposed in 1993 and which the Arizona Supreme Court prescribed during 1991, may correspondingly inform understanding of how the temporal restrictions on depositions mandated by the new federal revisions will operate.[72]

The Arizona Supreme Court should attempt to determine exactly how well its discovery reforms instituted during the 1990s have worked. For instance, it would be helpful to know whether the Arizona automatic disclosure requirements have promoted the early revelation of information which has facilitated the resolution of civil lawsuits, especially by fostering settlement, or whether the strictures have led to contentious disagreements

---

69. *See* Marcus, *Discovery*, *supra* note 16, at 775–76; Subrin, *Fishing*, *supra* note 6, at 744–45.

70. *See* Thornburg, *supra* note 26, at 229–31; Tobias, *supra* note 66, at 1441–42; *see also* Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495–98 (1988–89) (analyzing plaintiff's proof in civil rights cases).

71. *See* Marcus, *Discovery*, *supra* note 16, at 760–68.

72. *See supra* notes 26, 32, 62, *infra* notes 77–79 and accompanying text. The 1991 revision of Arizona Rule 30(a) imposed presumptive limitations on depositions' length.

and unnecessary, costly and time-consuming satellite litigation over precisely what must be divulged. The Arizona Supreme Court might correspondingly institute efforts to ascertain whether presumptive discovery limitations on depositions and interrogatives have saved expense or time, an inquiry that experience with the federal analogues could inform,[73] and whether according judges increased control over the pretrial process and discovery has improved civil dispute resolution.

The Justices should carefully assemble, analyze and synthesize the maximum, feasible empirical data respecting these questions. Minimal empirical data currently exist because the Arizona Supreme Court has undertaken no formal attempt to study the impacts of the recent reforms generally, while baselines for comparing the effects of discovery devices' application have yet to be established specifically.[74] Several of the applicable issues may concomitantly resist precise empirical verification, and a few questions apparently defy definitive resolution.

Nevertheless, some relevant information might be available and certain raw data could be analyzed and synthesized. Moreover, the Arizona Supreme Court may be able to survey judges, lawyers and litigants in the state regarding their perceptions or to gather anecdotal information. The Justices should also seriously consider commissioning an assessment by an expert, independent evaluator, such as the National Center for State Courts or the State Justice Institute, each of which has previously analyzed procedures that the Arizona trial courts implemented.[75] Another helpful possibility could be the Institute for Civil Justice of the RAND Corporation. This research entity recently completed a comprehensive examination of expense and delay reduction techniques, including a broad spectrum of discovery and disclosure mechanisms that resemble the Arizona state court reforms of the 1990s, with which the ninety-four federal districts experimented between 1990 and 1997.[76]

A related, instructive source that the Justices may consult is federal district court data. District court experience with the implementation, and evaluators' assessment, of the 1993 federal rules revisions would be particularly helpful, especially the amendments imposing automatic

---

73. *See supra* note 72, *infra* notes 77–79 and accompanying text.

74. Huntwork interviews, *supra* note 64.

75. *See id.*; *see also* 42 U.S.C. § 10701 (1994) (authorizing the State Justice Institute).

76. *See, e.g.*, JAMES S. KAKALIK ET AL., IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS (1996); JAMES S. KAKALIK ET AL., JUST, SPEEDY AND INEXPENSIVE?: AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); *see also* 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 (1998).

disclosure and presumptive limitations on interrogatories and depositions.[77] The federal changes differed somewhat from the 1992 Arizona alterations;[78] however, the respective provisions governing disclosure and presumptive limitations are sufficiently similar so that material related to the efficacy of the federal revisions can increase understanding of the Arizona amendments. Of course, the recent decision of the United States Supreme Court to narrow the scope of automatic disclosure apparently suggests that the federal rule revisors had some concerns about the procedure's operation, even as the determination to impose presumptive limitations on the length of depositions seemingly indicates a measure of satisfaction with this technique.[79]

An additional, significant factor will be the tolerance of the judiciary and practicing attorneys in Arizona for greater discovery reform. Too much or too frequent modification can exceed the patience of judges and lawyers who must find, master and employ the new requirements. At some juncture, the bench and bar will tire of, or find overly expensive, the effort to discover, understand and apply incessantly changing strictures. Judges and counsel in Arizona could well have reached that point. If so, it might be advisable to impose a moratorium on discovery reform.[80] For example, the Arizona Supreme Court could study the efficacy of the discovery revisions instituted during the 1990s, while the Justices might await analysis of the effectiveness of the federal amendments that district judges have been applying since late 2000.

Any effort to provide recommendations for resolving the dilemma presented by new federal discovery proposals would be presumptuous and fraught with difficulty. Numerous ideas examined above suggest that the Justices can best make this decision by consulting the maximum, relevant, empirical data which expert, independent evaluators have systematically collected, assessed and synthesized. However, that information has yet to be assembled. Notwithstanding these substantial complications, a few recommendations can be offered.

---

77. *See, e.g.*, James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998); Willging, *supra* note 76; *see also supra* notes 24–26 and accompanying text (analyzing disclosure and presumptive limitations).

78. *See supra* notes 24–26, 59–63 and accompanying text.

79. *See supra* notes 24, 26, 32, 72 and accompanying text.

80. *See* Stephen B. Burbank, *Ignorance and Procedural Reform: A Call for a Moratorium*, 59 BROOK L. REV. 841, 856 (1993); Carl Tobias, *More Modern Civil Process*, 56 U. PITT. L. REV. 801, 839 (1995).

For several reasons, the best approach during the immediate future would apparently be to defer consideration of the 2000 federal amendments. These reasons are the federal rule revisors' seeming penchant for increasingly frequent, and often contradictory, alteration of the discovery requirements;[81] the apparent efficacy of the Arizona discovery reforms instituted during the 1990s; the peculiar circumstances that presently exist in the Arizona state courts; and the need for careful analysis of the new federal amendments and the recent Arizona reforms. Once the federal modifications have received application and close evaluation in all ninety-four federal district courts and the Arizona Justices have scrutinized their reforms of the 1990s, the Arizona Supreme Court should be able to make several important judgments with greater certainty than is possible today. The Justices can probably determine more conclusively whether the new federal changes deserve adoption and whether a return to uniformity is required. The Arizona Supreme Court could also ascertain whether the Arizona reforms have been successful enough to warrant retention, or if Arizona's situation is sufficiently unusual and troubling to necessitate continued application, and, thus, the perpetuation of inconsistency between the federal and state discovery regimes. In short, the Arizona Justices will need better information than is currently available to make the finest decision with the requisite confidence.

IV. CONCLUSION

The Arizona Supreme Court maintained much consistency between the discovery systems in the Arizona and the federal trial courts until the 1990s. The new federal discovery amendments, which became applicable in late 2000, pose a dilemma for the Justices. If the Arizona Supreme Court rejects those revisions, the Justices will allow Arizona discovery to depart further from the federal scheme and the court may well jeopardize the possibility of reinstituting uniformity. Should members of the court adopt the federal modifications, the Justices might threaten certain recent reforms in Arizona discovery and impose changes that are not tailored to the conditions presently existing in the state trial courts and require judges, lawyers and litigants to find, comprehend and use another set of strictures. The preferable approach at this juncture appears to be deferral of the decision to prescribe or reject the new federal proposals as well as systematic

81. *See supra* notes 21–31 and accompanying text. *See generally* Paul V. Niemeyer, *Here We Go Again: Are The Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517 (1998); Subrin, *Fishing*, *supra* note 6, at 739–45.

assessment of these requirements and of the discovery reforms that the Arizona Supreme Court instituted during the 1990s. Once the court has secured and consulted the maximum relevant information, it should be able to determine more definitively whether the new federal amendments will actually improve Arizona civil discovery.