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FOREWORD

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This is an important conference. The prestige of the sponsoring institutions and the experience and ability of the participants are powerful recognition of the importance of empirical research to the governance of federal courts. Rulemakers have long pined for organized and systematized gathering and study of data. The Federal Judicial Center has been a leader in efforts to remedy this weakness with its small but highly qualified staff. The Center has struggled with limited data and resources. Its work by necessity has been on specific projects, largely episodic responses to demand for study of the current perceived problem. The ordering of the RAND study of judicial practices may then prove to be the most lasting influence of The Civil Justice Reform Act of 1990.

As others have described, the RAND study brought important immediate findings, including those that validate widely held perceptions. The larger influence is simply the turning of the considerable energies of bench, bar and academy to the management of an increasingly complex judicial system in this country, with acceptance of the reality that today this governance must be informed by an organized and systematized empirical base. There are limits to the light cast by empiricism, but so

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also are there limits to anecdotal perception, important as this experience-based judging is to the management of legal institutions.

There are two intertwined ideas in what I have just said. First, there is a harnessing of bench, bar and the academy. Their distinct interests are accepted but their common interest is being emphasized.

Significantly, the synergism of this harnessing is powerful, independent of its service of values of wide based participation in manners of administering justice. Second, there is the nigh consensus that this process must include systematized gathering and study of data.

This process based harnessing of the players is illustrated by the changing dynamic of rulemaking. The Advisory Committee on Civil Rules is a working laboratory of judicial governance. It offers a large window for observing the dynamic I am describing and it is a strong testimony in support of a place at the table for those conducting sustained and systemized research.

Over the past four years the Advisory Committee has quietly shifted from study of possible changes in the rules of civil procedure by a handful of highly capable judges and lawyers to a process calculated to allow greater direct participation by the bar and the academy. Meetings of the committee are now often conducted in conjunction with a conference sponsored by a law school and focused on an important issue, such as class actions or discovery. The committee has been the spark for other conferences attended by its members, such as the Conference on Civil Rules sponsored by the Southwestern Legal Foundation and Southern Methodist University School of Law and the law schools at N.Y.U. and the University of Pennsylvania. This shift responds to the reality that the timeless dance of substance and procedure is today close indeed. The change in process is not a cause of the greater interest today in rulemaking, heat if you prefer. Rather, it is a recognition, expressed in the choice of process, of need for direct participation of the bench, bar, and academy in matters of judicial governance. This greater need is kindled by the reality that changes in rules of procedure today immediately engage social policy in ways that tax the dichotomy of substance and procedure struck by the enabling act.

The rulemaker faces the difficult task of peering around corners, of predicting the effect of a rule change. Locating the dimensions of a problem, including its causes, and tailoring an appropriate response will always be a judgment rooted on the considered experience of all participants, but it can be better informed by use of investigative techniques well established, indeed often central to policy formulation by other institutions. This is familiar enough, but it is an incomplete picture.

Today rulemaking in particular and judicial governance in general, face increased difficulty in defining the problem, of answering the related questions of magnitude of claimed difficulty and whether it is created or manageable by the third branch. There are many examples including the assault of the asbestosis cases and mass torts. Any list must include discovery, the ever popular candidate for reform. The list of examples will share questions such as whether the cause of difficulty inheres in the underlying substantive law including its indeterminacy, whether the problems stem from the number of cases alone or whether the aggregation was judicially created, perhaps perversely such as the pursuit of efficiency in M.D.L. consolidations. The questions are best answered by this process I have described, but there is a larger operating limit upon reforms of federal civil litigation that must be identified. The issue by issue location of this operating limit enlarges the need for the dynamic I have described with its acceptance of systematized empirical research of the RAND model.

The ongoing examination of discovery abuse by the advisory committee offers a useful example. Significantly, RAND has repaired to the civil justice act evaluation data and has produced a report on discovery issues for the advisory committee. This report, now in draft form, was funded in part by the litigation section of the American Bar Association, a participant in the meetings of the committee and the conferences at the University of Pennsylvania, Dallas, and the Conference in Alabama, the subject of this symposium. The Federal Judicial Center conducted an extensive and useful survey of judges and lawyers regarding the working of discovery. The project was launched in response to a proposal submitted to the advisory committee by a distinguished committee of the American College of Trial Lawyers. Continuing its open process, the advisory committee held

its meeting in September 1997 in conjunction with a conference on discovery held at the Boston University School of Law. This is made more significant by the circumstance that this process, with its gathering of both anecdotal and empirical evidence, is essential to a grasp of present operating limits upon rulemaking and related judicial practices.

These operating limits lie like rock just beneath the surface and are encountered when examination plows deep. The concern with abuse of discovery offers a forceful lesson. One suspects that hitting the underlying rock explains much of the history of the struggle with discovery by rulemakers. The committee has over the years on several occasions considered changes in the scope of discovery including narrowing its scope by redefining relevancy. It has responded to calls for correction of abuse by distinguished bodies and officials. Yet the committee has most often stopped short. When it did act its change had little impact. The proportionality language added to Federal Rule of Civil Procedure 26 was thought to be a major reform. Few would now contend that this hard fought change had effect. The fact is that we do not yet know what discovery abuse is. We question whether abuse describes too much discovery in absolute terms, too much for the amount at issue in the case, or something else. The seemingly uniform assertion at major meetings of bar associations and judicial groups over the years gives little comfort. We suspect that this chorus may reflect no more than the perception of those active in such associations rather than a true cross section. The present dynamic of the advisory committee increases its chances for meaningful consideration of the discovery quandary. It should also assist the committee in recognizing that the power to change the fundamentals of the notice pleading and discovery tandem have been taken from it by a complex matrix of statutory rights of action heavily dependent on that duo.

The revolution in procedure wrought by the changes of the 1938 rules has served us well for an extraordinary period of time. Over the years access to the powerful federal engine of discovery has become central to a wide array of social policies. Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence

from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress. The recent legislation imposing restraints on suits under the securities laws by private persons was no quibble over the level of fact pleading. It was a decision by Congress that enforcement of the securities laws was excessive in ways that it wished to curb. It is apparent that the marriage of substance and procedure may affect the perception of what is discovery abuse, at least with the large civil cases which appear to be generating the problems with discovery.

Naked rules are seldom the culprit in discussions among trial lawyers of how well the federal trial courts are operating—how fair and how efficient. The debate inevitably includes various practices that fall within a broad range of management choices lying largely within judicial discretion. Discovery is a good example. The discussion will turn to establishing a cut off date for discovery, setting an early and firm trial date, or at least a firm trial date, and access of judges for rulings on matters of discovery. All provide a larger matrix of legal culture in which the rules lie in a given jurisdiction. This is important because the study of rules and empirical research informing that study must embrace this culture. This play of local legal culture is a limit to the ideal of geographical if not substantive uniformity. Its introduction of more variation taxes the need for a baseline. There is at least one.

The job of the trial judge is to try cases. She has additional duties, but they all serve the central mission—offering trials. This overarching model of the trial court must be kept before us. If it is a baseline, movement from it must be justified. Stated bluntly, trial courts do a good job of conducting bench and jury trials. They do other related tasks less well, or at least that is the hypothesis. As we move from a bi-polar classic case with a plaintiff and a defendant, trial courts do less well. Relatedly, as we move from rules that constrain judges to rules that leave judges sway to avoid injustice we substitute the arbitrary action of judges for the arbitrary action of rules—but it is arbitrary justice nonetheless, a point made by Dean Pound as Professor Subrin has pointed out.[1]

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1. Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a*

> The baseline trial work of our courts is being blurred today by the growing interest in alternatives to trial. ADR, mediation, and arbitration are opted for by parties in increasing numbers. Unfortunately, many of this phenomenon's most ardent admirers have little experience in trials themselves. Acceptance of a baseline of trials against which alternatives must make their case suffers for lack of persons with real trial experience. The coincidence of inexperience and ardor of support of alternatives to trial by judge or jury is suspicious. As I scan the list of lawyers offering their services in arbitration and mediation I cannot ignore the many without trial experience. They may be good at what they do but as proponents of alternatives, they suffer from not knowing what is being compared. This ignorance skews the data that might otherwise suggest that parties are voting by their feet. Relatedly, we are loading onto juries the burdens of poor legislative and judicial lawmaking. Rulemaking must have baselines and for the federal rules of civil procedure that baseline is the trial. Data identifies the most powerful management tool of courts and curiously it is very simple . . . . a trial date. This looks much like validation of the baseline. The lesson is that courts need to offer trials. At the least trials ought to get preferred shelf space.

Sound Procedural System: The Case for Presumptive Limits, 49 ALA. L. REV. 79, 87-88 (1997).