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Judge William W Schwarzer and Automatic Disclosure

Carl Tobias*

During the spring of 1995, Senior United States District Judge William W Schwarzer concludes nearly half a decade of distinguished service as the Director of the Federal Judicial Center (FJC), which is one of the primary research arms of the federal courts. Judge Schwarzer carefully and thoroughly discharged the challenging responsibilities of that post, ably heading the FJC in difficult times for the federal courts, which have been increasingly required to achieve more with fewer resources.

Judge Schwarzer assumed the directorship of the Center after serving for fourteen years on the Northern District of California. When Judge Schwarzer was a member of that court, he earned a well-deserved reputation as an innovative judge who vigorously practiced judicial case management and actively participated in numerous efforts to improve the revision and application of federal civil procedures.

As Judge Schwarzer leaves the position of Director and returns West to sit by designation on the United States Court of Appeals for the Ninth Circuit and to teach part-time at Hastings College of the Law in San Francisco, the jurist should focus his considerable energy and expertise on an important procedural development which he was substantially responsible for initiating. Judge Schwarzer ought to guarantee that automatic, or mandatory pre-discovery, disclosure, which was one of the most controversial procedures that the United States Supreme Court has ever included in amendments to the Federal Rules of Civil Procedure, receives rigorous assessment.¹

* Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.


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During the late 1980s, Judge Schwarzer became one of the earliest and strongest advocates of automatic disclosure, a procedure which requires that litigants divulge information which is important to their cases before parties commence formal discovery. Judge Schwarzer enthusiastically and masterfully shepherded the highly controversial proposal to modify Federal Rule of Civil Procedure 26 through an extremely contentious rule revision process which culminated in the amendment’s promulgation in 1993. Judge Schwarzer attempted to persuade various rule revision entities, such as the Advisory Committee on the Civil Rules, that adoption of the mechanism was critical, and wrote law review articles urging and defending the procedure’s implementation.

Automatic disclosure has continued to be controversial since it became effective in December 1993. Indeed, fewer than one-half of the ninety-four federal districts have chosen to apply the federal revision in Rule 26 prescribing disclosure as it was adopted in 1993. That change included a provision for the federal


3 This assertion is premised on conversations with several individuals who are knowledgeable about the rule revision process in which automatic disclosure was adopted. See generally Tobias, supra note 3, at 1611-16.


districts to reject or to vary the federal amendment. Only a very small number of states have decided to impose disclosure requirements, although numerous states usually adopt most federal revisions relatively soon after they take effect.

Several important reasons explain why automatic disclosure has been so controversial. Nearly all elements of the organized bar and a number of additional interests have contended that the disclosure requirements fail to state clearly exactly what information must be disclosed. These groups also argue that the requirements could impose an extra layer of discovery, raise ethical questions, and may increase litigation costs.

Another significant reason for the controversy is that automatic disclosure received comparatively little experimentation before the measure was incorporated in the Federal Rules of Civil Procedure. Correspondingly, limited empirical data on automatic disclosure's operation has been systematically gathered, analyzed, and synthesized, although there is some anecdotal information available. For instance, the American Bar Association surveyed lawyers' experience with the mechanism in numerous Early Implementation District Courts which experimented with the mechanism under the Civil Justice Reform Act of 1990 (CJRA).

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10 See, e.g., Mengler, supra note 1, at 158; Carl Tobias, Collision Course in Federal Civil Discovery, 145 F.R.D. 139, 142 (1993). See generally Tobias, supra note 3, at 1612.
11 See Bell et al., supra note 1, at 17-18; Samuel Issacharoff & George Loewenstein, Unintended Consequences of Mandatory Disclosure, 73 Tex. L. Rev. 753, 754 (1995); Linda S. Mullenix, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. Rev. 795, 813-21 (1991); see also infra note 12 and accompanying text (stating that automatic disclosure received some experimentation in EIDCs).
12 See American Bar Ass'n, Section of Litigation, Mandatory Prediscovery Disclosure: A First Look (1994); see also Tobias, supra note 3, at 1611 (examining experimentation in EIDCs).
Moreover, the RAND Corporation is currently evaluating disclosure in a number of districts as one component of a study that the CJRA authorized. Some Early Implementation District Courts have included analyses of disclosure in the annual assessments which the 1990 legislation requires courts to prepare.

This current lack of information on automatic disclosure means that Judge Schwarzer must do everything practicable to insure that it receives more rigorous evaluation. The jurist should institute measures that will facilitate the systematic collection, assessment, and synthesis of empirical data on the procedure's implementation and operation. This effort ought to focus on ascertaining as definitively as possible the mechanism's effectiveness in reducing expense and delay in federal civil litigation.

The specifics of such an analysis warrant relatively little treatment in this Essay partly because the Federal Judicial Center possesses considerable experience and expertise, having performed a number of analogous assessments in the past. Recent examples are the valuable FJC studies of the operation of the 1983 amendment of Rule 11. These evaluations were substantially responsible for the provision's significant revision in 1993.

Another helpful illustration is the FJC's studies of court-annexed arbitration, an important alternative to traditional dispute resolution. It also appears preferable in such an assessment to em-

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ploy a single entity, such as the FJC, which can serve as a clearinghouse in coordinating the effort and can apply the same techniques for analyzing automatic disclosure in different districts.

Some guidance may be useful, however. The Federal Judicial Center should probably assemble and assess the available anecdotal information on automatic disclosure while exercising caution in relying on such data. For example, certain anecdotal information suggests that the procedure works well when the material divulged is rather general; in comparatively simple, routine cases, such as automobile accident litigation; and once lawyers have secured some familiarity with the measure. Disclosure similarly appears to function rather effectively when the attorneys who must reveal information know each other or are relatively civil and collegial. The FJC must evaluate considerably more experimentation, however, before it can verify these ideas.

It will also be important for the Federal Judicial Center to consult the methodologies and results of other analyses of automatic disclosure. These include the American Bar Association study; the evaluations of disclosure included in the annual assessments that the CJRA requires districts to compile, a number of which have yielded rather inconclusive determinations regarding disclosure’s efficacy; and the study that RAND is presently conducting. The FJC should, of course, be careful to avoid duplicating these efforts. For instance, the FJC might want to analyze disclosure in districts other than the twenty courts that RAND is evaluating.

(prescribing court-annexed arbitration).


18 See supra note 12 and accompanying text.


20 See supra note 13 and accompanying text; see also Issacharoff & Loewenstein, supra note 11, at 756-57 (conducing study which relies primarily on formal models of litigation behavior drawn from three areas: economics, psychology, and what may be called strategic theory).
It is appropriate to defer to the Federal Judicial Center's experience and expertise regarding numerous significant technical details of assessment. For instance, the FJC's past studies of Rule 11 should provide instructive insights on the type of information to be collected; how to ascertain automatic disclosure's comparative efficacy, if any, in decreasing expense and delay and in facilitating settlement; and how best to assemble and evaluate the relevant material. More specifically, evaluators should attempt to determine as conclusively as possible whether disclosure is affording its purported benefits, such as reducing cost and delay and promoting settlement, and whether it is imposing its ascribed disadvantages, such as adding another layer of discovery. I do not, and the Federal Judicial Center is unlikely to, underestimate the difficulty of certain aspects of rigorously analyzing disclosure, such as establishing relevant baselines or precisely measuring expense and delay reduction.

As Judge William Schwarzer departs the Federal Judicial Center after rendering almost half a decade of dedicated service, he should insure that one of the most controversial procedural innovations in the history of the Federal Rules of Civil Procedure, for whose adoption he bears substantial responsibility, receives a careful test of its effectiveness. The jurist can achieve this by insuring that disclosure is systematically evaluated through the collection, assessment, and synthesis of empirical data on the procedure's operation.

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11 See supra notes 4-5 and accompanying text.
12 See supra note 10 and accompanying text.