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Judge William W. Schwarzer and Automatic Disclosure

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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]

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[1] *See* FED. R. CIV. P. 26(a)(1), *reprinted in* 146 F.R.D. 402, 431-32 (1993). *See generally* Griffin B. Bell et al., *Automatic Disclosure in Discovery — The Rush to Reform*, 27 GA. L. REV. 1

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.[2] 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.[3] 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,[4] and wrote law review articles urging and defending the procedure's implementation.[5]

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.[6] That change included a provision for the federal

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(1993); Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155 (1991); Carl Tobias, *In Defense of Experimentation with Automatic Disclosure*, 27 GA. L. REV. 665 (1993).

[2] *See* William W Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721-23 (1989); *see also* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1361 (1978) (affording earlier suggestion that automatic disclosure be adopted).

[3] *See, e.g.*, William W Schwarzer, *In Defense of "Automatic Disclosure in Discovery,"* 27 GA. L. REV. 655 (1993); *see also* Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1611-16 (1994) (describing contentious rule revision process). *See generally* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994); Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 265-71 (1992).

[4] 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.

[5] *See, e.g.*, William W Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178 (1991); Schwarzer, *supra* note 3. *See generally* Terry Carter, *Judge Schwarzer Goes to Washington*, CAL. LAW., Sept. 1991, at 21, 21.

[6] *See* Alfred W. Cortese & Kathleen L. Blaner, Mandatory Disclosure Rule 26(a)(1): Not the Rule of Choice (Oct. 28, 1994) (copy on file with author) (indicating fewer than one-third of districts apply federal revision); DONNA STIENSTRA, 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. 24, 1995) (copy on file with author) (indicating fewer than one-half of districts apply federal revision).

districts to reject or to vary the federal amendment.[7] Only a very small number of states have decided to impose disclosure requirements,[8] although numerous states usually adopt most federal revisions relatively soon after they take effect.[9]

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.[10]

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.[11] 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).[12]

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[7] *See* FED. R. CIV. P. 26(a)(1).

[8] Arizona is the only state which broadly prescribed automatic disclosure before the Federal amendment became effective. *See* 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); *see also* ALASKA SUPREME COURT, FINAL DRAFT DISCOVERY AND DISCLOSURE RULES (adopting disclosure procedure which will become effective on July 15, 1995). *See generally* Jill Schachner Chanen, *States Considering Discovery Reform*, A.B.A. J., Apr. 1995, at 20. California had prescribed disclosure in narrowly confined contexts. *See* CAL. CIV. PROC. CODE §§ 90-95, 1141.11(d) (West 1982 & Supp. 1995).

[9] *See* John P. Frank, *Local Rules*, 137 U. PA. L. REV. 2059 (1989); 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 (1986).

[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.[13] Some Early Implementation District Courts have included analyses of disclosure in the annual assessments which the 1990 legislation requires courts to prepare.[14]

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.[15] Another helpful illustration is the FJC's studies of court-annexed arbitration, an important alternative to traditional dispute resolution.[16] It also appears preferable in such an assessment to em-

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[13] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, §105, 104 Stat. 5089, 5097-98 (1990); *see also* Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303, 1327-29, 1335-36 (1994) (providing RAND preliminary study).

[14] *See, e.g.*, DISTRICT OF IDAHO, CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE, ANNUAL EVALUATION REPORT 4 (May 1994); CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, ANNUAL ASSESSMENT 5-6 (Oct. 1994); *see also* 28 U.S.C. § 475 (Supp. V 1993) (prescribing annual assessments).

[15] *See, e.g.*, THOMAS E. WILLGING, THE RULE 11 SANCTIONING PROCESS (1988); ELIZABETH C. WIGGINS ET AL., FINAL REPORT ON RULE 11 TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1991); *see also* William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988) (providing suggestions partly responsible for Rule 11's revision). The American Judicature Society also undertook a valuable Rule 11 study on which the FJC should rely. *See* Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943 (1992).

[16] *See* E. ALLAN LIND & JOHN E. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (1983); BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS (1990); *see also* 28 U.S.C. §§ 651-58 (1988)

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.[17] 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;[18] 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;[19] and the study that RAND is presently conducting.[20] 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).

[17] *See, e.g.*, Carl Tobias, *A Progress Report on Automatic Disclosure in the Federal Districts*, 155 F.R.D. 229, 231 (1994); Carl Tobias, *More on Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 357, 363 (1993). *See generally* Tobias, *supra* note 3, at 1615.

[18] *See supra* note 12 and accompanying text.

[19] *See, e.g.*, CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE EASTERN DISTRICT OF NEW YORK ANN. REP. 3, 5-8 (Jan. 25, 1994); REPORT ON THE IMPACT OF THE COST AND DELAY REDUCTION PLAN ADOPTED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS 13-15 (Apr. 6, 1993). *See generally supra* note 14 and accompanying text.

[20] *See supra* note 13 and accompanying text; *see also* Issacharoff & Loewenstein, *supra* note 11, at 756-57 (conducting 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,[21] and whether it is imposing its ascribed disadvantages, such as adding another layer of discovery.[22] 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.[23]

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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[21] *See supra* notes 4-5 and accompanying text.

[22] *See supra* note 10 and accompanying text.

[23] *See* Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115, 124 (1993).