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Discovery Reform Redux

CARL TOBIAS*

The recent resolve of the Advisory Committee on the Civil Rules to revisit reform of the discovery rules, which the Supreme Court revised as recently as 1993, is replete with ironies. In August, 1998, that Committee, which has primary responsibility for studying the Federal Rules of Civil Procedure and developing suggestions for their improvement, published proposals that would significantly revise the substantial 1993 revisions of the discovery rules.¹ Ironies suffuse many specific aspects of the rule revision process and of the proposals to revise the 1993 revisions less than five years after their implementation. I emphasize the proposal to revise mandatory automatic disclosure, which requires that litigants exchange important information before formal discovery. This procedure has been controversial, although several other proposed revisions would significantly change discovery and are similarly ironic.

I. THE RULE REVISION PROCESS

Numerous ironies attend the nascent phase of the protracted rule revision process that will be the second major test of the rule revision procedures that Congress instituted a decade ago. For example, the rule revisors clearly ignored the astute admonitions of two former Advisory Committee reporters, additional distinguished legal scholars and experienced practitioners that most rule revisions require a generation of practical application before their efficacy can be judged fairly.² The rule revisors corre-

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1. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Civil Procedure, 181 F.R.D. 18 (1998) [hereinafter Proposed Amendments].

2. *See* Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 52-53 (1967) (citing Benjamin Kaplan's view of generation time period for analyzing rules);

spondingly disregarded the remonstrations of a growing chorus of critics who have urged that rule revision occur less frequently and have even called for moratoria on revision and procedural change.³ Indeed, if the proposed discovery revisions traverse the extensive rule revision gauntlet and become effective, they would constitute the fourth important package of discovery revisions since 1980.

At least, the Advisory Committee apparently remembered the earlier, unfortunate experiences with the 1983 revision of Rule 11, which required that judges sanction lawyers and litigants who failed to conduct reasonable pre-filing inquiries, and the 1993 revision of Rule 26(a)(1), which imposed automatic disclosure. Rule 11's 1983 revision became the most controversial change in the Federal Rules' half-century history, thus necessitating its fundamental revision in 1993. Rule 26(a)(1)'s proposed revision had been the most controversial formal proposal ever to revise the Rules. Significant reasons why these provisions proved so troubling were that the rule revisors had collected no empirical data on Rule 11's operation before revamping it in 1983,⁴ while they had minimal empirical information regarding automatic disclosure and little experience with the procedure's practical application when the revisors proposed to impose disclosure.⁵

This time, Judge Paul Niemeyer, Chair of the Advisory Committee, appointed a Discovery Subcommittee to investigate the need for revisions in the discovery rules.⁶ That group concomitantly commissioned studies of discovery by the Federal Judicial Center (FJC), an important research arm of the federal courts, and the RAND Corporation Institute for Civil Justice (RAND), an expert independent research entity that had recently completed an unprecedented analysis of procedures for reducing expense and delay in civil litigation under the Civil Justice Reform Act (CJRA) of

Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 677 (1979) (providing Miller's similar view).

3. See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 854-55 (1993); John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 434 (1994).

4. See, e.g., Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1930 (1989); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 455-59 (1993).

5. See, e.g., Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 17-18 (1992); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 813-21 (1991).

6. See Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules to Alice-marie H. Stotler, Chair, Comm. on Rules of Practice and Procedure, 181 F.R.D. 24, 25 (1998) [hereinafter Niemeyer Memorandum]; Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 521 (1998) [hereinafter Niemeyer, *Here We Go Again*].

1990.⁷ Although the Committee had minimal understanding of how several major proposed revisions would in fact operate because the measures had received little actual application, the Advisory Committee ultimately premised the proposals for revision substantially on these studies, which included considerable empirical data.

II. SPECIFIC PROPOSED REVISIONS

A. *Automatic Disclosure*

Numerous, specific proposals to revise the 1993 discovery revisions are ironic. Illustrative is the proposed change in automatic disclosure. The Advisory Committee principally based its determination to propose revision of Federal Rule 26(a) on two perceptions.⁸ One was that the proposal that eventually became the 1993 amendment requiring automatic disclosure had been the most controversial proposal to revise the Federal Rules in 60 years. For example, practically all segments of the organized bar vociferously opposed the proposed disclosure amendment. They believed that it would impose an additional, unnecessary layer of discovery, substantially undermine the traditional adversary system, create certain ethical dilemmas, such as conflicting obligations of counsel to the court and to clients; and leave unclear precisely what information must be revealed, and thus lead to unnecessarily expensive satellite litigation over the proposed revision's meaning.⁹

The second perception was that Rule 26(a)'s provision for all ninety-four federal districts by local rule, judges by order in specific cases, and litigants by consent to opt out of the compulsory disclosure requirements, complicated federal civil practice by facilitating the application of inconsistent disclosure strictures.¹⁰ For instance, one-third of the courts rejected disclosure altogether, another third eschewed the federal disclosure rule and adopted their own local disclosure measures, and one-third subscribed

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

8. See Niemeyer Memorandum, *supra* note 6, at 6-7.

9. See, e.g., Bell et al., *supra* note 5, at 28-32; Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1612 (1994); Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 512 (1993) (Scalia, J., dissenting).

10. The 1993 discovery revisions in Rule 26(b)(2) included similar opt-out provisions for the number of depositions and interrogatories and the length of depositions.

to the Federal Rule.¹¹

The two perceptions on which the Advisory Committee primarily premised the decision to propose revision of Federal Rule 26(a) may actually have been misperceptions, however. The realities, apparently, are that the 1993 disclosure amendment has proved considerably less controversial, particularly by operating more effectively, than many critics predicted, while the revision has fostered the application of fewer conflicting local disclosure measures and promoted less balkanization than some federal courts observers anticipated. These actualities are manifested in the findings of the recent Federal Judicial Center and RAND Corporation studies of discovery that the Advisory Committee commissioned.

The Committee requested that the Federal Judicial Center evaluate discovery's expense. The Center received responses from 1200 of the 2000 attorneys whom it surveyed, and this information enabled the FJC to reach numerous conclusions respecting the 1993 disclosure revision.¹² The Center determined that disclosure was being broadly employed and was apparently having the effects that the Advisory Committee intended.¹³ For example, "[f]ar more attorneys reported that initial disclosure decreased litigation expense, time from filing to disposition, the amount of discovery, and the number of discovery disputes than said it increased them."¹⁴ The FJC also found that "many more attorneys said initial disclosure increased overall procedural fairness, the fairness of the case outcome, and the prospects of settlement than said it decreased them."¹⁵ Multivariate analyses which employed docket data confirmed lawyers' perceptions regarding reductions in time from filing to resolution, but did not support their views that disclosure decreased litigation expense, while "[r]elatively few attorneys reported that disclosure requirements led to motions to compel, motions for sanctions, or other satellite litigation."¹⁶ However, thirty-seven percent of attorneys who had experience with disclosure identified

11. See DONNA STIENSTRA, FEDERAL JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (Mar. 30, 1998), reprinted in 182 F.R.D. 304 (1998). Inconsistency's problems were exacerbated when the federal disclosure revision became effective on the same 1993 date that the CJRA required 50 districts to issue civil justice expense and delay reduction plans. Only the last minute failure to strike a satisfactory compromise precluded passage of a statute which would have prevented that federal revision from taking effect. Because numerous districts had seemingly not planned for the provision to become effective, this created much additional confusion. See Tobias, *supra* note 9, at 1613-14.

12. See Willging et al., *supra* note 7; Niemeyer, *Here We Go Again*, *supra* note 6, at 521.

13. See Willging et al., *supra* note 7, at 534-35.

14. *Id.* at 535.

15. *Id.*

16. *Id.*

one or multiple difficulties with the procedure.¹⁷

Ironically, the RAND study yielded somewhat different results. The Committee commissioned the RAND Institute for Civil Justice to review a broad database that RAND had assembled in conducting the major CJRA study and additionally assess this information in ascertaining how well discovery functions and how it could be improved.¹⁸ The earlier study proved inconclusive because RAND selected sample cases before revised Rule 26(a)(1) became effective.¹⁹ The follow-up examination determined that disclosure minimally affected cost and delay. For example, RAND's data and evaluations did not "support strongly the policy of mandatory early disclosure as a means of significantly reducing lawyer work hours and thereby reducing the costs of litigation, or as a means of reducing time to disposition."²⁰ RAND concomitantly observed that "[f]indings from a recent survey of about 1000 attorneys by the ABA's Litigation Section" resembled the RAND determinations:²¹ "Analysis of the survey results suggests that Rule 26(a)(1) disclosure has not had a significant impact on federal civil litigation. . . . The survey provided no evidence that . . . disclosure had reduced discovery costs or delays" or that it had decreased conflict between adversaries in the discovery process.²² Finally, "[d]espite the dire warnings of critics of early mandatory disclosure, [RAND] did not find any explosion of ancillary litigation and motion practice related to disclosure"²³

As to the second perception respecting the application of inconsistent discovery requirements, the FJC claimed that an "increasing number of voices among both the bench and the bar have asserted that non-uniformity in the discovery rules—and in the disclosure rules in particular—is a serious problem and should be resolved."²⁴ The Center found that sixty percent of the lawyers polled think that the adoption of conflicting disclosure procedures across districts creates difficulties.²⁵ Ironically, only sixteen percent characterize the complications as serious,²⁶ while a mere six percent believe that intra-district inconsistency fosters serious difficul-

17. *See id.*

18. *See* Kakalik et al., *supra* note 7; Niemeyer, *Here We Go Again*, *supra* note 6, at 522.

19. *See* Kakalik et al., *supra* note 7, at 628; JAMES S. KAKALIK ET AL., IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS 37-39 (1996).

20. Kakalik et al., *supra* note 7, at 678.

21. *Id.* at 679.

22. *Id.* (quoting KATHLEEN L. BLANER ET AL., AMERICAN BAR ASSOCIATION, MANDATORY DISCLOSURE SURVEY: FEDERAL RULE 26(A)(1) AFTER ONE YEAR (1996)).

23. *Id.* at 658; *see also supra* notes 9 & 16 and accompanying text.

24. Willging et al., *supra* note 7, at 541.

25. *See id.* at 542, 583.

26. *See id.* at 583.

ties, and nearly three quarters "think non-uniformity within a district is not a problem."²⁷

The substance of Rule 26(a)(1)'s proposed revision substantially revises the 1993 disclosure revision, which mandates that a party reveal information which is "relevant to disputed facts alleged with particularity."²⁸ The new proposal would require that a litigant disclose only material which favors its position.²⁹ The proposed revision, thus, would narrow, and perhaps eviscerate, the 1993 disclosure strictures by demanding the exchange of less information.³⁰

A threshold irony is why the Advisory Committee chose to propose this revision today. After all, the FJC and RAND studies indicate that the 1993 disclosure amendment has operated efficaciously. Insofar as the 1993 revision has seemed to work poorly, several phenomena could explain this apparent ineffectiveness. There may simply be too little experience with the provision or insufficient evaluation of disclosure's application to posit definitive conclusions regarding efficacy, while early criticism of the device might have colored its subsequent implementation. Additional experimentation with multiple formulations of the procedure may correspondingly enhance appreciation and even lead to the discovery of a clearly superior disclosure mechanism. Ironically, the rule revisors seemed less concerned about proposing the most effective measure than about placating disclosure's critics by diluting the 1993 revision. Even were the current need for change clearer, it is uncertain that the new formulation would actually be an improvement. The proposed revision substitutes wording that might prove ambiguous for terminology that has acquired rather definite meaning.

Judges concomitantly understand, and are accustomed to applying, this phraseology, while lawyers and litigants comprehend, and are used to complying with the language. The new articulation could also foster considerable satellite litigation over its meaning and disclosure's scope, thereby imposing cost and delay. The rule revisors ironically suggested that the proposed revision apply in all cases, although the RAND and FJC studies found disclosure to be most problematic in relatively few, complex lawsuits.

The Advisory Committee, therefore, appeared ambivalent about auto-

27. *Id.* at 583-84.

28. FED. R. CIV. P. 26(a)(1)(A), (B) (1998); see Proposed Amendments, *supra* note 1, at 57-58 (Proposed Amendment in Rule 26(a)(1)).

29. See Proposed Amendments, *supra* note 1, at 57-58 (Proposed Amendment in Rule 26(a)(1)).

30. The proposed revision would at least reduce incentives to plead with particularity, thereby honoring the Federal Rules' notice pleading regime. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

matic disclosure.³¹ The Committee seemingly conceded that judges and lawyers have not subscribed to the regime instituted by Rule 26(a)(1)'s 1993 revision and that disclosure has effected little change in discovery, even as the Committee appeared unwilling to jettison the idea and attempted to preserve it in a less objectionable form.³² Indeed, Judge Niemeyer candidly acknowledged that the

beginning was a strong disclosure rule that could be, and was, defeated by local option. The next step is a diluted disclosure rule that cannot be defeated by local option. Perhaps in several more years the time will come for a strong disclosure rule that cannot be defeated by local option.³³

Ironically, attorneys appear equally unclear about whether disclosure warrants change today, and if so, how. For example, the FJC found that lawyers consider judicial case management the most promising way to decrease discovery difficulties, although eighty-three percent want modifications in the discovery provisions themselves.³⁴ Forty-one percent of those polled favor a "uniform national rule requiring initial disclosure in every district," but twenty-seven percent desire a national rule imposing no disclosure and prohibiting local disclosure provisions while thirty percent prefer the status quo.³⁵ Thirty-three percent of respondents want disclosure to be made uniform now; however, twenty-seven percent think that revision should await greater experience with the 1993 disclosure amendment.³⁶

B. *Other Major Proposed Revisions*

Several additional major changes that the Advisory Committee suggested implicate similar ironies. Perhaps most important and illustrative is a proposal that involves the scope of discovery.³⁷ For many years, parties have been able to secure information that was "relevant to the subject matter involved in the pending action."³⁸ The proposed revision would narrow the scope of discovery to material that is "relevant to the claim or

31. See Edward D. Cavanagh, *Obstacles in the Search for Truth; Proposed Amendments to the Federal Rules of Civil Procedure Hinder Discovery in Ways Unnecessary and Unjust*, LEGAL TIMES, July 27, 1998, at 21.

32. See *id.*; see also *supra* note 9 and accompanying text (listing the factors that virtually all segments of the organized bar found objectionable about the 1993 disclosure amendment).

33. Niemeyer Memorandum, *supra* note 6, at 7.

34. See Willging et al., *supra* note 7, at 543.

35. *Id.*

36. See *id.* at 592.

37. See Proposed Amendments, *supra* note 1, at 64-67 (Proposed Amendment in Rule 26(b)(1)).

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

defense,"³⁹ while litigants could only acquire information relevant to the subject matter upon motion and a showing of good cause.⁴⁰ The proposal's ostensible purposes are to restrict discovery and preclude fishing expeditions by limiting parties to the discovery of matters raised in the pleadings.

As with disclosure, an initial irony is why the Advisory Committee decided to recommend this change now. For instance, the FJC and RAND evaluations suggest that discovery is generally working well and that the 1993 revisions have been efficacious, particularly by limiting considerable contentiousness which attended discovery without prejudicing litigants' rights to secure necessary discovery. To the extent that overbroad discovery apparently is a serious problem, judges currently have numerous mechanisms for restricting discovery's scope.⁴¹ Even were change obviously warranted today, the new proposal might not constitute improvement. For example, it is unclear that the proposed alteration will actually limit the amount of discovery. The proposal would correspondingly replace the "subject matter" standard that is familiar to judges, lawyers, and litigants and that has a relatively clear meaning with a new criterion which could produce much satellite litigation over its interpretation and discovery's breadth, thus increasing expense and delay. Another irony is that the proposed measure would apply to all lawsuits, even though the recent FJC and RAND studies indicate that overbroad discovery principally occurs in a rather small number of complicated cases.

The proposal might also erode the notion of general pleading that has prevailed since the 1938 adoption of the initial Federal Rules. For instance, the proposed "claim or defense" stricture may require that plaintiffs attempt to draft specific pleadings before they can secure material that is under defendants' control that would now be available through discovery. The "claim or defense" language could lead plaintiffs to include in pleadings broader assertions than the material that they possess supports to secure greater discovery, thereby exposing plaintiffs to motions to dismiss and motions for Rule 11 sanctions.⁴²

39. Proposed Amendments, *supra* note 1, at 64 (Proposed Amendment in Rule 26(b)(1)).

40. *See id.* at 64-65 (Proposed Amendment in Rule 26(b)(1)).

41. As with disclosure, any apparent inefficacy may be attributable to insufficient experience with, or evaluation of, the relevant discovery revisions, while additional experimentation may increase understanding or prompt discovery of better approaches.

42. These possible effects on notice pleading ironically differ from that which the disclosure proposal may have. *See supra* note 30. Similar ironies attend proposed imposition of presumptive limitations on depositions to one day or seven hours. *See Proposed Amendments, supra* note 1, at 83 (Proposed Amendment in Rule 30(d)(2)). For example, there is a threshold question of whether this modification is necessary. Insofar as deposition length is a problem, courts can now respond under Rule 30 or by tailoring temporal restrictions to specific cases' needs in pretrial conferences, while the proposal applies to all cases, even though limitations may only be necessary in relatively few.

Another similarly ironic proposal involves the notion of cost bearing, whereby judges may allow discovery that is disproportionate to a case's needs only if the requesting litigant pays for the information sought.⁴³ The proposed revision might simply be unnecessary, especially given the substantial authority which courts currently have over discovery practice. This proposal is also ironic because it reverses the long-standing premise underlying discovery in the American adversary system that parties have similar access to proof. The present scheme makes information either discoverable or not, an issue which judges ultimately resolve. The proposed revision favors those who possess documents by reducing the party that wants information to the undesirable choice of having less material than it needs or sustaining potentially large search expenses. The proposal concomitantly disadvantages resource-poor litigants while creating perverse incentives for parties with economic or political power.⁴⁴ Finally, even if the proposal were formulated to treat the rather rare situations involving discovery abuse⁴⁵ or document-intensive cases, the proposed revision applies to all lawsuits.

III. ADDITIONAL IRONIC IMPLICATIONS

Additional ironies would accompany implementation of the new discovery proposals. If the proposed rule revisions survive the protracted rule revision gauntlet and take effect, the proposals both alone and synergistically could upset the delicate balance between plaintiffs and defendants that is carefully struck by the Advisory Committee in the 1993 revisions. For instance, the proposed changes would narrow the permissible scope of discovery and impose search costs on plaintiffs. The balance would be altered, notwithstanding protestations to the contrary by Judge Niemeyer that the Committee assiduously labored to maintain this balance.⁴⁶

The introduction of new, untested mandates might also require that lawyers and litigants file additional papers, that they and judges participate in more hearings and conferences, and that judicial officers resolve greater numbers of discovery disputes. The imposition of different discovery

43. See Proposed Amendments, *supra* note 1, at 87-89 (Proposed Amendment in Rule 34(b)).

44. See Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988/89).

45. See Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683 (1998) (discussing discovery abuse and rule revisions in light of empirical studies); see also Jack Weinstein, *What Discovery Abuse?: A Comment on John Setear's "The Barrister and the Bomb"*, 69 B.U. L. REV. 649 (1989) (considering different types of discovery abuse and possible solutions).

46. See Niemeyer Memorandum, *supra* note 6, at 4; see also Cavanagh, *supra* note 31, at 21-22.

mandates and criteria will concomitantly demand that judges comprehend, apply, and refine, and that attorneys and litigants discover, understand, and conform to the new concepts. These requirements will additionally complicate federal civil practice by expanding the already enormous quantity of procedures that counsel and parties must find, apprehend, and satisfy.⁴⁷ The measures include provisions in Title 28 of the United States Code and substantive statutes, in the Federal Rules of Civil Procedure and in local procedures which all ninety-four district courts apply. Those local strictures encompass a growing number of local rules that differ from the Federal Rules and Acts of Congress, some of which districts adopted under the Civil Justice Reform Act, as well as a plethora of local requirements, such as standing, scheduling, and minute orders, individual-judge procedures and informal unwritten practices that apply in every court.

If the proposed rule revisions become effective, the modifications would constitute the fourth major set of discovery revisions in the last two decades. Their addition to the stunning array of procedures that now govern federal civil practice may have several detrimental consequences. This development would require once again that federal judges master and enforce, and federal court practitioners and litigants find, understand, and comply with discovery revisions and may trigger another prolonged period of inconsistent judicial application, satellite litigation, and uncertainty. It would concurrently exacerbate systemic overload while additionally testing, and perhaps exhausting, the tolerance of the bench, bar, and litigants for procedural change. The proposed discovery alterations could further fragment the already fractured condition of modern federal civil procedure. Finally, most of the phenomena described above would increase expense and delay, thus directly contravening Congress's clearly expressed intent in the CJRA to reduce cost and delay.⁴⁸

CONCLUSION

Perhaps the consummate irony is that neither the ironies witnessed in the recent rule revision process nor in the proposed discovery revisions are novel. This rule revision roundelay simply serves as another trenchant testament to procedure's cyclical character and as a reminder that the rule revisors, American proceduralists, and others interested in reforming the rules, as tinkerers, are destined to "repeat the cycle of revision and relapse

47. I rely in the remainder of this paragraph on Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379 (1992); Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century* (1998) (unpublished manuscript, on file with author).

48. See 28 U.S.C. § 471 (1994); Tobias, *supra* note 9, at 1601-04.

again and again."⁴⁹ Indeed, the specter of the rule revisors tinkering with the discovery rules for the fourth time in less than twenty years assumes a surreal quality and renders even more prescient Justice Lewis Powell's explanation for his opposition to the modest 1980 discovery revisions: "Congress's acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms."⁵⁰

The recent rule revision experience correspondingly reaffirms the aphorism that the "history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms,"⁵¹ although the measure of a generation has been radically truncated. Of course, if the rule revisors "cannot know what the result of any given change will be,"⁵² it is not surprising that they needed to revisit the 1993 discovery revisions so soon. At least, the revisors apparently learned from, and attempted to correct, certain of their predecessors' mistakes. After all, the Advisory Committee commissioned several studies before recommending revision of the 1993 discovery revisions. Moreover, the proposed elimination of opt-out provisions in those revisions would help restore uniformity and ameliorate the balkanization that the strictures created. This omission would concomitantly enable the rule revisors to refurbish their tarnished reputation or perhaps regain some of the respect that they lost by evidencing insufficient commitment to the protection and preservation of a national procedure code.⁵³ In the final analysis, procedural progress may be ephemeral or at best incremental, frequently advancing two steps and losing one or moving laterally and even falling back.⁵⁴

49. Marcus, *supra* note 30, at 494.

50. Amendments to Federal Rules of Civil Procedure, 446 U.S. 995, 1000 (1980) (Powell, J., dissenting); see also Carl Tobias, *Rule Revision Roundelay*, 1992 WIS. L. REV. 236 (discussing issues raised by Rule 11 revision).

51. Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1030 (1984); see also *supra* note 2 and accompanying text.

52. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 677; see also Carl Tobias, *More Modern Civil Process*, 56 U. PITT. L. REV. 801 (1995) (response to Stephen Yeazell's piece; evaluating modern process and making suggestions for treating changes).

53. See Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules*, 14 REV. LITIG. 49 (1994) (discussing the Advisory Committee's inadequate protection of a national code). But see Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994) (defending to some extent the process for promulgating rules and asking for the support of the bar). Even if issuance of the recent proposed revisions only reflects an effort by the revisors to justify their continued existence, it would at least suggest that the revisors are human and subject to the foibles of other bureaucratic, entrenched institutions. See Mullenix, *supra* note 45, at 689.

54. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 812-23 (1993).