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IN DEFENSE OF EXPERIMENTATION WITH AUTOMATIC DISCLOSURE

Carl Tobias*

It would be presumptuous of me to criticize either view articulated, and even worse form to choose sides, in the recent dispute over the merits of automatic disclosure that graced the pages of this journal.¹ Federal civil procedure cognoscenti need no introduction to these highly respected participants in, and students of, the federal courts. Former Judge Griffin B. Bell rendered distinguished service on the United States Court of Appeals for the Fifth Circuit before President Jimmy Carter appointed him Attorney General. Senior Judge William W Schwarzer compiled an excellent record of service as a judge of the United States District Court for the Northern District of California and was a prolific, frequently cited writer on federal civil procedure before he assumed the post of Director of the Federal Judicial Center (FJC).²

Only an author more foolish than I, therefore, would take on either of these federal court giants. Fortunately for me, several factors make that unnecessary. First, there is considerable merit to what Judge Bell and Judge Schwarzer propose, and both have thoroughly and carefully enunciated the cases for their respective positions on the merits of various proposals for automatic disclosure. Second, it is virtually impossible to ascertain which judge is correct due to the paucity of relevant empirical information that is currently available. Indeed, it may well be that each is right and

* 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.

¹ See Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1993); William W Schwarzer, *In Defense of "Automatic Disclosure in Discovery"*, 27 GA. L. REV. 655 (1993). For purposes of convenience, I refer to Judge Bell as the author of the first article; this is not meant to accord less credit to the other able authors of the article, Chilton Davis Varner and Hugh Q. Gottschalk.

² See, e.g., William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988); William W Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985). He has remained an active writer. See, e.g., Schwarzer, *supra* note 1; William W Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178 (1991).

both are wrong in some measure.

All of these considerations indicate that discretion is the better part of valor. The preferable approach, accordingly, is to mediate this controversy by applying a substantial dose of that much-touted tonic, alternative dispute resolution. My purpose is to discover a pragmatic, feasible solution to the difficulties posed by the proposal for automatic disclosure which the United States Supreme Court transmitted to Congress on April 22, 1993³ and to the disagreement over that proposal between Judge Bell and Judge Schwarzer. I find that remedy in the Civil Justice Reform Act (CJRA) of 1990,⁴ which affords an extremely effective vehicle for treating this dispute.

I. THE DISPUTE

Brief examination of the dispute over the automatic disclosure proposal is warranted. Many federal court observers across a broad political spectrum, including parties, lawyers, and judges who participate in federal civil litigation, agree that numerous problems attend modern discovery, namely excessive discovery, abusive discovery, and expense and delay.⁵ There appears to be equally widespread opposition to the automatic disclosure proposal among

³ See COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, H.R. DOC. 74, 103d Cong., 1st Sess. (1993) (on file with the *Georgia Law Review*) [hereinafter SUPREME COURT TRANSMITTAL].

⁴ See Judicial Improvements Act of 1990, Tit. I, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. 1993)). Others have advocated similar general approaches. Critics of the first automatic disclosure proposal developed by the Advisory Committee suggested limited experimentation. See Bell, *supra* note 1, at 31-32; see also *infra* note 23 and accompanying text (discussing automatic disclosure procedures recommended by 1991 Advisory Committee). Judge Bell makes an analogous recommendation. See Bell, *supra* note 1, at 53-57. Indeed, the Advisory Committee subscribed to such an approach for a brief time. See *id.* at 34-35. I elaborate these general approaches in an effort to afford Congress specific, concrete guidance for implementation and for treating the automatic disclosure proposal.

⁵ See, e.g., Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Litigation: Enough Is Enough*, 1981 B.Y.U. L. REV. 579; Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992); Committee on Discovery, New York Bar Association, Report on Discovery Under Rule 26(b)(1), in 127 F.R.D. 625 (1990).

similarly diverse participants in federal civil litigation.⁶ Judge Bell articulates five principal ideas to support his contention that the disclosure proposal is flawed,⁷ while Judge Schwarzer evaluates those propositions and emphasizes significant features of the proposal which he believes are relevant to its adoption.⁸

Justice Antonin Scalia, in his dissenting statement opposing transmittal of the disclosure proposal, subscribed to many ideas offered by Judge Bell.⁹ Justice Scalia observed that the new regime would "perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system."¹⁰ He found it "most imprudent to embrace such a radical alteration that [had not received] any significant testing on a local level."¹¹ Justice Scalia added that Judge Schwarzer himself had recognized the need for analogous experimentation prior to the promulgation of a national requirement when Judge Schwarzer advocated a considerably more extreme disclosure proposal four years ago.¹²

Justice Scalia considered it more important that Congress similarly had found such local experimentation with disclosure to be essential "before major revision"¹³ and had created an experimental program for federal trial courts under the Civil Justice

⁶ See, e.g., Bell, *supra* note 1, at 28-32 and sources cited therein; Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155 (1991); see also Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).

⁷ See Bell, *supra* note 1, at 5, 41-46. For example, Judge Bell suggests that the proposal's vagueness will increase motion practice and foster overproduction while automatic disclosure will increase expense. *Id.*

⁸ Schwarzer, *supra* note 1, at 655-64.

⁹ See SUPREME COURT TRANSMITTAL, *supra* note 3, at 107-09 (Scalia, J., dissenting) (citing Bell et al., *supra* note 1). For instance, Justice Scalia contends that the proposal will increase motion practice and expense. *Id.* at 107 (Scalia, J., dissenting); see also *supra* note 7 (discussing similar criticism by Judge Bell).

¹⁰ SUPREME COURT TRANSMITTAL, *supra* note 3, at 104 (Scalia, J., dissenting).

¹¹ *Id.* at 108.

¹² *Id.* (citing William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 723 (1989) (suggesting adoption of his disclosure proposal only after successful "trial period")); see also Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1361 (1978) (similar recognition by another advocate of discovery reform and participant in development of current disclosure proposal).

¹³ SUPREME COURT TRANSMITTAL, *supra* note 3, at 108 (Scalia, J., dissenting).

Reform Act (CJRA).¹⁴ The statute prescribes experimentation with some form of cooperative discovery for not less than three years in many of the ninety-four districts and mandates that the Judicial Conference of the United States prepare a report and recommendations on certain of these efforts for Congress by 1995.¹⁵ This experimentation is the linchpin for reconciling the differences between Judge Bell and Judge Schwarzer. It concomitantly enables Congress to treat effectively the national automatic disclosure proposal that the Court forwarded, thereby averting a potential collision between that proposal and local experimentation under the CJRA.¹⁶

II. POSSIBLE SOLUTIONS

Congress may follow numerous courses of action. It could simply allow the controversial national automatic discovery proposal to become effective in December 1993 by inaction.¹⁷ For reasons enumerated above, this manner of proceeding is inadvisable.¹⁸ Preferably, Congress might also attempt to resolve the controversy over the efficacy of the automatic disclosure proposal that it is currently considering.

Congress could collect, analyze, and synthesize information on experimentation with automatic disclosure in the approximately twenty-five Early Implementation District Courts (EIDCs) that have instituted the procedure.¹⁹ The Federal Judicial Center, the Administrative Office of the United States Courts (AO), or the

¹⁴ *Id.* (citing Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 104-105, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. 1993))); *see also* 28 U.S.C. § 473 (Supp. 1993) (providing guidance to district courts for formulation of experimental programs).

¹⁵ Pub. L. No. 101-650, § 105, 104 Stat. 5089, 5097-98.

¹⁶ The collision will be between the national disclosure rule and the inconsistent local rules adopted in the federal districts. *See* Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 139 (1993).

¹⁷ *See* SUPREME COURT TRANSMITTAL, *supra* note 3, at 1; *see also* 28 U.S.C. § 2074 (Supp. 1993) ("Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.").

¹⁸ *See supra* notes 6-11 and accompanying text (highlighting some criticisms of quick adoption of proposal).

¹⁹ *See, e.g.*, JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL JUSTICE REFORM ACT REPORT, Exhibit D (June 1, 1992) (providing profiles of districts experimenting with automatic disclosure).

EIDCs themselves may have some relevant material. Correspondingly, Congress could schedule hearings to elicit testimony on the efficacy of automatic disclosure in the EIDCs and on the automatic discovery proposal that is now before it.²⁰

The prospects for the success of these efforts are rather limited, however. For example, many EIDCs have had less than eighteen months in which to experiment with and evaluate automatic disclosure, most districts have relied on a procedure different from the one transmitted by the Supreme Court, some apparently did not create baselines against which to measure that technique's effects, and few districts seem to have undertaken rigorous efforts to gather, assess, and synthesize information on the mechanism's efficacy.

The preferable approach is for Congress to suspend the effective date of the automatic disclosure proposal presently under consideration and to suspend debate temporarily over the efficacy of that proposal and other disclosure procedures. Congress, in consultation with the FJC, AO, EIDCs, or others possessing relevant expertise, such as Judge Bell, Judge Schwarzer, and Magistrate Judge Wayne Brazil, and federal court litigators, such as Bob Gibbins, Greg Joseph, Laura Kaster, and Loren Kieve,²¹ should then identify a small number of automatic disclosure procedures that apparently have the greatest promise. Congress could prescribe experimentation with various forms of automatic disclosure for three to five years²² in fewer than all ninety-four federal districts.

²⁰ Congress might also explore the efficacy of the national rule revision procedures that it instituted in the 1988 Judicial Improvements Act and the potential inconsistency between the Federal Rules and local rules adopted to implement the CJRA. These topics are beyond the scope of this piece, however. For a discussion of these topics, see Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992) [hereinafter Tobias, *Balkanization*] (analyzing the progressive balkanization of federal civil procedure, especially in the passage of the CJRA, and its detrimental implications for federal judges, lawyers, and litigants); Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115 (1993) [hereinafter Tobias, *Recalibrating*] (examining requirements of CJRA and its implementation in EIDCs and offering suggestions to solve problems with early reform efforts).

²¹ This list obviously is not intended to be comprehensive.

²² My choice of this specific time frame is tailored to that prescribed in the CJRA. See *supra* note 15 and accompanying text; cf. JUDICIAL CONFERENCE OF THE UNITED STATES COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF

This approach actually would be less complicated and more cost-effective than it might appear, because the structure for experimentation already exists in the Civil Justice Reform Act and its implementation. For instance, nearly all of the EIDCs presently imposing automatic disclosure premised their procedures on a 1991 Advisory Committee draft requiring disclosure of information that "bears significantly on any claim or defense."²³ In April 1992, the Committee replaced this stricture with the requirement that litigants disclose "discoverable information relevant to disputed facts alleged with particularity in the pleadings."²⁴

The EIDCs experimenting with the language in the first draft should continue to do so, while a somewhat smaller number of districts currently completing their civil justice expense and delay reduction plans probably should experiment with the second draft (the proposal now before Congress), unless either formulation appears to be unworkable.²⁵ A few districts might experiment with the "meet and confer" procedure proposed by Judge Bell.²⁶ They also could experiment with other possibilities which are limited only by the creativity of the federal judiciary, the CJRA advisory groups, the FJC, the AO, and other informed experts, such as Judge Schwarzer; by the feasibility of the various proposals that are developed; and by the manageability of the overall effort.²⁷ In short, Congress should support broad experimentation but be attuned to the possibility that the project might become unwieldy or that federal civil procedure may experience too much additional

EVIDENCE, reprinted in 137 F.R.D. 53, 153 (1991) (containing draft of withdrawn proposal that prescribed experimentation with inconsistent local rules for not greater than five years).

²³ *Id.* (Proposed FED. R. CIV. P. 26(a)), reprinted in 137 F.R.D. at 87-88; see also *supra* note 19 and accompanying text. See generally Tobias, *supra* note 16, at 140-41.

²⁴ See JUDICIAL CONFERENCE OF THE UNITED STATES COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 26 (May 1992). See generally Winter, *supra* note 5.

²⁵ I assume that both formulations satisfy this standard. Most EIDCs have apparently encountered little difficulty implementing the initial draft. Respected observers, including Judge Schwarzer and Judge Winter, believe that the second draft is workable.

²⁶ See Bell, *supra* note 1, at 49-53.

²⁷ If too many districts experiment with too many disclosure procedures, the effort could become impossible to administer. Congress, therefore, should designate a small number of procedures that seem most promising.

balkanization.²⁸

Once Congress has designated the appropriate forms of automatic disclosure for experimentation in the proper number of federal districts, it must ensure that these efforts are correctly assessed. Congress should mandate that independent, expert evaluators establish baselines and measure the efficacy of different disclosure procedures over a sufficient period to afford a reliable sense of each procedure's relative effectiveness. When that information has been assembled, analyzed, and synthesized, the rule revisors and Congress should be able to ascertain which disclosure mechanisms are most efficacious in specific contexts and to prescribe them as indicated.²⁹ If one procedure seems vastly superior and appears applicable across a broad range of circumstances, its embodiment in a national rule may be warranted.³⁰

III. CONCLUSION

Judge Bell and Judge Schwarzer have contributed significantly to the national debate that is currently raging over automatic disclosure. Congress should address this controversy by drawing upon the civil justice reform effort that it instituted under the 1990 statute. Appropriately measured experimentation should help to identify those automatic disclosure procedures that will prove most efficacious.

²⁸ See generally Tobias, *Balkanization*, *supra* note 20; Tobias, *Recalibrating*, *supra* note 20.

²⁹ See Tobias, *Recalibrating*, *supra* note 20, at 128-32 (similarly suggesting broader implementation of CJRA).

³⁰ See Tobias, *Recalibrating*, *supra* note 20, at 130 n.75; Tobias, *supra* note 16, at 147. See generally Robert E. Keeton, *The Function of Local Rules and the Tension With Uniformity*, 50 U. PITT. L. REV. 853 (1989).