

# POLITICS AND SOCIOLOGY IN FEDERAL CIVIL RULEMAKING: ERRORS OF SCOPE

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INTRODUCTION

In April 2000 the United States Supreme Court promulgated a package of Proposed Amendments to the Federal Rules of Civil Procedure that took effect on December 1, 2000, without Congressional intervention. As one commentator observed, “[a]ll of [the proposed amendments] promise to have a significant effect on discovery practice.”<sup>1</sup> One Proposed Amendment—narrowing the scope of discovery available pursuant to Rule 26(b)(1)—was particularly controversial before both the Advisory Committee, the Standing Committee, and the Judicial Conference.<sup>2</sup> Nonetheless, the Proposed Amended Rule narrowing scope proceeded from the Court to finality with no intervention by Congress. Proponents of the change minimized criticism by characterizing the change as modest. Also, Congress faced an election year, adjourned early, and focused on more high profile political issues. Republican leaders in the House and the Senate generally adopt a friendly view toward any proposal that appears to promise less civil litigation activity.<sup>3</sup> The proposal to narrow the scope of discovery will generally

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1. Gregory P. Joseph, *Federal Practice: Civil Rules Amendments*, NAT'L L.J., Mar. 13, 2000, at A19. In addition to being a practicing litigator and scholar, Joseph is also a member of the Evidence Rules Advisory Committee. See also Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, 119 S. Ct. 416 (1998). See *infra* Part IV for discussion of proposed changes.

2. See *infra* Part III (discussing controversy including Committee and Conference votes on the issue).

3. For example, Trent Lott (R-Miss.), the Senate Majority leader, has supported legislation designed to reduce plaintiff pejoratives and litigation claims such as a cap on pain and suffering awards and punitive damages, the Private Securities Litigation Reform Act of 1995, and subsequent legislation to prevent plaintiffs from resorting to state court to avoid the strictures of the 1995 Act. See U.S. Newswire, *Lott Voices Support of Medical Tort Reform at PIAA Annual Meeting*, June 3, 1997, available in LEXIS, News Library, Wire Services Stories File; Congressional Press Release, *Lott Says Senate Will Act on "Uniform Standards" Bill*, Jan. 28, 1998, available in LEXIS, News Library, Wire Services Stories File.

House Speaker Dennis Hastert (R-Ill.) has similar views. See Rebecca Carr, *Patients' Rights*

aid defendants at the expense of plaintiffs, particularly in product liability and civil rights litigation.<sup>4</sup>

Despite its seemingly charmed life, the Scope Amendment is unwise for a number of reasons. Most substantively, it accrues to the detriment of claimants, particularly those of modest means but also major claimants such as the United States government, while largely benefiting defendants.<sup>5</sup> Procedurally, the Scope Amendment is likely to be an inefficient disaster forcing courts to confront thorny issues of differentiation in the application of a new Rule, spurring attendant transaction costs and out-of-pocket costs for clients paying for the attorney's time navigating this new sea of scope.<sup>6</sup> One trial judge who opposed the Scope Amendment predicted ten years of litigation to determine the application of the new rule, with no redeeming reward for the effort.<sup>7</sup>

Proposed Amended Rule 26(b)(1)'s narrowing scope is more than just an unwise Amendment to the Rules, however. It is an unwise Amendment whose passage speaks volumes about the new order in Federal Civil Rulemaking and Litigation Policy. This Article examines both wisdom of the Amendment and the historical, political, and social forces that led to it. Part I examines discovery<sup>8</sup> scope in the historical context of the Federal Rules. Part II outlines the Scope Amendment itself and its planned operation. Part III discusses the evolution of current Proposed Amended Rule 26(b)(1) through the Advisory Committee, Standing Committee, and Judicial Conference. Part IV examines

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*up for Vote in House*, ATLANTA CONST., Oct. 7, 1999, at 1A (stating that Hastert opposed Democratic bill permitting greater HMO liability and patient claims from managed care cost-cutting procedures that allegedly encouraged malpractice, but would support considerably more limited patients' rights bill).

In its "Contract With America," a platform that was the centerpiece of the Republicans' successful 1994 Congressional campaign, the GOP urged passage of legislation to impose the English ("loser pays") rule in American litigation, caps on punitive damages, and pro-defendant product liability reforms. See David E. Rosenbaum, *The 1994 Campaign; The Republicans; It's the Economy Again, as Democrats Attack the "Contract With America"*, N.Y. TIMES, Nov. 1, 1994, at A20.

4. See *infra* Part IV.G.2-3.

5. See *infra* Part IV.

6. See *infra* Part IV.A-F.

7. See Civil Rules Advisory Committee, *Minutes of Civil Rules Advisory Committee*, Apr. 19 & 20, 1999, available at <<http://www.uscourts.gov/rules/Minutes/0499civilminutes.htm>> [hereinafter *April 1999 Committee Minutes*] (containing comments of Hon. Shira Scheindlin (S.D.N.Y.) regarding motion to abandon the Scope Amendment). See also *infra* text accompanying notes 238-52.

8. Since 1993, of course, federal civil litigation includes a disclosure mechanism as well as a discovery mechanism. For ease of reference, this Article will generally not speak of "discovery or disclosure" when discussing the information available to litigants but will specifically note when referring to the disclosure rules. Discussion of "discovery" generally refers to attorney efforts to obtain information from others after initial disclosures have been provided. See FED. R. CIV. P. 26(a) & 26(b).

the likely impact of the Proposed Amended Rule itself and concludes the change is unwise. Part V attempts to explain current Proposed Amended Rule 26(b)(1) and its likely success in light of the political and sociological forces bearing on civil litigation and the Rulemakers<sup>9</sup> today.

## I. DISCOVERY SCOPE IN HISTORICAL CONTEXT

The package of proposed changes to the Federal Civil Rules are to a large extent undrastic but continue the post-1976 pattern of making discovery the convenient scapegoat for generalized complaints about the dispute resolution system.<sup>10</sup> Despite its disfavored status, the principle of broad discovery has nonetheless managed to survive discovery “reform” efforts of the past twenty years, although discovery has been restrained in significant part.<sup>11</sup> Despite discovery’s survival, there has been a significant shrinkage in a litigant’s ability to obtain information, which tends to advantage the disputants who would prefer to provide less information. For the most part, this group is comprised of defendants.<sup>12</sup>

Discovery in general continues to get blamed for an inordinate quantum of the ills of the litigation system. Both the pending Proposed Amendments for 2000 and the 1993 Amendments to the Civil Rules are

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9. For ease of reference, the term “Rulemakers” generally refers to members of a Federal Rules Advisory Committee, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, and staff. These entities are explained in more detail *infra* Part V.A-C.

10. See *infra* text accompanying notes 78-104. See Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continued Odyssey of Discovery “Reform”*, LAW & CONTEMP. PROBS. (forthcoming 2001) [hereinafter Stempel, *Ulysses*]; Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433 (1999); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683 (1998); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Court at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996) [hereinafter Stempel, *Reflections*]; Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1156-58 (1993).

11. See Tobias, *supra* note 10; Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

12. See *infra* text accompanying notes 359-90 (discussing probable impact of narrowing of scope of discovery for specific types of cases); John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 538-43 (2000) (explaining that proposed narrowing of Rule 26 scope generally favors defendants); Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229 (1999) (explaining that Proposed Amendment narrowing discovery scope accrues to advantages of defendants, particularly businesses); Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 968-84 (1997) [hereinafter Stempel, *Contracting Access*] (describing trend toward more barriers to discovery as largely favoring defendants); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 688-90 (1993) [hereinafter Stempel, *New Paradigm*] (same).

strong evidence of this trend. But at the same time, the 1993 Amendments also demonstrate the ongoing inconsistency of American law on the ongoing issue of rules-vs-discretion. The 1993 Amendments instituted a system of initial disclosure in lieu of initial discovery with the aspiration that judges would be relieved of some of their discovery management duties. Presumptive limits were established for interrogatories (twenty-five per party) and depositions (ten per side).<sup>13</sup> But while laying down these “rules” of the litigation road, the 1993 Amendments simultaneously provided that judges retained discretion to modify these rules if the party seeking discovery could justify the need for further interrogatories or depositions.<sup>14</sup> The 2000 Amendments, discussed more fully below, continue this trend.

#### A. *The Enabling Act and the Rulemaking System*

To appreciate the latest round of Proposed Amendments, some brief recapitulation of the history of the Federal Civil Rules is in order. The Rules resulted from passage of the Rules Enabling Act of 1934,<sup>15</sup> legislation that established the present system of judiciary-drafted federal court rules presented to Congress.<sup>16</sup> Specifically, Rules are drafted by the relevant Advisory Committee, screened by the Standing Committee, and submitted to the Judicial Conference of the United States for consideration.<sup>17</sup> The Advisory Committee’s final product is then reviewed by the Standing Committee, which is appointed in the same manner as the Advisory Committee in the sole discretion of the Chief Justice.<sup>18</sup> The Rules revisions, as modified by the Standing Committee, are then reviewed by the Judicial Conference of the United States, which is composed of the Chief Justice, the Chief Judges of the U.S. Courts of Appeals, and a District Judge from each Circuit elected as Judicial Conference representative by the judges of

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13. FED. R. CIV. P. 33(a) & 30(a)(2)(A).

14. See generally *infra* text accompanying notes 105-08 (discussing the 1993 Amendments); Stempel, *Ulysses*, *supra* note 10.

15. Now codified at 28 U.S.C. § 2072 (1994).

16. For a comprehensive history of the background of the Enabling Act, see Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

17. The Advisory Committee is appointed by the Chief Justice of the United States, with members having set three-year terms and membership rotating. See U.S. Courts website (visited Oct. 26, 2000) <<http://www.uscourts.gov/review.htm>>. See also 28 U.S.C. §§ 2072-74.

The Advisory Committee ordinarily has a majority of sitting federal judges with a smaller number of practitioners and occasionally a state supreme court justice and a law professor as its membership. The Advisory Committee engages in study of the operation of the Federal Civil Rules, proposes revisions, receives public comment, and produces final versions of proposed revisions.

18. See 28 U.S.C. § 2073.

that Circuit.<sup>19</sup> After Judicial Conference approval, the Rules are considered by the United States Supreme Court.<sup>20</sup> The Court may reject or modify proposed revisions and then promulgates them prior to May 1st.<sup>21</sup> After this occurs, Congress has until December 1st to modify or reject the Proposed Rules.<sup>22</sup> If Congress does not act, the Amended Rules take effect.<sup>23</sup> The Judicial Conference submits proposed Rules Changes to the Supreme Court, which again may revise or even reject proposals before submitting them to Congress.<sup>24</sup> If Congress does not act, the Court's promulgated Rules become effective.<sup>25</sup> Although Congress retained the authority to amend or reject Rules, the underlying assumption of the Enabling Act is that rulemaking would be largely a judicial function, with Congress stepping in only on rare occasion.<sup>26</sup> For the most part, this aspiration was realized. Ordinarily, proposed changes to federal court rules of procedure become operative with little or no congressional intervention. The enactment of the Federal Rules of Evidence has been the most notable exception.<sup>27</sup>

The Enabling Act was a much sought-after law reform by the organized bar.<sup>28</sup> After passage of the Act, there fell to the Supreme Court the task of drafting federal rules of procedure. The original drafting Committee contained many luminaries of the legal and political establishment.<sup>29</sup> The Committee had as its Reporter Yale Law School Dean

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19. See *id.* § 331.

20. See U.S. Courts website (visited Oct. 26, 2000)  
<<http://www.uscourts.gov/review.htm>>.

21. *Id.*

22. *Id.*

23. See 28 U.S.C. § 2072.

24. *Id.*

25. See generally *id.*

26. See CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 62, at 403 (4th ed. 1983) ("It cannot be doubted that legislative regulation is less satisfactory than regulation by court-made rules."); Burbank, *supra* note 16, at 1048-98. See also Stephen B. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

27. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS* 4 (3d ed. 1996) (noting that instead of the usual quiet passage of Court Rules into law, "Congress held hearings, scrutinized the Rules, changed them substantially, and finally enacted the changed version in statutory form."). Mueller and Kirkpatrick attribute this unusually zealous congressional oversight to an "accident of history" in which "the Rules arrived at Congress as the Watergate scandal was erupting. Amidst claims of executive privilege by President Nixon stirring impassioned resentment in Congress, the privilege provisions in the Rules attracted immediate attention" and were seen by many in Congress as judicial encroachment on legislative prerogatives paralleling the perceived executive encroachment. *Id.* For example, the draft Federal Rules of Evidence originally codified many evidentiary privileges; the final version of the Rules simply stated that privilege would be addressed via the common law.

28. See Burbank, *supra* note 16, at 1048-98.

29. See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 498-500 (1986) (noting "establishment" character of Advisory Committee makeup and listing members).

Charles Clark and included a cast of experts such as former Attorney General William Mitchell (Chair), special assistant to the Attorney General Edgar Tolman, Harvard Professor Edmund Morgan, and noted Philadelphia attorney George Wharton Pepper.<sup>30</sup> The Committee's chief activist on discovery was University of Michigan Law Professor Edson Sunderland.<sup>31</sup>

### B. *The Revolution of the Rules*

Despite their establishment pedigree, the Committee produced a product that then, and subsequently, won the admiration of reformers and advocates of open courts.<sup>32</sup> The 1938 Rules liberalized the rules of pleading and joinder, with the practical effect of making it easier for litigants, even those of modest means and limited expertise, to have their day in court.<sup>33</sup> The Committee did adopt a summary judgment rule designed to eliminate trial for weak claims,<sup>34</sup> but that rule was not aggressively administered in many cases until the 1980s.<sup>35</sup>

Perhaps most notably, the Advisory Committee adopted wide-ranging discovery in the Proposed Rules, borrowing heavily from the greater discovery generally available in equity actions.<sup>36</sup> Document exchange, deposition, and interrogatories became available to federal civil litigants as a matter of course.<sup>37</sup> Litigants could avail themselves of all these remedies under a relatively broad definition of the scope of discovery, which permits discovery of information relevant to the "subject matter" of the dispute.<sup>38</sup> "Fishing expeditions" were to be

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30. *Id.* at 498. In addition to the names listed in the text, the Committee included Scott Loftin, George Wickersham, Wilbur Cherry, Armistead Dobie, Robert Dodge, George Donworth, Joseph Gamble, Monte Lemann, and Warren Olney. Dobie was Dean of the University of Virginia Law School; Cherry was a Professor at the University of Minnesota Law School.

31. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 697-700 (1998); Subrin, *supra* note 26, at 920-40; Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 9 (1959) (crediting Sunderland as prime architect of discovery rules); Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737 (1939).

32. See Resnik, *supra* note 29, at 500-01.

33. See 6 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* chs. 1, 8 (3d ed. 1997); Subrin, *supra* note 11, at 695-700.

34. See Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 129-40 (1988); Charles E. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567 (1952); Charles E. Clark & William Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929).

35. See Stempel, *supra* note 34, at 129-59 (reviewing history of summary judgment doctrine through 1986 trilogy of Supreme Court cases enhancing use of summary judgment).

36. See Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153 (1999); Subrin, *supra* note 11, at 697-702; Subrin, *supra* note 26, at 920-30.

37. See FED. R. CIV. P. 26(a) & 26(b).

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

allowed in the interests of developing facts in a relatively efficient way so that legal disputes could be determined in light of maximum factual information.<sup>39</sup> In the words of Professor Sunderland, the discovery mechanism established in the Rules “serves much the same function in the field of law as the X-ray in the field of medicine and surgery; and if its use can be sufficiently extended and its methods simplified, litigation will largely cease to be a game of chance.”<sup>40</sup>

The new Rules brought a revolution of sorts,<sup>41</sup> and established a system of uniform federal procedure that expanded the trial judge’s range of procedural options and the litigants’ ability to obtain information relevant to the dispute. The result of which was a new uniformity across the nation’s federal courts for the new, liberalized federal rules permitting discovery.<sup>42</sup> During 1938, the Supreme Court also decided *Erie Railroad Co. v. Tompkins*,<sup>43</sup> which held that state substantive law applicable to a case was controlling even if the case was litigated in federal court due to diversity of citizenship, abolishing the “general federal common law” of *Swift v. Tyson*.<sup>44</sup> Prior to *Erie* and the Federal Rules, the Conformity Act required that federal courts sitting in diversity apply the procedural rules of the state in which the court was located.<sup>45</sup> The mere enactment of the Rules, of course, did not com-

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39. See Subrin, *supra* note 31, at 691. Subrin’s analysis is consistent with that of other commentators and the contemporaneous Supreme Court. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“[n]o longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case”); *Olson Transp. Co. v. Socony-Vacuum Oil Co.*, 7 F.R.D. 134 (E.D. Wis. 1944). See also *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518, 521 (E.D. Tenn. 1977) (permitting “fishing expeditions” under discovery rules); ROGER S. HAYDOCK & DAVID F. HERR, *DISCOVERY PRACTICE* ch. 26 (3d ed. 1997) (same).

40. See Edson R. Sunderland, *Improving the Administration of Civil Justice*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 60, 76 (1933). See also Stephen N. Subrin, *On Thinking About a Description of a Country’s Civil Procedure*, 7 TUL. J. INT’L & COMP. L. 139, 147 n.36 (1999) (quoting Sunderland and also observing that discovery expert, Rules defender, and Enabling Act proponent George Ragland also used the X-ray analogy, suggesting that the “lawyer who does not use discovery procedure is in the position of a physician who treats a serious case without first using the X-ray.” See GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 251 (1932).

41. See Marcus, *supra* note 36, at 158-59 (finding overall package of 1938 discovery Rules was “genuinely revolutionary”). See also *id.* at 159 n.19 (citing *Carpenter v. Winn*, 221 U.S. 533, 540 (1911)).

42. Enthusiasm for the new rules of broad discovery ran high as well. See ALEXANDER HOLTZOFF, *NEW FEDERAL PROCEDURE AND THE COURTS* 70 (1940) (“An outstanding achievement of the new procedure is to be found in connection with discovery. The new Rules include a veritable armory of weapons for the purpose of enabling parties to secure pertinent information prior to the trial.”).

43. 304 U.S. 64 (1938).

44. 41 U.S. 1 (1842); *Erie*, 304 U.S. at 78.

45. See WRIGHT, *supra* note 26, § 61 (discussing the original conformity provisions of the Judiciary Act of 1789 and the Conformity Act of 1872, Act of June 1, 1872, 17 Stat. 197, Rev. Stat. § 914). See also MOORE ET AL., *supra* note 33, ¶¶ 1.02-1.04; WRIGHT, *supra* note 26, § 61.



pletely change pre-existing attitudes and practices.<sup>46</sup> For some twenty years thereafter, judicial decisions enforcing the Rules required lower courts and counsel to conform their conduct more closely to the Rules.<sup>47</sup>

### C. *Discovery in the Early Days of the Rules*

Although much of this judicial enforcement was in connection with pleading, considerable judicial effort also enforced the discovery regime.<sup>48</sup> It appears that these efforts did change the legal culture into one that brought much actual litigation behavior in line with the aspirations of the Rules and the expectations of the drafters. As we now know, notice pleading and liberal amendment became the order of the day, as did broad discovery.<sup>49</sup> Arguably, the very success of these efforts to effect the 1938 Rules were what created the counterrevolution

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46. See *Poppino v. Jones Store Co.*, 1 F.R.D. 215 (W.D. Mo. 1940); *Benevento v. A. & P. Food Stores, Inc.*, 26 F. Supp. 424 (E.D.N.Y. 1939) (considering material “relevant” for discovery purposes only if “material” and “admissible in evidence”). The Advisory Committee subsequently criticized these two cases as wrongly decided in its Note to the 1946 Amendment, discussed *infra* text accompanying notes 53-62.

47. See, e.g., *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944) (reversing trial court’s dismissal of complaint as insufficiently specific and understandable; Court emphasizes low threshold required for acceptable notice pleading). The effort to enforce the liberalized pleading requirements of the 1938 Rules perhaps had its punctuation mark in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which also reversed dismissal of a complaint and provided the memorable admonition that a complaint should not be dismissed unless it is clear that “plaintiff can prove no set of facts . . . which would entitle him to relief.” However, the rear guard action against liberalized notice pleading continued and continues, although the Court and the Rulemakers continue to support the Clark position. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) (observing growing number of lower court cases that, notwithstanding language of Rule 8 and *Conley v. Gibson*, dismiss claims for insufficient specificity and failure to plead all legal elements of cause of action); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (rejecting lower court’s common law rule requiring heightened pleading requirements for civil rights claim); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1996) (detailing that notwithstanding *Conley v. Gibson* and *Leatherman*, lower courts continue to require more than “short and plain statement of the claim” set forth in FED. R. CIV. P. 8); Karen M. Blum, *Heightened Pleading: Is There Life After Leatherman?*, 44 CATH. U. L. REV. 59 (1994) (same).

See also *Foman v. Davis*, 371 U.S. 178 (1962) (reinstating case due to trial court’s refusal to permit amended complaint and gives broad reading to standard for amending complaints under FED. R. CIV. P. 15).

48. See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (explaining that discovery rules providing for adverse medical examination are consistent with the admonition of Rules Enabling Act that Rules not alter substantive legal rights); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (permitting adverse medical examination of parties other than plaintiff but limiting exam to matters properly at issue, reversing trial court’s absurdly broad order requiring bus driver in collision case to submit to nine adverse medical exams).

49. See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 897-99 (1999) (referring to perceived “golden age” of rulemaking and federal civil litigation); Stempel, *New Paradigm*, *supra* note 12, at 675-90; Resnik, *supra* note 29, at 500-05.

of the late Twentieth Century's discovery reform movements.<sup>50</sup> Professor Bone refers to this phenomenon as the "rise of procedural skepticism" and attributes it primarily to intellectual trends.<sup>51</sup> I see the counterrevolution against the open courts model as more political than theoretical and more driven by interest group activity than scholarship, as do other commentators.<sup>52</sup>

Reacting to resistance to the new Rules, the Advisory Committee supplemented judicial efforts giving force to liberalized procedure and broad discovery. In 1946, the discovery rules were revised to make clearer the breadth of the discovery wrought by the 1938 enactment. As noted, the 1938 language established the broad scope standard of "relevant to the subject matter." The 1946 Amendment reacted to cases construing the standard too narrowly, reiterating and explaining the distinction between "relevant" evidence and "admissible" evidence and the notion that something may be relevant to the subject matter of a case even if not clearly relevant to an existing claim or defense in the case.<sup>53</sup>

At that time, of course, Rule 26 was not the general metastructure of discovery that it became in 1970 and remains today. It governed depositions but in doing so set forth important declarations as to the proper scope of discovery. The 1946 Amendment added language stating that at a deposition, "[i]t is not ground for objection that the testi-

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50. The story is, of course, a bit more complicated. Even though cases like *Leatherman*, discussed *supra* note 47, supported liberalized pleading, earlier events reflected judicial activity to constrict the broad open courts model reflected in the 1938 Rules. On occasion, Rulemakers and Congress were part of this trend while on other occasions they expanded court access. See Stempel, *Contracting Access*, *supra* note 12, at 965 (discussing that decisions during last quarter of Twentieth Century narrowed subject matter and personal jurisdiction, encouraged ADR rather than litigation, restricted use of class action, strengthened use of summary judgment and judgment as a matter of law, and imposed pleading requirements on certain cases); Stempel, *New Paradigm*, *supra* note 12, at 705-37 (noting movement away from open courts model and political struggle between elements of legal community with continued commitment to liberalized procedure and elements committed to reforms that would restrain liberalism underlying the 1938 Rules).

51. See Bone, *supra* note 49, at 900-07.

52. See Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994) [hereinafter Mullenix, *Pervasive Myth*] ("[P]oliticians, lawyers, judges, insurance companies, and other interested parties successfully have used the media to identify American litigiousness as a social ill."); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 830-51 (1991) [hereinafter Mullenix, *Hope Over Experience*]. Even members of the rulemaking establishment have observed the political content of procedural reform efforts. See, e.g., Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 53 (1997) (observing that much of "hoopla about litigation costs" is a "disguised outcry for tort reform").

53. See 6 MOORE ET AL., *supra* note 33, § 26App.02[2] (noting that Advisory Committee Note to 1946 Amendment disapproves of cases giving restrictive reading to "subject matter" standard of relevance and adds additional language to clarify that matter is relevant if it may help discovering party in formulating a case).

mony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>54</sup> Since the 1970 reorganization of the discovery rules, this famous sentiment now applies to the scope of discovery by whatever device employed. The 1946 Amendment also removed the requirement that a party wishing to take a deposition obtain leave of court unless the deposition was to be conducted within twenty days of commencement of the action.<sup>55</sup>

As the Advisory Committee Note to the 1946 Amendment makes clear, the Amendment was added in response to judicial decisions that had been too resistant to permitting discovery.<sup>56</sup> The most common error was requiring that discovery sought be admissible as evidence in itself. Although many lower court decisions were regarded as faithfully applying the language of the 1938 Rules, the Advisory Committee noted that others had been too restrictive in permitting discovery and had erroneously required that the information sought be itself admissible in evidence.<sup>57</sup>

The Supreme Court also assisted the Rulemakers’ effort at cultural change. One extremely important discovery decision during this time period—*Hickman v. Taylor*<sup>58</sup>—endorsed the broad scope of discovery provided for in the Rules, providing the famous dictum that after the 1938 Rules, the time-honored cry of “fishing expedition” would no longer be a bar to discovery because anything relevant to the subject matter was discoverable. However, *Hickman* also upheld a qualified protection for attorney work product.<sup>59</sup>

Despite any seeming contradiction between the poles of broad discovery and protection for work product, *Hickman* is perfectly consistent with the language and intent of the Rules. Rule 26(b), since its inception in 1938, provided that notwithstanding the broad scope of discovery, privileged material was not discoverable.<sup>60</sup> Longstanding attitudes about the adversary system suggest that there was indeed a de facto privilege against turning over work product that predated the 1938 Rules and was not intended to be overturned by the Rules.<sup>61</sup> In

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54. See *id.* § 26App.02[1] (reproducing 1946 Amendment). See also Marcus, *supra* note 36, at 161 (describing 1946 Amendment and characterizing it as removal of restraint on discovery and significant part of expansion of discovery during 1938-1970 period).

55. See 6 MOORE ET AL., *supra* note 33, § 26App.02[1] (providing text of 1946 Amendment).

56. See FED. R. CIV. P. 26 (providing Advisory Committee Note to 1946 Amendment).

57. See 6 MOORE ET AL., *supra* note 33, § 26App.02[2].

58. 329 U.S. 495 (1947).

59. See *Hickman*, 329 U.S. at 509-10.

60. See 6 MOORE ET AL., *supra* note 33, §§ 26App.01-05 (setting forth content of Rule 26 scope language and its predecessors), § 26.02 (describing privilege rules).

61. See, e.g., *Hickman*, 329 U.S. at 510 (1943) (Jackson, J., concurring) (noting that tradi-

addition, the work product privilege recognized in *Hickman* is a qualified privilege, one that is overcome if the party seeking information can demonstrate a substantial need for the information and the inability to obtain its reasonable equivalent without undue hardship.<sup>62</sup>

By the 1950s and 1960s, the liberal ethos of the Rules on broad discovery became a central part of American litigation.<sup>63</sup> On other fronts, such as the amendment of complaints and the expansion of the class action device, the judicial system was also moving in a direction consistent with the “open courts” ethos of the Rules and a policy of relatively easy access to information, even the information held by the opponent.<sup>64</sup> The 1963 and 1966 Amendments also provided technical changes consistent with the prevailing ethos.<sup>65</sup>

#### D. The 1970 Amendments: Apogee of Broad Discovery?

The 1970 Amendments to the Rules, which were primarily discovery amendments, continued this movement. Some of the changes were technical, reordering and renumbering the rules.<sup>66</sup> Other changes were significant, all in the direction of broadening discovery and increasing access to information. New Rule 26(b)(2) made insurance policies discoverable as a matter of course.<sup>67</sup> The Rule regarding document production was changed so that a showing of “good cause” was no longer

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tionally, trial in adversary system is a battle of wits and one side should not be able to prevail by the use of “wits borrowed from the adversary”).

62. See *id.* at 509-10; FED. R. CIV. P. 26(b)(3) (codifying *Hickman* standard).

63. See 6 MOORE ET AL., *supra* note 33, §§ 26.41-26.46; HAYDOCK & HERR, *supra* note 39, §§ 26.02-26.04; WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 35-55 (1968); Marcus, *supra* note 36, at 160-61.

64. See 6 MOORE ET AL., *supra* note 33, §§ 23.01-23.03 (describing expansion of class action device through 1966 Amendments to Rule 23); WRIGHT, *supra* note 26, § 72 (describing 1966 class action amendments as of major importance in liberalizing access to courts for small claimants to comparative disadvantage of corporate defendants).

65. See 6 MOORE ET AL., *supra* note 33, §§ 26.App.03[1]-[2]. The 1963 Amendment conformed Rule 26(e), then still a Rule about depositions, with Rule 28(b) and continued the norm that objections at a deposition would not preclude the taking of evidence, but would preserve the objection for possible use at trial. *Id.* The 1966 Amendment provided that in a nonadmiralty case depositions could aptly be taken pursuant to certain statutes as well as pursuant to then-Rule 26. *Id.*

66. *Id.* § 26App.05[1]-[2] (providing the 1970 Amendment and Committee Note; “Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32 . . . . In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general.”). *Id.* §§ 30App.03[1]-[2], 31App.02[1]-[2], 32App.02[1]-[2]. See also 6 MOORE ET AL., *supra* note 33, § 26App.05[3] (providing the Advisory Committee’s Explanatory Statement Concerning 1970 Reorganization of Discovery Rules).

67. *Id.* § 26App.05[2] (providing the 1970 Advisory Committee Note). Of course, knowing there is an insurance policy does not always clearly resolve the issue of whether there is insurance coverage for the parties. See generally JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES ch. 10 (2d ed. 1999) (presenting overview of frequently contested coverage disputes involving liability insurance).

required in order for a party to obtain documents.<sup>68</sup> The 1970 Amendments made it clear that a party was entitled to obtain a copy of its own statement from the possession of another party.<sup>69</sup> A new subdivision of Rule 26 provided for discovery regarding expert witnesses expected to be used at trial.<sup>70</sup> Rule 26(c) regarding protective orders (which resulted from a transfer of Rule 30(b) to the revised Rule 26) was amended to provide for discovery sanctions where a party continued to resist discovery after having lost a protective order motion.<sup>71</sup> Revised Rule 26(d) established that discovery need not take place in any order of priority.<sup>72</sup>

Perhaps most important in light of the current Proposed Rules, the broad scope of discovery provided by the Rules remained unchanged. After 1970, the scope of discovery was expanded because the “subject matter” standard of relevance found in Rule 26 now applied to all discovery, not only to depositions.<sup>73</sup> As had been the case since 1938, a discovery request was obviously permissible if “relevant to a claim or defense” in the case.<sup>74</sup> After 1970 discovery request was permissible (for both depositions and other forms of discovery requests) if

relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasona-

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68. 6 MOORE ET AL., *supra* note 33, § 34App.03[1]-[2]. *See also id.* § 26App.05[2] (revealing that the 1970 Advisory Note justifies deletion of good cause requirement for document production in part because of divergent good cause standards evolving for use in determining when there is good cause for document disclosure (majority of courts find mere relevance sufficient) as opposed to forcing disclosure of trial preparation materials (where majority of courts “are increasingly interpreting ‘good cause’ as requiring more than relevance”). The Advisory Committee concluded that the higher standard was correct for work product and commanded by *Hickman v. Taylor*, and that the relevance standard was better suited to document production. Because courts following the heightened work product standard of good cause might deny parties proper document production, the good cause standard was deleted from modern Rule 34.

69. *Id.* § 26App.05 [1]-[2] (providing the 1970 Amendment to Rule 26 and Advisory Committee Note).

70. *See* FED. R. CIV. P. 26(b)(4); 6 MOORE ET AL., *supra* note 33, §§ 26App.05[1]-[2] (providing the 1970 Amendment and Advisory Committee Note). Although the 1970 changes have now been eclipsed by the 1993 Amendment providing for trial expert witness disclosure, the 1970 Amendment was a broadening of expert discovery, essentially adopting the approach of case law favoring more expert discovery over case law favoring less expert discovery.

71. *See* 6 MOORE ET AL., *supra* note 33, §§ 26App.05[1]-[2] (providing the 1970 Amendment and Advisory Committee Note).

72. *Id.*

73. *See id.*

74. *See id.*

bly calculated to lead to the discovery of admissible evidence.<sup>75</sup>

In discussing the 1970 discovery changes, the Advisory Committee appeared to have no misgivings regarding the scope and amount of discovery. The Committee noted research conducted by the Columbia Professor Maurice Rosenberg and interpreted the findings as supportive of its intuition in favor of continued broad or broadened discovery:

The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement.<sup>76</sup>

The 1970 Amendments and their aftermath thus appeared to not only continue but expand the open courts model of civil litigation. Simultaneously, there continued to grow a docket of large case litigation that often involved complex, multiparty litigation that frequently entailed institutional reform or impact on public policy for society at large. By the mid-1970s, this trend was so established that it provided the springboard for Harvard Professor Abram Chayes's famous and much-cited law review article concerning "Public Law Litigation."<sup>77</sup> This open courts ethos receptive to claimants seeking to vindicate rights was fueled in substantial part by broadly available discovery.

#### *E. The Post-1970 Counterrevolution on Discovery*

At this same time, the tide had also begun to shift against megalitigation and broad discovery. As to the former, there arose a number of decisions, most from the United States Supreme Court, that limited judicial power over such instances of public law litigation.<sup>78</sup> As to the

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75. See FED. R. CIV. P. 26(b)(1).

76. See 6 MOORE ET AL., *supra* note 33, § 26App.05[3]. But, unsurprisingly in light of the ongoing imbedded contradictions of this field, the Committee added that "[o]n the other hand, no positive evidence is found that discovery promotes settlement." *Id.*

77. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). The Chayes article has been one of the most frequently cited in legal literature (at least 664 times according to my March 2000 LEXIS search) and has significantly impacted legal scholars assessment of litigation. See Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647 (1987) (discussing and assessing influence and prominence of Chayes article).

78. See Stempel, *Contracting Access*, *supra* note 12, at 970-95.

latter, there arose the rhetorical attack on “discovery abuse.”<sup>79</sup> Whether one regards talk of discovery problems as a “pervasive myth” or reality,<sup>80</sup> there is no denying that the term and the concept of “discovery abuse” began to take hold in the American psyche during the 1970s, a countercurrent to the frequent expansion that had been seen in the areas of the actual discovery Rules, other procedural Rules, and the substantive law generally.<sup>81</sup>

Counterforces of the open courts movement received a major political shot in the arm with the ascension of Warren Burger to the position of Chief Justice, where he used the bully pulpit of the post to inveigh against perceived excessive litigation. The Burger-organized Pound Conference of 1976 has been characterized as the inaugural event of the counterrevolution against the open courts model of liberal pleading, broad discovery, and activist courts.<sup>82</sup> Simultaneously, significant scholarly and judicial commentary became critical of broad discovery.<sup>83</sup>

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79. See American Bar Association, *ABA Litigation Section Special Committee on Abuse of Discovery: Report to Bench and Bar*, 92 F.R.D. 137 (1977). The Discovery Abuse Committee recommended limiting the scope of discovery, limiting the number of interrogatories, and requiring a discovery conference. *Id.* at 140-41. The Civil Rules Advisory Committee in the late 1970s initially supported all three suggestions and published draft Rules for comment containing the narrowed scope of discovery. See *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 77 F.R.D. 613 (1978); see also Marcus, *supra* note 36, at 162. As discussed below, the 1980 Amendments established the mandatory discovery conference but interrogatory limitation was not adopted until the 1993 Amendments. 92 F.R.D. at 140-41. The question of the scope of discovery is once more “on the table” via the currently Proposed Amendments.

80. See Mullenix, *Pervasive Myth*, *supra* note 52, at 1393. Professor Mullenix sees the currently Proposed Amendments as resulting from the Advisory Committee’s continued belief in the discovery abuse mythology. See Mullenix, *supra* note 10, at 683.

81. See Marcus, *supra* note 36, at 161-62 (describing “Post-1970 Effort at [Discovery] Containment” and noting irony of the containment effort coming so closely on the heels of the 1970 expansion of discovery). Professor Marcus aptly described the situation: “Perhaps every action invites a reaction. Certainly there was a reaction to the procedural relaxation effected by the Federal Rules. By the mid-1970s, this reaction had achieved considerable momentum, and much of that momentum focused on discovery.” *Id.* See also Bone, *supra* note 49, at 900-07 (observing similar counter-reaction); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992).

82. See Stempel, *Reflections*, *supra* note 10, at 297; Subrin, *supra* note 10, at 1158-59. According to Professor Subrin, the Pound Conference was a watershed in which the sponsors and speakers to the position that the underlying ideology of liberality of pleading, wide-open discovery and attorney latitude was no longer feasible. The alleged litigation explosion would have to be controlled; the few bad lawyers could not be trusted to control themselves. The “sea change” also occurred in the courts [at approximately the same time] . . . at the local level as well. *Id.* at 1158-59.

83. See, e.g., William W. Schwarzer, *Managing Civil Litigation: The Trial Judge’s Role*, 61 JUDICATURE 400 (1978) (suggesting that broad discovery and other liberal rules of procedure required judicial intervention to narrow issues and confine scope of litigation activity); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978) (finding discovery too contentious, expensive, and time-consuming); see also E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986) (describing managerial judging trend as ad hoc effort to constrain

One need not engage in a lengthy analysis of the politics of law and procedure during the 1970s nor subscribe to my view that a basic ideological and distributional battle underlay the shift in thinking and activity. As Professor Subrin has observed, “[t]here is a direct relationship between politics and change in substantive and procedural law.”<sup>84</sup> For purposes of understanding the discovery history, it is sufficient simply to note that by the mid-1970s and certainly by 1980, things had changed enough that the Rulemakers were beginning to cut back on the model of broad discovery that they had endorsed only a decade earlier. The 1980 Amendments provided generally for more active judicial management of cases with an eye toward controlling discovery. The 1980 Amendments established a mandatory discovery conference, established signing of discovery requests by counsel as a certification that the discovery request was justified, and “directed judges to curtail discovery that was disproportionate.”<sup>85</sup>

Of interest and importance for the current scope debate, the ABA Section on Litigation proposed in 1977 that the scope of discovery be narrowed from the “relevant to the subject matter” standard to a “relevant to the claims and defenses of the parties” standard. The Litigation Section published its proposed narrowing<sup>86</sup> and the Advisory Committee appeared to heed the call, publishing for comment a proposed new Rule 26 with “claim-or-defense” as the standard for relevancy.<sup>87</sup> However, sentiment in favor of the broader “subject matter” definition of relevance was still sufficiently strong to engender substantial opposition to the proposal, which was subsequently withdrawn by the Standing Committee.

Although the 1980 Amendments were part of the movement against

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magnitude of litigation despite the codified breadth of Civil Rules, including discovery).

84. Subrin, *supra* note 40, at 142. He continued:

In the mid-nineteen seventies, when the country at large and the federal judiciary in particular were turning more conservative, complaints deepened about discovery abuse and acquisitive lawyers. To put events in historical and political perspective, we can look at the change in the composition of the U.S. Supreme Court between 1953 and 1981. In the last decade of this period, the Supreme Court tended to move toward the political “right.” For comparative examples, Chief Justice Warren was appointed in 1953 and Justice Brennan in 1957, while Chief Justice Rehnquist was appointed in 1972 (becoming Chief Justice in 1986) and Justice O'Connor in 1981.

*Id.* at 142-43.

85. See Marcus, *supra* note 36, at 162. See also FED. R. CIV. P. 26(g), which was added in the 1970 Amendments.

86. American Bar Association, *ABA Litigation Section, Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 157 (1977). The Litigation Section Report specifically referred to the 1976 Pound Conference as an inspiration for its examination of discovery scope. See *supra* text accompanying notes 82-85.

87. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 77 F.R.D. 613 (1978).



broad discovery, they were regarded as too mild by the “discovery abuse” camp and were criticized for just that reason. The 1980 Amendments established the Rule 26(f) “Discovery Conference,” empowering judges to “direct the attorneys for the parties to appear before it for a conference on the subject of discovery” and requiring the court to hold such a conference upon proper motion of a party.<sup>88</sup> As a practical matter, the initial pretrial conference required by the 1983 Amendment to Rule 16(b) became a de facto mandatory discovery conference held in every case (not only where ordered by the court). The effect was to provide for mandatory discovery conferences during most of the life of the 1980 Amendment, which was revised substantially as part of the 1993 disclosure amendments.

Because the 1980 Amendment to Rule 26 was discretionary (at least on its face) and was a procedural directive (“thou shalt meet”) rather than a substantive directive (“thou shalt produce” or “thou need not produce”), critics characterized the Amendment as inconsequential. Most famously, Justice Powell (joined by Justices Stewart and Rehnquist) dissented from the Court’s adoption of the 1980 Rules, labeling them “tinkering” when more drastic discovery reform was in order.<sup>89</sup>

Perhaps taking the hint from Justice Powell and the failed Litigation Section proposal to narrow scope, the 1983 Amendments both suggested a further contraction of the availability of discovery and increased judicial discretion as the front-line weapon in fighting perceived “discovery abuse.” The 1983 Amendment to Rule 26(b) did not change the scope of discovery but added the following language:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the

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88. See 6 MOORE ET AL., *supra* note 33, § 26App.06[1]. To trigger a discovery conference, the motion must include a statement of issue, a proposed plan and schedule of discovery, any limitations to be placed on discovery, and any proposed orders regarding discovery. *Id.* (reprinting former FED. R. CIV. P. 26(f)). Most important, perhaps, Rule 26(f) as added in the 1980 Amendments also imposed a “meet-and-confer” rule requiring attorneys to attempt informal resolution of discovery questions. *Id.* A lawyer could not seek a discovery conference without making “reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.” *Id.* (reprinting former Rule 26(f)). The 1980 Amendment’s meet-and-confer rule has subsequently been replaced with a revised Rule 26(f) that makes a disclosure and discovery conference mandatory during the early stages of the case prior to the initial pretrial conference mandated by Rule 16(b). *Id.* After conferring, counsel are to agree on a disclosure plan. See FED. R. CIV. P. 26(f).

89. *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting from Court’s approval of 1980 Amendments regarding discovery).

party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).<sup>90</sup>

The new Rule 26(b)(2) language merely codified what some courts had been doing during the process of granting protective orders under Rule 26(c)<sup>91</sup> but was designed to encourage more of this sort of fine-tuning of discovery otherwise available under the broad definition of relevance.<sup>92</sup>

In addition, the 1983 Amendments added a Rule 11-like provision to discovery in the form of new Rule 26(g), which stated that discovery requests, objections, or responses must be signed.<sup>93</sup> As in Rule 11, the attorney's signature constituted a certification of the bona fides of the discovery paper, particularly that it was legally justified, not interposed for delay or improper purpose, or unduly burdensome in light of the discovery at issue, the stakes of the case, and other sources of information.<sup>94</sup> An attorney violating Rule 26(g) was subject to sanction.<sup>95</sup>

90. See 6 MOORE ET AL., *supra* note 33, § 26App.07[1] (providing the 1983 Amendment adding quoted language to Rule 26(b)(1), now codified in Rule 26(b)(2) per the 1993 Amendments and their revision of Rule 26).

91. See, e.g., *Carlson Cos. v. Sperry & Hutchinson Co.*, 374 F. Supp. 1080 (D. Minn. 1974); *Dolgow v. Anderson*, 53 F.R.D. 661 (E.D.N.Y. 1971); *Mitchell v. American Tobacco Co.*, 33 F.R.D. 262 (M.D. Pa. 1963); *Welty v. Clute*, 1 F.R.D. 446 (W.D.N.Y. 1940), cited in the Advisory Committee note, *reprinted in* 6 MOORE ET AL., *supra* note 33, § 26App.07[2].

92. 6 MOORE ET AL., *supra* note 33, § 26App.07[2] (reprinting Advisory Committee Note) (“[o]n the whole, however, district judges have been reluctant to limit the use of the discovery devices”; “[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis”).

93. *Id.* § 26App.07[1].

94. *Id.*

95. *Id.* The new Rule 26(g) language in full read:

(g) SIGNING OF DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS. Every Request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is

This new provision was “designed to curb discovery abuse by explicitly encouraging the imposition of sanctions” and was a parallel to the Rule 11 Amendment.<sup>96</sup>

The focus of the 1983 revisions was deterrence of discovery “abuse,” which in theory can be either excessive seeking of discovery or excessive resistance to discovery. However, the underlying assumption of the Amendments was one suggesting that the problem was too much discovery rather than too little. The Advisory Committee Note cited Justice Powell.<sup>97</sup> It is for defendants asserting this cause that Jus-

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signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

*Id.*

In conjunction with the 1993 Amendment to Rule 11, Rule 26(g) was also defanged to a degree. Current Rule 26(g) requires the court to impose sanctions upon counsel only if the violation of the Rule occurred “without substantial justification.” 6 MOORE ET AL., *supra* note 33, § 26App.07[2]. However, the Rule 26(g) sanctions language remains mandatory, as was the case with the 1983 version of Rule 11, which was made discretionary in the 1993 Amendments. The 1993 Amendments also provided that Rule 11 does not apply to discovery disputes, ceding the sanctions field in this area to Rules 26 and 37. In practice, Rule 26(g)—unlike the 1983 version of Rule 11—has been infrequently used. This comparative underuse became one of its attractions. By eliminating Rule 11 in discovery matters, the rulemakers sought to further their effort to curb the hyperuse of the 1983 version of Rule 11. Ironically, of course, the comparative underuse of Rule 26(g) has contributed to sentiment that more needs to be done in the way of Rules revision to curb excessive discovery.

96. *Id.* § 26App.07[2] (reprinting Advisory Committee Note).

97. *Id.* (citing *ACF Indus. v. EEOC*, 439 U.S. 1081 (1979), *cert. denied* (Powell, J., dissenting)). In *ACF Industries*, Justice Powell was upset that certiorari was denied to a company objecting to the EEOC's failure to provide what the defendant considered a sufficiently specific answer to an interrogatory. *ACF Industries*, 439 U.S. at 1086-87. In this dissent, Powell was again joined by Justices Stewart and Rehnquist. *Id.* at 1081.

The *ACF* case does provide a textbook example of discovery gone awry, which may have prompted Powell's interest in granting certiorari. See *EEOC v. Carter Carburetor*, 577 F.2d 43, 45-48 (8th Cir. 1978) (explaining that both litigants “displayed dilatory tactics during the discovery period,” and that “[n]umerous motions to compel discovery have been filed”). But it is disturbingly interesting that he (and current Chief Justice Rehnquist) wanted to review a case with an eminently reasonable holding in view of the historical reality that the Court normally grants certiorari only in significant cases and normally reverses in certiorari cases two-thirds of the time. The trial court, reversed by the Eighth Circuit, had entered sanctions against the EEOC, deciding vast substantive aspects of the case as a Rule 37 discovery sanction without giving the EEOC a chance to respond to the motion. *Carter Carburetor*, 577 F.2d at 48. The appellate court further found that it was the defendant's delay in providing information that prevented the EEOC from more fully answering the interrogatory that led to the reversed sanctions order. *Id.* at 46-48.

Additionally of note, the defendant's opposition to discovery was essentially a claim that the EEOC was seeking discovery that went beyond the confines of discrimination involving the named plaintiffs in the EEOC's complaint. *Id.* at 45. Decoded, this means that the discrimination defendant was opposing the Rule 26(b)(1) standard of “subject matter” discovery and seek-

tices Powell and Rehnquist are willing to go to the ramparts with a grant of certiorari, dissenting when they cannot swing a fourth vote beyond Justice Stewart. One need not be a dramatically legal realist to discern a political agenda by Justices Powell and Rehnquist, who damned the 1980 changes as mere “tinkering” and who were no friends of broad discovery.<sup>98</sup> The Advisory Committee, in addition to its regular Note, issued an “Explanatory Statement Concerning [the] 1983 Amendments” that sought to justify the Committee’s newfound emphasis on deterring excessive claims, defenses, and discovery.<sup>99</sup> The Explanatory Note on its face is balanced, noting the “significant problems” posed by both “[e]xcessive discovery and evasion or resistance to reasonable discovery requests.”<sup>100</sup> The Explanatory Note cites Justice Powell (again), who in *Herbert v. Lando*,<sup>101</sup> suggested that discovery has “not infrequently [been] exploited to the disadvantage of justice.”<sup>102</sup>

During the 1980s as well, local rules of civil procedure were tending to restrict the broad discovery that had been endorsed in the 1970 Amendments.<sup>103</sup> Most commonly, local district courts were adopting rules that limited the total number of interrogatories a party could employ as a matter of right or restricted the use of so-called contention interrogatories that ask the opponent to outline its theory of the case and legal support.<sup>104</sup>

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ing instead to litigate under a claim-or-defense standard of discovery relevance, and a narrow one at that.

Carter Carburetor (a subsidiary of ACF) also complained that the EEOC had not pleaded sufficient facts in its complaint but was merely attempting to get discovery to make its case. *Id.* at 48. In other words, the defendant was arguing for a pre-1938 return to fact pleading and against the very rationale for discovery that had animated the 1938 Rules.

98. Justice Powell was a long-time partner and at one time the managing partner of the venerable Richmond-based Hunton & Williams, a large, wealthy law firm representing corporate defendants and the locus of Powell’s entire legal career prior to ascending to the Court. Powell was also a past President of the ABA, another badge of establishment status. It is, to say the least, interesting that this ordinarily mild-mannered Justice viewed by most as an ideological and doctrinal centrist should have been the Court’s firebrand on discovery. (Chief Justice Burger was a firebrand against excessive litigation but focused more generally on claims and trials). Thus, writ small, we have in Justice Powell and the *ACF Industries* matter an example of discovery “reform” during the late Twentieth Century. A lawyer who made a career of representing corporate defendants is upset that corporate defendants are subject to broad discovery requests, so much so that he deems the problem worthy of the rare grant of certiorari review. Rather than questioning this situation, the Advisory Committee defers to it as an indication that more discovery control is required. *See infra* Part V.A. (discussing the social and political makeup of the Rulemakers).

99. *See* 6 MOORE ET AL., *supra* note 33, § 26App.07[2] (reprinting Explanatory Note).

100. *Id.*

101. 441 U.S. 153, 179 (1979) (Powell, J., concurring).

102. *See* 6 MOORE ET AL., *supra* note 33, § 26App.07[3] (reprinting Explanatory Note citing Justice Powell quotation from *Herbert v. Lando*, 441 U.S. 153, 179 (1979)).

103. *See* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989).

104. *See, e.g.*, S.D.N.Y. LOCAL R. CIV. P. 33.05 (restricting use of contention interrogato-

The 1993 Amendments were quite another matter, comprising perhaps the most contested discovery changes in the history of the Federal Rules. Most controversy centered on the disclosure rules.<sup>105</sup> Aside from the disclosure rules, the 1993 Amendments were very clearly in the direction of limiting discovery but left untouched the historically broad scope of relevant discovery that had existed since 1938. The 1993 Amendments enacted a presumptive limit of twenty-five interrogatories per party<sup>106</sup> and a presumptive limit of ten depositions per side.<sup>107</sup> The limits can be expanded by the court on motion for cause shown or by stipulation of the parties.<sup>108</sup>

## II. PROPOSED AMENDED RULE 26(B)(1) NARROWING SCOPE

The Proposed Amendments for 2000, in major part:

1. Eliminate the local "opt out" provision in Rule 26 for mandatory disclosure that was allowed in the 1993 Amendments.<sup>109</sup>
2. Modify the initial disclosure obligation so that a party need only disclose information supporting its claim rather than all information relevant to the matter.<sup>110</sup>
3. Make disclosure mandatory in all cases, not only where the disclosure is relevant to facts alleged "with particularity."<sup>111</sup>

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ries and setting presumptive limit of 50 interrogatories per party); E.D.N.Y. LOCAL R. CIV. P. 33.02 (setting presumptive limit of 30 interrogatories per party). At least one state enacted similar limits. See MINN. R. CIV. P. 33.03 (setting presumptive limit of 50 interrogatories per party).

105. See Stempel, *New Paradigm*, *supra* note 12; Griffin Bell et al., *Automatic Disclosure in Discovery - The Rush to Reform*, 27 GA. L. REV. 1 (1992).

106. FED. R. CIV. P. 33(a).

107. FED. R. CIV. P. 30(a)(2)(A).

108. FED. R. CIV. P. 26(b)(2).

109. Proposed Rule 26(a)(1), in redlined version provides:

(1) **Initial Disclosures.** Except in categories of proceedings specified in Rule 26(a)(1)(E) [a new Proposed Amendment exempting "low-end" cases from discovery], or to the extent otherwise stipulated or directed by order ~~or local rule~~, a party shall must, without awaiting a discovery request, provide to other parties [required initial disclosures].

FED. R. CIV. P. 26(a)(1) (Proposed Draft 2000).

110. Proposed Rule 26(a)(1) adds the language requiring a party to provide information "support[ing] its claims or defenses, unless solely for impeachment" rather than information relevant to any "disputed facts." FED. R. CIV. P. 26(a)(1)(A). For example, Proposed Rule 26(a)(1)(A) in redlined form would require disclosure of

(A) the name, and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment ~~relevant to disputed facts alleged with particularity in the pleadings~~, identifying the subjects of the information.

FED. R. CIV. P. 26(a)(1)(A) (Proposed Draft 2000).

111. FED. R. CIV. P. 26(a)(1)(A). See also *supra* note 109.

4. Remove certain categories of “low-end” cases from disclosure.<sup>112</sup> These are types of cases thought to involve minimal discovery and hence cases where requiring disclosure and its attendant procedure is likely to increase disputing costs beyond their benefit in most of these cases.<sup>113</sup>

5. Establish a presumptive deposition time limit of one day of seven hours.<sup>114</sup>

6. Make failure to supplement disclosure responses expressly part of the Court’s Rule 37 Sanctioning power.<sup>115</sup>

Of more importance and controversy, the Proposed Amendment to Rule 26(b)(1) would shrink the scope of discovery from anything relevant to the “subject matter”<sup>116</sup> of the controversy to things relevant to a

112. *April 1999 Committee Minutes, supra* note 7. Proposed new Rule 26(a)(1)(E) in redlined form reads:

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(i) an action for review on an administrative record;

(ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(iv) an action to enforce or quash an administrative summons or subpoena;

(v) an action by the United States to recover benefit payments;

(vi) an action by the United States to collect on a student loan guaranteed by the United States;

(vii) a proceeding ancillary to proceedings in other courts; and

(viii) an action to enforce an arbitration award.

FED. R. CIV. P. 26(a)(1)(E) (Proposed Draft 2000).

113. *See* FED. R. CIV. P. 26(a)(1)(E), committee’s note (Proposed Draft 2000).

114. Proposed Rule 30(d)(2) in redlined form reads:

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person party, or other circumstance, impedes or delays the examination.

FED. R. CIV. P. 30(d)(2) (Proposed Draft 2000).

115. *See* Proposed Rule 37(c)(1), which in redlined form reads:

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1)- or to amend a prior response to discovery as required by Rule 26(e)(2) shall is not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney’s fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs Rule 37(b)(2)(A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

FED. R. CIV. P. 37(c)(1) (Proposed Draft 2000).

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

“claim or defense” interposed by the parties.<sup>117</sup> Proposed Rule 26(b)(1) in redlined form would read:

Parties may obtain discovery regarding any matter, not privileged, that which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant The information sought need not be admissible at the trial if the discovery information sought appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).<sup>118</sup>

The Advisory Committee had also proposed a “cost-bearing” amendment to Rule 26, but this change was rejected by the Judicial Conference.<sup>119</sup> The proposal would have permitted litigants to have somewhat broader discovery in the discretion of the court, provided that the requesting party paid the responding party’s costs for providing the discovery.<sup>120</sup>

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117. FED. R. CIV. P. 26(b)(1) (Proposed Draft 2000). In addition, Rule 5(d) would be changed. Currently, Rule 5(d) provides that “[a]ll papers after the complaint required to be served upon a party . . . shall be filed with the court.” FED. R. CIV. P. 5(d). The amended version of Rule 5(d) would provide that discovery materials “must not be filed until they are used in the proceeding or the court orders filing.” FED. R. CIV. P. 5(d) (Proposed Draft 2000). See Gregory P. Joseph, *Federal Practice[:] Civil Rules Amendments*, NAT’L L.J., Mar. 13, 2000, at A19.

118. FED. R. CIV. P. 26(b)(1) (Proposed Draft 2000).

119. *Id.*

120. Initially, the Advisory Committee had considered amending Rule 34 so that it would have, in redlined form, read:

The party submitting the [document production] request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall -- if appropriate to implement the limitations of Rule 26(b)(2)(i),(ii), or (iii) -- limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party.

At the April 1999 Advisory Committee meeting, discussed *infra* at text accompanying notes 223-29, the Committee determined instead to place the cost-shifting language in Rule 26 so that potential cost-shifting would apply to all discovery matters. This Proposed Amended Rule 26(b)(2), which was subsequently rejected by the Judicial Conference, would have read in redlined form:

(2) **Limitations.** By order ~~or by local rule~~, the court may alter the limits in these rules on the number of depositions and interrogatories, ~~or and may also limit the length of depositions under Rule 30, and~~ By order or local rule, the court may also limit the number of requests under Rule 36. The court shall limit the fre-

The Rulemakers have taken to referring to ordinary discovery in the absence of judicial intervention as “lawyer-managed” discovery, while discovery conducted pursuant to court order is “court-managed” discovery.<sup>121</sup> Under Proposed Amended Rule 26(b)(1), the default rule of civil litigation would provide for discovery where the information requested is “relevant to the claim or defense” of a party.<sup>122</sup> If a litigant wishes to obtain additional information, it must be sought through motion to the court, assuming the party holding the information will not voluntarily agree to provide the material.<sup>123</sup> In this “court-managed” phase of discovery, the requesting party may obtain information relevant to the “subject matter” of the dispute (not merely relevant to a “claim or defense”)<sup>124</sup> if the party persuades the court that there is “good cause” for the broader discovery request.<sup>125</sup>

### III. THE ETIOLOGY AND CONTROVERSY OF THE SCOPE AMENDMENT

Proposed Amended Rule 26(b)(1) generated considerable controversy.<sup>126</sup> The scope narrowing was proposed by the Discovery Subcommittee of the Civil Rules Advisory Committee and discussed at some length by the Advisory Committee, which voted nine to four in favor of the proposed change in the face of an amendment to delete the change.<sup>127</sup>

When the Proposed Rules were presented to the Standing Committee, the controversy continued but the Committee continued to back the change by a ten to two vote.<sup>128</sup> Before the Judicial Conference, the matter was also discussed extensively. This time, the change barely

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quency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule ~~shall be limited by the court, or require a party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party,~~ if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

121. *April 1999 Committee Minutes, supra* note 7.

122. FED. R. CIV. P. 26(b)(1) (Proposed Draft 2000).

123. *See id.*

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

125. FED. R. CIV. P. 26(b)(1) (Proposed Draft 2000).

126. *See infra* text and accompanying notes 161-390 for more extensive discussion of the proposed scope amendment.

127. *April 1999 Committee Minutes, supra* note 7.

128. *See Minutes of Committee on Rules of Practice and Procedure, June 14 & 15, 1999* (Newton, Mass.) (on file with the author).



obtained approval by a thirteen to twelve vote.<sup>129</sup> During the period of public comment, significant commentary was made concerning the proposed change, much of it arguing against the proposed change.<sup>130</sup>

Like most Amendments to the Civil Rules (or other Rules of Procedure), the current batch of proposed rules had a relatively long gestation period. To some extent, modern Rulemaking has become perpetual in that the Advisory Committee is under a charge to engage in continuous review of the Rules with an eye to revision.<sup>131</sup> Although there is not a specific convocation of the Committee for particular Rules initiatives, the impetus for the current proposed changes to the discovery Rules began in the mid-1990s. At the October 1996 Committee Meeting, the Committee determined to embark on a sustained examination of discovery and appointed a special Discovery Subcommittee chaired by Judge David F. Levi (E.D. Cal.).<sup>132</sup>

Regarding Judge Levi specifically, there is rich irony in his key role in the Proposed Amendments for 2000. Judge Levi is a former law clerk to Justice Powell, having served in the 1981-82 term.<sup>133</sup> In essence, Levi was working for Powell—the Court’s chief advocate of limiting discovery—in the wake of Justice Powell’s damnation of the 1980 Amendments as “tinkering” and his repeated assertion that par-

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129. See Confidential Communication of Nov. 19, 1999 (on file with Author) (relating Advisory Committee and Judicial Conference votes). The nine to four Advisory Committee vote on the scope amendment is of public record. See *April 1999 Committee Minutes*, *supra* note 7. The Judicial Conference proceedings and vote are not reflected in public documents.

130. See *April 1999 Committee Minutes*, *supra* note 7 (summarizing public comments and noting many comments and witnesses opposed narrowing of Rule 26(b)(1) scope).

131. As Professor Marcus has noted, there has always been a significant body of attorney opinion that would prefer not to see continuously organic Rule reformation and perhaps eliminate the Advisory Committee altogether. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 761-63 (1993) (relating anecdote where prominent New York attorney Edward Labaton, Esq., identifies permanent standing Advisory Committee as mistake). See also Statement of Justice Powell (joined by Justices Stewart & Rehnquist) Dissenting from 1980 Amendments, 85 F.R.D. 521, 522 (1980) (“it often is said that the bar has a vested interest in maintaining the status quo”). This viewpoint has been in significant, perhaps permanent retreat. See Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years -- The Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857 (1992) (calling for establishment of permanent standing Advisory Committee on the Federal Rules of Evidence; the call was heeded rather rapidly; in 1993, Congress enacted legislation to establish the current Evidence Advisory Committee).

132. Civil Rules Advisory Committee, *Minutes of Civil Rules Advisory Committee, Oct. 17 & 18, 1996*, available at <<http://www.uscourts.gov/rules/Minutes/cv10-1796.htm>> [hereinafter *October 1996 Committee Minutes*]. Unless otherwise indicated, biographical data for judges is drawn from THE AMERICAN BENCH or the ALMANAC OF THE FEDERAL JUDICIARY while biographical data for lawyers is drawn from Martindale-Hubbell Law Directory. Law professor biographies are available in the American Association of Law Schools *Directory of Law Teachers*.

133. THE AMERICAN BENCH 343 (Diana R. Irvine et al. eds., 11th ed. 2000) (providing short biography of Judge Levi).

ties seeking discovery were taking unfair advantage of defendants.<sup>134</sup> One suspects the decision of the Chief Justice (who joined Powell's opinions criticizing broad discovery) to appoint Levi to the Committee was no coincidence. The Discovery Committee was also composed of Judge David Doty (D. Minn.),<sup>135</sup> Judge Lee H. Rosenthal (S.D. Tex.), Carol J. Hansen Posegate, Esq., (of Posegate & Denes) and Francis Fox, Esq., (a partner at the large Boston firm Bingham Dana).<sup>136</sup> Mark Kasanin, Esq., (a product-liability defense attorney with the large San Francisco-based law firm of McCutcheon, Doyle, Brown & Enerson)<sup>137</sup> later replaced Posegate.<sup>138</sup> Professor Richard Marcus (Hastings) was appointed Associate Reporter to work with the Subcommittee.<sup>139</sup>

Although the Committee professed to be entering its inquiry with an open mind,<sup>140</sup> the tone of the discussion suggested that discovery continued to enjoy its post Pound Conference status as a scapegoat for perceived litigation ills.<sup>141</sup> The Committee appeared to have a general

134. Statement of Justice Powell, 85 F.R.D. at 523.

135. Doty, a Republican, was a name partner in the large Minneapolis-based law firm Popham, Haik, Schnobrich, Kaufman & Doty where a significant part of his practice was the representation of discrimination defendants. *See* ALMANAC OF THE FEDERAL JUDICIARY (Christine Housen et al. eds., 2000). The law firm literally "fell apart" after Doty's departure, dissolving in 1993 for a variety of reasons. I suppose I should also disclose that I worked as a summer associate at Popham, Haik in 1980, even using Doty's office for two weeks while he took a rare vacation. Doty is an extremely intelligent, likeable person who I in no way intend to attack (or even criticize), but his pro-defendant background is inarguable.

136. *October 1996 Committee Meetings*, *supra* note 132.

137. *See infra* text accompanying notes 407-11 (describing lawyer members of Advisory Committee in more detail).

138. Civil Rules Advisory Committee, *Minutes of Civil Rules Advisory Committee Meeting, Oct. 6 & 7, 1997*, available at <<http://www.uscourts.gov/rules/Minutes/cv10-97.htm>> [hereinafter *October 1997 Committee Minutes*].

139. *See October 1996 Committee Minutes*, *supra* note 132:

Discovery questions have been continually before the Committee for many years. It has been several years, however, since the Committee last explored the most fundamental issues going to the scope of discovery and the relationship between "notice" pleading and discovery. The time may have come to consider changes more fundamental than those made in recent years. The Civil Justice Reform Act manifests concern with the costs and delays associated with discovery, and may justify further study. The new disclosure practice authorized by Civil Rule 26(a) also must be studied.

*Id.*

140. *See id.* (emphasis added):

As complex as the problems are, caution is necessary. *Lawyers and judges do not like frequent rule changes.* Discovery practice has been changed many times. The Civil Rules, moreover, have become "organic" in the sense that they are understood and implemented as a seamless whole. *Changes are appropriate only when there is a clear case for the change.*

*Id.* (emphasis added).

141. *See id.* (emphasis added):

When appointment of the Discovery Committee was announced, it was observed that most studies of the causes of popular dissatisfaction with the administration of civil procedure focus in large part on discovery. Discovery is expensive. Discovery is often conducted in a mean-spirited way. Discovery is used as a strategic

view that discovery was problematic, that discovery practice was deteriorating for a variety of reasons, that experiments with discovery reform on the state and local level appeared to be working, and that some change in the Federal Rules was apt.<sup>142</sup> The Committee seems to have been operating under both a preference for scientific inquiry and the gravitational pull of the venerable myth of discovery abuse.

On the scientific method side of the ledger, the Committee expressed support for empirical research bearing on discovery issues and Rules reform in general.<sup>143</sup> Research conducted by the Federal Judicial Center and Rand Corporation, discussed in Part IV below, was available to the Committee and was a centerpiece of a conference on Rules reform arranged by the Committee.<sup>144</sup> The Conference, held in Boston in September 1997, resulted in a symposium of excellent papers published in the *Boston College Law Review*.<sup>145</sup> A similar but smaller conference was held in San Francisco in early 1997.<sup>146</sup> At its October 1997 Meeting, the Committee heard from the Discovery Subcommittee in the wake of the conference regarding the Subcommittee's work.<sup>147</sup>

At the October 1997 Committee Meeting, Chair Niemeyer characterized the Committee's Discovery Project as "aim[ed] at three central questions": the cost of discovery; whether costs exceed benefits sufficiently to require "remedial action"; and "if remedies should be sought, whether changes can be made that do not interfere with the full development of information for trial."<sup>148</sup> He also established a framework for discussion that tends to overlook the heart of any discovery problems in that the Committee's Discovery Project was designed to be "more likely to focus on the framework of discovery than on attempts to control 'abuses.'"<sup>149</sup>

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tool, not to facilitate resolution of a controversy. Attorney self-regulation too often fails to work, as adversariness gets in the way of more professional behavior. Egos and tactics intrude. Over-use by discovery out of any reasonable proportion to the needs of the case may be more common than more direct abuse. The new disclosure practice is badly fractured as many districts have opted out of the national rule and adopted different local variations. The American College of Trial Lawyers has proposed that it is once again time to reconsider the basic scope and nature of discovery. *If any aspect of the rules is broken, discovery is it.*

*October 1996 Committee Minutes, supra note 132 (emphasis added).*

142. *See id.*

143. *October 1997 Committee Minutes, supra note 138 (discussing ongoing FJC and Rand studies).*

144. *See Civil Rules Advisory Committee, Minutes of Civil Rules Advisory Committee, Sept. 11 & 12, 1997, available at <<http://www.uscourts.gov/rules/Minutes/cv09-97.htm>> [hereinafter *September 1997 Committee Minutes*].*

145. Symposium, *Conference on Discovery Rules*, 39 B.C. L. REV. 517-840 (1998).

146. *See October 1997 Committee Minutes, supra note 138.*

147. *See id.* The Minutes describe the Boston conference as being "as good as a conference can be" and the generator of a "'smorgasbord' of ideas." *Id.*

148. *Id.*

149. *Id.*

The Discovery Subcommittee began its report at the October 1997 Meeting by again stating the group's seemingly agnostic view on the subject of reform, identifying the first "big question" as "whether to do anything at all about discovery" and observing: "Discovery seems to be working rather well in general, but there are problem spots. Lawyers are open to change, but doubt whether much can be accomplished."<sup>150</sup>

The Subcommittee Special Reporter then summarized the changes suggested at the conferences and through other means. The list of possible changes included: increasing or mandating uniformity generally, particularly with regard to disclosure; limiting disclosure to only the facts supportive of the disclosing party's case; managed discovery; a clear discovery cutoff time expressed in the "[c]ore discovery rules"; use of "[p]attern" discovery; revising waiver doctrine to reduce the problematic aspects of counsel spending inordinate time screening documents to avoid inadvertent waiver of privilege.<sup>151</sup> As it would later develop, the concept of judicially managed discovery would be used as part of the justification for narrowing the scope of discovery.<sup>152</sup> However, the Proposed Rules ultimately do not establish any real regime for judicial administration tailored to the relatively small subset of cases that presents discovery problems. In addition, of course, the Rulemakers fail to provide a persuasive rationale for placing the burdens of discovery reform upon those seeking information rather than upon those opposing its release.

#### A. *Agenda-Setting and the College of Trial Lawyers*

Perhaps most important in retrospect, the Subcommittee identified as one of its potential changes "the basic scope of discovery," noting:

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150. *October 1997 Committee Minutes, supra* note 138.

151. *Id.* According to the Minutes:

The central idea [of managed discovery] is that discovery might proceed in three stages. First would be disclosure, however disclosure may be reshaped. Second would be some level of core discovery, defined to be available to the lawyers without court management. This stage might well include stricter limits on the numbers of interrogatories and depositions than those set by current rules. It also might include time limits on depositions, and even might include some attempt to limit the quantity of document exchange. The third stage would require court management when any party wishes to engage in discovery beyond the core limits. In many ways this would involve a party-selected means of tracking; court management would be provided at the request of any party coming up against the limits of core discovery. This managed discovery system could be viewed together with Judge Keeton's proposal, including changes in Rule 16, using the whole pleading-discovery-pretrial conference process to get a better definition of the issues.

*Id.*

152. *See infra* Part IV.

The American College of Trial Lawyers has long supported the 1977 proposal [of the ABA Litigation Section] to narrow the scope of discovery defined by Rule 26(b)(1). There is a related view that the major problem of discovery arises with document production, and that the scope of discovery should be narrowed only for document discovery.<sup>153</sup>

Among these suggestions, the Subcommittee identified as its “A” list of potential changes “three ‘bullet’ items: uniformity; initial disclosures; and the scope of discovery.”<sup>154</sup> In addition, the Subcommittee noted “many other worthy suggestions” that were deemed of “second-level priority.”<sup>155</sup> According to the Special Reporter, the “most important idea on [this] list is the firm trial date, an item relegated to [the B] list only because it is not a discovery matter, even though it is closely related to discovery cutoff issues.”<sup>156</sup> Also noted was a “C” list of technical changes.<sup>157</sup>

At the October 1997 Meeting, the full Committee discussed extensively the list of potential changes noted by the Subcommittee. Particularly significant discussion attended the issues of uniformity in disclosure, the core discovery that should be ordinarily available to litigants, and the scope of discovery relevance.<sup>158</sup> There appeared to be an emerging Committee consensus that uniformity was desirable in light of significant criticism of the local opt out for disclosure in the 1993 Amendments and other forces fragmenting civil procedure such as the Civil Justice Expense and Delay Reduction plans, which had encouraged local experimentation.<sup>159</sup>

On the issue of scope, the American College of Trial Lawyers was once again identified as the moving force behind a proposal to narrow the definition of what is “relevant” and within the scope of permissible discovery:

The American College of Trial Lawyers has renewed the suggestion that the Rule 26(b)(1) scope of discovery be narrowed to focus on claims (or issues) framed by the pleadings. The weight of this suggestion figured centrally in the decision to undertake the present discovery project. The specific proposal was first advanced by the American Bar Association Liti-

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153. *October 1997 Committee Minutes, supra* note 138.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *October 1997 Committee Minutes, supra* 138.

159. *Id.*

gation Section in 1977, and was promptly taken up and published for comment by this committee in the form now advanced by the American College. The proposal was abandoned after publication. It has been considered repeatedly by this committee over the years, but never again has advanced as far as publication. Current discussion of the proposal has gone further, suggesting revision of the final (b)(1) provision that the information sought need not be admissible at trial if it appears reasonably calculated to lead to the discovery of admissible evidence.

This proposal has been much argued over the years. The committee agreed that there is little need for additional work by the subcommittee in preparation for the spring meeting. The subject will be discussed at the spring meeting. But the subcommittee should draft alternative proposals to modify the (b)(1) provision allowing discovery of information reasonably calculated to lead to the discovery of admissible evidence.<sup>160</sup>

At the Spring 1998 Committee Meeting, further discussion of disclosure and discovery ensued, with particular focus on the question of scope. The Subcommittee brought three models to the committee for consideration. One would limit the initial scope of discovery to matter relevant to “the claim or defense” of a party, but allow the court to expand discovery to “any information relevant to the subject matter” of the action.<sup>161</sup> The second model would “modify the final sentence of present Rule 26(b)(1), emphasizing that only relevant information may be sought under the permission for discovery of information that is not admissible but is reasonably calculated to lead to the discovery of admissible evidence.”<sup>162</sup> The third model would “add to [Rule 26](b)(1) an explicit cross-reference invocation to the ‘reasonable discovery’ principles articulated in present (b)(2).”<sup>163</sup>

The Committee noted that the proposed restrictions in discovery scope championed by the College had been published by the Advisory

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160. *Id.* The question of scope was discussed with respect to document production in particular:

A recurring suggestion has been that the scope of discovery could be narrowed for documents [sic] production, but not for other modes of discovery. The American College proposal, for example, could be adopted only as part of Rule 34. Robert Campbell [representing the American College of Trial Lawyers] stated that document production problems may be a dominant part of the concern underlying the proposal. But it was suggested that it may be difficult to implement rules that apply different tests for the scope of discovery to different discovery devices.

*Id.*

161. Civil Rules Advisory Committee, *Minutes of Civil Rules Advisory Committee, Mar. 16 & 17, 1998*, available at <<http://uscourts.gov/rules/Minutes/0398civilminutes.htm>> [hereinafter *March 1998 Committee Minutes*].

162. *Id.*

163. *Id.*

Committee in essentially the same form in 1978 but withdrawn in light of adverse comments.<sup>164</sup> But, like the mythical phoenix bird, the proposal had resurfaced periodically since.<sup>165</sup> Even prior to public comment on the idea, the Committee was aware of problematic aspects of the College proposal, as the Minutes note:

There is reason for caution because it is not clear whether the proposed change would lead to mild restraint or considerable curtailment. Whatever the outcome, moreover, the very fact of change will lead to a transitional period in which contending parties seek to attribute unintended meanings to the change. No language is available to calibrate precisely the degree of desired change, even if agreement could be reached on the precise degree. These concerns suggest that the Committee should demand a clear reason for moving toward the change.<sup>166</sup>

### *B. Reaction to and Processing of the Scope Proposal*

Different views circulated as to whether changing the definition of scope from “relevant to the subject matter” to relevant to the “claim or defense” really would make a difference.<sup>167</sup> Several participants at the Boston conference had suggested that the two verbal formulations would collapse in practice.<sup>168</sup> Others, principally the College of Trial Lawyers, disagreed.<sup>169</sup> Despite this reference to the offering of case examples, the Minutes of the October 1998 Meeting and other Committee Meetings contain no recitation of these specific examples. The “examples” themselves are a group of five hypotheticals, apparently based on actual cases (but without identifying information) contained in the College’s Report, which was submitted to the

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164. *Id.* See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 77 F.R.D. 613 (1978); ABA Litigation Section, *Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137 app. (1980) (issuing original report in 1977); ABA Litigation Section, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137 (1980).

165. *March 1998 Committee Minutes*, *supra* note 161.

166. *Id.*

167. *Id.*

168. *Id.* (“At the Boston College conference, many lawyers suggested that adopting this suggestion would not lead to any great change.”).

169. *Id.* Their position was summarized in the following manner:

The American College believes that it does make a difference. It has offered examples of cases in which judges thought the “subject matter” language of the present rule does make a difference. The Board of Regents of the College has adopted the recommendation as the recommendation of the College itself, a highly unusual step. Neither the College nor its federal rules committee has considered the possibility of restoring subject-matter discovery under court control; probably they would oppose this new feature.

*March 1998 Committee Minutes*, *supra* note 161.

the College's Report, which was submitted to the Advisory Committee during the public comment period.<sup>170</sup> Some complained that narrowing the scope while also providing for cost-shifting to the requesting party as a condition of obtaining broader, relevant-to-the-subject-matter discovery would "create a firestorm" of criticism.<sup>171</sup> Some saw this combination as excessively defense-oriented, or at least prone to this perception, with a suggestion that the Committee was interested in reforming the status quo of discovery that favored plaintiffs but not the status quo of discovery that favored defendants.<sup>172</sup>

In addition, the narrowed scope proposal was criticized as seemingly superfluous in light of existing judicial power under Rule 26(b)(2) to curb discovery that fails cost-benefit analysis.<sup>173</sup> Changing the scope was also criticized as needlessly creating new uncertainty and transaction costs by abandoning "60 years of precedent establishing the scope of discovery in return for a well of new uncertainties."<sup>174</sup> Some commentators suggested that it might be a sufficient change to adopt a limitation on the "reasonably calculated to lead to . . . admissible evidence" portion of Rule 26(a)(1), limiting this ground only to "relevant" information, coupled with a verbal reminder to courts of their discretionary powers to curtail overbroad discovery under Rule 26(b)(2).<sup>175</sup>

Although some at the Meeting were concerned about the sociology of the proposal (senior lawyers making suggestions that would be implemented largely by junior lawyers), substantial comment at the Meeting favored the proposal as a good idea in that it would "send a signal" against overbroad discovery, particularly in document production.<sup>176</sup> According to the Minutes, "[s]trong support was expressed for the American College proposal. Out-of-control discovery is common."<sup>177</sup> Answering this question, at least tentatively, would seem to

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170. As discussed *infra* at text accompanying notes 317-21, these hypotheticals are not only vague but largely unpersuasive.

171. *March 1998 Committee Minutes*, *supra* note 161.

172. *Id.*

173. *Id.* Rule 26(b)(2) provides that the court may limit discovery that is relevant under the Rule 26(b)(1) standard if the court determines that the discovery is (i) unreasonably cumulative or more easily and cheaply available; (ii) the requesting party has already had ample opportunity to obtain the information sought; or (iii) the burden or expense of the discovery sought outweighs its likely benefit to the requesting party in light of the stakes of the case. *See* FED. R. CIV. P. 26(b)(2).

174. *March 1998 Committee Minutes*, *supra* note 161.

175. *See id.*

176. *Id.*

177. *Id.* Continued the Minutes:

No one who participated in designing the discovery system foresaw what it would become. Technological advances in storing and retrieving information have only exacerbated a problem that already was made acute by document discovery excesses. Adoption of the proposal will send an important signal that discovery must



be a prerequisite to changing the scope of discovery as it has existed since 1938. But the Committee, despite repeatedly expressing an interest in empiricism, made no serious examination of the issue, either at the October 1998 meeting or later. However, as discussed below, the College presented essentially no facts or case law to support its assertion.<sup>178</sup>

On the vexing question of whether the proposed linguistic change really would matter, the Minutes note that “[i]t was asked whether it is possible to provide more concrete illustrations of the differences that the proposal would make.”<sup>179</sup> The question was unanswered at the October 1998 Committee Meeting and remained unanswered throughout the process that produced the Proposed Rules.

The Committee identified three options regarding scope of discovery: (1) do nothing; (2) amend Rule 26(b)(1) with explicit language cross-referencing to Rule 26(b)(2)’s language of judicial control in hope of encouraging more aggressive judicial policing of proportionality; and (3) amend the scope language from “relevant to the subject matter” to “relevant to claims or defenses” but permit the court on motion to allow the discovery up to the limits of the current “subject matter” scope.<sup>180</sup> Option one received no votes in Committee.<sup>181</sup> Option two received two votes.<sup>182</sup> Option three, now the Amended Rule 26(b)(1), received nine votes.<sup>183</sup> This decision led to the current language in the Amendment that would condition judicially authorized “subject matter” discovery upon “good cause shown.”<sup>184</sup>

At the October 1998 Meeting, the Committee also approved (by a nine to one vote) a durational limit on depositions, with the precise contours of the limit to be decided at a subsequent meeting.<sup>185</sup> After some discussion, the Committee unanimously agreed to maintain the Rule 26(d) “discovery moratorium” that requires completion of initial

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be better controlled. Reasonable proportionality is required by (b)(2) now, and it has not been made to work.

*Id.* Unfortunately, the Committee did not appear to take on the issue of whether discovery now really is disproportionately broad in any significant degree. To be sure, Rule 26(b)(2) appears to be seldom invoked, at least if reported cases are any guide. But this does not necessarily mean that overbroad discovery is a cancer metastasizing on the land. It may be that Rule 26(b)(2) is seldom used because there are relatively few discovery requests overbroad enough to trigger it.

178. Civil Rules Advisory Committee, *Minutes of Civil Rules Advisory Committee, Oct. 16 & 17, 1998*, available at <<http://uscourt.gov/rules/Minutes/1098civilminutes.htm>> [hereinafter *March 1998 Committee Minutes*].

179. *Id.*

180. *March 1998 Committee Minutes*, *supra* note 161.

181. *Id.*

182. *Id.*

183. *October 1998 Committee Minutes*, *supra* note 178.

184. *Id.*

185. *See id.*

disclosures before lawyer-directed discovery can take place.<sup>186</sup> The Committee also rejected ideas concerning possible changes in Rule 16 (pretrial conferences), Rule 30(a)(2)(A) (setting presumptive number of depositions at ten per side), Rule 26(c) (protective orders), and agreed to certain technical amendments.<sup>187</sup>

The Committee also discussed the issue of cost-bearing in discovery. Although noting that “[w]e are accustomed to a procedure that generally makes no attempt to allocate the costs of demanding and responding to discovery,”<sup>188</sup> the Committee was attracted to the idea of requiring the requesting party to pay the opponent’s cost of furnishing discovery in cases where the request is very broad or burdensome.<sup>189</sup> This, of course, may take place under the pre-2000 Rules if the court uses its Rule 26(b)(2) power to condition otherwise available discovery on such payments or cost-sharing. The Subcommittee proposed a change that would add additional language to encourage such cost shifting.<sup>190</sup> The full Committee rejected the proposal on a seven to four vote but on a ten to one vote agreed to add cost-shifting language to Rule 34.<sup>191</sup> The specific cost language unanimously formulated by the Committee provided that a party may seek a protective order to shift discovery costs by motion or object to self-funded discovery, with Rule 26(b)(2) as the yardstick for determining whether cost-shifting was appropriate.<sup>192</sup> At its April 1999 Meeting, the Advisory Committee changed its collective mind and put the cost-shifting language into a Proposed Amended Rule 26(b)(2), which did not survive the Judicial Conference.<sup>193</sup>

In August 1998, the Proposed Amendments were published for comment, beginning the public comment period that would end by February 1, 1999, and setting public hearings in December 1998 and January 1999.<sup>194</sup> At its November 1998 Meeting, the Committee received an interim report from its Discovery Subcommittee and again addressed proposed changes in discovery. The Special Reporter presented to the Committee the draft Note explaining the changes. Regarding the scope/relevance language, it was explained that:

The goal [of the proposed change in the Rule 26(b)(1) scope

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186. *Id.*

187. *See id.*

188. *March 1998 Committee Minutes, supra* note 161.

189. *Id.*

190. *Id.*

191. *Id.*

192. *See id.*

193. *See supra* text accompanying notes 119-20.

194. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Notice of Hearing and Proposed Rules*, 181 F.R.D. 21 (1998).

language] is to win involvement of the court when discovery becomes a problem that the lawyers cannot manage on their own. The present full scope of discovery remains available, as all matters relevant to the subject matter of the litigation, either when the parties agree or when a recalcitrant party is overruled by the court. Absent court order, discovery is limited to matters relevant to the claims or defenses of the parties. No one is entirely clear on the breadth of the gap between information relevant to the claims and defenses of the parties and information relevant to the subject matter of the action, but the very juxtaposition makes it clear that there is a reduction in the scope of discovery available as a matter of right.<sup>195</sup>

The Committee was informed that early comments on the Proposed Amendment had been a mixture of praise, criticism, and uncertainty, which was also the case regarding proposed cost-shifting.<sup>196</sup> All at the Meeting appeared to agree, however, that “[t]he most important source of the most extravagantly expensive over-discovery is document production” and that as a result, any cost-shifting device should be in Rule 34 rather than Rule 26.<sup>197</sup>

### C. *The Rules Committee Hearings on Scope*

During the period of public comment on the Proposed Rules, the Committee held live public hearings on December 7, 1998 (Baltimore), January 22 (San Francisco), and January 29, 1999 (Chicago). At the hearings, a variety of comments were made, with plaintiffs and defendants essentially presenting dramatically opposed visions of the Proposed Amendment regarding scope, a division that would be replicated in the Advisory Committee’s final determination to send the Amendment forward.<sup>198</sup>

For example, the January 22 San Francisco hearing was led off by Max Blecher, Esq., a plaintiff’s antitrust lawyer. He viewed the Proposed Amendment as a “clear signal to district judges to limit discovery in major commercial litigation, antitrust, intellectual property and the like.”<sup>199</sup> Committee Member Magistrate Judge John Carroll point-

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195. Civil Rules Advisory Committee, *Minutes of Civil Rules Advisory Committee*, Nov. 12 & 13, 1998, available at <<http://www.uscourts.gov/rules/Minutes/1198civilminutes.htm>> [hereinafter *November 1998 Committee Minutes*].

196. *See id.*

197. *See id.*

198. *See infra* Part III.D. (discussing failed motion to delete Proposed Amendment to Rule 26(b)(1)).

199. *See* Transcript of Proceedings, Hearings Before the Federal Civil Rules Advisory Committee 6 (San Francisco) (Jan. 22, 1999) (testimony of Maxwell M. Blecher, Esq.) (on file with the author). The Hearing Transcript is a public record on file with the Administrative

edly asked Blecher, "What sorts of discovery do you think that you can get under subject matter that you would not be able to get under claim or defense?"<sup>200</sup> Blecher responded:

In an antitrust context, if we were going about monopolizing oranges and we wanted to ask a question about grapefruits, it would not relate to the claim or defense, but it could relate to the subject matter of how do you conduct your business, what kind of contracts, agreements and restrictive practices do you engage in.<sup>201</sup>

Later in the hearing, a prominent defense lawyer took issue with these expressed fears but also allowed that the Proposed Amendment would be more limiting than the current Rule 26(b)(1).

I don't think if you make a modest change in the scope of discovery, such as is recommended, that the enforcement of the antitrust laws is going to suffer significantly. I believe that Mr. Blecher will get discovery of his oranges and his grapefruits and maybe even his apples, so he'll be able to discover his apples and oranges in the same case.<sup>202</sup>

Let's assume he alleges a conspiracy to fix the price of oranges in the Sacramento Valley or somewhere else in California. Should he be entitled as part of that claim to examine whether there is any conspiracy with respect to grapefruits? That could be a debatable question, but I don't think that we should assume that just because he has alleged claim[s] as to oranges, where he may have some evidence of a conspiracy, that he is entitled to explore whether there is a conspiracy about grapefruits or apples.<sup>203</sup>

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Office of the United States Courts. Blecher is a partner in the firm Blecher & Collins, which generally represents plaintiffs in antitrust disputes.

200. *Id.*

201. *Id.* at 6.

202. *Id.* at 175 (providing testimony of Alfred Cortese, Jr., Esq.). Cortese is a partner in the large Pepper Hamilton firm and appeared representing the American Tort Reform Association, for whom he has been a spokesman in rules revision matters during the 1990s. Cortese and the Association, a group largely composed of product liability defendants, were particularly active in opposing required mandatory initial disclosure in the round of rulemaking leading up to the 1993 Amendments.

203. *Id.* at 176 (providing testimony of Alfred Cortese, Jr., Esq.). Discovery Subcommittee Chair Judge David Levi, speaking on behalf of the Advisory Committee before the Standing Committee at its June 1999 Meeting, took essentially the same position regarding the impact of the Proposed Amendment:

Judge Levi added that the current law makes almost everything relevant to the claims or defenses in civil rights and environmental cases. The amendment, he said, would not limit the broad array of information that plaintiffs presently receive through discovery. They will, for example, still be entitled under the

Blecher also observed that although broader subject-matter discovery remained available upon motion, it required the plaintiff seeking information to go through the effort of the motion, seek the discretionary favor of the judge, and perhaps be subject to cost-shifting: “[I]nstitutionalizing that process and saying every time we go beyond the claim or defense, we are going to get into an area where the plaintiff has to pay for it I think discourages the process.”<sup>204</sup>

Blecher defended the status quo of broad discovery as maintaining the relative balance between plaintiffs and defendants in statutory and commercial cases:

I think today there is a slight tilt in favor of the defendant’s view that the plaintiff’s request for discovery are [sic] too expansive. We can deal with that today because the Rule has subject matter relevancy. And despite that tilt, [judges] tend to allow a fair[ly] reasonable range of discovery that I do not regard as unduly restrictive. I think this [changing discovery scope to the “claim or defense” standard] will lead and encourage judges to be unduly restrictive. Discovery is the lifeblood of the antitrust litigation that I do . . . . [T]o the extent that we make discovery less available or more costly, you are going to reduce antitrust enforcement—probably enforcement in the securities area and intellectual property area, as well.<sup>205</sup>

From the defense perspective, witnesses praised the proposed narrowing of scope as a partial antidote to high costs and suggested that defendants had been to some extent victimized by plaintiffs’ strategic use of overdiscovery, with one speaker invoking the well-known actions by states against tobacco companies: “[I]n the tobacco litigation there were literally warehouses full of documents that have been produced. And new plaintiffs who enter the litigation, their sole goal in life is to expand on that warehouse, never having looked at one document in the warehouse.”<sup>206</sup>

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amended rule to information about the treatment of other employees, a pattern of discrimination, or a continuing violation, as well as information extending beyond the statute of limitations. These types of information are all considered relevant to the claims and defenses under current law.

See Committee on Rules of Practice and Procedure, Draft Minutes of Meeting 23-24 (June 14 & 15, 1999) (Newton, Mass.) (on file with the author).

204. See Transcript of Proceedings, *supra* note 199, at 5-7.

205. See *id.* at 13.

206. See *id.* at 15 (providing testimony of Kevin Dunne, Esq.). Dunne, a partner in Sedgwick, Detert, Moran & Arnold, identified himself as President of Lawyers for Civil Justice, *id.* at 14, a conservative, pro-business interest group, and as a lawyer who spent much of his time defending pharmaceutical litigation. *Id.* at 16. The Sedgwick Firm’s practice is insurance defense work.

Another lawyer defending corporations characterized the problem of overdiscovery as “endemic” but gave no specific examples.<sup>207</sup> Under questioning, however, he asserted a general problem in product defect cases:

The best examples is [sic] what we encounter in a product liability action. Rather than the discovery focusing upon the supposed defect if [sic] the product, under the circumstances of its use, at the time and place where it was being used. Instead what we get is discovery that says, give us everything that you have about the history of this product regardless of the circumstances of its use, regardless of the time, regardless of the relationship between anything else in this product and what happened in this case.<sup>208</sup>

Prodded by a friendly question from a lawyer member of the Committee, this witness asserted that it was difficult to persuade judges to limit discovery because of the breadth of the subject-matter definition of relevance.<sup>209</sup>

Another defense lawyer saw the change as helpful in curbing the “fishing expeditions [that are now] routine” in that it would discourage lawyers from asking for full breadth subject-matter discovery because of the burden of demonstrating “good cause.”<sup>210</sup> As a practical matter, he interpreted the proposed claim-or-defense standard as a narrowing that would require him to provide less discovery.<sup>211</sup> Another defense lawyer gave an example:

I do have a certain pessimism about subject matter. I feel that subject matter means that I have to produce everything and I have not been terribly successful in trying to focus on the claims of my adversaries. If I might give you [sic] couple ex-

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207. See Transcript of Proceedings, *supra* note 199, at 39 (providing testimony of J.J. Pickle, Esq., Associate General Counsel of Shell Oil).

208. *Id.* at 44 (providing testimony of J.J. Pickle, Esq.).

209. *Id.* at 46:

“Do you find that your lawyers are feeling that they can't accomplish anything in fighting discovery battles because of the use of the words ‘subject matter?’” [Question by Committee Member Mark Kasanin, Esq.]

“That has been my experience.” [Response by J.J. Pickle, Esq.]

Kasanin is a product liability defense lawyer at the large San Francisco-based law firm of McCutcheon, Doyle, Brown, & Enerson. See *supra* text accompanying notes 399-407 for additional information about Kasanin and other members of the Committee.

210. Transcript of Proceedings, *supra* note 199, at 56 (providing statement of H. Thomas Wells, Esq.). Wells is a partner in Maynard, Cooper & Gale, P.C., a large Birmingham, Alabama law firm that specializes in commercial litigation and emphasizes its representation of defendant manufacturers and insurance companies. See generally Maynard, Cooper & Gale website (visited Oct. 26, 2000) <<http://www.mcglaw.com>> .

211. See Transcript of Proceedings, *supra* note 199, at 56.

amples. I have had a series of litigation over the years involving a product used in surgery. It is a fragile product, it can break. Frequently that product is thrown away. The claim is it is a manufacturing defect. There is no product to examine, so basically discovery is for all documents under the universe and all kinds of people, and I have been unsuccessful over the years and at a tremendous cost to my client in producing this discovery. And rarely have I gotten relief.<sup>212</sup>

Realistically, however, this defense lawyer's lament is really not a request that there be some "fine tuning" of the application of current discovery standards. In seeking to avoid "fishing expeditions" or providing information outside the confines of the complaint itself, this lawyer is tacitly making a direct frontal assault on the entire theory of discovery enunciated in the 1938 Rules.<sup>213</sup>

Without doubt, the Proposed Amendment will consequently generate many interpretative battles, whatever one's hopes for the outcome of the discovery war. One lawyer expected substantial motion practice under the Proposed Amendment and predicted that "good cause is where this whole thing is going to stand or fall," suggesting some Committee revision to provide a more precise standard for determining good cause.<sup>214</sup> One witness, Judge Owen Panner (D. Or.) supported the Proposed Amendment for its psychic value in discouraging excess discovery, but also noted that he had seldom seen motions for Rule 26(b) relief from the corporate defendants that supported the change and criticized the status quo, stating "I talk about 26(b) and seldom get anybody to bring it to me."<sup>215</sup>

A lawyer who claimed a practice representing both plaintiffs and defendants argued for a continued broad subject-matter definition of relevance.<sup>216</sup> Another lawyer criticized the proposed change as creating too much inconsistency, with available discovery depending on the predilections of what the judge assigned to the case views as "good cause."<sup>217</sup> This view was echoed by an in-house corporate lawyer.<sup>218</sup>

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212. *See id.* at 62-63 (providing statement of Charles F. Preuss, Esq.).

213. *See supra* Part I.B. (discussing history of the 1938 Rules and expressing the view that subject matter discovery was designed to permit previously problematic "fishing expeditions").

214. *See* Transcript of Proceedings, *supra* note 199, at 66 (providing testimony of Charles F. Preuss, Esq.). Preuss is a partner in Preuss, Walker & Shangher, LLP, a San Francisco defense firm, and is a past president of the International Association of Defense Firms.

215. *See id.* at 75 (providing testimony of Judge Owen Panner).

216. *See id.* at 99-106 (providing testimony of Larry R. Veselka, Esq.). Veselka is a partner in Houston firm of Smysner, Kaplan & Veselka.

217. *Id.* at 112 (providing testimony of Mark A. Chavez, Esq., of Chavez & Gertler, a Mill Valley, California plaintiffs' firm). Prior to becoming a plaintiffs' lawyer, Chavez worked at the large San Francisco defense firm of Pillsbury, Madison & Sutro.

218. *See id.* at 170-71 (providing testimony of Thomas Y. Allman, Esq.) Allman is senior

As expected, the American College of Trial Lawyers weighed in with continued support for narrowing the scope of discovery.<sup>219</sup> The College representative argued that the organization was balanced in its perspective and also suggested that the change in the definition of relevance would not produce drastic changes in discovery actually provided:

We would suggest that in that sense our Committee [of the College] is composed of plaintiffs' counsel and defense counsel. Most of my career has been representing plaintiffs in fairly significant commercial-type litigation. And I will tell you that counsel, in a class action plaintiff's case against tobacco companies at this very time, in my judgment, every document that has been found to have any relevancy at all in all the tobacco litigation in the various courts throughout the United States, in both the Attorney General's cases [sic], the Catano cases and other types of cases would have been produced under the framework of not just subject matter, but of claims and defenses.<sup>220</sup>

The College representative also provided an example of what might constitute "good cause" for providing subject-matter relevance discovery rather than merely claim-or-defense relevance discovery:

[O]ne of our [the College's] examples is a [product liability claim involving a] shearing pin issue. It is an aircraft case, 747, and the question is not only this shearing pin as it relates to the locking mechanism of the landing gear, but what about, has there been a significant review by the defendants of safety issues on other aspects of the airplane? So they wish to expand the whole area because the position is that perhaps the defendant has followed a course of conduct in which they have ignored safety, ignored safety in connection with not only tricycle landing gears but also perhaps with wing struts and other areas. That would be a basis for good cause.<sup>221</sup>

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vice president and general counsel of BASF Corporation.

219. See Transcript of Proceedings, *supra* note 199, at 122-23 (providing testimony of Robert Campbell, Esq.). Campbell is a named partner in the Salt Lake City firm of Berman, Gaufin, Tomsic, Savage & Campbell. The firm appears to specialize in commercial litigation. See Berman, Gaufin, Tomsic, Savage & Campbell website (visited Oct. 26, 2000) <<http://www.bgtslaw.com>>.

220. See Transcript of Proceedings, *supra* note 199, at 123.

221. *Id.* at 123-25 (providing testimony of Robert Campbell, Esq.). Campbell went on to state:

We hope that in any event, that the exception does not become the rule. And we take exception with those that say the court is simply going to have to hear good cause motions in every case. We think that is not going to be the case. Lawyers will work together and they will work within the framework of the case. They will



A witness affiliated with the Defense Research Institute defended the proposed change to a “claim or defense” standard of relevancy as necessary because “my experience is [sic] that most district court judges just don’t want anything to do with discovery” and hence are congenitally incapable of policing excessive discovery requests through application of the current Rule 26(b)(2).<sup>222</sup>

After the hearings and close of the public comment period, the Committee met again in April 1999 to assess reaction to the Proposed Amendments. More than seventy witnesses had testified at the three hearings and 301 numbered comments had been received.<sup>223</sup> The Committee characterized the submissions as “thoughtful and thorough” as well as “voluminous.”<sup>224</sup> The Committee regarded the comments as “generally . . . parallel to the arguments that were considered by the committee during the process of meetings, conferences, and subcommittee deliberations that shaped the published proposals,” which in large part “reinforced the initial conclusions” of the Committee.<sup>225</sup>

Despite not having its views moved by public input, the Committee nodded toward the democratic imperative of allowing public input and also articulated its view of the value of the public comments:

There are differing interests in the civil rules, [sic] often divided for rough purposes between plaintiffs and defendants. The committee must work to identify the interests, to appraise them, and ultimately to balance them. Hearing from many different points of view advances this process from well-informed speculation to clear articulation of these interests.<sup>226</sup>

The Committee discussed and approved the Proposed Amendments regarding the reduced initial disclosure imperative, requiring the disclosing party to produce only information it might use to support its claims or defenses.<sup>227</sup> The Committee also considered and approved the exceptions to initial disclosure for “low end” cases under new Pro-

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stay on the ball, claims and defenses.

*Id.* at 125.

222. *See id.* at 150 (providing the testimony of Gregory C. Read, Esq.). Mr. Read spoke as a representative of the DRI and the Northern California Association of Defense Counsel. He is a partner in San Francisco’s Sedgwick, Detert, Moran & Arnold, a defense firm frequently retained by insurers.

223. *See April 1999 Committee Minutes, supra* note 7.

224. *Id.* The comments were also overwhelmingly against the Proposed Amendment narrowing scope. *See infra* text and notes 477-86.

225. *April 1999 Committee Minutes, supra* note 7.

226. *See id.*

227. *See id.* The Committee also dealt with Rule 5(d) regarding filing of discovery materials and amended the rule to prohibit such filing absent court order. *Id.*

posed Rule 26(a)(1)(E).<sup>228</sup> After debate, the Committee also approved Proposed Amended Rule 30(d)(2)'s presumptive deposition time limit of seven hours and broadened the prohibitions on instructions not to answer in depositions.<sup>229</sup>

*D. The Unsuccessful Attempt to Retain "Subject Matter" Scope*

On the subject of scope, the Discovery Subcommittee maintained its support of the narrowing language in the wake of public comment.<sup>230</sup> After presentation of the Subcommittee position, Committee member Professor Thomas Rowe (Duke University) made a motion to "abandon" the scope change and to delete the new language.<sup>231</sup> Although sympathetic to many of the goals animating the proposed change, Rowe argued that the new language was "unclear" and would both "spawn satellite litigation" and "encourage resistance to discovery."<sup>232</sup> In addition, it was submitted that the "central effect of the Rule 26(b)(1) scope change will be "to narrow private enforcement of our regulatory laws."<sup>233</sup> Possible examples were "product [liability] cases, excessive force cases, and employment discrimination cases."<sup>234</sup>

Opponents of the deletion amendment argued in response that plaintiffs could still obtain necessary but not overbroad discovery through the "good cause" provision of the new language via court order. In counter-response, Professor Rowe (or his allies)<sup>235</sup> argued that the Proposed Amendment would shift the burden of bearing transaction costs and make it relatively unlikely that parties could get back to the level of relevant-to-the-subject matter discovery via motion and show-

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228. *See id.*

229. *April 1999 Committee Minutes, supra* note 7. Under the Proposed Amendment, the prohibitions on instructing a witness not to answer will apply to any "person." The current language ("party") was thought insufficiently broad and protective since nonparties may be in attendance at a deposition. *See id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *April 1999 Committee Minutes, supra* note 7. With respect to this argument, reference was made to comments to this effect by Judge Patrick Higginbotham (5th Cir.), a former chair of the Standing Committee, during a panel discussion at the 1997 Boston conference. *See Symposium, Transcript of the "Alumni" Panel on Discovery Reform*, 39 B.C. L. REV. 809, 833-34 (1998) (providing comments of Judge Higginbotham).

234. *April 1999 Committee Minutes, supra* note 7.

235. The Minutes of the Committee Meetings record the making of statements but do not normally attribute particular comments to particular speakers. Although the Minutes make it obvious that certain comments were made by those who wished to abandon the scope amendment and others by its supporters, it is normally not precisely clear who made which comment. Sometimes, but not always, speaker identity is apparent from the context of the statement. For convenience, unless otherwise indicated, I will continue to refer to abandonment arguments as being made by Professor Rowe and comments in favor of narrowing the scope definition as being made by the Committee.

ing of good cause: “[a]bsent a sufficient investment of judicial time, the result will, by default, be no discovery.”<sup>236</sup> The Justice Department, despite some division in its ranks, supported the Rowe motion for this reason.<sup>237</sup>

Committee Member Judge Shira Scheindlin (S.D.N.Y.) spoke in support of the Rowe motion. She emphasized that the empirical data available suggested that the current broad scope of discovery was not viewed as a problem by lawyers,<sup>238</sup> citing the proceedings at the 1997 Boston College conference in particular support of this view.<sup>239</sup> Judge Scheindlin described the Proposed Amendment as “polarizing” and noted that “[t]he 301 written comments break down precisely—defendants champion the scope change, and plaintiffs excoriate it . . . . The professors and most of the neutral bar associations also oppose the proposal.”<sup>240</sup>

Judge Scheindlin was particularly critical of using “good cause” as the standard for determining when the current broad discovery might be available to requesting parties under the Proposed Rule: “The ‘good cause’ requirement will lead to ten or twenty years of satellite litigation while its meaning is worked out; the good cause requirement was abandoned from Rule 34 in 1970, and should not now be resurrected.”<sup>241</sup> Judge Scheindlin also noted similar problems affecting initial disclosure and its potential for only adding another layer of litigation activity.

The Rowe motion was opposed in particular by Committee member

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236. *April 1999 Committee Minutes*, *supra* note 7.

237. *Id.*

238. *Id.* See also *infra* text accompanying notes 253-92 (discussing the FJC and Rand studies).

239. See generally 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) (summarizing FJC Study); James S. Kakalic et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 597, 613 (1998) (summarizing Rand Study). See *April 1999 Committee Minutes*, *supra* note 7 (“[t]hese extensive materials show that there is no real clamor of lawyers for a scope change.”).

240. *April 1999 Committee Minutes*, *supra* note 7. My review of the Public Comments confirms Judge Scheindlin’s summary.

241. *Id.* She continued by supporting Professor Rowe regarding the lack of necessity for the change and expanding on the satellite litigation objection to the Proposed Amendment.

If it be said, as it often is, [by some supporters of the Proposed Amendment] that there is no change in the scope of discovery, why are we doing this? No plaintiff will accept [sic] less than present discovery. They will make good-cause motions in case after case. The proposal will increase cost and delay. In New York a discovery motion costs from \$25,000 to \$50,000. The change, further, will lead to overpleading. Careful plaintiffs will plead as broadly as possible. But the judge cannot know the case as well as the lawyers do; in ruling on good cause, the judge “can only make a stab at it.” “Claim-or-defense” discovery in fact makes a change. It is narrower than subject-matter discovery.

*Id.*

Francis Fox, Esq., who spoke on behalf of the American College of Trial Lawyers, of which he is a member. According to Fox, the College had “studied this proposal intensely” and concluded that the current “subject-matter” scope of discovery was a problem in 10-15% of all federal cases and that a broad standard of discovery needlessly increased litigation costs.<sup>242</sup> Fox also dismissed or minimized fears of satellite litigation or real substantive harm to parties, suggesting that judicial intervention to expand discovery from claim-or-defense to subject-matter would be available when needed.<sup>243</sup>

Judge David Levi (E.D. Cal.),<sup>244</sup> Chair of the Discovery Subcommittee, also spoke in opposition to the Rowe amendment, noting that it was supported by “such neutral bodies as the ABA Litigation Section, the American College of Trial Lawyers, and the Magistrate Judges Association.”<sup>245</sup> Judge Scheindlin later responded by noting that other bar associations “including many that have outstanding reputations for very careful and well-reasoned work,” opposed the Proposed Amendment narrowing discovery scope.<sup>246</sup> Perhaps Judge Levi’s trump card in the discussion about the opinions of interest groups, however, was his noting that the Magistrate Judges Association supported the change to claim-or-defense relevancy. Judge Levi further defended the Proposed Amendment as sufficiently definite, essentially suggesting that economy and justice would be better served by placing the burden of obtaining broad, subject-matter discovery upon the requesting party to obtain judicial support for the full breadth of discovery.

After general discussion in the same vein, the Rowe motion failed by a vote of nine to four.<sup>247</sup> Before the Standing Committee, the Proposed Amendment became the subject of a similar, but less extensive debate and was passed by a ten to two vote.<sup>248</sup>

One of the [Standing Committee] members strongly opposed the proposed amendment to Rule 26(b)(1), calling it—along with the proposed cost-bearing amendment to Rule 26(b)(2)—the most radical change in the civil rules in 60 years. He said that every employment law group and civil rights organization

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242. *Id.*

243. *Id.*

244. See source cited *supra* note 133 for additional information regarding Judge Levi.

245. See *April 1999 Committee Minutes, supra* note 7

246. See *id.* Although Scheindlin suggested it was “impressive” that the ABA Litigation Section and the College of Trial Lawyers supported the Proposed Amendment, there is an implicit undercurrent in her comment suggesting that perhaps these two bodies, despite their prestige, are not entirely neutral as between plaintiffs and defendants. See *infra* Part IV.C-V.B. (discussing politics of the bar).

247. *April 1999 Committee Minutes, supra* note 7.

248. See *Draft Minutes of Meeting, supra* note 203, at 23-24.

was opposed to the change, because it would limit discovery and strongly tilt the playing field against them. Another member, however, responded that he could not think of a single piece of information obtainable under the current rule that would not be discovered under the new rule. Other members added that they supported the amendment because it would cause lawyers to focus their discovery efforts more effectively and require them to be more specific and responsible in what they request.<sup>249</sup>

When the Proposed Amendments were reviewed by the Judicial Conference, a similar debate ensued, with a similar result, but with a much closer thirteen to twelve vote.<sup>250</sup> A related debate over the cost-shifting amendment took place at the April 1999 Advisory Committee Meeting, where a motion to delete the provision failed on an eight to five vote.<sup>251</sup> However, on this issue, the Judicial Conference overruled the Advisory Committee and Standing Committee, rejecting cost-shifting and failing to send it forward in the package of Proposed Rules reported to the Supreme Court.<sup>252</sup>

#### IV. THE UNCONVINCING CASE FOR NARROWING SCOPE

In crafting the Proposed Amendments, the Advisory Committee made self-conscious references to two major examinations of the state of discovery and the impact of the 1993 Amendments (particularly the disclosure provisions). One study was by the Federal Judicial Center (“FJC”).<sup>253</sup> In the FJC Study, a sample of 1,000 cases was drawn, excluding cases thought not likely to have much discovery activity (Social Security appeals, student loan collections, foreclosures, default judgment, and cases terminated within sixty days of filing). Questionnaires were sent to 2000 attorneys in these cases, with 1,178 lawyers responding, a 59% response rate. The FJC Study team thought these respondents’ cases were “representative of the sample as a whole.”<sup>254</sup>

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249. *Id.* at 24.

250. See Confidential Communication, *supra* note 129. The Judicial Conference proceedings are not considered public and no recorded votes or minutes are available to the public.

251. See *April 1999 Committee Minutes*, *supra* note 7.

252. See Confidential Communication, *supra* note 129.

253. See THOMAS E. WILLGING ET AL., FEDERAL JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE (1997). For a summary of pertinent provisions of the study and an update including additional information, see 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) [hereinafter *FJC Study*] (this is not in derogation of the published booklet but out of a belief that the law review article will be more easily accessible for interested readers).

254. Willging et al., *FJC Study*, *supra* note 253, at 528.

The questionnaire itself is reproduced in Appendix B of the book publication of the Study and the other by Rand Corporation.<sup>255</sup> These studies assessed the impact of disclosure and other reforms, primarily through examination of case disposition data and attorney questionnaire responses regarding discovery and disclosure activity.

The FJC and Rand examinations have some divergent data that for the most part appears explained and harmonized.<sup>256</sup> The FJC and Rand studies found somewhat different patterns of expense, depending on whether the court was active in managing discovery and the setting of early and firm trial dates. Garth finds that seemingly different data in the FJC and Rand studies can be reconciled by considering the likely differences in the samples concerning the size, complexity, and stakes of the cases.<sup>257</sup> Generally, these studies—and those that preceded them—reflect substantial consistency in the story of modern discovery. In particular, these examinations of discovery during the 1990s found the following.

1. In many cases, little or no discovery is conducted. In a majority of cases, three hours or fewer were spent on discovery and in a third of the cases studied, there was no discovery at all.<sup>258</sup>

2. In a significant minority of the cases, discovery becomes a significant expense of litigation. In cases that are not resolved rather quickly, approximately a third of the total attorney expenses are devoted to discovery.<sup>259</sup> Where discovery occurs, document production is the most frequent form of discovery, occurring in 84% of the cases. Interrogatories took place in 81% of the cases. Depositions were held

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255. The Rand Study resulted in four publications: JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); JAMES S. KAKALIK ET AL., IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS (1996); JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); and JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996). For a summary of the Rand study team's findings, 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) [hereinafter *Rand Discovery Study*]. The Rand study focused on the 1990 CJRA, but the CJRA assessment was made with an eye to the impact of similar discovery and case management changes contained in the 1993 Civil Rules Amendments. See *id.* at 614-16.

256. See generally Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597 (1998). See also Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785 (1998) (summarizing studies of discovery during past 25 years).

257. Garth, *supra* note 256, at 602-05.

258. See JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA § II(B) (1998); see also Kakalik et al., *Rand Discovery Study*, *supra* note 255, at 642-50, 682.

259. See Kakalik et al., *Rand Discovery Study*, *supra* note 255, at 642-45.

two-thirds of the time. Initial disclosure occurred “only” 58% of the time, with expert disclosure in 29% of the cases. In two-thirds of the cases that had formal discovery, there was also informal exchange of information.<sup>260</sup>

3. As Points 1 and 2 above suggest, for the most part, discovery is working adequately if not well for most federal civil litigation.<sup>261</sup>

The above-summarized findings are consistent with the findings of other empirical examinations of discovery.<sup>262</sup> As the authors of the FJC study note:

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260. See Willging et al., *FJC Study*, *supra* note 253, at 530; Garth, *supra* note 256, at 597, 599-605 (summarizing FJC and Rand findings).

261. See Kakalik et al., *Rand Discovery Study*, *supra* note 255, at 676-84; see also Willging et al., *FJC Study*, *supra* note 253, at 584-94. These findings appear to be embraced by the Rulemakers as well. See Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 523 (1998) (discussing empirical study that shows that “[d]iscovery is now working effectively and efficiently in a majority of the cases”).

262. See McKenna & Wiggins, *supra* note 256, at 785 (summarizing results of discovery studies since 1968). As McKenna and Wiggins note, “[n]ot all observers were equally sanguine about the state of discovery.” *Id.* at 787. In support of the point, they cite Justice Powell’s offhanded comment in *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring); see also John K. Setear, Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982); see also Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CAL. L. REV. 264 (1979).

Setear later elaborated on this point in an article, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 (1986). Although Setear and I would disagree as to the actual extent of discovery abuse, his *Bomb* article suggests that he sees judicial supervision as more important for controlling discovery than Rules changes.

Setear then had no experience. At the time of his anti-discovery inveighing, Justice Powell was far removed from litigation. As a top partner at a large firm, Powell had most likely seen only the proverbial tip of the iceberg of discovery—the cases that result in imbroglios. Judge Renfrew undoubtedly was subject to the same influences. By definition, judges deal with discovery problems rather than the situations where discovery works smoothly. Consequently, it is most likely true that the perception of discovery as a problem was “based on potentially unrepresentative experiences coalesced in a widely shared belief that discovery abuse was a pervasive and serious phenomenon.” See McKenna & Wiggins, *supra* note 256, at 787, citing Mullenix, *Pervasive Myth*, *supra* note 52, at 1393. As an aside, Judge Renfrew is a most interesting polestar if one chooses to use him as the yardstick for measuring the existence of discovery abuse. In the recent tobacco mega-litigation brought by state Attorneys General against cigarette makers for reimbursement of tobacco-related Medicaid expenditures, the case was settled and the question of plaintiff counsel fees was arbitrated by a three-member panel. In a two to one decision, the panel awarded plaintiffs’ counsel \$8.2 billion in fees. Judge Renfrew dissented vigorously, a stance that may, depending on one’s view, enhance his status as a keen observer of litigation excess or further mark him as an unrepresentative curmudgeon. See Daniel Wise, *State’s Work in Tobacco Suit Is Rewarded*, N.Y.L.J., Mar. 12, 1999, at 3; Robert A. Levy, *Spoils of the Tobacco Shakedown: Contingent Fee Contracts Between State and Private Attorneys Should be Illegal*, TEXAS LAW., Feb. 15, 1999, at 23. My own view is somewhat in the middle. The states’ lawyers in the tobacco litigation are receiving an awful lot of money; probably too much. But these lawyers took substantial economic and professional risks fronting the expense of this massive litigation when states refused. These lawyers also achieved dramatically successful results for their clients and society.

Empirical research about discovery in civil litigation has yielded results that differ from the conventional wisdom, which claims that discovery is abusive, time-consuming, unproductive, and too costly. In contrast to this picture of discovery, empirical research over the last three decades has shown consistently that voluminous discovery tends to be related to case characteristics such as complexity and case type, that the typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation, and that discovery generally—but with notable exceptions—yields information that aids in the just disposition of cases.<sup>263</sup>

In a very small minority of cases, discovery battles become pitched and substantial expense results, often a majority of the total disputing costs, but this was comparatively rare, somewhere between 5-15% of the cases, depending upon how one counts. Discovery expenses were on average hardly exorbitant. The median total attorney-related cost of litigation in the FJC sample was \$13,000 per client.<sup>264</sup> Median discovery costs were only 3% of these amounts, although in five percent of the cases, attorneys characterized discovery expense as one-third of the total.<sup>265</sup> The attorneys responding to the FJC sample tended to characterize discovery expense as appropriate, although there were significant subsets who characterized discovery cost as too high (15% of the sample) or too low (20% of the sample).<sup>266</sup>

4. However, in cases with pronounced discovery, lawyers do seem to find it burdensome.<sup>267</sup> The strongest predictor of discovery activity and expense was the “monetary stakes in the case.”<sup>268</sup> Predictably perhaps, higher stakes were positively correlated with longer time to disposition.<sup>269</sup> Adding fuel to the debate about lawyer billing methods, the FJC Study found that cases had longer deposition times where attorneys billed by the hour.<sup>270</sup> “Plaintiffs’ lawyers seemed most concerned with the length, number and cost of depositions, and defendants’ lawyers seemed most concerned by the number of documents

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263. See Willging et al., *FJC Study*, *supra* note 253, at 527.

264. *Id.* at 531.

265. *Id.*

266. *Id.*

267. Probably with good reason. Although the median per client expenditures were \$13,000 per case, in a small subset of the most expensive cases (the 95th percentile), per client costs were \$170,000. Thus, when ordinary litigation morphs into intensive, more discovery-laden litigation, the bill appears to increase quite dramatically. *Id.* at 548.

268. Willging et al., *FJC Study*, *supra* note 253, at 532.

269. *Id.* at 554-56.

270. *Id.* at 533.



required in document production and the cost of selecting and producing them.”<sup>271</sup> And, although there was hardly evidence of a discovery meltdown, 48% of the attorneys in the FJC Study reported one or more discovery problems.<sup>272</sup> Nearly as many of the respondents “reported unnecessary discovery expenses due to discovery problems.”<sup>273</sup>

5. Attorneys dislike extensive local variation and like uniformity of rules.<sup>274</sup> This was perhaps the clearest finding in the FJC and Rand Studies. For example, in the FJC Study, 60% of the responding attorneys identified nonuniformity as a serious or moderate problem.<sup>275</sup> When given a list of thirteen proposed reforms for reducing litigation costs, a uniform initial disclosure rule was the second most popular option, endorsed by 44% of the responding attorneys.<sup>276</sup> This should hardly be surprising in light of the many criticisms made of the 1993 Amendments and the 1990 CJRA. on just these grounds.<sup>277</sup> To a large extent, these critics would be justified in telling the Rulemakers “we told you so.” The Rulemakers have essentially conceded this point in the Proposed Amendments, which eliminate the local district “opt out” provision of Rule 26(a).

6. Attorneys affirmatively like judicial involvement in resolving discovery disputes and believe that judicial intervention generally lowers costs and produces fair results. Among the thirteen possible changes in discovery evaluated by the responding attorneys, this was overwhelmingly the most popular, endorsed by 54% of the respondents.<sup>278</sup> In particular, attorneys responding to the FJC questionnaire wanted sanctions imposed “more frequently and severely” (42% of

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271. Niemeyer, *supra* note 261, at 523. See also Kakalik et al., *Rand Discovery Study*, *supra* note 255, at 637-40; Willging et al., *FJC Study*, *supra* note 253, at 534-93.

272. Willging et al., *FJC Study*, *supra* note 253, at 532 (“Of those who reported problems, 44% said problems occurred in document production, 37% said they occurred in initial disclosure, 27% said they occurred in expert disclosure, and 26% said they occurred in depositions.”) As might be expected, if a responding attorney reported problems of one type regarding discovery, there were usually other types of discovery problems in the case.

273. *Id.*

274. *Id.* at 541-42.

275. *Id.* at 542.

276. *Id.* at 542.

277. See Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994); Carl Tobias, *Civil Justice Reform and the Balkanization of Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992); Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115 (1991); Bell et al., *supra* note 105, at 1 (criticizing disclosure concept as well as potential for inconsistency); Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is it Again Time for Reform?*, 138 F.R.D. 155 (1991) (same); Mullenix, *supra* note 81, at 375; Mullenix, *Hope Over Experience*, *supra* note 52.

278. Willging et al., *FJC Study*, *supra* note 253, at 542.

respondents) and a civility code for counsel (42% of respondents).<sup>279</sup> For example, a state bar association or other regulators may have a good deal of impact on attorney civility if an attorney is disciplined for uncivil behavior even if not sanctioned in connection with the particular case in which uncivil behavior occurred.<sup>280</sup> Rules and norms alone, even if clear, direct, and widely shared, will not fully accomplish their purpose unless backed sufficiently by adequate coercive power. In other words, all of these things thought to hold additional potential for improving civil litigation need more aggressive and consistent judicial involvement.

7. Attorneys continue to prefer firm trial dates as the ultimate settlement promotion. A relatively short and fixed discovery cutoff date is also popular with counsel, but it is less clear whether the discovery cutoff has any effect on either the speed of case disposition or the amount of resources devoted to discovery. The FJC Study team was “unable to detect any relationship between the time permitted for discovery (‘discovery cutoff’) and the duration of a case. This finding, which differs from RAND’s finding on the same point, suggests that altering discovery cutoffs may not reduce litigation disposition time.”<sup>281</sup>

A fair reading of the FJC and Rand studies does not suggest that the current “subject matter” scope of discovery is a particular problem. In ranking priorities of possible discovery reforms, the respondents to the FJC survey made scope the fifth out of six possible priorities.<sup>282</sup> Proponents of narrowing can point out, however, that one-third of the respondent attorneys agreed with the statement that “[n]arrowing the definition of what is discoverable” would “[d]ecrease expenses generally” without leading to unfair substantive results.<sup>283</sup> However, as Advisory Committee member Professor Rowe pointed out in arguing for deletion of the Proposed Amendment, this datum “leaves out the two-thirds who did not express this view.”<sup>284</sup> In short, there was not

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279. *Id.*

Although the FJC Study team treats these as two separate categories—(1) judicial management and (2) “changing attorney behavior through sanctions or civility codes,” *see id.* at 542,—I regard this as a misclassification, a point elaborated on elsewhere. *See* Stempel, *Ulysses*, *supra* note 10. Attorney sanctions and attorney civility are not self-executing: they stem from judges and other authorities enforcing rules and norms.

280. *See* STEPHEN GILLERS, *REGULATION OF LAWYERS* 775 (5th ed. 1998) (reprimanding attorney for sexist epithets and unwarranted, uncivil behavior disruptive of deposition).

281. *See* Willging et al., *FJC Study*, *supra* note 253, at 533. *See also* Kakalik et al., *Rand Discovery Study*, *supra* note 255, at 680-81.

282. *See* Willging et al., *FJC Study*, *supra* note 253, at 542-43, 585.

283. *Id.* at 585.

284. *See* Memorandum from Thomas D. Rowe, Jr. to Advisory Committee on Civil Rules 3 (Apr. 14, 1999) (on file with author) (supporting abandonment of Proposed Amendment narrow-

much of an empirical case for change favoring the narrowing of discovery scope.

### A. *The 1998 Litigation Section Study*

In addition to the FJC and Rand studies, there is another relatively recent study of discovery conducted under the auspices of the ABA Section on Litigation.<sup>285</sup> The Litigation Section team surveyed reported cases in federal trial and appellate courts for the 1980-1997 time period.<sup>286</sup> It is both an illuminating and frustrating study. On one hand, it involves the sort of systematic reading and analysis of cases that should be part of the “empirical research” that attends procedural reform. Although the current Rulemakers deserve credit for bringing empirical research to bear far more than did many of their predecessors.<sup>287</sup> The

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ing discovery scope).

285. See SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, *THE SCOPE OF DISCOVERY IN THE FEDERAL COURTS* (1998) [hereinafter *LITIGATION SECTION STUDY*]. The Study was conducted by a team of lawyers working in coordination with the Federal Rules Revision Subcommittee (Kathleen L. Blaner & Lance A. Harke, co-chairs) and the Pretrial Practice and Discovery Committee (Sheldon M. Finkelstein & Paul Kalish, co-chairs). The Study and its conclusions have not been endorsed as official ABA policy, and thus some care is required in assessing and describing its content.

286. See *LITIGATION SECTION STUDY*, *supra* note 285, at 2 (focusing on published cases from 1980 to the present). The Study indicates a publication date of “Winter 1998.”

287. Prior to the 1980s, procedural reform was undertaken based on what might be termed the “squeaky wheel” theory. Which lawyers (including judges) or interest groups could draw the most attention to a matter determined the agenda of the Rulemakers and the likely areas of Rule modification. When changes were made in the Rules, this often appeared to have little basis in factual analysis. For example, the 1983 Amendments produced the now-infamous pumped-up version of Rule 11 that proved so problematic that it was substantially modified and defanged in the 1993 Amendments, in part as a result of empirical data about the Rules operation. See generally GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* ch. 1 (2d ed. 1992) (describing history of Rule 11). Although the Rulemakers did not amend Rule 11 in a vacuum, they were heavily influenced by scholarly commentators attacking the infrequency of Rule 11’s use and acted in response to these critiques without systematic study of the perceived problem of unpunished “frivolous litigation.” See, e.g., D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some “Striking” Problems With Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976); *Nemeroff v. Abelson*, 704 F.2d 652 (2d Cir. 1983) (finding under pre-1983 Rule 11, sanctions imposed against plaintiff and law firm based on court’s finding of constructive bad faith in pursuing suit with clearly insufficient factual basis; the case is a relative rarity under the pre-1983 Rule and notwithstanding its imposition of sanctions was cited by many as an example of the need for a stronger Rule 11).

To be fair, one cannot lay the Rule 11 tragicomedy solely at the feet of the Rulemakers. Much of the difficulty with Rule 11 was excessive infatuation with the Rule by federal judges, who unwisely seized on it as a tool for case management and applied it in a wooden manner to disfavored cases, claims, or counsel. See VAIRO, *supra*, § 3.01; Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988-1989); Eric Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990).

After what many regard as a horrendous first few years of Rule 11, Rule 11 jurisprudence was regarded by many as improving even in the absence of the 1993 Amendments. See, e.g., Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105 (1991).

But Rule 11 horror stories continued, and can continue even under the 1993 Amendment. See,

empirical studies on which the Rulemakers rely are not necessarily definitive. The FJC Study, for example, is primarily a survey of attorney attitudes about discovery, disclosure, and the 1993 Amendments. The Rand Study also relies heavily on attorney questionnaires and focuses on the length of time for case disposition in light of certain traits of the cases. The Litigation Section's 1998 Study as discussed further below, initially seemed promising in its focus on actual cases.

To be sure, time to disposition and attorney opinion are important factors useful in assessing the efficacy of a procedural system. However, these methods are so "objective" as to be bloodless. They make no substantive evaluation of the discovery situation. If, for example, 33% percent of attorneys surveyed think that *X* is a problem, by definition *X* becomes a problem de jure that must be addressed by the Rulemakers. Similarly, if cases that include *X* are resolved faster on average than those that do not, then the inevitable conclusion seems to be that *X* speeds litigation along and is therefore efficient. Neither conclusion is logically compelled. Although such assessments may provide correct analysis, they seem at least as likely to affirmatively mislead and to elevate the pet peeves of some lawyers into "important problems" when it might have been better to do nothing.

Although the FJC and Rand Studies are noteworthy for better-than-normal attempts to control for the type and complexity of the cases in the sample, neither makes any real effort to evaluate the correctness of case outcomes or the validity of counsel's views. Put bluntly, these studies never really take on the question of whether the 33% of responding attorneys perceiving *X* as a problem are correct in their assessment. This third of attorneys could be self-serving, mistaken, overly emotional about bad case outcomes, or simply responding strategically in hope of influencing future rulemaking. Neither FJC and Rand studies nor most any other study of discovery and civil litigation make a serious attempt to assess the quality of respondent data.

Despite some arguable shortcomings of the FJC and Rand studies, one thing is clear: neither study suggests that there is any need to narrow the scope of discovery in federal court. In other words, the empirical data available to the Rulemakers neither suggests nor supports Proposed Amended Rule 26(b)(1). The Advisory Committee appears to have determined to fight an unnecessary battle largely because of the political preferences of the leadership of the American College of Trial

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*e.g.*, Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplications of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 *FORDHAM L. REV.* 257 (1991) (noting decisions imposing Rule 11 sanctions on claims that have survived multiple motions for summary judgment or judgment as a matter of law, which should instead constitute essentially ironclad proof that the claim was not legally or factually frivolous).

Lawyers and the ABA Litigation Section.

Which brings us to the most recent Litigation Section Study of discovery scope. Unlike the FJC and Rand studies, which are largely straight and factual recitations of survey responses, the Litigation Section at first blush appears to be taking a more substantively evaluative role. Lawyers, after all, are reading real judicial decisions and summarizing them. The prospect of some evaluative component specifically directed to the scope debate at first raised my expectation. Alas, my raised expectations in beginning to read the Litigation Section Study were dashed as I read further into the Study.

The Study provides a short, head-note like “blurb” about virtually every reported discovery case rendered during the 1980-1997 period, and some summary data is provided about reversal rates and similar figures. But in the main, there is neither comprehensive statistical analysis of the cases nor reasoned editorial analysis of the cases. It is, for example, merely reported in largely deadpan prose that in Case *A*, the Title VII plaintiff was awarded requested discovery while in Case *B* she was not. No effort is made to discern whether the cases were in fact distinguishable or irreconcilably inconsistent. No effort is made to determine whether the discovering party or the producing party received a fair deal or a raw deal. In short, no effort is made to decide whether discovery worked well or poorly in terms of the resulting decision. Beyond this, of course, no effort was made to determine whether the discovery decision, whether fair or unfair, was worth the resources expended.

The Litigation Section Study has an almost monotonous *A.L.R.* quality to its droning on about the cases. With the exception of one or two chapters that provide more analysis, the cases are summarized seriatim, with essentially no assessment of whether the case is rightly decided or whether it is significant. Reading the Litigation Section Study, one is reminded of Judge Posner’s description of Willard Hurst’s tome on the lumbering history in Wisconsin. The work is encyclopedic and factually accurate but impossible to read because it lacks a thesis to organize the reader’s thoughts.<sup>288</sup>

Notwithstanding this same problem, the Litigation Section Study does have a few opinionated moments. For example, the Study concluded that “[t]here has been little meaningful judicial refinement of the scope of discovery in Rule 26(b) since adoption of the current formulation in 1970. It has remained an ambiguous and indeterminate standard, whose application results in discovery decisions that are

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288. See RICHARD A. POSNER, *OVERCOMING LAW* 431 (1995) (commenting on JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915* (1964)).

highly fact-based and subjective.”<sup>289</sup> The Litigation Section Study decried this indeterminacy and recommended

more objective, predictable boundaries for the scope of discovery—a bright line rule or bright line perimeter. For example, discovery could be limited to cover no more than a fixed number of years prior to the act that is the subject of the litigation. Such limits are analogous to statutes of limitations, and would serve similar policy objectives.<sup>290</sup>

Although the Litigation Section may be on to something and the position favoring more specificity has support in other quarters, nothing in the underlying report really establishes the summary’s case for bright lines and curtailed discovery. Consistent with the litigation policy Zeitgeist of the late Twentieth Century, an at times annoyingly noncommittal report nonetheless finds itself advocating reduced discovery rather than increased discovery. Once again, the myth of discovery abuse, or at least discovery problem, overshadows the actual facts of the situation (in the form of case holdings, counsel opinion, and case disposition statistics).

Despite the fact that the Litigation Section Study emanates from an outwardly neutral source (the ABA Litigation Section), the Study adopts a group of recommendations that essentially urges at least a little less discovery and is thus at least mildly pro-defendant. The sociological factors affecting the Study are not surprising when one considers the overwhelming presence of defense firm lawyers in the formulation of the Study. Several of the chapters are written by attorneys for Steele, Hector & Davis, the Miami-based firm, and the prominent Philadelphia-based national firm Pepper, Hamilton & Scheetz. These two firms appear to have provided financial backing to the study as well. Both Steele, Hector and Pepper, Hamilton are large defense-oriented firms. Both are particularly well-regarded as firms that defend employers when sued by employees, a type of case identified in the study as particularly fraught with discovery problems and inconsistent district court determinations. Furthermore, the bulk of the contributing authors and those examining the sample of cases appear to be lawyers in firms that primarily represent defendants. Thus, it is perhaps not surprising that to the extent the Litigation Section Study takes positions, they are pro-defendant positions that urge some greater formalist employed to constrict discovery.

As Bryant Garth has observed:

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289. See LITIGATION SECTION STUDY, *supra* note 285, at 4.

290. *Id.* at 4-5.

One of the challenges for researchers is to get beyond the information that tends to be produced by the elite lawyers themselves or by lawyers and journalists parroting those lawyers. The available information, unfortunately, typically lines up according to professional and client interests. Each side provides an almost stylized account of the world of big litigation—alleged “strike suits” and settlements induced by the “blackmail” of discovery expense on one side, alleged “stonewalling,” hiding documents and harassing the plaintiffs on the other . . . . [A] consequence [of this effect] is that the reform agenda may be distorted by the domination of the paradigm promoted collectively by the contending elites.<sup>291</sup>

### *B. Reassessing the Case for Narrowing Scope*

The more academic research data before the Advisory Committee during 1997-98 was thus inconclusive or suggested no great problems with the scope of discovery. Nonetheless, the Committee forged ahead with the proposed narrowing of scope, including it in its package of possible Proposed Amendments issued for public comment in August 1998. A period of public comment ensued, closing on February 1, 1999. Hearings were held in December 1998 (Baltimore) and January 1999 (San Francisco and Chicago). Against this backdrop, the Committee met in April 1999, rejected the motion to abandon the scope-narrowing amendment, and sent Proposed Amended Rule 26(b)(1) forward to the Judicial Conference and ultimately the Supreme Court. In April 2000, the Supreme Court promulgated the proposed narrowing of discovery scope in its Proposed Amendments.

More than 300 comments were received by the Advisory Committee during the comment period. A substantial number did not speak directly to the issue of Proposed Rule 26(b)(1). Of those that did, commentary was fairly evenly divided. Opposition to the narrowed scope outnumbered support for the Amendment, however. To a large degree, sentiment was roughly divided according to the client interests of the attorney or group making comments. For example, most plaintiffs' attorneys and civil rights groups opposed the Amendment while most defense counsel and industry entities supported the narrowing of scope. Bar associations and related groups were divided. The ABA Litigation Section and the College of Trial Lawyers, of course, maintained their support for narrowed scope. The Justice Department, the

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291. See Garth, *supra* note 256, at 597-98.

Association of the Bar of the City of New York, the Eastern District of New York Committee on Federal Litigation, the Chicago Council of Lawyers Federal Courts Committee, the Chicago Chapter of the Federal Bar Association, the Connecticut Bar Association Federal Practice Section, the Federal Bar Council Committee on Second Circuit Courts, the Philadelphia Bar Association Federal Courts Committee, the Ohio State Bar Association, the District of Columbia Bar Section on Courts, Lawyers and the Administration of Justice all opposed the new Amendment to narrow scope.<sup>292</sup> Judges also divided on the issue, but the pro-Amendment forces received a major shot in the arm when the Magistrate Judges Association endorsed narrow disclosure.

Notwithstanding that the Proposed Amendment enjoyed substantial support from prestigious bar associations as well as the support of the Committee, the arguments in favor of narrowed disclosure are far less convincing than the arguments for maintaining the status quo. The restriction in the scope of discovery is misguided for a number of reasons.

1. As noted above, there is no clamoring for the reduction in scope due to perceived problems in the field. A significant subset of influential lawyers wants the change but surveys suggest the profession as a whole (and the bench) are comfortable with the status quo of “relevant to the subject matter.”<sup>293</sup>

2. As also noted above, studies by Rand and FJC in fact suggest the best thing to do would be to leave the scope of discovery alone. Proponents of the change to narrower discovery have not made much of an anecdotal case for change nor any sort of empirical/statistical case for change.<sup>294</sup>

3. Although the change in language from “subject matter” to “claim-or-defense” suggests narrowing, no one is really sure what difference there may be between the two verbal formulations. At this

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292. See Memorandum from Professor Tom Rowe to Advisory Committee on Civil Rules 4 (Apr. 14, 1999) (on file with author) (listing bar associations opposed to narrowing scope of discovery) [hereinafter Rowe Memorandum]. The respective citations to the Public Comment Record for the bar organizations listed in text are Dkt. Nos. 98-CV-039 at 7-9; 98-CV-077 at 8-10; 98-CV-152 at 2; 98-CV156 at 3-4; 98-CV-157 at 3-4; 98-CV-193 at 9-10; 98-CV-213 at 3-4; 98-CV-267 at 8. The Justice Department Comments are listed at Dkt. No. 98-CV-266 at 4-9 [hereinafter Justice Department Comments]. All documents listed hereinafter as docket numbers are on file with the author.

293. See *supra* text accompanying notes 253-84. See also Rowe Memorandum, *supra* note 292, at 2-3.

294. See *supra* text accompanying notes 242-46; Rowe Memorandum, *supra* note 292, at 3 (referring to “[l]imited support” for proposal and “thin” arguments by proponents of change).



junction, it is impossible to tell whether the Proposed Amendment will bring virtually no change, some change, significant change, or substantial change.<sup>295</sup>

4. Whatever the true “meaning” of the new verbal standard, there will be substantial costs in litigating it for years to come in order to develop a common law dividing line between what is relevant to claims and defenses and what is merely relevant to the subject matter.<sup>296</sup>

5. In particular, there is substantial uncertainty as to what the “good cause” escape hatch of the new, narrower scope of discovery means and what will constitute good cause sufficient to enable a party to enjoy the previous status quo of subject-matter discovery.<sup>297</sup> As one Advisory Committee member aptly concluded, the Proposed Amendment “amounts to an invitation to those who can afford the costs of resisting discovery to resist on multiple fronts—without even guaranteeing much reduction in costs to those resisting, who most likely incur a large fraction of their discovery costs from reviewing requested materials rather than from their production.”<sup>298</sup>

6. If overbreadth of the “relevant to the subject matter” standard is a problem, current rules provide ample authority for courts to limit discovery. Rule 26(g), a Rule 11 of sorts for discovery requests, makes a lawyer subject to sanctions for making frivolous discovery requests. Rule 26(b)(2) provides that a judge may limit the availability of even relevant discovery if the discovery sought is disproportionate to any likely benefits from the information. Rule 26(c), of course, permits courts to impose a wide array of tailored protective orders.<sup>299</sup>

7. The Proposed Amendment shifts the burden of uncertainty in favor of those opposing release of information and places it upon those who seek information, reversing more than a half-century of federal litigation policy. This will have adverse substantive effects on American public policy, particularly the enforcement of citizen rights in mat-

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295. See *supra* text accompanying notes 230-32; Rowe Memorandum, *supra* note 292, at 1-2.

296. See Rowe Memorandum, *supra* note 292, at 1-2.

297. *Id.* at 2-4. Prior to the 1970 Amendment to Rule 34 eliminating the “good cause” requirement, courts took a variety of approaches to determining what constituted good cause. Some courts required only a showing of relevance. Others required a showing of materiality. Some required a showing of particularized need or lack of alternative sources of the information. In short, the old Rule 34 good cause standard gave no more consistency and predictability than the Rule 26 “subject matter” standard of discovery relevancy.

298. *Id.* at 2.

299. See *supra* text accompanying notes 242-46; Rowe Memorandum, *supra* note 292, at 4.

ters of discrimination, pollution, and product safety.<sup>300</sup>

8. In order to maximize the possibility of obtaining discovery under a claim-or-defense standard, litigants will be tempted, perhaps compelled, to file more expansive “shotgun” pleadings on the theory that expanding the number and reach of claims and defenses will probably expand the discovery available to the pleader.<sup>301</sup> Although the discussion at the Advisory Committee and hearings focused more on the plaintiff’s tendency to plead more claims, defendants will have an equally great incentive to “overplead” defenses, affirmative defenses, counterclaims, and cross-claims.<sup>302</sup>

9. The Proposed Amendment may encourage forum-shopping based on the scope of discovery by creating differences between either state and federal courts or between the federal courts themselves.<sup>303</sup>

A closer examination of the arguments employed by those favoring narrowed scope of discovery underscores the lack of wisdom in the amendment. First, concerns about fishing expeditions should be dispelled. As noted above, hearing testimony by plaintiffs’ counsel, particularly Allen Black, Esq., was to the effect that lawyers under the current regime often conduct broad discovery in order to see whether there may be other valid claims against an opponent.<sup>304</sup> Some discussion before the Advisory Committee seemed to suggest that there is something “wrong” with this approach. On the contrary, this state of affairs is a ringing endorsement of the wisdom of American civil litigation. A party wronged by another (or perceiving it was wronged) may bring a claim so long as it has a reasonable basis for thinking it is entitled to legal relief. The complaint need not be highly detailed to enable the aggrieved party (or party that thinks it is aggrieved) to be heard. If

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300. See *infra* text accompanying notes 359-85; Memorandum from Raymond C. Fisher to Peter G. McCabe regarding Comments on Proposed Amendments to the Federal Rules of Civil Procedure, Public Comment Dkt. No. 98-CV-266, 5-10 (Mar. 3, 1999) (on file with author) [hereinafter Justice Department Memorandum]. This Memorandum, which presents the U.S. Justice Department’s opposition to the narrowing of the scope of discovery, outlines the types of cases the Department regards as being adversely affected by the change.

301. See Rowe Memorandum, *supra* note 292, at 2-3.

302. This emphasis on plaintiff pleading probably resulted from the reference in the Rowe Memorandum, which was the springboard for the Advisory Committee’s discussion of the scope change, to hearing testimony by plaintiff attorney Allen Black, who stated that he may plead a breach of contract claim but utilize broad discovery to ascertain whether his client was also defrauded in the breach. See *id.*, at 2 (referring to Black Statement in Transcript of Proceedings, *supra* note 199, at 7 (Dkt. No. 98-CV-015)). Black’s strategy seems perfectly acceptable to me, but there appeared to be a reaction deeming this an example of the defects inherent in the “subject matter” definition of discovery.

303. See *infra* Part IV.F.

304. See Rowe Memorandum, *supra* note 292, at 2 (describing Black testimony).

the complaint passes muster under Rules 11 and 12, the claimant may utilize discovery to determine exactly what happened and the merits of its claim. The claimant may drop the case or settle cheaply—or may find out that what prompted the suit is only the tip of the iceberg. Perhaps the defendant has defrauded the plaintiff or knowingly marketed a deadly product. If the claimant unearths this during discovery, the claimant may amend its pleadings to allege fraud or seek punitive damages.

To me, this is a wonderful state of affairs: injured persons have redress and opportunity to assert additional rights if the facts merit their assertion. Why would right-thinking Rulemakers frown on this situation or wish to change it? If, in fact, fraud has been perpetrated, why should the judicial system condemn the breadth of the subject-matter scope of discovery that allowed the claimant to unearth the fraud when prosecuting breach of contract? As Professor Rowe observed when discussing the Black testimony in his Memorandum opposing Amended 26(b):

It seems doubtful that defendants would be better off with more charges lodged against them in the early stages of litigation, as seems likely to happen. This difficulty raises questions whether developing “new claims or defenses that are not already identified in the pleadings” via subject-matter discovery should really be frowned upon, as the draft Committee Note suggests. (Preliminary Draft, at 56.) Better, it seems, to have such claims or defenses added (or not added) upon an informed basis after subject-matter discovery than to have them loaded into initial pleadings for procedural reasons when parties have not had enough of a chance to see if they are well grounded. We should remember that Rule 11, as revised in 1993, permits allegations that “if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” There is, then, little inhibition to the tactic of including as-yet-unsupported allegations if the discovery rules push parties toward asserting them to avoid the limits imposed by the proposed scope amendment.<sup>305</sup>

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305. See Rowe Memorandum, *supra* note 292, at 2-3. The Committee note was subsequently revised and no longer expressly frowns on using contract discovery to uncover fraud. This episode provides another illustration of the often contradictory postures of the Rulemakers in addressing litigation reform. On the one hand, shotgun pleading is frowned upon. On the other hand, there is an effort to limit discovery, which will in turn encourage shotgun pleading, or at least make targeted pleading more difficult. We have liberal ground rules for amendment under FED. R. CIV. P. 15; but in narrowing discovery also are making it less likely that litigants will find out something more in discovery that will prompt them to amend the pleadings to add anything. See generally Stempel, *Ulysses*, *supra* note 10 (noting longstanding contradiction in Rule-maker attitudes, particularly tension between imposing fixed rules and according courts substantial decisionmaking discretion).

C. *The Weakness of the College of Trial Lawyers Case for Changes*

The weakness of the Proposed Amendment narrowing the scope of discovery becomes even more apparent when one looks at the key materials used by the Rulemakers to support the change. Professor Rowe's memorandum referring to support for the change as "thin" was charitable—the arguments made in support of the change were not merely weak but in many ways make a brief in favor of the wisdom of a subject matter standard of discovery relevance.

As noted, the American College of Trial Lawyers was the driving force for the Amendment. It revived the 1977 ABA Litigation Section proposal, testified before the Advisory Committee, and submitted a Report in favor of the change that was endorsed by the College's "Board of Regents," an unusual showing of organization support that the College trumpeted to the Committee as evidence of its seriousness.<sup>306</sup> The College's focus on the rarity of the Regents' endorsement, like much of the College argument for change, has a certain "it's important because we're important" quality that I find annoying. As discussed below,<sup>307</sup> the College's actual work product in favor of the change is unimpressive, and is far below the caliber one would expect from a good attorney. Yet, because the College has successfully defined itself as a group of elite attorneys, its views received substantial deference before the Advisory Committee (undue deference in my view). The Report<sup>308</sup> begins by reminding the reader of the College and its self-ascribed prestige and further seeking to enhance the credibility of its suggestions by describing the Committee that produced the Report as "29 trial lawyers from virtually all parts of the United States who have significant experience in federal civil litigation and specialized knowledge in procedural rules at the trial court level. The Committee includes those whose practices are typically the representation of plaintiffs as well as those who typically represent defendants."<sup>309</sup> The College further asserts that its proposal "is not tilted or designed to benefit any type of case or to serve plaintiff-oriented or defense-

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306. See Testimony of Robert Campbell, Esq., in Transcript of Proceedings, *supra* note 199, at 40-60.

307. See *infra* text accompanying notes 312-21.

308. See *Report On the Deletion of the "Subject Matter" Phrase From Federal Rule of Civil Procedure 26(b)(1)—An Amendment Whose Time Has Come* (Jan. 1998), submitted to the Advisory Committee as Dkt No. 98-CV-122 (containing Letter from E. Osborne Ayscue, Jr. and Robert S. Campbell, Jr. to the Advisory Committee (Nov. 30, 1998)) [hereinafter *College Report*].

309. See *College Report*, *supra* note 308, at 1 n.1.

oriented parties or the trial Bar,”<sup>310</sup> an assertion belied by a considered analysis of the proposal.<sup>311</sup>

The College Report then gives a short history of subject-matter scope and notes the wide breadth of the standard. The College, citing a New York State Bar Report,<sup>312</sup> decries the situation, contending that

[s]weeping and abusive discovery is encouraged by permitting discovery confined only by the “subject matter” of a case rather than limiting it to the issues presented. For example, the present Rule may allow inquiry into the practices of an entire business or industry upon the ground that the business or industry is the “subject matter” of an action.<sup>313</sup>

The reader of the College Report, of course, is supposed to immediately jump to the conclusion that the situation described above is “bad.” It is a leap I am unwilling to make, at least without some “evidence” stronger than the fact that lawyers who represent businesses wish that discovery were not so broad. Consider the College/New York State Bar “horrible hypothetical.”<sup>314</sup> Outside the classroom and its Rube Goldberg hypotheticals, these forms of argument usually take the following form: “Your Honor, if we have to give up this document, there is no logical stopping point and everything is fair game.” While the argument may be valid in many cases, it is just as often overdone. For most any principle there are always logical stopping

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310. *Id.* at 2.

311. *See infra* Part IV.G. (assessing the Proposed Amendment and finding it to have a distinct bias favoring defendants in particular classes of cases). This assessment is shared by a number of other observers. *See, e.g.*, Justice Department Comments, *supra* note 292, at 8-15; Beckerman, *supra* note 12, at 541 n.148 (“The proposal favors defendants for at least two reasons. First, plaintiffs typically need more discovery than do defendants, and the restricted scope of ‘attorney-managed’ discovery will facilitate narrowing and resisting discovery by defendants. Second, the proposal’s indirect effects on pleadings, namely that it will require plaintiffs’ lawyers to aver the circumstances giving rise to claims in greater detail if discovery is to be available, will give additional particularized notice to defendants.”); Thornburg, *supra* note 12, at 240-59.

312. The New York State Bar Association (which advocated narrowing scope) is a different organization than the Association of the Bar of the City of New York, which opposed the scope reduction. I am a nonresident member of the latter organization.

313. *See College Report, supra* note 308, at 4 (quoting Report of the New York State Bar Association, 127 F.R.D. 625, 632 (1990)).

314. Even though I find the in terrarium effect of this hypothetical unconvincing, I pause to note the rhetorical tactics of the College. The illustration offers the familiar “parade of horrors” one finds in law school class discussion. The professor serves up a proposition to the class and then argues that from the proposition (e.g., strict liability, broad discovery) flow a number of initially unforeseen consequences suggesting that the effect of the proposition may be quite negative for society. It is a cousin of the “slippery slope” argument in which an advocate contends that if the court permits the thing now resisted (e.g., production of certain information) the court is bound to permit unlimited expansion of similar things that will lead to chaos or absurdity (e.g., production of all information ad nauseum).

points depending on the facts of the case. The Federal Rules already delineate “stopping-point” factors in Rule 26(b)(2), which authorizes limits on otherwise relevant discovery and embraces their judicial application in Rule 26(b)(2) and in Rule 26(c), which authorizes protective orders. A plaintiff argues that she has been injured by a product (e.g., asbestos insulation; PCBs; intrauterine devices; silicon breast implants; an all-terrain vehicle; the Ford Pinto with the exploding gas tank; vanishing premium life insurance; a stock offering; and so on). Defendants in these cases are not very excited about providing any information to the claimant. They are unlikely to be any happier if they know that information about other manufacturers is not part of the pre-trial litigation. More important, one can readily see good reasons in these cases for permitting the claimant to find out about the “entire business or industry” that produced the offending product. Unless one defines the “entire business” to mean any operation of the defendant, no matter how unrelated to the allegedly injurious item, the scope of this discovery is not unreasonable (as suggested by the College) but is eminently fair, reasonable, and perhaps even necessary for product liability and other plaintiffs who seek compensation and provide enforcement of society’s health and safety norms.

Consider asbestos. I might be suing Johns-Manville,<sup>315</sup> but is it not relevant what Celotex, AC&S, Forty-Eight Insulations and other manufacturers knew about the product or did with the product—especially if it helps to establish constructive knowledge of the dangers of asbestos known by my target manufacturer defendant? If the documents at issue are in fact in the Manville files, I may even have my smoking gun. If the documents are in Celotex files, it may still become a smoking gun if it refers to knowledge possessed by Manville or other manufacturers. In addition, we are then not talking about the convenience of the defendant but that of a third-party record-keeping deponent. To be sure, Celotex will find this discovery bothersome, but that is hardly grounds for changing the rule. Plaintiffs’ efforts at discovery will not create much inconvenience for Celotex. Further, Celotex will have the same prerogatives if it should be suing a supplier or other litigation opponent and will have a credible basis for seeking third-party information about the products or things at issue.

A similar analysis applies to all of the examples noted above. Consider the Dalkon Shield intrauterine birth control device. If a plaintiff

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315. For ease of illustration, I will use real company names from real litigation to address the matter of relevance. However, unless otherwise indicated, I am not purporting to talk about the actual facts of these cases. Needless to say, I am not intending to assert that any of the companies whose names are used for illustrative purposes in fact committed any particular wrongdoing.

sues A.H. Robins alleging injury, surely it is relevant if other IUD makers elected to make the product in a different manner because test results suggested dangers in the Dalkon design. What about the Ford Pinto, which became the subject of significant litigation over alleged defects in its design that facilitated gas tank explosions and fires after rear-end collisions? Is the College seriously suggesting that a charred plaintiff cannot seek to obtain information about industry safety standards for gas tank design but is instead limited only to documents pertaining to the particular make and model year of the blazing vehicle that caused injury?

What about all-terrain vehicles? Plaintiff may sue Honda after an ATV rollover makes him a paraplegic. Should the plaintiff not be able to find out the degree to which the Honda ATV did or did not differ from the design standards of the industry or other manufacturers? This may well lead to admissible evidence, particularly if Suzuki rejected the design of the Honda ATV the plaintiff was riding at the time of injury.

The breadth of "industry-wide" discovery is not inevitably pro-plaintiff. An examination of industry standards is, in fact, often a part of a product liability defendant's "state of the art" defense in litigation. In addition, broad discovery presumably opens up access (for both plaintiffs and defendants) to academic and government research. Consider products such as Bendectin and silicon breast implants that have been the subject of litigation but are regarded by many as perfectly safe products. Independent research and analysis is read by many as confirming the safety of the products. Plaintiffs should have the benefit of this information, which may reduce protracted litigation; defendants should be able to obtain this information as part of their defense, even if the documents or data relate to other drugs, other uses of silicon in the human body, or different but informative research.<sup>316</sup> Although claims against these products essentially drove them from the market, one cannot "blame" the scope of discovery for this phenomenon. The inadequacies of the product and the weight and economics of class action litigation provided the driving force here. That may suggest a rethinking of class action practice or of the substantive law of product liability. It does not support narrowing the scope of discovery.

The College Report continues in this vein in its attack on subject matter discovery—and continues to be unconvincing. For example, the College presents the following as an allegedly impressive hypothetical

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316. I should add that I am among those who find the greater weight of the evidence to suggest that silicon biomedical devices in the human body are not dangerous, or at least not dangerous to the degree asserted by breast implant plaintiffs. In addition, I have been a consultant to breast implant manufacturers in litigation concerning insurance coverage for such lawsuits.

illustrating the deficiencies of the current scope rule:

Case #1. [Plaintiff] A sued X Motor Car Company, claiming strict and negligent liability for the failure of a braking system allegedly due to the stress failure of a shearing pin mechanism in the wheel of the automobile. As to the claim and defense in the case, the question was whether the specific shearing pin was properly designed and manufactured to withstand the stress exerted by the sharply turning automobile.

[Plaintiff] A filed Rule 34 document requests and Rule 33 interrogatories claiming that the “subject matter” of the case was automobile safety design and, therefore, A was entitled to copies of all design drawings, expert witness reports, research and development materials and other data on each safety design feature of the automobile. X claimed that all that was required to be produced was the drawings, materials, and data surrounding the shearing pin.

Is the “subject matter” of the case safety design of the entire automobile, or is it the safety design and stress points of the shearing pin in the wheel base? The “subject matter” phrase would suggest the entire automobile.<sup>317</sup>

The College’s analysis of the application of current Rule 26(b)(1) is correct. The College, of course, wants the reader to agree that the result is deleterious. As with the “entire business” horrible hypothetical advanced by the College and discussed above, sustained analysis suggests that the result wrought by the current subject-matter scope Rule is sound.

A plaintiff injured in a car accident may be pretty sure that the shearing pin is the culprit for the accident—but she cannot be positive. The manufacturer, of course, knows a good deal about the shearing pin and also knows a great deal about the making of the entire car. The car may be defective in ways other than the shearing pin. If the plaintiff is confined only to “shearing pin” discovery, the potential for injustice is significant. The manufacturer may obtain a defense verdict even though it knows it was at fault (in, say, the making of the wheel mechanism). Allowing a plaintiff in the College’s Case #1 to find out generally how the car was designed, tested, made, and used in the field is perfectly reasonable in light of the claim.

With regard to College Case #1, one also wonders whether narrowing scope will change things on a broad basis or merely lead to isolated injustice. The canny plaintiff in College Case #1 is unlikely to draft a complaint pointing solely at the shearing pin. More likely is a com-

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317. See *College Report*, *supra* note 308, at 5-6.



plaint that alleges defects in the auto, including but not limited to the shearing pin. For this sort of complaint, discovery about the car as a whole is presumably available even under the narrower claim-or-defense standard. Either the narrowing of scope accomplishes nothing or it stands in the way of legitimate discovery. There appears to be no benefit based on the College's own hypothetical.

The case for narrowing scope is no better in the other hypotheticals offered by the College (discussed below). Presumably, a group of astute trial lawyers like the College drafted its Report to make its most persuasive case to the Rulemakers. Thus, if the College Report's hypotheticals are not convincing, presumably the case of narrowing scope is not convincing. The College, having taken its "best shot," presumably has no better arguments for Proposed Amended Rule 26(b)(1). For example, the second College hypothetical reads:

Case #2. D Company was sued by S Company for not paying the contract price for seismic work done in connection with oil well drilling. The case was a relatively simple question of whether S Company had performed the seismic work in a reasonable manner that met industry standards. D Company had obligations to other oil well partners and was under an obligation to provide seismic data that met industry standards. To D Company, the case was a straightforward breach of contract claim as to whether S company had performed the seismic services in a workmanlike manner. But S Company argued that the "subject matter" of the case involved oil well drilling in general and demanded production of highly proprietary and sensitive drilling information between D Company and its other joint venture interests in the oil field.

On the basis that the "subject matter" of the suit was oil well drilling, discovery was permitted as to highly sensitive and proprietary business documents between D Company and the joint venturers.

Because of the reluctance of D Company to produce seismic data in other wells and oil fields, D settled the breach of contract suit with S. The "subject matter" phrase gave S Company a strategic advantage on an irrelevant issue to which it was not otherwise entitled.<sup>318</sup>

Once again, the College serves up an unsympathetic hypothetical. First, there is no indication that the defendant moved for a Rule 26(c) protective order regarding allegedly sensitive information. There is also no indication that the defendant even attempted to utilize Rule

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318. See *id.* at 6-7.

26(b)(2) to have the court limit the availability of discovery that is arguably relevant but too burdensome or inefficient in light of its utility. The seismic data may well have been limitable discovery under the pre-2000 Federal Rules. Second, if a court could not be persuaded to restrict plaintiff's access to the seismic data, this strongly suggests that there was some utility in the data. Perhaps it showed that plaintiff was entitled to certain contract compensation as part of industry standards or extraordinary effort. Third, in the hypothetical Defendant asks for our pity when it was apparently not willing to stand up for itself, as it settled the case. Although the College wants the reader to believe this was all the result of discovery leverage, cynics among us might think the Defendant had something to hide or no legitimate contract defense if it settled so easily.

The College Report's third hypothetical was an antitrust claim in which plaintiff wanted information about the Defendants' dealings with third parties, as this might bear upon restraint of trade issues. The Defendants wished to avoid this discovery because they are in the midst of sensitive negotiations with one third party.<sup>319</sup> The Defendants may have grounds for avoiding discovery, but these grounds already exist under Rules 26(b)(2) and Rule 26(c). If the third-party negotiations are too far afield from the nature of the antitrust claim (refusal to sell raw material to plaintiff), the Defendants should be able to convince a judge of this fact and limit discovery. If unable to do so, they can hardly blame their fate completely on the subject matter test of relevance.

Of course, one can flip this argument to assert that claimants desiring discovery should be the ones to bear the burden of persuasion on such matters. This approach, soon to be enshrined in Proposed Amended Rule 26(b)(1), misallocates the burden. The party who is the target of the discovery request generally has greater knowledge of what information is responsive under the subject-matter standard and of the degree to which this information is arguably minor, expensive, inconvenient, or sensitive. The resisting party is far better equipped to make a case for the exercise of judicial discretion limiting discovery. The party seeking discovery is to some extent "flying blind" when trying to make a "good cause" case for broad discovery. Only if the court is willing to permit plaintiffs substantial latitude to take discovery on the issue of discovery will the new Rule be fair—and only at the cost of substantial satellite litigation.

College Report Case No. 4, the last of the College's illustrations,

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319. *Id.* at 7.

suffers from similar deficiencies.<sup>320</sup> It states:

C Corporation filed suit against D Corporation and others for breach of contract. D filed document requests concerning all business relationships of the sole shareholder of C, claiming that the “subject matter” of the dispute was all of C’s businesses, not just the plaintiff corporation. By arguing that every aspect of C’s businesses was relevant, including the personal business transactions of C’s sole shareholder, D attempted to pressure C into dropping its contract claim to avoid making public completely unrelated financial matters.<sup>321</sup>

Here, to be relevant under the subject matter standard, the plaintiff in most courts would be required to articulate a connection of some sort between C’s sole shareholder and the substance of the contract dispute. Mere stock ownership does not make the owner the alter ego of the corporation and the contract claim does not make all the Corporation or sole shareholders’ activity relevant. Plaintiff must articulate a theory of relevancy. Under the current rules, Defendant C has ample protection in the subject matter standard and in the availability of discovery-limiting devices.

With the fourth hypothetical, as well as with the others, the College spins a tale but does not cite to an actual case. The College asserts that subject matter discovery is a terrible problem leading to terrible dilemmas for litigants and counsel, but the College fails to cite a single case to support this position. The Rulemakers and the legal system are asked to simply agree in response to conjecture that subject matter relevance has resulted in a world where defendants are routinely unfairly aggrieved in resisting discovery. At some point, one must ask the College to convince the audience that it is not merely conjuring up problems that seldom or never exist in reality. Unfortunately, the College failed to do this, but nonetheless found an overly receptive audience in the Advisory Committee.

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320. This point was made by Professor Rowe, whose memorandum was too brief to give a “detailed discussion of the American College’s hypotheticals,” but concluded: “suffice it to say that they seem readily subject to treatment under existing limits as to relevance or burdensomeness, or to protective orders for sensitive and confidential material.” See Rowe Memorandum, *supra* note 292, at 3.

321. See *College Report*, *supra* note 308, at 7-8.

*D. The Weakness of the Litigation Section's Case for Change*

The Litigation Section's 1977 Proposal to narrow discovery,<sup>322</sup> on which the College proposal is based, fares no better as a persuasive document. The Litigation Section Report, which was officially approved by the ABA Board of Governors,<sup>323</sup> sets forth a number of proposed Rules changes, of which narrowing scope is by far the most dramatic.<sup>324</sup> Following each proposed new rule is a short Committee Note. The Notes are striking not only in their brevity but in their dearth of case law. To one accustomed to reading ALI Restatements or bar association submissions, the "thinness" (to use Professor Rowe's phrase) of the Litigation Section Report is striking.

For example, an ALI Restatement, which assumes only the burden of summarizing the law rather than revising the law, normally contains not only a black letter statement of law but is followed by illustrations and examples and a Reporter's Note that functions as a miniature treatise on the topic, replete with leading case citations and examples of different applications of the legal principle at issue. The Litigation Section Report, which has the burden of prompting a change in long-settled law, has nothing nearly so comprehensive or persuasive.

The one-page (yes, that's right, one-page) Committee Note on scope simply states that "sweeping and abusive discovery is encouraged by permitting discovery confined only by the 'subject matter' of a case."<sup>325</sup> The Committee cites no cases involving such "abuse." Instead, the Committee gives the original example of alleged abuse later seized upon by the New York State Bar and the College of Trial Lawyers: the possibility that the practices of "an entire business or indus-

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322. See ABA Section on Litigation, *Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 149 (1977) [hereinafter *Litigation Section Report*].

323. *Id.* at 150 (providing the Board of Governors approved Report on Dec. 2, 1977).

324. The Litigation Section's proposal to narrow discovery had slightly different language than Proposed Amended Rule 26(b)(1) and did not contain the "good cause" escape hatch that may permit parties to obtain subject-matter relevance. The Litigation Section's proposed new Rule 26 reads:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the ~~subject matter involved in the pending action, whether it relates to the issues raised by the claim or defense claims or defenses of the any party. seeking discovery or to the claim or defense of any other party, including~~ *The discovery may include* the existence, description, nature, custody, condition and location of any books, documents, or other tangible things; and the identity and location of persons having knowledge of any discovery matter; *and the oral testimony of witnesses.* It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

See *Litigation Section Report*, supra note 322, at 157.

325. *Id.* at 158.

try” might be deemed relevant to the subject matter of the case.<sup>326</sup> Although in an age of disbelief it is comforting to find such feeling, one wishes the Committee had at least attempted to back up its beliefs with some facts. For the reason set forth above, this “horrible hypothetical” is as unconvincing as the purported abuse appears to be rare. Further, the notion of examining industry practices is in many cases not such a horrible prospect. It may even be required if the dispute is to be fairly adjudicated.<sup>327</sup>

The thinness of the Litigation Section Report on this important proposal for change is particularly striking in light of the “all-star” cast of the Special Committee that produced the Report, which included Professor Barbara A. Babcock, then on leave from Stanford as an Assistant Attorney General of the United States, Judge Warren Ferguson (C.D. Cal.) and prominent litigators Philip Corboy (of Chicago’s Corboy and DeMetro), Weyman Lundquist (Heller, Ehrmann, White & McAuliffe), Morton Galane (a very successful Las Vegas trial lawyer perhaps best known for obtaining a multimillion dollar verdict against NBC in a defamation claim brought by singer Wayne Newton),<sup>328</sup> Edward Mullinix (of Philadelphia’s Schnader, Harrison, Segal & Lewis), Ronald Olson (of Los Angeles-based Munger, Tolles & Olson firm) and Steven Umin (of Washington D.C.’s Williams & Connolly).<sup>329</sup> Professor James Jeans of Kansas City, Missouri was the Reporter. Corboy and Galane are best known as plaintiffs’ lawyers and apparently did not dissent from the Report,<sup>330</sup> providing further puzzling factors in assessing the Report.

In any event, despite its official push from the ABA and the Advisory Committee’s receptiveness, the Litigation Section Report’s proposal to narrow scope was a dud when presented for public comment.<sup>331</sup> Adverse reaction prompted the Advisory Committee not to go

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326. *Id.* The Committee Notes states:

For example, the present Rule may allow inquiry into the practices of an entire business or industry upon the ground that the business or industry is the “subject matter” of an action, even though only specified industry practices raise the “issues” in the case. The Committee believes that discovery should be limited to the specific practices or acts that are in issue.

*Id.* at 158.

327. *See supra* text accompanying notes 312-21.

328. *See Newton v. National Broad. Co.*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991).

329. Unless otherwise indicated, the identification of the Litigation Section Committee members is confirmable through resort to Martindale-Hubbell or the Association of American Law Schools Directory, THE AMERICAN BENCH, or the ALMANAC OF THE FEDERAL JUDICIARY. In addition, attorneys such as Corboy are often highlighted on the websites for their law firms.

330. *See Litigation Section Report, supra* note 322, at 151-55.

331. The Advisory Committee proposal to narrow Rule 26 differed in language from the Litigation Section proposal, but was in accord in replacing subject-matter relevance with claim-or-defense relevance. *See* Committee on Rules of Practice and Procedure of the Judicial Confer-

forward with the scope proposal, although other suggestions in the Litigation Section Report, most importantly the Rule 26(f) discovery conference, were incorporated into the 1980 Amendments.<sup>332</sup> The Litigation Section Report also proposed a presumptive limit of thirty interrogatories,<sup>333</sup> which was rejected at the time but ultimately influential when the 1993 Amendments established a presumptive limit of twenty-five interrogatories.<sup>334</sup>

The Advisory Committee and Standing Committee were no more persuasive in arguing for narrowed discovery than was the Litigation Section. Shockingly, the Advisory Committee Note accompanying the proposed change is, like that of the Litigation Section, but a page in length and cites no caselaw.<sup>335</sup> The Advisory Committee Note instead simply cites the Litigation Section Report (although rejecting the Section's language in some respects) and concludes: "If the term 'subject matter' does in fact persuade courts to err 'on the side of expansive discovery,' it should be eliminated, and that is the course recommended by the Committee."<sup>336</sup>

That's it—only the Committee's view that courts should be erring against discovery rather than in favor of discovery. The Report contains no empirical data; no sustained, careful analysis; and no case law and no consideration of the collateral impact the change might have on substantive law and public policy. No wonder the proposal was mercifully withdrawn. But, as the events of the ensuing twenty years reveal, the scope-narrowing proposal was only in hiding. Proponents kept the flame alive, to be fanned again in the late 1990s by the College of Trial Lawyers and other kindred spirits. As discussed in Part V below, the revival of restricting discovery scope had a good deal more to do with politics and the social demographics of rulemaking than with any strengthened case for narrow scope.<sup>337</sup>

In addition, as noted by Professor Rowe in seeking to delete the proposed new Rule, the profession as a whole and even the ABA Litigation Section as a whole appear to be rather divided on the issue of discovery scope. Although the Section's relevant Committee endorsed

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ence of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 77 F.R.D. 613, 623 (1978).

332. See *Litigation Section Report*, *supra* note 322, at 159 (discussing the discovery conference), 165 (providing for nonstenographic recording of depositions in amendment to Rule 30(b)(4)), 177 (requiring that production of business records be in their normal order of organization so as not to hide documents in needle-in-haystack style), 178-79 (increasing court sanction power under Rule 37).

333. *Id.* at 173.

334. FED. R. CIV. P. 33(a).

335. See *Preliminary Draft of Proposed Amendments*, *supra* note 331, at 626-28.

336. *Id.* at 627-28.

337. See *infra* Part V.

a narrowing of disclosure, in part out of deference to a quarter-century-old tradition, the current Chair of the Section and many prominent Section members oppose the new Rule,<sup>338</sup> as do many of the “rank-and-file” Section members, including me.

*E. The Unpersuasiveness of Others Arguing to Narrow Scope*

Allies of the College and Litigation Section proposal provide no more persuasive grounds for narrowing discovery scope than do these organizations. Many of the arguments for narrowed scope are in fact to the contrary and underscore the wisdom of retaining the subject-matter test of scope. For example, John H. Beisner, Esq., marshalls a good deal of case law on the topic, but it is case law refuting the need for change. Beisner is a partner in the prestigious Los Angeles-based O’Melveny & Myers firm and identifies himself as a defense lawyer. His memorandum and hearing testimony was considered sufficiently impressive that it was specifically mentioned in Professor Rowe’s memorandum.<sup>339</sup>

Notwithstanding its greater use of authority than the College or the Litigation Section, the Beisner Memorandum commits many of the same errors found in the College Report, only dressed up with more citation. For example, Beisner cites *Bacon v. Smith Barney Shearson, Inc.*,<sup>340</sup> to illustrate the great breadth of the subject matter standard because the case states that the standard of discovery relevance “is construed broadly and may encompass any matter that bears on any issue that is or may be involved in the case.”<sup>341</sup> But notwithstanding this dicta in the opinion, the plaintiff in *Bacon* was denied the discovery she requested in her securities fraud suit.<sup>342</sup> On this type of crum-

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338. See Rowe Memorandum, *supra* note 292, at 3 (citing statement of Robert A. Clifford, Esq., Public Comment Dkt No. 98-CV-084).

339. See Rowe Memorandum, *supra* note 292, at 3 (referring to Beisner Memorandum but noting as I do that many of the cases cited show courts refusing discovery under the subject-matter standard).

340. 938 F. Supp. 98 (D.N.H. 1996).

341. See Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Before the Advisory Committee on Civil Rules 5 n.1 (Jan. 29, 1999) (Chicago) (Public Comment Dkt. No. 98-CV-094) (statement of John H. Beisner, Esq., O’Melveny & Myers LLP, Washington, D.C.) [hereinafter Beisner Memorandum]. Beisner describes this as an example of courts construing the relevance standard “quite liberally.”

342. See *Bacon*, 938 F. Supp. at 101. Bacon alleged that Smith Barney had misinformed her of the tax consequences of taking a lump sum distribution of an Individual Retirement Account (“IRA”) that was inherited. *Id.* at 100. As a result, she incurred significant losses for which she blamed the firm. *Id.* At discovery, plaintiff sought “information concerning the dealing had by the decedent [who had established the IRA] and communications between [decedent] and the defendants concerning the ‘types of investments that were appropriate for her financial situation.’” *Id.* at 103. Defendants argued that this information was not relevant to the subject matter of the bad tax advice on the IRA claim and the Court agreed. *Id.* at 103-04. So much for the perils of the subject matter standard. The defendant here was not subjected to a fishing expedi-

bling sand, the proponents of narrowed discovery attempt to build their church.

Beisner's Memorandum is also as wonderfully contradictory as it is impressive in gleaning cases. For example, Beisner notes that in earlier days courts only permitted discovery that was "noticeably narrower and less burdensome than what is typically allowed by federal courts today."<sup>343</sup> But what Beisner erroneously suggests is that this was because the standard for discovery relevance was different and narrower in golden days of yore.<sup>344</sup> Once again, the proponents of narrower scope seem to be shooting blanks effective only with the current Rule-makers and the logically challenged. It is hard to justify rescission of the Rules based upon older, wrongly decided (or at least wrongly worded) cases that were rejected by the contemporaneous Rulemakers, who added the 1946 language to make sure that judges understood the subject-matter concept of relevance. The written standard has been the same since 1938 and it has been applied with seriousness since at least the 1940s, effectively being reiterated by the Supreme Court's 1947 opinion in *Hickman v. Taylor*.<sup>345</sup> At least until the most recent round of rulemaking, the conventional wisdom was that any judge-made restrictions on Rule 26 discovery scope were errors rather than advancements.

Notwithstanding the legal standard governing discovery, Beisner makes another observation that essentially deflates the case for amending Rule 26. He observes, citing cases, that courts frequently refuse to let litigants roam in the "shadow zones" of relevancy or engage in "fishing expeditions."<sup>346</sup> Again, the rhetoric of the cases may diverge

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tion, or even a short boat ride.

343. See Beisner Memorandum, *supra* note 341, at 6 (citing cases at n.2).

344. Beisner's exact statement, which I do not believe he meant to be misleading, is this: "Any suggestion that this [changing to claim-or-defense relevance] would be a meaningless change is undermined by the fact that in the several years before the current Rule 26(b)(1) was adopted, many courts did view the scope of discovery as being limited to 'claims and defenses'—or to the 'issues' of a case." *Id.*

Although it is technically correct that the language of Rule 26 (then a rule governing depositions rather than providing the general umbrella for discovery) was changed after these 1939-1941 cases, readers can easily be misled by the quoted statement. The 1946 Amendment to the Civil Rules added the famous language that discovery should not be disallowed even when its fruits are not relevant evidence so long as the inquiry is "reasonably calculated to lead to the admissibility of admissible evidence." See *supra* text accompanying notes 53-62.

However, and this is a big however, the standard of relevance under Rule 26 has always been "subject matter." It has been so since the very inception of the 1938 Federal Rules without interruption or revision. Claim-or-defense has never been the relevance standard. Consequently, when Beisner cites cases (in note 2 of his statement), these 1939-1941 cases are either misapplying the Rules or the claim-or-defense/issues language is mere, erroneous dicta.

345. 329 U.S. 495 (1947); see *supra* text accompanying notes 53-62 (discussing 1946 language strengthening subject-matter standard of relevance in order to curb judicial narrowing of the standard).

346. See Beisner Memorandum, *supra* note 341, at 6 n.2 (citing 23 such cases in 1998



from the result and the courts using this intemperate language at odds with the Rules may in fact be according fair discovery relevant to the subject matter. But if not, the cases are simply in error. The Supreme Court in *Hickman v. Taylor* declared that fishing expeditions were indeed proper under the subject matter standard,<sup>347</sup> which was the clear intent of the drafters.<sup>348</sup> The cases cited by Beisner thus suggest that notwithstanding the broad subject-matter standard, courts are frequently resisting discovery, restricting discovery, denying discovery, and limiting the effective reach of the subject-matter standard. If this is correct, there would appear to be no need to make the text of Rule 26 more restrictive. If anything, there may be a need for another 1946-style amendment to remind courts of the extent of the reach of the subject-matter standard.

#### F. *Discovery Scope and Forum-Shopping*

An additional argument against the Proposed Amendment, one not raised during the rulemaking process, is the extent to which the narrowing of discovery in federal trial courts may encourage undesirable forum shopping. Currently, the subject-matter relevance of federal discovery is obtained in the bulk of states. Many states codified their standard of discovery in exactly the language of Federal Rule 26(b).<sup>349</sup> Because of the controversy attending Proposed Amended Rule 26(b)(1) in the rulemaking process, many states may refuse to follow the federal lead in this area. Certainly, many lawyers and plaintiff-affiliated interest groups will urge states to avoid following the federal narrowing of scope.

To the extent that states retain subject-matter discovery while federal district courts have claim-or-defense discovery, there is an obvious differentiation that will encourage forum-shopping. In particular, claimants of a certain type will be more attracted to state court with broader discovery. To a degree, this is probably what some proponents of the Proposed Amendment seek: movement of many plaintiffs' cases out of federal court. To the extent cases that would otherwise be better tried in federal court move to the state system, this may produce unwise side effects of judicial administration, including at least temporary logjams until states react, probably with increased funding that may or may not be readily available.

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alone).

347. See *Hickman*, 329 U.S. at 507, discussed *supra* text accompanying notes 58-62.

348. See *supra* text accompanying notes 58-62; Subrin, *supra* note 11.

349. See 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).

Of course, if resort to state court is available, perhaps those opposing the narrowing of scope are complaining too loudly. But even if broader discovery is advantageous, other aspects of going to state court may not be. The claimant preferring broader discovery then is placed between the proverbial rock and hard place, and claimants generally lose some of the choice-of-forum options that existed prior to the change in federal discovery. Further, forum-shopping is a limited option for many litigants because the case is subject to removal to federal courts,<sup>350</sup> where defendants will enjoy the advantages of narrowed discovery.

In addition, there may even be forum selection concerns as between the federal courts. For example, Bankruptcy Procedure Rule 2004, which governs examination of the debtor or “an entity” involved in the administration of the debtor’s estate, provides for wide ranging examination.<sup>351</sup> Although the Rule is styled as one of procedure, it functions as a discovery rule in that the examination of the debtor and others is conducted not as a means of adjudicating claims involving the estate but as a means of gathering information.

Bankruptcy Rule 2004 provides that the examination may extend “to any matter which may affect the administration of the debtor’s estate, or to the debtor’s right to a discharge.”<sup>352</sup> In many cases, “the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor . . . [or] any other matter relevant to the case or to the formulation of a plan.”<sup>353</sup> This is a scope of discovery at least as broad as the subject matter test of former Rule 26(b)(1).

Although probably infrequent, there may well be cases where a potential debtor files for bankruptcy or where creditors force an involuntary bankruptcy primarily to obtain this breadth of subject-matter discovery rather than the more limited claim-or-defense discovery that will exist in federal trial courts after adoption of Proposed Amended Rule 26(b)(1). At the very least, the Bankruptcy Rule has the advantage of not forcing the discoverer to beseech the court with a proffering of “good cause.”

On a structural level, policymakers should also ponder what, if

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350. See 28 U.S.C. § 1441 (1994) (setting forth criteria for removable actions). See also *id.* § 1331 (federal question subject matter jurisdiction); *id.* § 1332 (diversity subject matter jurisdiction).

351. BANKR. R.P. 2004.

352. *Id.* at 2004(b).

353. *Id.* at 2004(b). The quoted language applies to “a family farmer’s debt adjustment case under chapter 12, an individual’s debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad.” *Id.*

anything, justifies providing a narrower scope of discovery in general jurisdiction courts than in bankruptcy courts. One's first inclination is to think that the standards should be symmetric. Proposed Amended Rule 26(b)(1) upsets this symmetry and may put pressure on the bankruptcy Rulemakers to similarly narrow discovery. This would create an additional casualty of the new Civil Rule. The debtor and contestants over an estate require wide-ranging access to information to combat fraud and self-dealing and to fairly apportion the assets of the estate, which by definition are exceeded by the estate's liabilities.<sup>354</sup>

After the dust of rulemaking has settled, one finds little to recommend a narrowing of Rule 26(b). The Rule change is either unnecessary, cost-increasing, or both—unless it effects significant change in litigation outcomes. Because the scope standard has been broad for more than sixty years, it is a bit difficult to predict what impact would result from the new language and how a more limited scope would affect actual cases. But some relatively convincing thought experiments suggest that generally the Proposed Amendment would normally accrue to the advantages of defendants in tort and statutory litigation.

### *G. The Likely Impact of Narrowed Scope in Particular Cases*

A more sustained look at how claim-or-defense relevancy might work in particular cases suggests that Proposed Amended Rule 26(b)(1) will indeed be likely to favor defendants, particularly in cases involving discrimination, product liability, and environmental protection as well as perhaps in cases of securities fraud and various regulatory matters or claims based on statutory rights. The class of cases most likely to be relatively unscathed by the change—or at least symmetric as between claimants and defendants—are contract and other commercial disputes between business entities. Not coincidentally, these types of cases and defense work comprise the bread-and-butter of many elite attorneys such as the College and the leadership of the Litigation Section.<sup>355</sup> In particular, Proposed Amended Rule 26(b)(1) will have undesirable effects in a number of different types of cases.

#### *1. Negligence Torts*

In the garden variety negligence action, discovery constriction is probably not fatal to plaintiffs, but will make it harder for plaintiffs to

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354. See 11 U.S.C. § 101(32) (explaining that definition of insolvency is used as criterion for bankruptcy eligibility). See also BENJAMIN WEINTRAUB & ALAN N. RESNICK, *BANKRUPTCY LAW MANUAL* ch. 2 (4th ed. 1996).

355. See *infra* text accompanying notes 454-62 (discussing composition of College and its Civil Procedure Committee).

prove negligence through a pattern of careless or unreasonable behavior. Under the claim-or-defense scope of relevancy, defendants may succeed in keeping from plaintiffs instances of past negligence that would fit within Federal Rule of Evidence 404(b) and be permitted at trial even though a defendant's prior bad acts are normally inadmissible. Such information could also be useful for impeachment of the allegedly negligent or their witnesses, but only if claimants can obtain the information.

## 2. *Product Liability Claims*

In product liability torts, plaintiffs will be more adversely affected by narrowed scope. Although discovery would seemingly be available for any tests or memoranda pertaining to the precise product involved in the injury, discovery of other background data of the manufacturer will be less available. Similarly, discovery of information about related products or operations may be barred from claimants under the Proposed Amendment. This sort of interpretation of Proposed Rule 26(b)(1) is arguably excessively narrow,<sup>356</sup> but also is clearly the type of ruling desired by the College and other proponents of the change.

Under this sort of regime, products plaintiffs generally and products in such celebrated cases as Dalkon Shield and tobacco claims could be denied discovery, allowing rather unsavory defendants to escape civil liability. The tobacco litigation provides a particularly good example. One of the defense lawyers testifying in favor of the Proposed Amendment specifically referred to the tobacco cases as producing unnecessary mountains of documents.<sup>357</sup> What he neglected to note, however, was the degree to which plaintiffs' counsel were required to use every tool they had under the subject-matter standard of relevance in order to obtain key information that clearly implicated tobacco companies in the wrongdoing alleged.<sup>358</sup> Consideration of this type of case

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356. See *supra* note 203 and accompanying text (describing Advisory Committee Member and Discovery Subcommittee Chair David Levi's (E.D. Cal.) suggestion that claim-or-defense scope encompasses historical and pattern-and-practice evidence outside the parties to the instant litigation).

357. See *supra* text accompanying note 206 (discussing testimony of Kevin Dunne, Esq.).

358. See Symposium, *Transcript of the Florida Tobacco Litigation Symposium—Fact, Law, Policy, and Significance*, 25 FLA. ST. U. L. REV. 737, 779-91, 815-90 (1998) (noting comments of J. Anderson Berly, Esq., and W.C. Gentry, Esq., regarding reproduction of incriminating documents about tobacco industry unearthed during discovery). Berly is a partner in the prominent Charleston, South Carolina, plaintiffs' litigation firm of Ness, Motley, Loadholt, Richardson & Poole. Gentry is a plaintiff's lawyer in Jacksonville, Florida. Both represented the State of Florida in litigation against tobacco companies to obtain reimbursement for state-financed Medicare and Medicaid expenses related to tobacco-induced health problems. I was a co-chair of the Symposium, but was not involved in these or related cases against tobacco companies. I was also at the time the Fonvielle & Hinkle Professor of Law at Florida State, a named

prompts one to cling to subject-matter relevance with some ferocity.

### 3. *Discrimination Claims*

In its Memorandum expressing opposition to the Proposed Amendment, the United States Justice Department expressed particular concern that a narrowing of scope would make enforcement of the nation's civil rights laws more difficult.<sup>359</sup> The Department also argued strenuously against the Proposed Amendment before the Standing Committee.<sup>360</sup>

The Department's assessment is persuasive. For example, it suggested that "[d]efendants in employment discrimination cases could try [under the new standard] to limit discovery to the specific employment decision claimed to be discriminatory."<sup>361</sup> The Department found this a highly undesirable result because of the importance of "circumstantial evidence, such as acts of discrimination other than the act pleaded" in proving up discrimination.<sup>362</sup>

Reduced scope may, depending on how judges construe the new standard, bar plaintiffs from using larger defendant workforce and employment practices data to bolster circumstantial evidence of discrimination. The Department identified this as a potential problem in housing discrimination and Voting Rights Act cases.

For discrimination claims alleging sexual harassment, reduced scope would also reduce plaintiff access to background material on the company or perpetrator if courts adopt a narrow view of the claim-or-defense standard.

The Justice Department also suggested that claim-or-defense discovery might revive "'trial by surprise'" in the federal courts. A defendant's defenses may not be alleged clearly in the pleadings, which may prevent inquiry into these areas under a claim-or-defense standard. "[B]ecause an employer's defenses might not be articulated with any specificity until quite late in the litigation," Proposed Amended Rule 26(b)(1) could be used, either intentionally or unintentionally, by

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professorship funded by a firm that also represented the state in the litigation, but was not involved in any of these firm activities.

359. See Justice Department Memorandum, *supra* note 300, at 7.

360. See Committee on Rules Draft Minutes, *supra* note 203, at 22-24. But the Department's plea fell on mostly deaf ears as Proposed Amended Rule 26(b)(1) was approved by a ten to two vote. *Id.*

361. See Justice Department Memorandum, *supra* note 300, at 7.

362. *Id.* The Department also noted the importance of derogatory remarks and a hostile work environment as having evidentiary value even though the plaintiff was not directly involved in these events or did not directly suffer an adverse job action. *Id.* See also Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993).

defendants to prevent discrimination plaintiffs from coming to trial with the knowledge they routinely possess under the current rule of subject-matter scope.<sup>363</sup>

#### 4. *Environmental Degradation Cases*

In this area as well, the Justice Department found considerable cause for concern in the Proposed Amendment.<sup>364</sup> It identified Clean Air Act cases as ones in which proof by the government seeking enforcement is enhanced if the government can obtain information about “more extensive environmental violations than those alleged in the complaint.” However, “[u]nder the proposed rule, such discovery might be resisted, and the Department might have to establish ‘good cause’ for such questions.”<sup>365</sup>

In hazardous waste cases, the Department noted that it already meets stiff resistance from targets under the subject-matter standard regarding discovery of the target’s ownership, general operations, waste disposal practices outside the narrow confines of the ground at issue, and past environmental problems. “If the standard were changed as proposed, opponents may be more encouraged to argue that the information sought goes beyond the elements of liability in the pleadings and to force the Department to seek court approval for such inquiries upon a showing of good cause.”<sup>366</sup>

As an example of the interference caused by claim-or-defense discovery, the Department observed:

Under the proposed rule, if the pleadings specified one type of chemical (because that was the only one well-grounded in fact at the time the complaint was filed), defendants would likely try to preclude questions about other types of hazardous substances released into the environment on the ground that such inquiries relate to the subject matter but not the claim pleaded. The Department would be required to establish good cause in order to engage in discovery beyond the complaint.<sup>367</sup>

The Department thought this a particularly likely prospect in cases concerning Superfund sites.<sup>368</sup>

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363. See Justice Department Memorandum, *supra* note 300, at 7.

364. *Id.* at 8.

365. *Id.*

366. *Id.*

367. *Id.*

368. See Justice Department Memorandum, *supra* note 300, at 8.

### 5. *Contract interpretation*

Here, the change to narrowed scope appears less likely to affect many disputes. Often, facts are not as important in contract litigation, where the meaning of a contract is a “question of law” for the court.<sup>369</sup> But narrowed scope will make it harder for the party that is asking for a favorable contract interpretation based on course of performance, course of dealing, usage in trade, intent of the parties, and similar defenses that are fact-based. Unless the court has a sufficiently wide view of the “claim or defense” standard, these sorts of contract claims may see less discovery to the detriment of parties that are making nontextual arguments about the meaning of the instrument.

Whatever the impact of narrowed scope, it would seem to be rather evenly divided among plaintiffs and defendants. At least in commercial litigation, both plaintiffs and defendants would seem equally likely to be asserting fact-based contract doctrines. An exception may be standardized consumer contracts. Restricted discovery makes standardized text more important, which should accrue to vendor defendants, presuming the form contract is as airtight as its lawyers were supposed to make it.

### 6. *Antitrust*

Proposed Amended Rule 26(b)(1) will probably impose significant burdens on antitrust plaintiffs. Antitrust plaintiffs’ counsel expressed this view quite forcefully to the Advisory Committee.<sup>370</sup> Plaintiffs in such cases ordinarily seek substantial amounts of information about defendants’ business and markets in order to make their case. To the extent that a court finds some of this background market data and defendant operations information to be outside the scope of claim-or-defense discovery, antitrust defendants gain from narrowed scope.

### 7. *Securities Regulation*

Narrowed discovery will probably be a significant victory for securities fraud defendants as well. In a typical fraud claim, plaintiffs argue that management released glowing forecasts when it knew better. Alternatively, plaintiffs may allege out-and-out fraud in the execution of

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369. See E. ALLAN FARNSWORTH, *CONTRACTS* §§ 7.3, 7.14 (3d ed. 1999); JEFFREY W. STEMPEL, *LAW OF INSURANCE CONTRACT DISPUTES* §§ 4.01-4.04 (2d ed. 1999 & Supp. 2000).

370. See Testimony of Max Blecher, Esq., Transcript of Proceedings, *supra* note 199, at 6-20, discussed *supra* text accompanying notes 199-205.

a knowing scheme designed to deceive customers or partners.<sup>371</sup> Could there be judges sufficiently hostile to the securities laws to resist discovery in such claims? Perhaps. For example, Georgetown University Law Center apparently was not outraged by arguable securities fraud activity and was reported not to be taking any disciplinary action against two students engaged in such activity.<sup>372</sup> Although a broad view of “claim or defense” scope probably allows plaintiffs to keep getting this information, a narrower view would make such “state of mind” circumstantial evidence less available. Defendants would probably then have more success with “you can’t blame us just because we had a bad quarter and the stock price went down” defenses or with defenses arguing that misleading activity was merely negligent rather than fraudulent.

In addition, securities fraud litigation historically involved issues of Federal Rule of Civil Procedure 9(b), which requires that fraud claims be pleaded with “particularity.”<sup>373</sup> Courts traditionally diverged in their application of Rule 9(b). Some judges require quite detailed specificity to meet the Rule while others require only that the complaint plead in “somewhat more” detail than the minimal detail required of the notice pleading regime under Rule 8(c).<sup>374</sup> Since passage of the Private Securities Litigation Reform Act of 1995, a relatively strong version of the particularity requirement has been statutorily

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371. One recent example comes from news headlines. The SEC recently accused three Georgetown law students of operating a pump-and-dump scheme in which they created a website offering free stock-picking advice. Unsurprisingly in retrospect, the website touted the stocks of little-known companies that just happened to be owned by the operators of the website. When unsuspecting (but probably incredibly stupid) readers bought the stocks, it pushed up their price, allowing the conspirators to sell at considerable profit. The student charlatans made more than \$300,000 on the scheme in only a few months. Michael Schroeder, *Georgetown Students Draw Web Investors—And an SEC Bust*, WALL ST. J., Mar. 3, 2000, at A1; Alex Berenson, *S.E.C. Reaches Settlement in Web-Based “Pump and Dump” Case*, N.Y. TIMES, Mar. 3, 2000, at C1.

Detection of the scheme was made possible because so much of the action took place online. There was the website, of course, and also a considerable number of incriminating e-mails by the perpetrators. On the one hand, the case demonstrates that broad discovery is not always essential for policing stock fraud. On the other hand, it provides a cautionary tale: what if the scheme had been done the old-fashioned way (to use Smith Barney’s famous slogan)? A defrauded stock purchaser would surely want information not only about her stock and the defendants’ activities with it but also about the entire distasteful enterprise.

A reasonable view of claim-or-defense relevance may be sufficient to provide the information—but may not, depending on the judge. In particular, a judge hostile to securities or other fraud suits may use Proposed Amended Rule 26(b)(1) to restrict discovery in such cases. By contrast, a judge applying subject-matter discovery would almost certainly allow the plaintiff this information. In my view, the latter situation is preferable, assuming one cares at all about deterring and punishing securities fraud and compensating its victims.

372. See Schroeder, *supra* note 371, at A1; Berenson, *supra* note 371, at C1; *supra* note 371 and accompanying text.

373. FED. R. CIV. P. (9)(b).

374. DAVID F. HERR ET AL., MOTION PRACTICE § 9.4 (3d ed. 1998 & Supp. 2000).



mandated for securities fraud suits,<sup>375</sup> although court division in application remains.<sup>376</sup>

Because of this particularized pleading requirement, securities plaintiffs are restricted in their ability to plead broadly as a tactic for expanding the range of claim-or-defense discovery. As a result, the narrowing of discovery scope is likely to have more impact on this class of litigants than others. The securities fraud plaintiff is in something of a “Catch-22” situation: she needs information to plead with sufficient specificity, but she cannot obtain the information through discovery unless her pleadings are broad enough to trigger claim-or-defense discovery.

Although the 1995 Act affects only certain securities actions, Rule 9(b) affects all fraud claims in federal court. “Garden variety” fraud plaintiffs are thus generally subjected to this “Catch-22” problem of needing specificity to get discovery while simultaneously needing discovery to get specificity. This issue was raised during hearings on the Proposed Amendments. Plaintiffs’ attorney Allen Black (of Philadelphia’s Fine, Kaplan & Black) testified that he frequently brings a breach of contract claim, but in conducting discovery, has an eye towards possibly unearthing evidence that would support a common law or statutory fraud claim.<sup>377</sup> Other participants seized on Black’s statement as an example of the deficiencies of subject-matter discovery in that it permits Black and others to allegedly circumvent the particularized pleading requirement of Rule 9(b).<sup>378</sup>

As discussed above, my own view is that Black’s strategy is perfectly proper and does not suggest any need to narrow the scope of discovery.<sup>379</sup> A major rationale for Rule 9(b) was to avoid subjecting defendants to the stigma of fraud allegations and the settlement leverage created by a fraud claim.<sup>380</sup> Rule 9(b) was never intended to be an immunity statute for fraud. It was designed only to require that a party have sufficient information before pleading fraud. That purpose is perfectly well served where the plaintiff engages in discovery under the

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375. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codifying pleading requirement at various sections of 15 U.S.C., with the particularity pleading provisions codified at 15 U.S.C. § 78jj); Elliot J. Weiss, *The New Securities Fraud Pleading Requirement: Speed Bump or Road Block?*, 38 ARIZ. L. REV. 675 (1996).

376. Susan Becker, *Circuit Courts Splinter on Scienter Pleading and Proof Requirements*, LITIG. NEWS, Jan. 2000, at 1.

377. Transcript of Hearings Held in Baltimore, Md. 18-30 (Dec. 7, 1998) (on file with author) (providing testimony of Allen Black, Esq.). See also Black comments, Dkt No. CV-98-015 at 7, Transcript of Proceedings, *supra* note 199. See also *supra* note 302 and accompanying text.

378. Transcript of Hearings, *supra* note 377, at 18-30.

379. See *supra* text accompanying note 308.

380. See HERR ET AL., *supra* note 374, § 9.4.

subject-matter standard prior to pleading fraud.

### 8. *Corporate Governance*

Shareholders' derivative suits are a distinct type of securities litigation in which the plaintiffs (one or more shareholders) "stand in the shoes" of the corporation in bringing suit against officers or directors who have allegedly harmed the corporation. The premise of such suits, of course, is that the corporation itself is unable to bring the claim because corporate control is vested in the very defendants who are looting or otherwise injuring the company.<sup>381</sup> As a litigation vehicle, they have been the object of controversy. Critics label derivative actions "strike suits" designed to effect quick-and-dirty settlements. Supporters praise them as a necessary tool to police unscrupulous or incompetent management. Recent empirical research suggests that such suits do, in fact, induce desirable management changes and other reforms in the affected companies.<sup>382</sup>

Whatever the merits of derivative actions, there is no denying that plaintiffs benefit from a broad discovery standard and would be hurt if discovery scope is narrowed. Derivative suits are the classic "outsider-looking-in" litigation. The plaintiff is often a small shareholder.<sup>383</sup> One feature of the 1995 Act was in fact to give larger shareholders the primary role as lead plaintiffs on the theory that the larger shareholders were more likely to control counsel and have larger corporate interests at heart rather than focusing only on the possible rewards of litigation.<sup>384</sup> The plaintiff may have a decent amount of external evidence of mismanagement (e.g., witnessing the ninety-three chauffeured limousines for corporate officials) but cannot prove its case without significant discovery (e.g., to find out what the ninety-three limos cost and what rationale the company has for the purchases, if they are purchases rather than leases).

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381. 19 AM. JUR. 2D *Corporations* § 2250 (1986).

382. See Stephen P. Ferris et al., *Derivative Lawsuits as a Corporate Governance Mechanism: Empirical Evidence on Board Changes Surrounding Filings* (Mar. 14, 2000) (unpublished manuscript, on file with author).

383. That is also one of the criticisms of this type of litigation. Small shareholders often serve as the named plaintiffs in litigation that in reality is administered by law firms specializing in this type of litigation. Concerns that such suits were really about the law firm rather than the shareholders fueled passage of the Private Securities Litigation Reform Act of 1995, which placed a variety of limits or additional requirements on such suits. See Pub. L. No. 104-67, 109 Stat. 737 (1995); Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273 (1998).

384. See Pub. L. No. 104-67, 109 Stat. 737 (1995); John S. Beckerman & Eliot J. Weiss, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1994) (articulating argument later accepted in 1995 Act).

Again, a reasonable reading of claim-or-defense may be sufficient to permit derivative action plaintiffs to obtain necessary information. However, in the hands of a judge hostile to such suits in general or credulous of corporate management's story, claim-or-defense discovery will give plaintiffs too little information to have a fair fight with the company leadership. As the inquiry moves away from visible corporate waste, such as the hypothetical fleet of limousines to more subtle matters, plaintiff may be seeking material that, while not so easily linked to a claim or defense, is still relevant to the subject matter and potentially valuable to prosecuting the claim. In this more difficult area, narrowed discovery will permit defendants to avoid giving information and fend off claims with merit. Certainly, there will be less information produced than under the subject-matter standard.

### 9. *Property Disputes*

Disputes over property title may be relatively unaffected by the narrowing of discovery scope. A good deal of property title and other information is of public record or is in the hands of both disputants. Fact-based, nondocumentary issues of permission or easement would almost certainly be relevant under the claim-or-defense standard as well as the subject-matter standard.

### 10. *Intellectual Property*

Disputes over patent, copyright, and trademark may or may not be widely affected by the change to claim-or-defense relevancy. At least one commentator suggested a significant impact to the advisory committee.<sup>385</sup> However, it is not immediately clear exactly how the narrowed discovery will be applied and whether this impacts claimants more than defendants. One suspects narrowed discovery will more adversely impact parties alleging infringement or misuse. In such cases, tests, data, and other information in the hands of an alleged infringer that are currently available under a subject-matter standard might be considered irrelevant by some judges under a claim-or-defense standard. The state of mind of the defendant may be of importance as well, and this is less likely to be illuminated under the Proposed Amendment narrowing discovery.

Many copyright cases turn on judicial determination of things like "substantial similarity" as a matter of law, which suggests that the scope change will have limited impact. However, narrowed discovery

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385. See Transcript of Proceedings, *supra* note 199, at 6-8 (providing testimony of Max Blecher, Esq.).

may make a difference in such cases to the extent the cases turn on issues of access to proprietary material. Trademark cases often involve issues of similarity and consumer confusion that are in public view. Narrowed discovery may have some impact if the Proposed Amendment shields documents tending to show that the alleged infringer knew it was infringing, although these should normally be deemed relevant under a claim-or-defense standard.

### *12. Constitutional Law Cases*

On constitutional law issues involving separation of powers and federalism, cases are normally decided as a matter of law rather than on any factual distinction, so narrowed scope would probably not have a dramatic impact. On constitutional questions of individual rights, however, the case may turn on questions of “compelling need” or “less drastic means”. Broader discovery from government defendants could be important and may be less available under the Proposed Amendment narrowing discovery.

### V. EXPLAINING ERROR: THE RULEMAKING PROCESS AND THE CONTINUING DEVOLUTION OF THE FEDERAL CIVIL RULES

Naturally, there are two sides to the discovery scope debate. I simply happen to find the status quo subject-matter side far more convincing. Others may of course disagree. However, only a claim-or-defense zealot is likely to not be mildly amazed at the success of the scope-narrowing amendment.

First, there is a Rule of Procedure in place for sixty years. Second, although subject to complaints, particularly from defendants and their counsel, the Rule has not recently been the subject of serious challenge and is not immediately mentioned as a high priority for change in two extensive surveys of discovery. Third, proposals to narrow scope were rejected in the not terribly distant past (1978 and 1993). Fourth, the public comments and hearing testimony about the change, although divided, are largely in favor of retaining the Rule and its subject-matter scope of discovery. Fifth, a respected law professor member of the Advisory Committee makes persuasive arguments for abandoning the Proposed Amendment narrowing scope. Under these circumstances, one might expect the scope narrowing proposal to fail again. Instead, it survives the Advisory Committee by a two-to-one margin, is overwhelmingly passed by the Standing Committee, avoids near death in the Judicial Conference, is promulgated without dissent by the Su-

preme Court, and ratified by Congress.

What explains the seeming success of the scope-narrowing Amendment despite the strong arguments against it? Is Proposed Amended Rule 26(b)(1) an idea whose time has come, as suggested by the College of Trial Lawyers?<sup>386</sup> I think not. Normally, the archetypical idea whose time has come is one that was ahead of society and became feasible because society evolved in the direction of the idea. Think of the end of slavery, women's suffrage, democracy, the income tax, and antidiscrimination law as examples. Although these are all progressive or liberal examples, the phenomenon is not limited to what might be termed the left side of the political spectrum. Other examples are Adam Smith economics, the Industrial Revolution, and privatizing government functions.

My point remains: The idea whose time has come gathers a critical mass of widespread social adherence as thought in an area becomes more sophisticated. As discussed above, Proposed Amended Rule 26(b)(1) does not fit this formula for a number of reasons. It is an idea that has been a good in the marketplace of ideas for years, really prior to the promulgation of the 1938 Rules. During that time, it generally was an idea rejected in favor of the broader, subject matter scope of discovery in current Rule 26(b)(1). The idea gained a following in 1977 with the Litigation Section's endorsement, but it was, of course, not a new idea but simply a recycled idea.<sup>387</sup> The typical idea whose time has come is a new tire rather than a retread.

In the intervening twenty years, claim-or-defense scope has gained no greater credibility or support. The arguments for claim-and-defense relevance are essentially the same as in 1977 (or for that matter, 1938) as are the arguments against. On the merits, the subject-matter side of the debate continues to be stronger.<sup>388</sup> Although the proposal to adopt claim-or-defense scope has gained some adherents during the intervening years, it has not received the widespread endorsement and growing support one normally finds with the proverbial idea whose time has come.

What has changed, of course, are the pressure points of political power, particularly the Advisory Committee's receptiveness to certain arguments preferred by certain groups. Although the Committee and other Rulemakers continue to strive for nonpartisan fairness, the com-

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386. The American College of Trial Lawyers Report recommending the narrowing of discovery scope was subtitled "An Amendment Whose Time Has Come." See *supra* Part IV.C. (discussing the Report and its arguments for the change).

387. See *supra* Parts I, II, III (discussing the history of federal discovery rules and scope-narrowing proposal).

388. See *supra* Part IV. (discussing the problems and adverse impact of claim-or-defense scope of discovery).

position of the Rulemakers has become distinctly more conservative in both ideology and social background. Defense-oriented law and business groups have become considerably more aggressive and sophisticated in pushing their agenda for reducing claimant access to the courts.<sup>389</sup>

*A. The Changing Faces of the Rulemakers and the Political Alignment of the Scope Vote*

In addition, of course, elite lawyers have always had inordinate influence on national legal policy.<sup>390</sup> The Rulemakers remain inordinately influenced by the procedural views of the elite bar, occasionally at the expense of other elements of the bar and the profession and society as a whole. If anything, the problem has become more pronounced as the private Corporate bar has taken on a greater role in Rulemaking. The original 1938 Committee not only included Dean Clark as Reporter but had four law professors on the Committee itself: Michigan's Edson Sunderland; Harvard's Edmund Morgan; Minnesota's Wilbur Cherry; and Armistead Dobie, Dean of Virginia's law school.<sup>391</sup> It also had a higher percentage of members identified with government service rather than private practice, including former U.S. Attorneys General William Mitchell and George Wickersham, Special Assistant to the Attorney General Edgar Tolman, and former Massachusetts Attorney General Robert Dodge.<sup>392</sup> George Pepper had been a U.S. Senator, as had Scott Loftin.<sup>393</sup> Wickersham had also been President of the American Law Institute.<sup>394</sup>

To be sure, there was also a strong, corporate law firm element to the Committee.<sup>395</sup> For example, Mitchell, Wickersham, Dodge, Loftin,

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389. See Stempel, *Contracting Access*, *supra* note 12, at 965; Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115 (1991) (arguing that 1990 Civil Justice Reform Act seems more designed to favor corporate desire to see "something done" about litigation costs than by sound analysis; Delaware Senator Joseph Biden responsive to this constituency because of Delaware's corporate focus and Biden's then-existing presidential ambitions); Mullenix, *supra* note 81, at 375 (finding rulemaking efforts increasingly aimed at constricting the open courts model of the 1938 Rules); Mullenix, *Hope Over Experience*, *supra* note 52, at 795 (proposing to alter or restrict discovery motivated by interest groups who oppose discovery for substantive reasons).

390. See Resnik, *supra* note 29, at 498-99 (stating that initial Civil Rules Advisory Committee, Chaired by Yale Law School Dean Charles Clark, later a Second Circuit Judge, was a group of elite lawyers—white, male lawyers at that); see *supra* text accompanying notes 29-31 (listing full Committee membership).

391. Resnick, *supra* note 29, at 499.

392. *Id.* See also Burbank, *supra* note 16, at 1031-47 (describing role of these and other persons regarding Enabling Act).

393. Resnik, *supra* note 29, at 499 n.24.

394. *Id.*

395. *Id.* (noting that other Committee members Monte Lehman and Scott Loftin were also private practitioners). Ironically, the now corporate defense firm of Steel, Hector & Davis,

and Pepper all were prominent private practitioners in large, business-oriented firms at the time of the actual drafting of the 1938 Rules.<sup>396</sup> The Wickersham and Pepper firms still bear their names.<sup>397</sup> But these lions of the private bar all seemed to fit particularly well the ideal of what Dean Kronman has termed the “lawyer-statesman,” private practitioners who also see themselves as professionals with an obligation to the public interest.<sup>398</sup>

The 1938 Committee is also notable in that it had no judges on it. Only George Donworth had been a federal district judge. Compare this to the 1999 Advisory Committee, which was composed of six sitting district judges, a Magistrate Judge (John Carroll, M.D. Ala.), and one state Supreme Court Justice (Christine Durham of Utah). Of the six district judges, all but one was appointed by a Republican president. Committee Chair Paul Niemeyer (Fourth Circuit) and Judges Richard Kyle (D. Minn.), David Levi (E.D. Cal.), and Lee Rosenthal (S.D. Tex.) were appointed by President George Bush.<sup>399</sup> Roger Vinson (N.D. Fla.) was appointed by President Reagan, who also originally appointed Niemeyer to the district court.<sup>400</sup> The lone federal judge Democratic appointee on the Committee was Clinton appointee and district Judge Shira Scheindlin (S.D.N.Y.), although Durham was appointed by former Utah Governor Scott Matheson, a Democrat.<sup>401</sup> Committee composition, then, favored the forces of narrowed discovery, as Republicans had at least a five to one advantage over Democrats among judges on the Committee, which comprised half the 1999 Advisory Committee.<sup>402</sup> Magistrate Judge Carroll was selected by the District Judges of the Northern District of Alabama, a majority of whom are Republican appointees.<sup>403</sup>

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whose attorneys played a significant role in the 1998 Litigation Section Report recommending narrowed discovery, traces its roots back to Loftin, Steel, Hector, & Davis, *Miami and Steel Hector, & Davis LLP: A Brief History* (visited Oct. 24, 2000) <[http://www.steelhector.com/about%20ourfirm\\_banner.htm](http://www.steelhector.com/about%20ourfirm_banner.htm)> .

396. See Resnik, *supra* note 29, at 499 n.24.

397. New York-based Cadwalader, Wickersham & Taft and Philadelphia-based Pepper Hamilton LLP. THE AMERICAN BAR 2021, 2736 (2000).

398. See ANTHONY T. KRONMAN, THE LOST LAWYER 14-15 (1993) (discussing the concept of the lawyer-statesman); Resnik, *supra* note 29, at 498-501 (referring to public service orientation of original Advisory Committee members).

399. THE AMERICAN BENCH 71, 347, 1887, 2392 (Diana R. Irvine et al. eds., 11th ed. 2000).

400. *Id.* at 71, 680.

401. *Id.* at 1803, 2422.

402. I hesitate to comment on Justice Durham’s politics based on her appointment by a Democrat in view of the state-to-state variance in what might be termed the “partisan ideology factor” in state judicial appointments. By contrast, it is quite clear to anyone who has read the newspaper since 1980 that federal judicial appointments have been quite politicized to the extent that the Presidents have sought judicial appointments consistent with their party’s ideology and social interests.

403. See AMERICAN BENCH, *supra* note 399, at 115-47 (providing short biographies of N.D.

After judges, private practitioners were the next significant subgroup on the 1999 Advisory Committee. Its private lawyers were primarily defense lawyers. For example, there was Sheila Birnbaum, a products liability defense litigator for a very large firm (New York-based Skadden, Arps, Slate, Meagher & Flom), although Birnbaum had also been a full-time law professor at New York University.<sup>404</sup> Another product liability defense lawyer was Mark Kasanin, partner in a large firm (San Francisco-based McCutchen, Doyle, Brown & Enerson) specializing in products liability defense.<sup>405</sup> Myles V. Lynk, a commercial litigator for a very large firm (New York-based Dewey Ballantine) was also on the Committee.

By contrast, only one private practitioner on the Committee was in a practice primarily representing plaintiffs. Andrew M. Scherffious practices in his own two-lawyer firm in Atlanta, Georgia, and is primarily a plaintiff's lawyer.<sup>406</sup> Sol Schreiber, Liaison to the Committee, is a member of Milberg, Weiss, Bershad, Hynes & Lerach,<sup>407</sup> perhaps the country's most prominent plaintiffs' securities class action firm, but Schreiber does not have a vote on the Committee. The Committee had only one government attorney member, Acting Assistant Attorney General David Ogden, the Justice Department's designee.

The 1999 Committee had far less representation by the academy than did the 1938 Committee. The 1938 group had four law professors. The 1999 Committee had only a single academic, Duke Law Professor Tom Rowe.<sup>408</sup> Michigan Professor Edward Cooper served as Reporter<sup>409</sup> and Hastings Professor Rick Marcus served as an Assistant Reporter on the Discovery Subcommittee.<sup>410</sup> Although these are important academic components of the process, neither votes on the Commit-

Ala. bench).

404. Biography of Sheila L. Birnbaum, Skadden, Arps, Slate, Meagher & Flom website (visited Oct. 24, 2000) <<http://www.skaddenarps.com/onefirm/partners.htm/>>. Birnbaum is also a frequent author on products liability matters, often arguing the defendant's perspective on the law. *See id.* Her website biography emphasizes her representation of defendants in significant products liability cases. *See id.*

405. *See* Attorney Profile of Mark O. Kasanin, McCutcheon, Doyle, Brown & Enerson website (visited Oct. 24, 2000) <[www.mccutchen.com/att/kasanin\\_m\\_att.htm](http://www.mccutchen.com/att/kasanin_m_att.htm)>. In his biography on the McCutchen, Doyle website, Kasanin emphasizes his role in defending vehicle manufacturers. *See id.* Kasanin replaced private practitioner Carol Hansen Posegate of the Springfield, Illinois firm of Giffin, Winning, Cohen & Bodewes, whose practice appears to be more balanced and perhaps even plaintiff-oriented.

406. *See* Martindale-Hubbell Law Directory for 2000, *available at* <<http://www.martindalehubbell.com/locator/home.html>>.

407. *Id.*

408. *Faculty Profile Thomas D. Rowe Jr.*, Duke University School of Law website (visited Oct. 26, 2000) <<http://www.law.duke.edu/fac/rowe/>>.

409. *Edward H. Cooper*, University of Michigan Law School webpage (visited Oct. 26, 2000) <[http://141.211.44.51/\\_FacultyBioPage/facultybiopage.asp?uniqname=coopere](http://141.211.44.51/_FacultyBioPage/facultybiopage.asp?uniqname=coopere)>.

410. *Hastings Faculty Web Faculty Profiles*, Hastings College of Law website (visited Oct. 26, 2000) <<http://www.uchastings.edu/faculty/fulltime/marcus.html>>.



tee. The 1999 Committee membership was thus dominated by Republican judges and large firm defense lawyers.

The 1999 Standing Committee, which supported the Proposed Amendment by a ten to two vote, might appear more balanced ideologically, as least as to its judicial members.<sup>411</sup> Of its six judges, three were appointed by Republicans and three by Democrats. Chair Anthony Scirica (Third Circuit) is a Reagan appointee, as is district Judge Frank Bullock (M.D.N.C.). Michael Boudin (First Circuit) is a Bush appointee who served in the Reagan Administration Justice Department. Judges Wallace Tashima (Ninth Circuit) and J. Garvan Murtha (D. Vt.) are Clinton appointees while Judge Phyllis Kravitch (Eleventh Circuit) is a Carter appointee.<sup>412</sup> Delaware Supreme Court Chief Justice Norman Veasey is considered a nonpartisan moderate and noted for his public service, but in private practice he was with a large commercial firm litigating the type of cases for which the analysis earlier in this Article suggested more evenhanded impact of a narrowing of scope. Justice Veasey is also a Fellow in the College of Trial Lawyers.<sup>413</sup>

The practitioners on the Committee include: Gene Lafitte of Liskow & Lewis, New Orleans; Patrick McCartan of Cleveland-based Jones, Day, Reavis & Pogue; David Bernick of Chicago's Kirkland & Ellis; and Charles J. Cooper of the Washington D.C. firm of Cooper, Carvin & Rosenthal.<sup>414</sup> Of the lawyers on the Standing Committee, only Lafitte appears to represent plaintiffs to any significant degree.<sup>415</sup> Attorneys McCartan and Bernick work with large firms known for defending business entities. Attorney Cooper is a name partner in a medium-sized firm and is also active in the Federalist Society, a distinctly conservative group.<sup>416</sup> Interestingly but not surprisingly, he clerked for Justice Rehnquist during 1978-79, proximate to the time of the Powell-Rehnquist dissents against discovery.<sup>417</sup> The lone academic on the Committee is Geoffrey C. Hazard (Pennsylvania),<sup>418</sup> Director of the

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411. Committee on Rules of Practice and Procedure, *Minutes of Committee on Rules of Practice and Procedure, June 14 & 15, 1999*, available at <<http://www.uscourts.gov/rules.htm>> [hereinafter *June 1999 Committee Minutes*]

412. Biographies of federal judges on the Standing Committee are taken from the ALMANAC OF THE FEDERAL JUDICIARY (2000).

413. THE AMERICAN BENCH 538-39 (2000); *Meet the Supreme Court Justices*, Delaware Courts website (visited Oct. 26, 2000) <<http://courts.state.de.us/supreme/jsts.htm>>. Veasey is Chair of the ABA's Ethics 2000 Committee, charged with revising the Model Rules of Professional Conduct.

414. Martindale-Hubbell Lawyer Locator 2000 (visited Oct. 26, 2000) <<http://www.martindalehubbell.com/locator.home.html>>.

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

ALI from 1986-1999. Deputy Attorney General Eric Holder<sup>419</sup> sits ex-officio while Prof. Daniel Coquillette<sup>420</sup> (Boston College) is the Reporter.

Under the Rules Enabling Act,<sup>421</sup> the Advisory Committee is appointed by the Chief Justice, as is the Standing Committee. During the last third of the century, two very conservative Chiefs—Warren Burger and William Rehnquist—have held this power and generally used it to put kindred spirits on the Advisory Committee. Not surprisingly, then, Professor Rowe's motion to abandon the scope-narrowing Amendment foundered on a nine to four vote along "party" and ideological lines.<sup>422</sup> Supporting Rowe was Clinton appointee Schiendlin,<sup>423</sup> the representative of the Clinton Justice Department (Ogden), and a lawyer who generally represents plaintiffs (Andrew Scherffious). Opposing the motion and favoring narrowed discovery were the Republican-appointed judges,<sup>424</sup> Utah State Supreme Court Justice Durham,<sup>425</sup> and large firm defense practitioners Miles Link, Sheila Birnbaum, and Mark Kasanin, the latter two product liability defense counsel.

In short, the Advisory Committee vote on scope of discovery, despite a debate of considerable sophistication, in the end resembled Capitol Hill as much as a judicial deliberation. After the Committee sent forth the Proposed Amendment, it was reviewed by the Standing Committee on Rules of Practice and Procedure. As noted above, the Standing Committee was more politically balanced in terms of judicial appointees, but its practitioner members were heavily drawn from the ranks of large law firms focused on representing corporate defendants.<sup>426</sup> Its less extensive debate over the proposal to narrow discovery paralleled that of the Advisory Committee and can be said to have broken along political lines, although at least two Democratic appointees supported the Proposed Amendment.<sup>427</sup>

After the Standing Committee approved the narrowing of discovery scope, the proposal was considered by the Judicial Conference. Again, the proposal was the most controversial of the package of Amend-

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419. Martindale-Hubbell Lawyer Locator 2000, *supra* note 414.

420. *Id.*

421. 28 U.S.C. § 2072 (1994).

422. *See April 1999 Committee Minutes, supra* note 7.

423. *See id.*

424. *See id.*

425. Durham is to some extent an exception to the vocational and ideological patterns of the voting. She has taught at Duke and Brigham Young Universities and was appointed to the Utah Supreme Court by Scott Matheson, a Democratic Governor. *THE AMERICAN BENCH* 2422 (2000).

426. *See supra* text accompanying notes 411-20 (discussing 1999 Standing Committee membership).

427. *See June 1999 Committee Minutes, supra* note 411.

ments. Before the Judicial Conference at its September 1999 Meeting, Third Circuit Chief Judge Edward Becker renewed Professor Rowe's motion to abandon the plan to narrow scope. After a debate that replicated the discussion of the Advisory Committee, the Judicial Conference voted to retain the scope-narrowing Amendment by a thirteen to twelve vote, which also divided along party and ideological lines, although not to the degree found in the Advisory Committee.

In the Judicial Conference, where the vote on scope was much closer, a variety of factors diluted the socio-political advantages possessed by claim-or-defense scope before the Advisory Committee. Unlike the Advisory Committee and the Standing Committee, which is appointed solely by the Chief Justice and can be shaped by the Chief Justice to fit his agenda, the Judicial Conference membership is established by statute and selected through more eclectic, less controllable criteria.

The Judicial Conference is comprised, in part, of the Chief Justice of the United States and the Chief Judges of each judicial district. The Chief Judge is the judge in the Circuit Court who has been in active service longest, provided she has served more than one year and is not yet sixty-five years old, and has not previously served as Chief Judge.<sup>428</sup> The remainder of the Conference is comprised of district judges who are elected to membership by the other judges of their respective circuits. As of the September 1999 Conference vote on discovery scope, the Chief Judge members of the Conference were: Juan R. Torruella (First Circuit), a Reagan appointee; Ralph K. Winter (Second Circuit), a Reagan appointee; Edward R. Becker (Third Circuit), a Reagan appointee (originally a Nixon appointee to the district bench); J. Harvie Wilkinson III (Fourth Circuit), a Reagan appointee; Carolyn Dineen King (Fifth Circuit), a Carter appointee; Boyce F. Martin, Jr. (Sixth Circuit), a Carter appointee; Richard A. Posner (Seventh Circuit), a Reagan appointee; Roger L. Wollman (Eighth Circuit), a Reagan appointee; Stephanie K. Seymour (Tenth Circuit), a Carter appointee; R. Lanier Anderson (Eleventh Circuit), a Carter appointee; Harry T. Edwards (D.C. Circuit), a Carter appointee; Haldane Robert Mayer (Federal Circuit), a Reagan appointee; and Gregory W. Carman (Court of International Trade), a Reagan appointee.

Although GOP appointees held an eight to five advantage among the Chief Judge membership of the Conference, this tally may be deceiving in that four of the eight Republican Chiefs are former full-time

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428. See 28 U.S.C. § 331 (1994) (establishing Judicial Conference and its composition); *id.* § 371 (establishing criteria for determination of Chief Judge). See U.S. Courts website, *supra* note 17.

law professors, who might be less politically predictable, a factor discussed at greater length below. The district judge members of the 1999 Conference were: Joseph A. DiClerico, Jr. (D.N.H.), a Bush appointee; Charles P. Sifton (E.D.N.Y.), a Carter appointee; Donald E. Zeigler (W.D. Pa.), a Carter appointee; Charles H. Haden II (S.D.W. Va.), a Ford appointee; Hayden W. Head, Jr. (S.D. Tex.), a Reagan appointee; Thomas A. Wiseman, Jr. (M.D. Tenn.), a Carter appointee; Robert L. Miller, Jr. (N.D. Ind.), a Reagan appointee; James M. Rosenbaum (D. Minn.), a Reagan appointee; Lloyd D. George (D. Nev.), a Reagan appointee; Ralph G. Thompson (W.D. Okla.), a Ford appointee; William Terrell Hodges (M.D. Fla.), a Nixon appointee; and Norma H. Johnson (D.D.C.), a Carter appointee.<sup>429</sup>

Among the trial court judge members of the Conference, then, there is another eight to four ratio of GOP and Democratic appointees, combining for a sixteen to nine Republican advantage at the Conference, seventeen to nine if one counts Chief Justice Rehnquist. While there is still a substantial Republican-conservative tilt to the Conference, it is not nearly so pronounced as that found on the Civil Rules Advisory Committee.

The method of the Conference's selection makes it less subject to political control than is the Advisory Committee. Each of the Chief Judges and district judges undoubtedly in part owes his or her position to the political winds of appointment at the outset of his judicial career. But White House and congressional politics cannot do as much to control longevity, age, and turnover in each circuit court. Thus, the Chief Judge in a given Circuit Court may or may not align with current political trends. For example, the Seventh Circuit Chief Judge is Richard Posner, a Reagan-appointee holding office more than a decade after Reagan's retirement while Democrat Bill Clinton holds office. Similarly, District of Columbia Circuit Chief Judge Harry Edwards, appointed by Democrat Jimmy Carter, holds office and votes on Civil Rules Amendments at a time when Republican-appointed Chief Justice William Rehnquist appears to be appointing Advisory Committees designed to curtail discovery.

District judge members of the Conference remain products of the political process of appointment and must be elected by other judges who are products of the political process. But to some extent their constituency is "local" and may exhibit a different ideological benefit than that of the current President, the Chief Justice, or the judiciary as a whole. Further complicating matters is the degree of variation among circuits in choosing district judge representatives of the Judicial Con-

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429. See U.S. Courts website, *supra* note 17.

ference. For example, some circuits simply select the most active district judge with the most seniority. Others have a more conventional election in which an interested district judge seeks to be selected through "running" for the post but in a low-key manner more akin to seeking the ABA presidency rather than a seat in Congress. In some circuits, it appears that an effort is made to ensure that district judge representatives to the Conference rotate sufficiently to provide different states or regions in the circuit with representation.<sup>430</sup>

As a result of the different composition structures, the Judicial Conference is more insulated from politics, particularly the politics of the Chief Justice. In addition, through perhaps a quirk of history, the current Judicial Conference has a much more academic tone than does the Advisory Committee. Four of the Chief Judges on the current Conference were once full-time law professors of prominence: Ralph Winter (Second Circuit, Yale); J. Harvie Wilkinson III (Fourth Circuit, Virginia); Richard Posner (Seventh Circuit, Chicago); and Harry Edwards (D.C. Circuit, Michigan). In addition, Third Circuit Chief Judge Becker has made significant contributions to legal scholarship and is a judge known for an academic bent,<sup>431</sup> and Chief Judge Boyce Martin (Sixth Circuit, Louisville) has taught as an adjunct professor. Among the district judges, Charles Haden (S.D. W.Va., West Virginia) is a former full-time law professor.<sup>432</sup>

Also, the current Judicial Conference exhibits some counterintuitive examples of law and politics. Judge Becker, who moved to abandon Proposed Amended Rule 26(b)(1), is a Republican appointee but is something of a "Rockefeller" Republican, an Eastern, urban political moderate who was originally appointed to the District Court by President Nixon,<sup>433</sup> a chief executive now viewed as less ideological in his judicial appointments than were Reagan and Bush.<sup>434</sup> Judge Rosenbaum

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430. The differences in the Circuit selection customs and procedures are not to my knowledge officially codified in public documents but are known to lawyers and judges familiar with the Circuits. This description, for example, was provided to me by a district judge familiar with the process in several Circuits.

431. See, e.g., Becker & Orenstein, *supra* note 131 (advocating creation of Advisory Committee on Rules of Evidence, a suggestion enacted by Judicial Conference the next year). Judge Becker is also a frequent panelist or guest speaker at law school symposia. See, e.g., Symposium, *The Future of the Federal Courts*, U.C. DAVIS L. REV. (forthcoming 2000); Symposium, *supra* note 233.

432. Biographical information about the Judges discussed in the preceding paragraph is from the ALMANAC OF THE FEDERAL JUDICIARY 2000, *supra* note 135.

433. See *id.* In addition, Becker himself comes from a more moderate Republican political tradition of Philadelphia and Eastern Pennsylvania, which has produced a significant number of moderate Republicans (e.g., U.S. Senators Arlen Specter, Richard Schweiker, Hugh Scott), many of them appointed to the bench (e.g., former 3d Cir. Judge Arlin Adams, E.D. Pa. Judge and former Lt. Gov. Raymond Broderick).

434. See Timothy B. Tomasini & Jess A. Velona, Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Court of Appeals*, 87 COLUM. L. REV. 766, 783

was appointed by Reagan but is a political moderate, Jewish, a former poverty lawyer, and did considerable criminal defense and plaintiffs' personal injury work prior to becoming U.S. Attorney and a federal trial judge.<sup>435</sup>

The former professors on the Conference are considerably more conservative than liberal which is, of course, why President Reagan appointed them. But they can exhibit the maverick intellectual traits of the scholar. For example, Judge Winter, despite his ideology, is known for "deciding on the merits"<sup>436</sup> and is best known as the architect of the litigation strategy that produced *Buckley v. Valeo*,<sup>437</sup> a decision that aided monied interests by striking down campaign contribution limits but was endorsed by the American Civil Liberties Union and founded on first amendment principles.<sup>438</sup> Judge Wilkinson is probably most conservative of the group but has rendered decisions favorable to plaintiffs.<sup>439</sup> Judge Posner is a pragmatic and eclectic author, who has exhibited tendencies toward legal realism and even entitled one recent book *Overcoming Law* (so much for hidebound traditionalism).<sup>440</sup> Judge Edwards is the most liberal, but he has often found for defendants and

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(1987) (finding 1970s less ideological in presidential politics; but Reagan appointees did not behave differently than Nixon or Ford appointees in study).

435. See ALMANAC, *supra* note 135. I should add that I am personally acquainted with Judge Rosenbaum and know about his political views and private practice from this experience rather than from the ALMANAC. Rosenbaum was a co-director of the 1978 U.S. Senate campaign of Republican Rudy Boschwitz, in which I served as research director and press secretary from September 1977 to August 1978. In the course of the campaign, issues were constantly discussed by campaign staff. In my view, Rosenbaum's views on the issues of the day were those of a moderate, "Rockefeller" style Republican, veering somewhat right or left of center depending on the matter in question. He certainly was not as conservative as President Reagan, and his subsequent judicial decisions tend to reflect that moderation. See, e.g., *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991) (certifying class action in gender discrimination suit); *Capellupa v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1989) (finding gender discrimination defendants to have "ordered and participated in the knowing and intentional destruction of documents and evidence").

436. Remarks of former Brooklyn Law School Dean David G. Trager, now a district judge (E.D.N.Y.) in introducing Judge Winter as Brooklyn Law graduation speaker (June 9, 1990).

437. 424 U.S. 1 (1976).

438. See Joel M. Gora, *Buckley v. Valeo: A Landmark of Political Freedom*, 33 AKRON L. REV. 7 (1999); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997).

439. See, e.g., *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411 (4th Cir. 1999) (holding that all testimony in a Title VII action is protected against employer retaliation, even if statements made are unreasonable); *Vienna Family Med. Assocs. v. Allstate Ins. Co.*, 78 F.3d 580 (4th Cir. 1996) (dissenting from panel ruling that insurance policy did not cover claims of wrongful discharge against employer).

440. See RICHARD A. POSNER, *OVERCOMING LAW* (1995). Although I have joined in criticizing Posner for being insufficiently sensitive to the realities of job discrimination, there is no doubt that he does not fit the classic conservative mold. See Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner and Pregnancy Discrimination*, 46 FLA. L. REV. 193 (1994) (criticizing Posner's treatment of plaintiff's claim but noting his pragmatist, post-Realist legal philosophy). See also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1992).

criticized excessively theoretical leftists.<sup>441</sup>

In short, the Conference was a less predictably corporate group than the Advisory Committee, and it showed: narrowed discovery narrowly escaped defeat in the Conference. Although the inner workings of the Conference and the actual tally of votes is confidential (and has remained unavailable to me), it appears that Chief Justice Rehnquist in fact cast the deciding vote in the thirteen to twelve Conference vote favoring narrowed discovery. As previously noted, Rehnquist has, as a Justice, criticized broad discovery and was part of a unanimous Supreme Court promulgating the Proposed 2000 Amendments, with Rehnquist as Chief authoring the transmittal letter to Congress. The inescapable deduction is that the Chief Justice ultimately was “more equal than others” in narrowing the scope of discovery in federal court—by stacking an Advisory Committee and Standing Committee with narrowed scope advocates, by keeping the status quo at bay in the Judicial Conference, and by shepherding the changes through the Court.

The Judicial Conference also eliminated the cost-shifting provisions of the Advisory Committee, which many feared would lead to the common imposition of plaintiffs funding defendants’ document production and information assembly.<sup>442</sup> Notwithstanding the more balanced makeup of the Conference, however, one would have to regard it by tint of political affiliation as a group more predisposed against broad discovery than for it.

### *B. The Influence of the Elite Bar and Procedural Reform*

In addition to favorable Committee and Conference composition, narrowed discovery was further favored by the extra-Committee factors of the current politics and sociology of Rulemaking. The elite, mostly large firm, bar largely represents corporate America.<sup>443</sup> To the extent that these elite attorneys do not separate themselves from client interests (or in fact themselves embrace the clients views), the message Rulemakers receive from the elite bar will be one favoring the corporate agenda, a major part of which is reducing discovery.<sup>444</sup> Defense

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441. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 401 (1992).

442. See Confidential Communication, *supra* note 129. As a matter of public record, one can substantiate the fact of the Judicial Conference’s change in cost-shifting (if not the size of the vote) by comparing the draft of Proposed Rules leaving the Standing Committee to that coming before the Supreme Court.

443. See LAWYERS’ IDEALS/LAWYERS’ PRACTICES (Robert L. Nelson et al. eds., 1992); RICHARD L. ABEL, AMERICAN LAWYERS (1989); MORTON HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW (1974).

444. Corporate spokespersons or their attorneys have historically criticized the breadth of

bar organizations specifically endorsed narrowing the scope of discovery.<sup>445</sup> Proposed Amended Rule 26(b)(1) provides a telling example of the manner in which the sociology and politics of Rulemaking converge to produce unwise changes in the law.

As noted above,<sup>446</sup> the proposal to narrow the scope of discovery did not begin with a groundswell at the grassroots. Rather, a relatively elite group of lawyers—the ABA Litigation Section—suggested the narrowing to claim-or-defense scope in 1977. I suggest relatively elite because the Litigation Section has a rather large membership and is open to anyone who wants to join. It is not a smaller, by-invitation-only group such as the American College of Trial Lawyers or a smaller, selective group such as the American Law Institute (one may apply for ALI membership but one must be “tapped” for College membership).<sup>447</sup> Regarding the Litigation Section, my prior enthusiasm and current misgivings may come from some concern over what constitutes the exception and what comprises the rule in Litigation Section activity. For the most part, Litigation Section publications and reports are excellent, marshaling the case law and discussing it cogently along with assessing the legal issues at stake. One prototypical such document is the Litigation Section’s *Standards and Guidelines for Practice*

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subject-matter discovery and the most recent round of Proposed Amendments was no exception. Of the nearly one dozen corporate representatives (clients or in-house counsel) submitting comments or testimony to the Committee, all favored narrowing discovery to the claim-or-defense standard. *See, e.g.*, Comments of Dow Chemical (Dkt. No. 98-CV-59), Houston Industries, Inc. (Dkt. No. 98-CV-091), Metropolitan Life Insurance Co. (Dkt. No. 98-CV-021), Estman Chemical Co. (Dkt. No. 98-CV-244), National Ass’n of Ind. Insurers (Dkt. No. 98-CV-227), Wal Mart (Dkt. No. 98-CV-228), Roche Chemical (Dkt. No. 98-CV-173), State Farm Insurance (Dkt. No. 98-CV-065), and Ford Motor Co. (98-CV-066).

445. *See supra* text accompanying notes 202-22 (discussing Defense Research Institute and American Tort Reform Association testimony).

446. *See supra* text accompanying notes 10-31 (discussing the history of proposed claim-or-defense discovery).

447. Because of the Litigation Section’s large cross-sectional membership and less elitist composition, I have in the past argued that the Section is a logical entity to draft case-specific presumptive standards for discovery conduct. *See* Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin’s New-Old Procedure as a Possible Antidote to Dreyfuss’s “Tolstoy Problem”*, 46 FLA. L. REV. 57 (1994) (commenting with favor upon proposal to attempt to establish such standards in Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994) (arguing that presumptive discovery practices should be established by lawyers themselves for particular types of frequently problematic cases)).

In that article, I argued that the broader scope of Litigation Section membership made it a better vehicle for testing Subrin’s proposal than the more “upscale” ALI (I am a member of both groups). The Proposed Amendments narrowing discovery scope prompted me to reconsider the relative advantages of the two organizations. Although ALI’s practitioner members are pronouncedly from the large firm elite, ALI has a significant academic and judicial presence that tends to leaven its policymaking. Consequently, it may be that I picked the “wrong horse” to try out Subrin’s proposal. Of course, if this is error, it is “no harm, no foul” error in that Subrin’s proposal has not been taken any distance by any bar group of which I am aware.



*Under Rule 11 of the Federal Rules of Civil Procedure*,<sup>448</sup> which set forth in *Restatement*-like form the better black letter view for applying the 1983 version of Rule 11 (I was a member of the drafting Committee). That document is rich in both research and analysis. By contrast, the Section's 1977 Report recommending the narrowing of discovery scope is conclusory and opinionated, making no convincing case for change.<sup>449</sup> Oddly, the Rulemakers appear about to codify a proposal stemming from one of the Section's weaker efforts. The law reform work of the ABA Litigation Section, however, is generally done through Committees or working groups disproportionately populated by lawyers from large, elite law firms.<sup>450</sup> Normally, these lawyers defend relatively wealthy corporate clients in commercial, products liability, securities fraud, and other business litigation. To the extent these sorts of committee members vote client interests during the law reform process, the law reform product will have a distinctly corporate slant disfavoring discovery.

The Litigation Section group that in 1977 suggested narrowing the scope of discovery was no exception, comprised chiefly of judges and prominent defense lawyers such as Weyman Lundquist (of San Francisco's Heller, Ehrman) and Peter Gruenberger (of New York's Weil, Gotshal & Manges), although it included a prominent scholar and at least two prominent plaintiffs' lawyers.<sup>451</sup> Because the Section Committee Report is so thin, public records are not readily available, and the meetings are a twenty-five-year-old memory, one cannot put together the sense of Committee opinion as one can with the 1999 Advisory Committee. There appears not to have been any division within the Section Committee on the scope issue, even though it included prominent plaintiffs' lawyers such as Philip Corboy of Chicago and Morton Galane of Las Vegas. In the 1999 Public Comments on the Proposed Amendments, the law firm of Corboy & DeMetrio opposed the narrowing of discovery scope, via Thomas Demetrio's submissions to the

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448. 121 F.R.D. 101 (1988).

449. See *supra* text accompanying notes 322-38 (discussing the 1977 Section proposal).

450. This observation certainly applies to the Section Study on discovery scope, discussed *supra* at text accompanying notes 322-38. It also applied to the Rule 11 Committee of which I was a member that included prominent private practitioners Gregory Joseph (Fried, Frank), Standish Forde Medina (Debevoise, Plimpton), Alvin Hellerstein (Stroock, Stroock & Lavan) and Jerome Gotkin (Nutter, McClennan & Fish). But the Rule 11 Committee also had the active participation of law professors Margaret A. Berger (Brooklyn), Edward Cavanaugh (St. Johns), Maurice Rosenberg (Columbia), Georgene Vairo (Fordham, now Loyola-L.A.) and Ettie Ward as well as me. See *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 105 (1988). In the latest round of rulemaking, Professors Ward and Cavanaugh each submitted comments specifically opposing Proposed Amended Rule 26(b)(1). See Public Comment Dkt. Nos. 98-CV-172 (Ward) and 98-CV-002 (Cavanaugh).

451. See *supra* text accompanying notes 328-30 (providing detailed description of the Section membership).

Advisory Committee.<sup>452</sup>

The Advisory Committee that in 1978 eventually backed away from the proposal to narrow scope was more balanced politically than the 1999 Committee. The 1978 group included seven judges, four appointed by Democrats and three Eisenhower Republicans. It had five practitioner members: Washington, D.C. antitrust attorney Earl Kintner; soon-to-be ABA President Robert Meserve of Boston's Palmer & Dodge; William Kirby of New York's Sullivan & Cromwell, and New York's Abraham Pomerantz, dean of the securities plaintiff's class action bar and reputed father of the shareholders' derivative lawsuit. In short, it was a Committee far less likely to forge ahead with an agenda for restricting discovery in the face of substantial and reasoned opposition by significant elements of the profession. Consequently, it is perhaps not surprising that this group, although initially interested in the Litigation Section suggestion of narrowed discovery, did not forge ahead with the proposal in the face of criticism.

The initial Litigation Section proposal that was defeated in the late 1970s was hardly a new idea. Rather, it was the exhumation of an old idea rejected by the more public-oriented 1938 Advisory Committee. The scope narrowing proposal again rose from these ashes to its current prominence because of the dogged advocacy of the American College of Trial Lawyers. The College's influence in bringing about Proposed Amended Rule 26(b)(1) in the Year 2000 cannot be overstated. The College placed the scope-narrowing change on the Advisory Committee's agenda. College representatives attended Committee Meetings and testified at the public hearings on the proposal. The College made a written submission on behalf of the proposal, which was endorsed by its Board of Regents, an unusual move designed to add weight and credibility to the recommendation.

Perhaps most important, the College had considerable credibility with the Advisory Committee. The College's support of Proposed Amended Rule 26(b)(1) was considered crucial to the Rule's survival in the face of Professor Rowe's abandonment motion. The College had this credibility both because it was an elite organization of lawyers and because it promoted itself as an organization of plaintiff and defense counsel.<sup>453</sup> Because so much of the commentary about the Proposed Amendments cleave along plaintiff-defendant lines, this gave the College additional credibility.

But the College's reputation for plaintiff-defendant evenhandedness is deceptive in this context. A closer look at the makeup of the College

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452. See Letter of Thomas Demetrio to Advisory Committee, Dkt. No. CV-98-085.

453. See *College Report*, *supra* note 308, at 1 n.1.

and its Committee recommending the Amendment reveals it to have a substantial defense makeup. Even more than that, the key membership of the College on this issue, like the College membership itself, is comprised disproportionately of lawyers practicing large-scale commercial litigation for wealthy corporate entities. For example, Robert Campbell, the Chair of the College Committee and the spokesperson for the College before the Rulemakers, represents defendants, often products liability defendants.<sup>454</sup>

Other College Committee Members fit this same profile. As an example, the College's Committee on Federal Civil Rules that produced the recommendation to narrow scope included the following members:<sup>455</sup> J. David Andrews, a lawyer for Seattle-based Perkins, Coie, one of the largest law firms in the Northwest and one that represents large businesses; Jeffrey Barist, a partner at New York's Milbank, Tweed, Hadley & McCloy, a firm best known for representing the Rockefeller family and Chase Manhattan Bank; Mark Belnick, formerly a partner at New York's Paul, Weiss, Rifkind, Wharton & Garrison and now chief corporate counsel for Tyco International, Ltd., a diversified manufacturer specializing in fire protection and security systems;<sup>456</sup> Peter Culley, a partner at Pierce Atwood, the largest firm in Maine and one representing businesses; William Goodman of Watkins & Eager, one of the largest firms in Mississippi and an old-line institution with major corporate clients; Thomas Holliday of Gibson, Dunn & Crutcher, the Los Angeles-based firm that represents large businesses and is the private practice home of several Reagan Administration alumni, including former Attorney General William French Smith and former Assistant Attorney General Theodore Olson, a prominent crusader for tort reform and George W. Bush's counsel in the litigation over the disputed 2000 presidential election; Edward Leibensperger of Nutter, McClennen & Fish, the large Boston firm that represents businesses and traces its lineage to Louis Brandeis, master corporate lawyer of the early Twentieth Century prior to his appointment to the Supreme Court; Daniel Mahoney of Nutter, McClennen & Fish, a large traditional commercial law firm in Boston; William McCormack of Boston's Bingham Dana, another large, traditional corporate firm; Barbara Mather of Philadelphia-based Pepper, Hamilton & Scheetz, a firm that represents businesses and has substantial activity devoted to defending discrimination and products liability

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454. See MARTINDALE-HUBBELL LAW DIRECTORY (2000).

455. The descriptions of the College Committee member practices are drawn from MARTINDALE HUBBELL LAW DIRECTORY (2000), including the firms' own descriptions of their practices.

456. See Bermuda Stock Exchange Press Release, *Mark Belnick to Join Tyco International* (visited Oct. 26, 2000) <<http://www.bsx.com/cgi-win/Bermuda-inc.exe/bsx-read-news>>.

suits;<sup>457</sup> Harry Reasoner, a business litigator at Houston megafirm Vinson & Elkins; L. Roland Roegge, a defense lawyer in the commercial and insurance defense firm of Smith, Haughey, Rice & Roegge (Grand Rapids, Michigan); Evan Schwab, a partner at the Seattle office of Minneapolis-based Dorsey & Whitney, one of the largest firms in the country with business clients including U.S. Bank; Kenneth Sherk, an insurance defense lawyer in Phoenix, Arizona's Fennemore Craig; Irving Segal, a litigator with business law firm Schnader, Harrison Segal & Lewis of Philadelphia, founded by his late brother, former ABA President Bernard Segal; and Joseph Spivey III of Hunton & Williams, the old-line Richmond firm that was the alma mater of Justice Powell, the modern Supreme Court's most prominent critic of discovery.

These listed lawyers clearly fit the big, business defense firm profile. A good deal of the work at these entities is undoubtedly for insurance companies and involves products liability and discrimination defense. Other College Committee members are less completely classified in this manner but appear to have largely business or defense practices. These other members include, for example: Burck Bailey, whose firm is one of approximately twenty-five lawyers but has a commercial clientele; David Beck of Beck, Redden & Secrest, a firm of "only" seventeen lawyers but one appearing to do traditional representation of corporate clients; John Cooper of Farella, Braun & Martel, an eighty-five-lawyer San Francisco firm that represents business but is best known for representing them as policyholders seeking insurance coverage, a perhaps more plaintiff-like stance; John Dolan of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, a firm of more than 100 lawyers serving largely business clients despite being named for lead partner and former Third Circuit Judge and Seton Hall professor John Gibbons, generally regarded as a liberal; Morris Harrell of Locke, Liddell & Sampp, a perhaps less known but large (more than 400-lawyer) firm with commercial clients that was formed in 1999 by a merger of two well-established corporate firms; Frederic Kauffman of Lincoln, Nebraska's Cline, Williams, Wright, Johnson & Oldfather, a firm large by local standards and appearing to concentrate on commercial litigation; Edwin Klett, a name partner in a medium-size firm that appears to represent commercial clients; John Moseley, who is a name partner in a small firm, but one that appears to specialize in insurance defense work; David Scott, Q.C., a Canadian lawyer in one of that country's

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457. Ironically, Pepper Hamilton was founded by George Wharton Pepper, a member of the 1938 Advisory Committee that endorsed subject-matter discovery. The firm is also the professional home of Kathleen Blanner, who spearheaded the 1998 Litigation Section report that in essence recommended repealing Pepper's 1938 work and substituting claim-or-defense as the standard for discovery relevance. *See supra* text accompanying notes 285-86.

largest firms and a specialist in intellectual property law; Roger Stanton, a partner in a small Kansas City, Missouri firm whose practice is less defined as pro or anti defendant; and John Vardaman of Williams & Connolly, a firm that is not quite as large and perhaps less corporate but largely an establishment firm.

Of the Committee members, only Charles Harvey (Harvey & Frank, Portland, Maine) appears to have a practice representing plaintiffs. In short, it appears there was hardly a single plaintiff's personal injury, products liability, or job discrimination lawyer on this College Committee that recommended narrowing the scope of discovery and provided so little "evidence" of any need for the change.<sup>458</sup> The College's twenty-nine-member Committee advocating a significant change in a sixty-year-old Civil Rule contained more than a dozen megafirm lawyers and was completely dominated by lawyers representing business entities. Insurance and product liability defense lawyers may be the single biggest subgroup on the Committee. LEXIS and Westlaw searches reveal that the College Committee attorneys represent plaintiffs in litigation with some frequency, but the nature of these disputes usually involves commercial litigation between businesses over commercial matters such as alleged contract breach.<sup>459</sup> Thus, the College Committee is almost exclusively a group of lawyers representing corporate America, more often as defendants, and frequently as products liability, discrimination, pollution, and securities fraud defendants.

Among the College's "Board of Regents" are business or defense lawyers such as: E. Osborn Ayscue, a prominent commercial litigator practicing in Charlotte, North Carolina, and one who represents products liability defendants on some occasions; Spencer Brown of Deacy & Deacy, which appears to be an insurance defense firm; Andrew Coats of Crowe & Dunlevy, a large, established, corporate firm; David Cupps of Vorys, Sater, Seymour & Pease, a large firm with business clients including pharmaceutical and insurance companies; Louis Fryman of the large Philadelphia firm Fox, Rothschild, O'Brien & Frankel, which is largely a commercial law firm; Thomas Lemon, a name partner in a small firm but one appearing to represent business clients rather than individuals or governments; John S. Martel, of San

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458. *See supra* Part IV.C. (assessing the College's arguments for a change to narrowed scope and finding them unconvincing).

459. This informal review of computer database cases involving College lawyers took place during March 2000. A full description of the cases and the respective roles of counsel would consume hundreds of pages and is insufficiently pertinent to merit the effort or space. The precise allegiance of counsel is also not always immediately apparent from reported cases. However, it is clear that the College lawyers almost always represent commercial entities, often in contract and related business disputes. The College lawyers are also representing officially denominated defendants more often than they do plaintiffs. The College attorneys frequently represent manufacturers, employers, insurance companies, or their policyholder-defendants.

Francisco's Farella, Braun & Martel, an eighty-five-lawyer firm representing businesses; James Morris, named partner in a small firm, but one with a business practice; Anthony Murray of large, Los Angeles-based Loeb & Loeb, a firm best known for entertainment and lending law; Edward Rice of Adams & Reese, a firm with substantial oil and gas and insurance clients; Earl Silbert of Piper, Marbury, Rudnick & Wolfe, a large Baltimore-based firm with a traditional business practice; and James Stapleton, a partner at Hartford's Day, Berry & Howard, Connecticut's largest firm, emphasizing commercial law.

Of the College Regents, only Michael Mone of Boston appears to be a plaintiff's personal injury lawyer. Garr King of Portland, Oregon provides only brief Martindale-Hubbell information but identifies himself as a commercial and tort litigator. A LEXIS and Westlaw review of the Regents' cases shows that they usually represent defendants but frequently represent commercial entities as claimants.<sup>460</sup>

The College's membership—at least on its Board of Regents and Federal Civil Rules Committee—is extraordinarily weighted toward corporate clients. While lawyers on the College Committee may be able to say—with the proverbial straight face—that they represent both plaintiffs and defendants, their practices are skewed toward commercial litigation among corporate entities. On this eighteen-lawyer Board of Regents, 90% of the membership is comprised of lawyers who represent businesses, often as products liability, discrimination, insurance, or statutory defendants.

As a consequence of this skewing, the views of the College regarding the scope of discovery are also skewed to a significant degree. As discussed above, narrowing the scope of discovery impacts certain litigants adversely.<sup>461</sup> Depending on one's practice, it is fairly easy to see whose proverbial ox may be getting gored by either narrow or broad discovery. Repeat-player corporate entities are something of an exception in this analysis.<sup>462</sup> The typical organization engaged in business behemoth against business behemoth litigation alternates between plaintiff and defendant status, particularly when one considers the role of

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460. This is based on a review of the College member attorneys' cases for the 1995-1999 period (conducted Mar. 2000).

461. See *supra* Part IV.G.

462. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974). Galanter's article provides the seminal analysis of the degree to which economically powerful entities that are frequent litigants have advantages, even under the broad discovery and open courts model that prevailed during the 1970s. Galanter's article hints at but did not fully anticipate the degree to which these "repeat players" would have advantages over "one-shot players," not only in the individual case but in the battle to influence the rules and doctrines of law. See Susan S. Silbey, *From the Editor*, 33 L. & SOC'Y REV. 799 (1999) (presenting a collection of papers from a 1998 conference at the University of Wisconsin Law School assessing the impact of Galanter's article).

counterclaims and cross-claims. Consequently, a narrowing of discovery scope is likely to be a wash for these defendants, helping and hurting roughly equivalent amounts of the time. Outside of business-on-business commercial disputes, these entities are most likely to be product liability or securities fraud defendants who will affirmatively benefit nearly all of the time from narrowed discovery.

Considered in the context of discovery and its impact, groups such as the Litigation Section Committee elite and the College cannot be considered nonpartisan groups with sympathies in equipoise between those of plaintiffs and defendants throughout society. Rather, the College, and to a lesser extent the Section, effectively are the voice of large corporate entities frequently engaged in commercial litigation or defense of plaintiffs' claims. In short, these groups, even if consciously aiming to be nonpartisan, are likely to find their views and sympathies oriented toward a view of discovery—narrower scope—that fits snugly with their clients' interest and the nature of their own practices.

The sociology of late Twentieth Century rulemaking thus promotes prestigious advocacy for narrowing of the scope of discovery. Lost in this mix was the fact that several other elite, business-oriented bar associations had rejected the Proposed Amendment and endorsed retention of the broader, subject-matter scope of discovery. For example, the Eastern District of New York Committee on Civil Litigation, the Chicago Council of Lawyers Federal Courts Committee, the Chicago Chapter of the Federal Bar Association, the Connecticut Bar Association Federal Practice Section, the Federal Bar Council Committee on Second Circuit Courts, the Philadelphia Bar Association Federal Courts Committee, the Ohio State Bar Association, and the District of Columbia Bar Section on Courts all opposed the scope-narrowing amendment.<sup>463</sup> The "broad scope" bar organizations are all disproportionately urban and generally include a wider spectrum of practicing attorneys than does the College. Yet these bar associations were not "listened to" in the same way in which the College was heard.

One prominent example is the Association of the Bar of the City of New York ("ABCNY"). It is, as the name implies, urban. Although its leadership tends to be from the elite large firms, its system of Committee work historically has attempted to include professors, small firm practitioners, and government lawyers on the committees such as the Committee on Federal Courts, which usually comments on pro-

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463. See Rowe Memorandum, *supra* note 292, at 4; Public Comment Docket Nos. 98-DV-077 at 8-102; 98-CV-152 at 2; 98-DV-156 at 3-4; 98-CV178 at 5-8; 98-CV-193 at 9-10; 98-CV-213 at 3-4; 98-CV-267 at 8.

posed rule changes.<sup>464</sup>

This group is to some degree a bit different than the others in another respect. Although the College and the Litigation Section seek to be nonpartisan, this value is hardwired into the ABCNY as a matter of tradition, almost catechism. The Association membership prides itself on “checking clients at the door” when coming to the Association’s headquarters to deliberate in the many committees that develop Association policy on legal issues.<sup>465</sup> The Chair of each Committee is chosen by the President of the Association to be a fair and neutral leader.<sup>466</sup> The Chair selects members with an eye toward balance between plaintiff-and-defendant, private-and-government, new-and-old, white-and-ethnic, male-and-female, and so on.

As an Association member, I admit to prejudice in favor of the group.<sup>467</sup> But I am also a Litigation Section member with similar pride in much of that group’s work.<sup>468</sup> However, I have somewhat less confidence that lawyers in the Litigation Section projects will divorce their participation in this work from client desires or personal agendas. The Section’s size and dispersal may make it impossible to achieve the same ethos that the Association appears to have achieved. Some Litigation Section Committees, like the Rule 11 group,<sup>469</sup> are quite balanced,<sup>470</sup> while others, like the Discovery Scope Subcommittee, are heavily weighted toward large firm defense lawyers.<sup>471</sup>

Apart from the social demographics of its location, ABCNY also has a tradition of progressive politics that transcends the economic conservatism of many of the member firms and clients. One former Federal Courts Committee Chair aptly described the group as the “lib-

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464. I should also note that I am a nonresident member of the Association of the Bar and have served on its Federal Courts Committee, including an assignment as spokesperson for the Committee opposing the 1993 Disclosure Amendment and presumptive limits on depositions and interrogatories.

465. This was the description and admonition given to me as a rookie member of the Federal Courts Committee by Jeffrey Mishkin, Esq., then a partner practicing antitrust, sports and labor law at the large, generally corporate defendant-representing law firm of Proskauer, Rose, Goetz & Mendelsohn.

466. The President of the Association is elected and does “run” for office, much in the manner of the ABA Presidency. The Association president is almost always a partner in an elite firm. Notwithstanding this, Association Presidents appear not to have based their agendas on initiatives that would assist their firms or clients.

467. I was also a member of the Association’s Committee on Federal Courts when it submitted comments largely in opposition to the 1993 Amendments and was the Committee’s representative at a hearing on the Amendments in March 1992 in Atlanta.

468. If nothing else, publications like *Litigation* magazine and *Litigation News*, both published by the Litigation Section, have considerable value for the profession.

469. See *supra* text accompanying notes 448-50.

470. At least the Rule 11 group had balance between large firm lawyers and law professors. Small practitioners and government lawyers were less well represented.

471. See *supra* text accompanying notes 458-64 (describing Subcommittee membership and background).



eral establishment.”<sup>472</sup> This was the bar group that officially opposed Robert Bork’s nomination to the United States Supreme Court.<sup>473</sup> Although some might see this as the Association’s finest hour, this was not the view in other quarters, making the Association something of an anathema to conservatives and partisan Republicans. This may account for the Advisory Committee’s rather dismissive attitude toward Association views concerning the 1993 and 2000 Amendments.

My own view is that the Association’s analyses of proposed Rules changes are not accorded the respect deserved because the more conservative Rulemakers generally are suspicious of the Association because it is liberal, New York-based, and thought to be driven by the economic interests of the membership even though the opposite is closer to the truth. Ironically, the Association’s views are discounted because elite New York firms are the lifeblood of the Association, but the College of Trial Lawyers is accorded deference even though its membership is also dominated by big firm lawyers with blue chip clients. The Association’s combination of liberalism and a New York base puts the Association at a disadvantage when pitted against the College. In addition to its reputation for liberalism, the Association tends to encounter an anti-New York prejudice in the Rulemaking process. Advisory committee members or others make jokes or barbs about New York lawyers with some frequency. For example, during the events leading up to the 1993 Amendments, the former Chair of the Advisory Committee suggested during a public hearing that the Association was opposing disclosure because disclosure would reduce the ability of New York lawyers to churn fees and expenses for discovery.<sup>474</sup> At about the same time, a former Committee Reporter suggested privately to me that the Association was opposed to presumptive limits on depositions (later adopted in the 1993 Amendments) because “everyone knows that’s how the big New York firms make their money.”<sup>475</sup>

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472. I again borrow this oral history of the Association’s traditions from former Committee on Federal Courts Chair Jeff Miskin. *See supra* note 465.

473. *See* Linda Greenhouse, *The Bork Hearings: Legal Establishment Divided Over Bork Nomination*, N.Y. TIMES, Sept. 26, 1987, at 33 (stating that City Bar President Robert M. Kaufman testified on behalf of organization against Bork nomination); *Reagan Lashes at Bork Foies*, CHI. TRIB., Sept. 26, 1987, at 1C (stating that President Reagan and Bork Supporters take offense at Association’s action). *But see* E.R. Shipp, *The Bork Hearings: New York Bar Association is Split Over Stand on Bork*, N.Y. TIMES, Sept. 24, 1987, at A20 (emphasizing that Association not uniformly liberal, political, or anti-Bork). *See also* 133 CONG. REC. S14001-11 (daily ed. Oct. 9, 1987) (providing Kaufman testimony against Bork.)

474. *See* Comments of former Advisory Committee Chair Sam Pointer (N.D. Ala.) at Advisory Committee hearing of March 1992 in Atlanta (on file with author). Judge Pointer engaged in these gratuitous digs at New York lawyers during the course of my testimony to the Committee on behalf of the Association.

475. Duke Professor Paul Carrington, Reporter for the Advisory Committee during the 1983-1990 period, made these comments to me in a conversation after a meeting of the Association’s Federal Courts Committee at which Professor Carrington had appeared to provide a guest brief-

Against this backdrop, the views of bar groups like the Association were no match for the College and the Litigation Section in influencing the Advisory Committee concerning the scope of discovery. But a successful salesperson needs a willing audience. As discussed above, the Advisory Committee in the late 1990s was a most willing group for narrowing the scope of discovery.<sup>476</sup>

### C. *Polarization and Plebiscite on the Scope Question*

Rules revision should not become a popularity contest or a “plebiscite” (to use the words of former Advisory Committee Chair Sam Pointer (N.D. Ala.)). But neither should Rulemakers be too quick to churn the language or structure of the Rules when the profession is divided or opposed. If a visitor from another planet were to review the comments on the Proposed Amendments, he or she would be astounded to learn that the Amendments had actually been passed in the face of such commentary.

There were 301 written submissions to the Committee during the Public Comment period. According to the count of Administrative Office (“AO”), eighty-three of these comments addressed the issue of narrowed scope. According to the AO classification, sixty-five of these comments were against the proposed change and only eighteen were supportive.<sup>477</sup> My own review of the comments, which treated even implicit expression of opinion as a comment on scope, produced a count of seventy-six comments against the change and thirty-six for the Proposed Amendment.<sup>478</sup> By either my count or that of the AO, there

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ing on the current work of the Advisory Committee in approximately November of 1992. Then, as now, I disagree with Professor Carrington’s assessment. Large firms, in New York and elsewhere, make most of their money in large litigation through document review and production, legal research, and extensive motion practice. Depositions are by contrast a small part of big case litigation and are substantial only if the firm is investing dramatically in preparation to take or defend the deposition (which may often be excessive; on that point I am in sympathy with Carrington). The subsequent Rand and FJC studies seem to vindicate my view, finding that document production is the greatest source of discovery expense. *See Willging et al., FJC Study, supra* note 253, at 545-55; Kakalik et al., *Rand Discovery Study, supra* note 255, at 634-45, 676-82. *See also supra* text accompanying notes 253-91 (discussing findings of these studies) and *supra* text accompanying notes 97-220 (discussing how 1999 Advisory Committee appears to view document production, rather than depositions, as problem area of discovery). Of course, one can still argue that big firm, big city lawyers are resisting changes in the discovery Rules in order to make money on document production rather than to make money on depositions. In addition, document production requests and attendant controversy may arise in connection with a deposition rather than standing alone as document production requests.

476. *See supra* text accompanying notes 133-52 (discussing Advisory Committee Composition).

477. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, SUMMARY OF COMMENTS ON PROPOSED AMENDMENTS (1998 Draft), *available at* U.S. Courts website, *supra* note 17.

478. This is based on my review of all written comments submitted to the Advisory Committee in the public comment period.

was opposition to narrowing scope—by a two to one margin. The demographic distribution of the comments was exactly as Advisory Committee member Judge Shira Scheindlin described it during debate on the scope Amendment.<sup>479</sup> Businesses, particularly oil and chemical companies, that are likely defendants, supported the change to narrowed scope.<sup>480</sup> Defense lawyers also supported the change.<sup>481</sup> Lawyers in large commercial firms supported the change.<sup>482</sup> On the other hand, plaintiffs' lawyers,<sup>483</sup> public interest lawyers,<sup>484</sup> law professors,<sup>485</sup> and most bar groups (other than the College and Litigation Section) opposed the change.<sup>486</sup>

Two submissions illustrate the division starkly. One joint submission supporting narrowed scope represented the Chemical Manufacturers Association, the Defense Research Institute, the Federation of Insurance and Corporate Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, and the Product Liability Advisory Council.<sup>487</sup> Another joint submission represented the Lawyers' Committee for Civil Rights Under Law, the American Civil Liberties Union, the Mexican American Legal Defense and Educational Fund, the National Asian and Pacific American Legal Consortium, the NAACP, the National Partnership for Women and Families, the National Women's Law Center, People for the American Way, Inc., and the Puerto Rican Legal Defense and Education Fund, Inc.<sup>488</sup>

All interest groups are not created equal. Although one can make too much of the public-private distinction, we can with some assurance separate public interest groups from private interest groups. Although

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479. See *supra* text accompanying notes 238-41.

480. See *supra* Part IV.

481. See, e.g., Comments of the Defense Research Institute (Dkt. No. 98-CV-097-101); Minnesota Defense Lawyers Association (Dkt. No. 98-CV-079); Dean Barnhard, a defense lawyer who described his practice as one representing chemical companies (Dkt. No. 98-CV-121).

482. See, e.g., Comments of John Beisner, O'Melveny & Myers (Dkt. No. 98-CV-094); Philip Lacovara, Mayer, Brown & Platt (Dkt. No. 98-CV-163).

483. See, e.g., Comments of Thomas Conlin, Robins, Kaplan (Dkt. No. 98-CV-041); Ronald Palagi, a self-described plaintiff's lawyer in a five-person Omaha firm (Dkt. No. 98-CV-095); Pamela Rochin, Meshbesh Spence (Dkt. No. 98-CV-037).

484. See, e.g., Comments of National Association of Consumer Advocates (Dkt. No. 98-CV-120); NAACP Legal Defense Fund (Dkt. No. 98-CV-248); Public Citizen (Dkt. No. 98-CV-181).

485. See, e.g., Comments of St. Johns' Edward Cavanaugh (Dkt. No. 98-CV-002); Rutgers' John Leubsdorf (Dkt. No. 98-CV-008); St. Johns' Ettie Ward (Dkt. No. 98-CV-172); SMU's Elizabeth Thornburg (98-CV-136).

486. See *supra* text accompanying notes 463-76. See, e.g., Comments of Eastern District of New York Federal Courts Committee (Dkt. No. 98-CV-077); Federal Bar Association of the State of Washington (Dkt. No. 98-CV-102).

487. See Dkt. No. 98-CV-001. Notwithstanding its name, Lawyers for Civil Justice is an industry-funded defense group.

488. See Dkt. No. 98-CV-198.

the NAACP can be described by its political opponents as an interest group, it has far greater claim to altruism consistent with national public policy than does the National Association of Manufacturers. Yet, in the battle over discovery scope, it was private interest groups with which the Advisory Committee cast its lot.

At the Advisory Committee hearing in December 1998 and January 1999, the distribution of comments did shift. Of forty-eight witnesses at these hearings, thirty were for narrowing scope and eighteen were against.<sup>489</sup> This distribution only indicates that forces favoring constricted discovery, who had already submitted written comments, were better able to attend the hearings in person. This is hardly surprising. Wealthier lawyers and interest groups have more time and money for these activities than do the small firm lawyers, law professors, and rank-and-file bar associations that opposed the change. One suspects that many of the lawyers testifying for the Proposed Amendment were billing clients for their services, although this was never probed by the Advisory Committee.

At the metaphorical end of the day, the proposal to limit discovery scope is explained less by the cerebral power of an idea whose time has come and more by the political structure of the rulemaking process and the socio-political structure of the elite bar and the current federal bench, particularly conservative Chief Justice Rehnquist, who selects the Advisory and Standing Committees.

### CONCLUSION

Since the legal realist movement, few lawyers would argue that the profession is devoid of the politics and self-interest found in other branches of government and society generally. We only hope that the law is less partisan and more principled, enough so that it will be considered distinct from pure politics. Although this historically brave effort to make law something more than a contest of power and interest groups generally holds against the modern tides of raw partisanship, the recent Rulemaking enterprise reveals how close to the line the profession can come.

Amended Rule 26(b)(1) is a substantive gift to defense interest groups purchased at the cost of claimants' rights, the judicial system's efficiency, and society's general interest in deciding disputes on the merits of the facts. Despite the weak and tired brief on its behalf, the proposal to reduce discovery took on new life and is likely to become new law because it was supported by respectable but narrowly inter-

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489. See SUMMARY OF COMMENTS, *supra* note 477.

ested lawyers and ideologically conservative judges, some of whom owe their rulemaking positions to a partisan movement aimed at making the judiciary more conservative generally and more resistant to claimants' rights in particular.

Amended Rule 26(b)(1) will probably not destroy the open courts and access to justice that was Twentieth Century law's greatest achievement—but it certainly hurts that cause. Although partisan tides and a new Chief Justice may someday permit a reversal, this is at best speculative and at worst suggests that civil rulemaking has perhaps descended further and perhaps irrevocably into partisan political swamp.

The most promising immediate strategy for rectifying the problem is the encouragement of federal judicial interpretations of Amended Rule 26(b)(1) that give a charitable construction to the new “claim-or-defense” and “good cause” language of the Rule, thus permitting adequately broad discovery to litigants. Additionally, states that normally take their cues from Federal Rules Amendments would do well to spurn Amended Rule 26 and retain the subject-matter standard of discovery relevance.

On a longer term, but perhaps more elusive level, policymakers should consider fine-tuning the generally wise Rules Enabling Act process to ensure that the various committees are more evenly balanced in socio-political makeup. At a minimum, the Chief Justice should ease away from his war against civil litigation plaintiffs and appoint more balanced committees.<sup>490</sup> If this does not take place, serious consideration should be given to reducing the power of the Chief Justice in rulemaking. Under current circumstances, the Judicial Conference and the Supreme Court could review Committee work with more scrutiny and a less deferential approach, intervening only when convinced a definite mistake had been made. But such an informal rectification of the problems caused by the modern politics of civil rulemaking is about as likely as a reasonable approach to the modern problems of discovery. Perhaps the saga of the 2000 Amendments suggests the need for structural changes to mandate political and sociological equilibrium on the playing field of litigation policy.

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490. See Stempel, *Ulysses*, *supra* note 10, at 90-110 (advocating proposals to mandate socio-political and ideological balance in the rulemaking process).

