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A MODEST REFORM FOR FEDERAL PROCEDURAL RULEMAKING

CARL TOBIAS*

The Judicial Conference of the United States Advisory Committee on Civil Rules (the "Advisory Committee"), which has primary responsibility to study the Federal Rules of Civil Procedure (the "Federal Rules") and to formulate recommendations for improvement, recently developed a thorough package of revisions to the Federal Rules that govern discovery.1 During April 2000, the United States Supreme Court promulgated essentially intact the set of amendments that the Advisory Committee had proposed.2 Those changes became effective in December 2000.3

The rule revision entities commissioned discovery studies, developed proposals, and solicited and considered extensive public input on the recommended alterations to the Federal Rules. Despite concerted effort, the efficacy of the new amendments remains unclear, partly because federal district courts have not actually applied them. The revisions, this deficiency in the amendment process, and prospects for its remediation warrant analysis.

The efforts to revise the rules commenced several years ago. In 1996, the Advisory Committee appointed a Discovery Subcommittee that it asked to explore the prospect of additional changes to the Federal Rules' discovery provisions, a number of which the Supreme Court had amended as recently as 1993.4 The Discovery Subcommittee investigated the necessity of further altering the discovery provisions, in part by commissioning several assessments that two expert en-

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ties conducted. One of these institutions was the Federal Judicial Center (the "FJC"), the principal research arm of the federal courts. The second body was the Institute for Civil Justice of the RAND Corporation (the "ICJ"), which had recently completed a comprehensive evaluation of the procedures for reducing expense and delay adopted and enforced by the ninety-four federal district courts under the Civil Justice Reform Act (the "CJRA") of 1990. The FJC and the ICJ collected and analyzed considerable empirical data on the application and operation of the 1993 revisions of the Federal Rules.

The Advisory Committee substantially relied on those studies in formulating a group of proposed amendments to the discovery rules for the consideration of the Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee"), which reviews proposals developed by the advisory committees on appellate, bankruptcy, civil, criminal, and evidentiary rules. The Standing Committee instituted few modifications to the Advisory Committee draft and published proposed revisions on which it sought public input. The Standing Committee then evaluated the public comments, minimally changed the suggested alterations, and, in 1999, compiled a final package of proposed amendments for the Judicial Conference, the policymaking arm of the federal courts. The Conference made one modification in the set that the Advisory Committee tendered and submitted the

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10. The Standing Committee rejected, on a 10-2 vote, deletion of the provision that would narrow the scope of discovery. See Letter from Richard H. Middleton, Jr., President, Association of Trial Lawyers of America to William H. Rehnquist, Chief Justice of the United States (Apr. 12, 2000).

11. The Conference deleted the “cost bearing” stricture, which would have authorized judges to permit discovery that was disproportionate to the needs of a case only if the party seeking broader discovery paid for it. See Proposed Amendments, supra note 1, at 87-89 (Amendment to Rule 34(b)); see also Scirica Memorandum, supra note 7, at 360. See generally Thornburg, supra note 1, at 239-40; Tobias, supra note 1, at 1441.
group to the Supreme Court;\textsuperscript{12} the Court promulgated the revisions without change in April 2000.\textsuperscript{13}

These amendments alter the present discovery regime in several significant ways. First, one of the 2000 Amendments imposing mandatory prediscovery, or automatic disclosure, requires parties to divulge less information than the 1993 version.\textsuperscript{14} Moreover, the 2000 Amendments' automatic disclosure provision applies nationally; it thus eliminates the 1993 provision that authorized each of the ninety-four federal district courts to opt out by changing the strictures in the federal rule or by rejecting those requirements altogether.\textsuperscript{15}

The 2000 Amendments also narrow the scope of discovery that litigants have traditionally been able to secure. For many years, parties could acquire any information that was "relevant to the subject matter involved in the pending action."\textsuperscript{16} The new version, however, restricts the scope of discovery to material that is "relevant to the claim or defense," and litigants can secure information that is relevant to the subject matter only after parties file motions showing good cause why they are entitled to broader discovery.\textsuperscript{17} The objectives of those who revised the rule are to limit discovery and to prevent fishing expeditions by restricting litigants to discovery that only implicates matters raised by them in the pleadings.\textsuperscript{18}

One important feature of the 2000 Amendments is that those responsible for federal rule revision formulated the comparatively significant modifications reviewed above, as well as additional changes, without systematically assembling or evaluating any empirical data on the amendments ultimately prescribed. Indeed, they apparently had only a limited understanding of how the alterations will work in practice, because federal district judges had never actually applied

\textsuperscript{12} The Conference also rejected, on a 13-12 vote, deletion of the provision that would narrow discovery's scope. See Letter from Professor Thomas D. Rowe to Carl Tobias (Nov. 19, 1999) (on file with author).

\textsuperscript{13} See generally Amendments to Federal Rules of Civil Procedure, supra note 2.

\textsuperscript{14} Compare FED. R. CIV. P. 26(a) (amended 1993) (requiring the disclosure of information that is "relevant to disputed facts alleged with particularity in the pleadings") with FED. R. CIV. P. 26(a) (amended 2000) (requiring the disclosure of information that "support[s a party's] claims or defenses, unless solely for impeachment").


\textsuperscript{16} FED. R. CIV. P. 26(b)(1) (1999). Information is discoverable, if it "appears reasonably calculated to lead to the discovery of admissible evidence," even if it is not admissible at trial. Id.; see also Beckerman, supra note 8, at 513-17; Richard L. Marcus, Discovery Containment Redux, 39 B.C. L. REV. 747, 748-79 (1998); Stephen N. Subrin, Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules, 39 B.C. L. REV. 691, 734-45 (1998).

\textsuperscript{17} See FED. R. CIV. P. 26(b); see also Thornburg, supra note 1, at 237-39; Gregory P. Joseph, Civil Rules II, NAT'L L. J., Apr. 24, 2000, at A17.

the modifications, and attorneys and parties had not attempted to satisfy them. Of course, no evaluator has analyzed how the measures actually function.

I am criticizing neither the substance of the 2000 Amendments nor the ostensibly open process by which they took effect. The benefits and disadvantages of these changes, and the methods by which the entities developed and promulgated the alterations, have received cogent assessment elsewhere. No individual or institution, even those responsible for rule amendment, however, can know exactly how the new provisions will in fact operate until judges have employed them, lawyers and litigants have attempted to comply with the measures, and the devices have received careful scrutiny.

One felicitous means of ascertaining how the proposed rule modifications will work as a practical matter is readily available. Congress should adopt the 1991 proposed amendment in Federal Rule of Civil Procedure 83 that would authorize the federal districts to test promising mechanisms for five years if the courts secure Judicial Conference approval. Unfortunately, the rule revision entities seemed to withdraw this proposed amendment out of deference for contemporaneous experimentation involving expense and delay reduction techniques under the Civil Justice Reform Act of 1990.

This amendment would enable the Advisory Committee and other revisors to determine more precisely how procedural changes will work in practice. A small number, or a representative group, of districts could test apparently efficacious measures that conflict with the federal rules or statutes for a significant period of not more than five years. This practice would permit judges to apply, construe, and enforce provisions; attorneys and parties to find, master, and satisfy the strictures; and expert, independent evaluators to analyze the procedures' relative effectiveness generally and their advantages and detriments specifically. With the information that the rule amendment entities derive from that experimentation, the revisors could recalibrate contemplated alterations. Those responsible for rule amendment might then recommend formal modifications with greater confidence about how the nascent measures would operate practically, while members of the bench and bar, as well as litigants, could comment

19. See, e.g., Beckerman, supra note 8; Jeffrey W. Stempel, Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform,” 64 LAW & CONTEMP. PROBS. 197 (Spring/Summer 2001); Thornburg, supra note 1. But cf. Scirica Memorandum, supra note 7, at 360-61 (praising the “thorough process that the [Advisory] Committee followed, the quantity of information that it evaluated, and the “depth of debate over the policy considerations”).


on the suggested changes in a manner informed by experience of how they actually function. The recent decision to alter automatic disclosure illustrates these potential benefits. Rigorous testing and assessment of the device before it was officially imposed might have obviated the need to revise the provision so soon after its 1993 amendment.\footnote{22}

Congress must expeditiously revitalize the proposed revision in Rule 83. Lawmakers should develop a new version premised on the 1991 proposal or a modified iteration of it; solicit public comment on the idea, perhaps in hearings; assess the public input that Congress receives; and pass legislation revising Rule 83.\footnote{23} This change would improve the quality of future amendments to the Federal Rules by facilitating productive experimentation with the procedures before the Supreme Court promulgates them.

The Supreme Court recently prescribed a package of discovery revisions. Whether those amendments will prove effective remains unclear, in part because federal courts have not applied them. Congress should expeditiously rectify this situation by adopting a proposed revision in Rule 83 that would authorize experimentation with promising procedures.


\footnote{23. For a careful exposition of why Congress is the preferable entity to effectuate this change, see Levin, \textit{supra} note 20, at 892-94; Levin, \textit{supra} note 21, at 1585-87. \textit{See generally} Tobias, \textit{supra} note 3, at 1633.}