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Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking

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HOPE OVER EXPERIENCE: MANDATORY INFORMAL DISCOVERY AND THE POLITICS OF RULEMAKING

LINDA S. MULLENIX*

Within the next few years, the Advisory Committee on Civil Rules will revise several provisions of the existing formal discovery rules, and probably will propose a new informal discovery rule. The purpose of these amendments is to address once again the problems of discovery abuse by reducing the need and expense of formal discovery. Professor Linda S. Mullenix discusses the original proposed version of an informal discovery rule, presenting both the advantages and potential drawbacks of such a rule. More importantly, Professor Mullenix uses this proposed rule to examine the increasing politicization of the civil rulemaking process. The Article traces the change in the Advisory Committee from an elitist rulemaking body subject to little public participation to a pluralistic committee that is now subject to public participation at all stages of rulemaking. Mullenix predicts that, as a result of this change, partisan law reformers increasingly will look to influence the rulemaking process, rather than the judicial arena, to bring about social change. The Article concludes that this politicization may lead to ineffective or nonexistent rulemaking. In addition, the change also may signal the decline of the Advisory Committee's role as a procedural rule-drafting body and the predominance of more politically responsive rulemaking bodies, such as congressional committees with rulemaking oversight.

INTRODUCTION: THE RULES OF THE GAME.....	797
I. THE INFORMAL DISCOVERY RULE: A CASE STUDY IN THE NEW RULEMAKING PROCESS	802
A. Proposed Rule 25.1: Prompt Disclosure of Evidence.....	803
B. The Origins and Genesis of a Mandatory Informal Discovery Rule.....	808
1. The Theory of Informal Discovery	808
2. The Practice of Informal Discovery: Show and Tell	811
(a) Informal Discovery in Complex Litigation	812
(b) Informal Discovery Under Existing Local Rules.....	813
C. Problems and Unresolved Issues Concerning Mandatory Informal Discovery.....	820

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D.	<i>An Informal Reprise: What Proposed Rule 25.1 Does and Does Not Do With Regard to Civil Discovery</i>	821
II.	THE ATTACK ON THE PROPOSED INFORMAL DISCOVERY RULE ..	822
A.	<i>The Public Interest Critique</i>	823
1.	The "Favorable Evidence" Criticism.....	824
2.	The "Supplanting Formal Discovery" Criticism	826
3.	The "Ineffective Sanction" Criticism.....	826
B.	<i>The Call for Further Study: Is This Empirical Study Really Necessary?</i>	828
III.	THE POLITICS OF RULEMAKING	830
A.	<i>Opening the Rulemaking Process</i>	830
1.	Implications of the New Openness	833
2.	Judicial Rulemaking and the Politics of Procedure.....	834
3.	Relationship with Congress: Substance and Procedure...	835
B.	<i>The Advisory Committee Dilemma</i>	836
C.	<i>The Rulemaking Process: Two Views</i>	837
1.	Rulemaking as a Participatory Process.....	838
2.	Rulemaking as Undemocratic Legislation	840
3.	Mediating the Models	842
D.	<i>Legislating the Rules</i>	843
1.	Promulgating Procedural Rules in the Legislative Branch: Of Process-Servers, Psychologists, and the Public Interest Bar	844
(a)	Rule 4 Revision	844
(b)	Rule 35 Revision	846
(c)	Attempted Rule 68 Revision.....	848
2.	Promulgating Procedural Rules in the Judicial Branch: Of Court Reporters and Rule 11	851
	CONCLUSION: TWILIGHT FOR THE ADVISORY COMMITTEE: THE LAST HURRAH?	855
	APPENDIX: DRAFT RULE 25.1. DISCLOSURE	858

A body of law that reflects no political agenda, has no apparent special consequence for any substantive interest group, and merely equips our courts to do their work largely according to their own lights is not the material of which political controversy is generally made. Thus it is that no Civil Rule or amendment to a Civil Rule finding its way up the rulemaking ladder has ever evoked political activity by any group organized around an interest extrinsic to the procedural system. Nor is it likely, or even imaginable, that such an amendment would move through the existing system in the absence of drastic change in the premises from which all of our procedural rulemaking proceeds.¹

INTRODUCTION: THE RULES OF THE GAME

Within the next few years, the Advisory Committee on Civil Rules² is going to promulgate a new rule of civil procedure requiring informal discovery.³ In

1. *Proposed Deletion of Supersession Provision by the Rules Enabling Act Amendments of 1988: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess., pt. 2, at 1260-61 (1987) [hereinafter *Hearings on H.R. 3152: Carrington Statement*] (statement of Paul D. Carrington, Dean, School of Law, Duke University). Professor Carrington's views regarding the rulemaking process largely are repeated in Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2067-87 (1989) [hereinafter Carrington, *Making Rules*]. See also Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 281-326 (1989) [hereinafter Carrington, "Substance" and "Procedure"] (examining the meanings of "substance" and "procedure" in evaluating the power of the supersession clause of the Rules Enabling Act). For a response to Professor Carrington's views on the rulemaking process, see Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012 (1989). Commenting on the failure of efforts to repeal the supersession clause of the Rules Enabling Act, Burbank observes:

Nonetheless, I believe that Professor Carrington has invited us to the wrong celebration and there is reason to doubt whether any celebration is in order. Having engaged Professor Carrington's views on generalism, judicial discretion and political neutrality elsewhere, I find his views on rulemaking power no more analytically satisfying, no more faithful to the facts, and no more reassuring.

Id. at 1015.

2. The Advisory Committee on Civil Rules is one committee of the Judicial Conference of the United States. It consists of 12 members and a Reporter, appointed by the Chief Justice of the United States to serve as chairman of the Judicial Conference. The current committee consists of two circuit court judges, three district court judges, one United States magistrate, one state court justice, one Justice Department attorney, two practitioners, and two law professors. The Advisory Committee Reporter also is a law professor. On the structure of the rulemaking committee system, see W. BROWN, *FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES* 5-34 (1981); *Hearings on H.R. 3152: Carrington Statement*, *supra* note 1, at 1251-66; Carrington, *Making Rules*, *supra* note 1, at 2069-87, 2119 app. See generally Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A. J. 772 (1961) (discussing the history of judicial rulemaking and the roles of the Judicial Conference and its advisory committees in reviewing the Federal Civil, Criminal, Admiralty, Bankruptcy, and Appellate rules); *The Rule-Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117, 117 (1958) (evaluating the Judicial Conference's proposal that Congress adopt "a revision in the procedure of rulemaking for the federal courts").

3. See FED. R. CIV. P. 25.1 (Proposed Drafts Feb. 24, 1990 & Mar. 8, 1990) (entitled "Prompt Disclosure of Evidence"). The proposed rule bears the notation "Reporter's Draft Not Intended for Public Discussion." See *infra* text accompanying note 321. At the November 16, 1989, meeting of the Standing Committee on Rules of Practice and Procedure, the Reporter expressed his discomfort with early circulation of proposed draft rules, indicating that early drafts were circulated to a short list of interested academicians and others known to the Reporter. The Reporter expressed his desire not to have draft rules subject to widespread distribution and comment at the early draft stages of formulation. He indicated that it was his intention to continue the practice of clearly labelling pro-

essence, this rule will formalize a practice currently used by many practicing lawyers to ease the exchange of documents and information, without recourse to the formal civil discovery provisions.⁴ As the draft Reporter's Note suggests, the new rule "embodies the idea that parties should disclose their own evidence early and often."⁵ The goal of the informal discovery rule is to reduce the necessity and expense of formal discovery, achievement of which "would depend on an elevation of the professionalism of lawyers."⁶

At its best, the new informal discovery rule would mandate easy and open discovery, the same goals of the 1938 formal discovery provisions that often have proven elusive and aspirational.⁷ At its worst, the new informal discovery provision may prove to be yet another barnacle on the civil discovery rules,⁸ honored more in form than in substance. Viewed moderately, the proposed informal discovery rule is a harmless accretion that will require litigators to jump through another procedural hoop on the road to trial. However construed, the proposed informal discovery rule is innocent, neutral, bland, and boring—as all good procedural rules should be.

It is fascinating, then, to watch this totally innocuous rule become the staging ground for a much more interesting phenomenon—the politicization of the

posed rule texts as "Reporter's Draft Not Intended for Public Discussion." The Reporter's stated preference for nondisclosure at early drafting stages suggests a tension within the open rulemaking process contemplated in 28 U.S.C.A. § 2073 (1990). See *infra* notes 15-16; see also Carrington, *Making Rules*, *supra* note 1, 2067 app. at 2121 n.18 (discussing the problems with premature comments on draft rule revisions). The discussion in this Article of proposed rule 25.1 analyzes the Reporter's drafts of that rule. This discussion recognizes that the proposed rule has not yet been endorsed by the members of the Advisory Committee, nor has it been circulated for public comment.

4. See FED. R. CIV. P. 25.1 Reporter's Note (Proposed Draft Feb. 24, 1990). The Reporter's Note indicates that some of the proposed rule's language and provisions are derived from similar local rules of court in the Southern District of New York, the Central District of California, and the Southern District of Florida. Guam also has a mandatory informal discovery rule. D. GUAM R. 235-5; see *infra* note 105. For a discussion of particular provisions of proposed rule 25.1, see *infra* notes 31-59 and accompanying text.

5. FED. R. CIV. P. 25.1 Reporter's Note (Proposed Draft Feb. 24, 1990).

6. *Id.* The Reporter's Note indicates that the basic idea for a mandatory informal discovery rule is derived from Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1296, 1348-61 (1978). Professor Brazil is now a United States judge magistrate in the Northern District of California and a current member of the Advisory Committee on Civil Rules.

7. See Brazil, *supra* note 6, at 1299-1303.

8. See, e.g., FED. R. CIV. P. 26(f). This discovery conference provision was added to rule 26 in 1980 as "the principal surviving product of the proposals in 1977 by a special committee of the Section of Litigation of the American Bar Association concerned with abuses in discovery, although even this proposal was modified before it was finally adopted." 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2051 (Supp. 1990). This provision for a discovery conference manifests a desire by the rulemakers to provide a means for discovery control, but it is to a great extent redundant with amended rule 16 on pretrial conferences. Current rule 26(f) is in many ways a forerunner of the new proposed rule 25.1. Rule 26(f)'s fifth provision requires a statement from the attorneys that they have made a reasonable effort with opposing counsel regarding the discovery matter prior to requesting a conference with the court. FED. R. CIV. P. 26(f). Little is known about practice under rule 26(f), especially concerning how often this discovery mechanism is invoked, in what circumstances, and to what result. Its continuing vitality is problematic in conjunction with the new proposed rule 25.1, although there is no reason why the possibility of discovery conferences should not continue to be available under the rules. In sum, rule 26(f) is a reminder of the repeated efforts of the rule drafters to curb discovery abuse. The discovery provisions resemble an archaeological dig, layered with eras of well-intentioned procedural reform.

civil rulemaking process. Until now, the civil rulemaking process has been a relatively benign and obscure function of the Judicial Conference of the United States.⁹ Traditionally, the rulemaking process of the Advisory Committees¹⁰ has been largely the work of a small group of judges, lawyers, and academicians.¹¹ The work of the Advisory Committee has been subject to virtually no public or professional interest,¹² inducing widespread ennui. In truth, few lawyers (and certainly fewer nonlawyers) know or care about the judicial rulemaking process.

The professional torpor in the civil rulemaking process is now about to change. In 1988 Congress passed the Judicial Improvements and Access to Justice Act,¹³ an omnibus bill incorporating numerous modifications into the procedural rules.¹⁴ One of the reforms in this legislation is a provision permitting greater public access to the civil rulemaking processes of the Advisory Committees.¹⁵ In essence, what previously had gone on behind closed doors is now open

9. See W. BROWN, *supra* note 2, at 5-8; see also Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUD. SOC'Y 250, 253-54 (1963) (providing an historical background of the Conference's role in federal rulemaking); Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975) (discussing the unfettered role of judges in the rulemaking process and congressional response); Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579 (1975) (proposing that Congress and the Judicial Conference re-examine and revamp the rulemaking process); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1509-11 (1987) (briefly surveying the traditional role of the court and Congress in federal civil rulemaking); Wheeler, *Broadening Participation in the Courts Through Rule-Making and Administration*, 62 JUDICATURE 281, 282-83 (1979) (describing the "relatively simple" federal rulemaking process); Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 565-66 (1967) (noting the apparently smooth operation of "procedural reform" within the federal system).

10. The Judicial Conference drafts, reviews, and promulgates rules through four standing committees: civil, criminal, appellate, and bankruptcy. For a discussion of the structure and processes of this committee system, see W. BROWN, *supra* note 2, at 5-35.

11. *Id.* For criticisms of the restrictive participatory nature of this rulemaking structure and processes, see *id.* at 35-102; Lesnick, *supra* note 9, at 580-83; Lewis, *supra* note 9, at 1557-73; Wheeler, *supra* note 9, at 282-88.

12. A notable exception to this general lack of interest occurred in relation to the promulgation of evidence rules revisions in 1972, which generated widespread criticism of the rulemaking process. See generally W. BROWN, *supra* note 2, at 2-3, 35-102 (discussing criticism of the rulemaking process and structure and of the content of the rules themselves as influenced by the judicial-legislative relationship); Lesnick, *supra* note 9, at 579 (observing that congressional preemption of the Federal Rules of Evidence gave Congress time to review the rules but challenged the "vitality" of the rulemaking process itself).

13. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. IV, 102 Stat. 4642 (1988) [hereinafter "Judicial Improvements Act"].

14. Among the reforms was an increase in jurisdictional amount to \$50,000 for diversity cases, *id.* § 201; the treatment of resident aliens as citizens for diversity purposes, *id.* § 203; changes relating to citizenship in estates cases, *id.* § 202; venue over corporations, *id.* § 1013; and removal jurisdiction, *id.* § 1016. Congress simplified the basic authorization for the Rules Enabling Act. See 28 U.S.C. § 2072 (1988). See generally Judicial Improvements Act, Pub. L. No. 100-702, tit. IV, 102 Stat. 4642 (Nov. 19, 1988) (Title IV makes several changes regarding public accessibility to meetings, records, and documents).

15. See 28 U.S.C. §§ 2073-2074 (1989); see also 28 U.S.C. § 2072(c)(1)-(2), (d). These subsections provide:

(c)(1) Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the

to enhanced public participation and scrutiny at the earliest stages of judicial rule formation.¹⁶ Participatory democracy now is emerging in the rulemaking process.¹⁷

This minor shift in process has gone largely unnoticed, except by a small group of procedural inside players.¹⁸ Yet the implications of this change may prove more dramatic than its congressional drafters anticipated. American pluralistic theory proceeds on the premise that participatory democracy is a good thing,¹⁹ from which one could infer that it is impossible to have too much of a good thing. The ultimate issue raised by the recent rulemaking reform, however, is an old one: who should make the rules?²⁰

While imbued with imposing philosophical overtones,²¹ the problem of procedural rulemaking is also rife with complex subsidiary issues. Is judicial rulemaking really a "legislative" function and, if so, should rule-drafting then be subject to the full-dress legislative process, including witness hearings and interest group lobbying? Who should be heard and when? What does it mean to be

transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting.

(2) Any meeting for the transaction of business under this chapter, by a committee appointed under this section, shall be preceded by sufficient notice to enable all interested persons to attend.

(d) In making a recommendation under this section or under section 2072, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

16. See 28 U.S.C. §§ 2071-2072 (1989). These provisions on the rulemaking power do not provide the specific authorization for open and public participation that §§ 2073-2074 now supply.

17. See generally Hazard, *Undemocratic Legislation* (Book Review), 87 YALE L.J. 1284 (1978) (in this review of J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977), Hazard criticizes participatory civil rulemaking).

18. See *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st & 2d Sess., at 3-450 (1987-88) (witness statements); id. at 1249-1368 (Appendix III—Materials Relating to Specific Court Reform Issues, sec. 4.: Rules Enabling Act) [hereinafter *Court Reform and Access to Justice Act: Hearings on H.R. 3152*].*

19. For the classic study of American pluralism, see R. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961). For a criticism of pluralistic theory, see T. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY (1969).

20. See W. BROWN, *supra* note 2, at 36-37. Brown writes: "The nature of the rulemaking process has been analyzed in detail, particularly at several critical periods in its development and exercise. The literature deals with several issues: the sources and the location of the power, the question of who can best exercise the power, and the nature of the process itself." *Id.* (footnote omitted); see also Walker, *Perfecting Federal Civil Rules: A Proposal For Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67, 67-85 (Summer 1988) (proposing increased empirical studies of federal procedural rules to assist in rule promulgation, amendment, and reform).

21. The general problem of rulemaking as a subset of law-giving is as old as humanity. See THE REPUBLIC OF PLATO, PART III (BOOKS V, 471C-VII); THE PHILOSOPHER KING (F. Cornford trans. 1945); THE POLITICS OF ARISTOTLE (Books III and IV) (Barker ed. 1969).

Professor Carrington has suggested that the rulemaking process resembles nothing so much as a Rawlsian exercise in decisionmaking from behind the "veil of ignorance." See Carrington, *Making Rules*, *supra* note 1, at 2079 (quoting J. RAWLS, A THEORY OF JUSTICE 136-42 (1971)). Professor Carrington also suggests an historical lineage for current rulemaking norms derived from Roscoe Pound, David Dudley Field, Henry Brougham, Jeremy Bentham, and Max Weber. *Id.* at 2077-78 (authorities cited at notes therein).

"heard" in the rule-drafting process? Does it matter if the judicial rulemaking process becomes politicized? Has the judicial rulemaking process ever not been politicized?

The purpose of this Article is twofold. First, the Article describes the new proposed informal discovery rule and its genesis. As a departure from existing civil discovery practice, this proposed rule deserves explanation and analysis contemporaneous with its promulgation. Second, and perhaps more importantly, this Article describes the rule-drafting process involved in creating the proposed informal discovery rule. The purpose of this discussion is to focus attention on the increased politicization of the civil rulemaking process and to assess the benefits and dangers involved in politicization.

This Article has three theses. First, partisan law reformers have abandoned the judicial arena as the forum for achieving social change,²² and instead are focusing legal reform efforts on the rules and the rulemaking process. Sensing the demise of judicial activism, social reformists have shifted strategy to the rulemaking process. This tactical repositioning is interesting because it reflects a belief on the part of many partisan advocates that all substantive law is procedurally driven. As every five-year-old knows, the kid who gets to make the rules of the game has the greatest chance of winning. If this is what this shift signals, then the Advisory Committee faces increased challenges to its rule reform efforts that result in procedural rules that expand, modify, or amend the substantive law,²³ as prohibited by the Rules Enabling Act.²⁴

Second, opening the rulemaking process at the earliest stages of rule promulgation will politicize the rulemaking process as never before, with perhaps worrisome consequences. Either the Advisory Committee will create vacuous, ineffective rules that are the result of political compromise, or the Committee will fail to effectuate any rule reform, becoming bogged down in endless stalemate, delay, and legislative paralysis. Even more troubling, the Committee in the future may face charges of unresponsive rulemaking if it fails to consider various new constituent concerns.

Third, the inevitable politicization of the Civil Rules Advisory Committee foreshadows the decline of that body's role in procedural rule-drafting. The partisan rule reformers will realize quickly that the Advisory Committee, by its nature,²⁵ is an ineffectual forum in which to lobby for rule reform. Not only is

22. See, e.g., Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 203 (1988) ("But the emergence of a more conservative judiciary alone demands that liberal scholars reorient their efforts away from a frustrating dialogue with the federal bench and toward some, as yet, unidentified new approaches."). See generally Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989) (critical of the traditional judicial rulemaking process and its underlying trans-substantive philosophy of the Federal Rules of Civil Procedure).

23. *Id.* See generally 4 C. WRIGHT & A. MILLER, *supra* note 8, § 1001 (1937) (discussing the allocation of power to regulate procedure between the legislature and the judiciary).

24. See 28 U.S.C. § 2072(b) (1988) ("Such rules shall not abridge, enlarge or modify any substantive right.").

25. For a discussion of the deliberative review processes of the Advisory Committees, see W. BROWN, *supra* note 2, at 5-25, 132. See also 4 C. WRIGHT & A. MILLER, *supra* note 8, §§ 1001-08 (1987) (summarizing the history of procedural rulemaking in the federal courts).

the Advisory Committee painfully slow, deliberative, and dull, but its Article III judges have little incentive to bend to political will. Hence, the partisan rule reformers eventually will abandon the Advisory Committee and take their causes to other rulemaking bodies, namely the congressional committees with federal rulemaking oversight.²⁶

The demise of the influence of the Advisory Committee in judicial rulemaking will place procedural reform in Congress's hands. What cannot be accomplished in the Advisory Committee—effective legislative lobbying—will be accomplished quite effectively in congressional committees. There, the full brunt of participatory democracy will come to bear in the rulemaking process. The questions, of course, are whether it is desirable for congressional committees to draft procedural rules and for current legislative processes to inform procedural rules.

This Article discusses these three theses in three sections. Part I first describes the provisions of the proposed informal discovery rule. Next, it discusses the basis for the proposed rule, as well as experience with similar informal discovery rules. Part II then examines the criticism and opposition to the proposed informal discovery rule as an illustration of the nascent politicization of the drafting process and the sources of this politicization. Finally, Part III explores the broad questions of participatory rulemaking and implications for the future of the traditional judicial rulemaking bodies.

This Article, then, contrasts abstract theories of rulemaking with the political realities of legislative politics. In essence, what is being played out is a contemporary version of Jean Renoir's classic movie, *The Rules of the Game*. There, the brutalities of World War I caused the remaining French nobility to witness the demise of their genteel, civilized world. The Advisory Committee has enjoyed this aura of the Old Guard—of genteel, deliberative rulemaking. Now, the rules of the game are changing and the question remains open whether the Advisory Committee is destined to go the way of the French aristocracy.

I. THE INFORMAL DISCOVERY RULE: A CASE STUDY IN THE NEW RULEMAKING PROCESS

The Advisory Committee's Proposed Rule 25.1, Prompt Disclosure of Evi-

26. In general, the Advisory Committees submit promulgated rules to the Supreme Court, which in turn submits the rules to Congress. W. BROWN, *supra* note 2, at 32. When Congress receives rules from the Court, it refers them to the appropriate judiciary committees for consideration. *Id.* Until 1973, Congress could allow the rules to become law by inaction. Independent of the Advisory Committee and Supreme Court, Congress may enact federal rules. *Id.* at 33; see also Judicial Improvements Act, Pub. L. No. 100-702, tit. IV, 102 Stat. 4649-50 (Nov. 19, 1989) (illustrating the process of congressionally enacted civil rule reform). Much of the reform takes place in congressional committees. The relevant House committees are the Committee on the Judiciary and its Subcommittee on Courts, Civil Liberties, and the Administration of Justice. CONGRESSIONAL STAFF DIRECTORY 282 (A. Brownson ed. 1990). In the Senate, the Committee on the Judiciary has six subcommittees with jurisdiction over various rulemaking matters. *Id.* at 281-83. The Senate Subcommittee on Courts and Administrative Practice has jurisdiction over court administration and management; judicial rules and procedures; creation of new courts and judgeships; bankruptcy; administrative practices and procedures; tort reform and liability issues; and private relief bills other than immigration. *Id.* at 282.

dence,²⁷ is the result of efforts by some Advisory Committee members to reform the discovery process to reduce discovery disputes, cost, and delay. The Committee envisions the rule as a partial discovery reform, accompanied by other rule modifications limiting the number of interrogatories, and the number and duration of depositions.²⁸ "Its purpose," states the current Advisory Committee Reporter, "is to materially reduce the cost of discovery before trial."²⁹

The aspirational goals of the Advisory Committee are important in light of the subsequent politicization of this seemingly innocent rule change. The Reporter states that:

Discovery practice has become encumbered with excess motion practice and other papers to such an extent that Rules 26 - 37 are no longer consonant with the aims of the rules stated in Rule 1. It is the aim of this rule to eliminate much of the excess paper by calling upon the professional responsibility of the bar to substitute informal methods of exchanging information for more costly formal methods.³⁰

Notwithstanding this goal, this reformist urge that would require informal discovery has taken on a surprisingly more sinister cast in the views of some critics.

A. Proposed Rule 25.1: Prompt Disclosure of Evidence

The first version of the proposed informal discovery rule, drafted during late 1989, contained five provisions. The first provision defined the litigant's duty to disclose information to every other party. The rule would have required a litigant to disclose in writing information about witnesses a party expected to call at trial;³¹ any expert opinion the disclosing party intended to offer at trial;³²

27. FED. R. CIV. P. 25.1 (Proposed Drafts Feb. 24, 1990 and Mar. 8, 1990); see *infra* text accompanying note 321.

28. *Id.* Reporter's Note (Proposed Draft Mar. 8, 1990). The Reporter's Note outlined the proposed rule's emphasis as follows:

This draft contemplates significant revisions in the discovery rules occasioned by the reduced reliance on discovery to secure information. Except by leave of court, interrogatories would be limited in number, perhaps to a number as small as five or ten. Depositions would be presumptively limited in both number and length.

Id.

29. *Id.* advisory committee note (Proposed Draft Feb. 24, 1990).

30. *Id.*

31. See FED. R. CIV. P. 25.1(a)(1) (Proposed Draft Feb. 24, 1990). The proposed language of the first draft reads as follows:

(a) Duty to Disclose; Scope. To secure the just, speedy, and inexpensive determination of the action, each party has a duty promptly to disclose in writing to every other party:

(1) the names, addresses, and telephone numbers of any witnesses that the disclosing party expects to call at trial either to prove any fact alleged by that party or to disprove any fact alleged by an opposing party, with a summary of the facts to which each witness might be called to testify;

Id. The March 8, 1990 draft rule retitled section (a) "Prompt Disclosure" and renumbered the above section (a) as new subsection (1) of (a). The March revision also eliminated the requirement of disclosure in writing. The above subsection (1) was redenominated as a new subsection (a). In addition, the March revision of the proposed rule eliminated the requirement of a summary of facts to which each witness might be called to testify. See FED. R. CIV. P. 25.1 (Proposed Draft Mar. 8, 1990).

damages computations alleged by the disclosing party;³³ and the existence, location, custodian, and general description of any tangible evidence or relevant documents that the disclosing party planned to use at trial.³⁴ The Reporter's Note indicates that the materials required to be disclosed under this provision would have been materials usually obtained under formal discovery requests (such as by interrogatory or deposition), and so proper exchange of information under the proposed rule would have "materially reduced" the need for resort to such traditional discovery methods.³⁵ The Reporter's Note also carefully indicates that under the proposed rule a party would not have been required to disclose voluntarily information the party would not be using at trial: "Discovery will therefore continue to be important as a means of securing from a party evidence that is needed by the discovering party to establish that party's own claims or defenses."³⁶

The second provision would have defined the time frame for mandatory informal disclosure of the required materials. This draft of the proposed rule required the parties to disclose "as fully as then possible" within twenty-one days after filing an answer to a complaint.³⁷ The rule would have allowed the court to shorten or extend this time and would have required that all disclosures

32. FED. R. CIV. P. 25.1(a)(2) (Proposed Draft Feb. 24, 1990). This section would require disclosure of

any expert opinion that the disclosing party intends to offer at trial, with a summary of the basis for any such opinion and of the qualifications of any witness expected to present it, including a list of all prior expert appearances by that witness that have occurred within the preceding three years.

Id.

This subsection was eliminated from the March 8, 1990 revised Reporter's Draft rule. See FED. R. CIV. P. 25.1 (Proposed Draft Mar. 8, 1990).

33. FED. R. CIV. P. 25.1(a)(3) (Proposed Draft Feb. 24, 1990). This provision would require disclosure of "the computation of any category of damage alleged by the disclosing party, and the documents or testimony on which such a computation is based." *Id.*

This subsection became new subsection (a)(1)(C) in the March 8, 1990 version of the proposed rule. See FED. R. CIV. P. 25.1(a)(1)(C) (Proposed Draft Mar. 8, 1990).

34. FED. R. CIV. P. 25.1(a)(4) (Proposed Draft Feb. 24, 1990). This would have required disclosure of "the existence, location, custodian, and general description of any tangible evidence or relevant documents, including pertinent insurance agreements or information of a similar nature, that the disclosing party plans to use at trial." *Id.*

This subsection was retained in the March 8, 1990, revision of the proposed rule, but was re-denominated as subsection (a)(1)(D). It also was reworded to state: "the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." FED. R. CIV. P. 25.1 (Proposed Draft Mar. 8, 1990).

35. See *id.* Reporter's Note (Proposed Draft Feb. 24, 1990).

36. *Id.*

37. See FED. R. CIV. P. 25.1(b)(1) (Proposed Draft Feb. 24, 1990). This subsection provided:

(b) *Time for Disclosure; A Continuing Duty.*

(1) The parties shall make the disclosure required by subdivision (a) as fully as then possible within twenty one days after the filing of an answer to the complaint. For cause, the court may shorten or extend this time. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. All disclosures shall be promptly filed with the court.

Id.

The March 8, 1990 revision of the proposed rule re-denominated this provision (2)(A) and deleted everything after the second sentence. The time specified was lengthened to 28 days after filing an answer. See FED. R. CIV. P. 25.1 (Proposed Draft Mar. 8, 1990).

be filed promptly with the court. Finally, the rule would have recommended that the opposing lawyers meet to exchange their disclosures "[i]f feasible"; otherwise they might exchange materials by ordinary service rules.³⁸ The duty to disclose materials would have been a continuing duty and would have required parties to amend or supplement their earlier disclosures as new or different information was discovered or revealed.³⁹ These supplemental disclosures would have had to have been served or filed within fourteen days after the disclosing party found out about the information.⁴⁰ Except by leave of court, a party would not have been able to make a mandatory disclosure twenty-one days before trial.⁴¹

The Reporter's Note indicates that the twenty-one-day time period for disclosure was to permit "the earliest occasion on which an exchange of information can be made with fairness to both sides."⁴² In general, regarding the timing of the disclosure of information, the Reporter's Note stresses flexibility, feasibility, and fairness.⁴³ The Committee also intended the proposed rule to minimize the "sporting event" concept of discovery by requiring leave of court to make a disclosure within twenty-one days of trial. With a particular view toward the late designation of expert witnesses,⁴⁴ the Reporter's Note suggests that the purpose of the twenty-one-day requirement "is further to reduce the opportunity and the incentive to surprise an adversary."⁴⁵

The third provision of the first draft of the proposed mandatory informal

38. FED. R. CIV. P. 25.1(b)(1) (Proposed Draft Feb. 24, 1990); *see also* FED. R. CIV. P. 5 (governing service and filing of pleadings and other papers).

39. *See* FED. R. CIV. P. 25.1 (Proposed Draft Feb. 24, 1990). Subsection (b)(2) states:

The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures as required by subdivision (a) whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be served and filed within fourteen days after the information is revealed to or discovered by the disclosing party, but in no event later than twenty one days before trial except by leave of court.

Id.

This provision was redennominated (2)(B) and the 21-day provision was lengthened to 28 days. *See* FED. R. CIV. P. 25.1 (Proposed Draft Mar. 8, 1990).

40. FED. R. CIV. P. 25.1(b)(2) (Proposed Draft Feb. 24, 1990).

41. *Id.*

42. *See* FED. R. CIV. P. 25.1 advisory committee note (Proposed Draft Feb. 24, 1990).

43. *Id.* With reference to the time requirements, the Advisory Committee Note states:

The time is selected as the earliest occasion on which an exchange of information can be made with fairness to both sides. If the matter is one requiring expedited disposition, the court may shorten the time. If there are other parties belatedly served who would gain an unfair advantage or who might be unfairly disadvantaged by premature disclosures, the court may extend the time.

Id.

44. *Id.* Discussing the bar against disclosure within 21 days of trial, the Advisory Committee Note states:

A problem is most likely to arise with respect to an adverse witness who is not selected and employed until the last possible moment in order to avoid an expense not necessary to be incurred in the event of settlement. The rule effectively requires parties to designate experts far enough in advance that the opposing parties have a reasonable opportunity to prepare a rebuttal.

Id.

45. *Id.*

discovery rule stated that formal discovery through interrogatories or depositions would not be necessary to obtain any material or information that must now be required to be disclosed under the new rule.⁴⁶ The only exception is that a party would have been entitled to depose, before trial, any witness identified by the disclosing party.⁴⁷ The effect of this third provision would have been to preclude duplicative discovery,⁴⁸ and the Reporter's Note indicates that "[b]ecause the purpose of this rule is to eliminate needless discovery, the court should protect parties from redundant discovery."⁴⁹ Therefore, the proposed rule would have imposed costs on an attorney who thwarted the informal disclosure provisions and sought redundant discovery.⁵⁰

The fourth provision of the proposed informal discovery rule provided for enforcement.⁵¹ The chief sanction for a lawyer's failure to disclose properly under the rule would have been the court's exclusion at trial of any evidence sought to be offered by a party that the party had not timely disclosed.⁵² In addition to being barred from using undisclosed evidence at trial, a party would have been prohibited from proving facts or examining witnesses that had been undisclosed to the party's opponents.⁵³ Finally, this enforcement provision would have allowed for "any other sanction the court may employ."⁵⁴ Again, in discussing these enforcement mechanisms, the Reporter's Note implicitly repudiates the poker-hand concept of litigation. "A party seeking to hide information in order to surprise an opponent at trial," the Reporter states, "is exposed to

46. See FED. R. CIV. P. 25.1(c) (Proposed Draft Feb. 24, 1990). This provision stated: No Discovery of Information Required to be Disclosed. No discovery of matters required to be disclosed shall be necessary to secure the information and a party shall be protected against such discovery as provided in subdivisions (c) and (g) of Rule 26 except that an opposing party shall be entitled pursuant to Rule 30 to depose prior to trial any witness identified by the disclosing party.

Id.

This provision was retained in the March 8, 1990 revision of the rule, but redennominated as subsection (d). See FED. R. CIV. P. 25.1 (Proposed Draft Mar. 8, 1990).

47. FED. R. CIV. P. 25.1(c) (Proposed Draft Feb. 24, 1990).

48. See *id.* advisory committee note.

49. *Id.*

50. *Id.*; see also FED. R. CIV. P. 26(g) (governing the signing of discovery requests, responses, and objections).

51. See FED. R. CIV. P. 25.1(d) (Proposed Draft Feb. 24, 1990). This subsection provided:

Exclusion of Undisclosed Evidence. In addition to any other sanction the court may employ, the court shall exclude at trial any evidence offered by a party that was not timely disclosed as required by this rule, and no party shall be permitted to examine that party's witness to prove facts other than those identified in the written disclosure to the party's opponents except by leave of court granted upon a showing of cause.

Id.

The Committee retained this provision substantially in the March 8, 1990, version of the rule, although redennominated as subsection (e). The clause "except by leave of court granted upon a showing of cause" was moved further in the text, after additional language relating to expert witnesses was added:

[N]or shall any expert witness be allowed to testify to an opinion or a basis for an opinion that was not timely disclosed, except by leave of court granted upon a showing of cause.

See FED. R. CIV. P. 25.1 (Proposed Draft Mar. 8, 1990).

52. FED. R. CIV. P. 25.1(d) (Proposed Draft Feb. 24, 1990).

53. *Id.*

54. *Id.*

the likely consequence that the trap set will be prevented from working by action of the court."⁵⁵

The fifth and final provision of the proposed informal discovery rule also was a sanctioning provision, providing a disincentive for lawyers who deliberately would make a misleading disclosure under the rule.⁵⁶ If a misleading disclosure caused an opposing attorney to engage in "substantial unnecessary investigation or discovery,"⁵⁷ the court then might order the lawyer who initially supplied the misleading information to reimburse opposing counsel for the costs of the unnecessary discovery. In addition, the lawyer who engaged in misleading discovery "may be subject to other appropriate sanctions as the court may direct."⁵⁸ The Reporter's Note again repudiates gamesmanship in civil discovery. Thus, this sanctioning provision would "impose[] restraint on parties tempted to over-disclose or 'shove' the opposing parties with an excess of information, as by listing many persons as possible witnesses whom the disclosing party knows or should know to have no useful information."⁵⁹

This, then, was the first draft of the proposed informal discovery rule that the Advisory Committee's Reporter characterized as "a fairly radical new rule."⁶⁰ The next section describes the genesis of this proposed new rule and the experiences with similar local rules used in the federal courts.

55. *Id.* advisory committee note.

56. *See* FED. R. CIV. P. 25.1(e) (Proposed Draft Feb. 24, 1990). The proposed rule set forth the following sanctions:

(e) *Misleading Disclosure.* A party who makes a disclosure pursuant to this rule that the party knew or should have known was inaccurate and thereby misleads an opposing party to engage in substantial unnecessary investigation or discovery shall be ordered by the court to reimburse [sic] the opposing party for the cost including attorneys' fees of such unnecessary investigation or discovery and may be subject to other appropriate sanctions as the court may direct.

Id.

The Reporter's Draft retained this provision, renaming it subsection (f). *See* FED. R. CIV. P. 25.1(f) (Proposed Draft March 8, 1990).

57. FED. R. CIV. P. 25.1(e) (Proposed Draft Feb. 24, 1990).

58. *Id.*

59. *Id.* advisory committee note (Proposed Draft Feb. 24, 1990). The Reporter's March 8, 1990 Draft moved pieces of the earlier rule around, and added a new subsection (b) entitled "Pretrial Disclosure." This new section states:

(b) Pretrial Disclosure.

(1) In addition to the prompt disclosure, each party shall before trial disclose to every other party the following information descriptive of the evidence that the disclosing party will present in support of that party's claim or defense:

(A) the names, addresses, and phone numbers of all witnesses with a summary of the material facts to which each witness is expected to testify;

(B) the substance of any expert opinion with a summary of the basis for any such opinion and of the qualifications of any witness expected to present it, including a list of all prior expert appearances by that witness that have occurred within the preceding three years; and

(C) the identity and location of any exhibits.

(2) Pretrial disclosure shall be made not later than 28 days before trial, unless the court designates another time.

FED. R. CIV. P. 25.1(b) (Proposed Draft Mar. 8, 1990).

60. Cover memorandum from Professor Paul Carrington, Office of the Reporter, Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (February 22, 1990).

B. *The Origins and Genesis of a Mandatory Informal Discovery Rule*

The impetus for drafting an informal discovery rule came from the Chair of the Advisory Committee on Civil Rules and two other members of the Advisory Committee, including Professor Wayne Brazil, a practicing attorney and now a federal magistrate.⁶¹ The Committee Chair's stated desire was to encourage attorneys to "utilize informal methods of discovery before resorting to the expensive formal methods such as depositions and interrogatories."⁶²

Professor Brazil had suggested such a mandatory informal discovery rule in a 1978 law review article.⁶³ Highly critical of the adversarial character of modern civil discovery, Professor Brazil proposed "imposing duties on both counsel and client to disclose voluntarily, and at all stages of trial preparation, all potentially relevant evidence and information."⁶⁴ Because the Federal Rules of Civil Procedure contain no mention of such mandatory informal discovery, the Advisory Committee in the autumn of 1989 began developing a proposed rule to formalize this informal discovery process.⁶⁵

1. The Theory of Informal Discovery

In general, "informal discovery" describes a process of information access and exchange that occurs in litigation before the parties resort to the more formalized discovery provided in Federal Rules of Civil Procedure 26 through 37. The federal discovery rules do not mention the possibility of informal discovery, but presume that attorneys in their trial preparation will resort to the standard, formal devices for information exchange: interrogatories, depositions, requests for production of documents, admissions, and physical and mental examinations.

61. The three members behind the proposed informal discovery rule were Chairman Judge John F. Grady (United States District Court, N.D. Ill.), Mr. James Powers, Esq., and the Hon. Wayne D. Brazil (United States Magistrate, N.D. Cal.). Preliminary discussions concerning this rule took place during the summer of 1989. In August 1989 Judge Grady requested that the Federal Judicial Center conduct preliminary research into local informal discovery rules. See Letters from Judge John F. Grady to Mr. Tom Willging (Federal Judicial Center) and Magistrate Wayne D. Brazil (September 1, 1989) (discussing a proposed informal discovery rule).

62. Letter from Judge John F. Grady to the Hon. Wayne D. Brazil (September 1, 1989).

63. See Brazil, *supra* note 6, at 1349.

64. *Id.* Professor Brazil's proposals were tied to a heightened sense of lawyer professionalism during pretrial preparation, now also stressed by the Advisory Committee. He described this professionalism as follows:

In particular, new rules of professional responsibility and civil procedure should be fashioned for the investigative and discovery stages. During these stages, counsel should be directed to view themselves primarily as officers of the court rather than partisan advocates. As officers of the court, counsel should be commanded by new ethical directives and civil rules to search diligently for all data that might help resolve disputes fairly and to share voluntarily the results of their searches with both the court and the other parties to the action Under the changes proposed here, counsel's primary loyalties during the trial and post-trial stages would remain where they are today: to their clients.

Id. at 1349-50.

65. See *supra* notes 61-62 and accompanying text. The author conducted preliminary research into local rules practice for the Advisory Committee during fall 1989. The results of this research and telephone interviews with practicing attorneys were presented to the Advisory Committee at its November 1989 meeting. See Memorandum to the Members of the Advisory Committee on Civil Rules Regarding Proposed Rule 25.1 (Informal Discovery Procedure) (November 16, 1989).

In its broadest understanding, informal discovery contemplates several actions by attorneys. For example, it might include an attorney preparing a case by independently investigating a client's assertions, collecting documents from the client, and interviewing witnesses known through the client.⁶⁶ Informal discovery also occurs when attorneys on both sides of a litigation exchange the fruits of these investigations: documents, witness lists, tangible evidence, and any other material relevant to the case.

Although the Federal Rules of Civil Procedure currently do not contemplate anything other than formal discovery, amended Federal Rule of Civil Procedure 16(a)(3) indicates that the purpose of the pretrial conference is to discourage wasteful pretrial activities.⁶⁷ In addition, Federal Rule of Civil Procedure 16(c) indicates that the participants at pretrial conferences may take action to obtain (1) admissions of fact and documents that will avoid unnecessary proof, (2) stipulations regarding the authenticity of documents, and (3) the identification of witnesses and documents.⁶⁸ Taken together, these provisions suggest the possibility of early case management that would include encouraging the informal exchange of information about the litigation. Overarching all these technical provisions is Federal Rule of Civil Procedure 1, which simply states that the federal rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."⁶⁹

Contemporary discovery practice perpetually has been criticized, attacked, and generally lamented,⁷⁰ a trend that continues unabated.⁷¹ The prevalent critique of civil discovery under the federal rules is that it is inefficient, wasteful, costly, and subject to precisely the kind of gamesmanship that the drafters of the rules sought to eliminate.⁷² Thus, rather than reducing the poker-hand concept

66. See Moot, *Consider Doing No Discovery*, 15 LITIGATION 36, 39-40 (1988).

67. See FED. R. CIV. P. 16(a)(3).

68. FED. R. CIV. P. 16(c)(3), (5).

69. FED. R. CIV. P. 1.

70. See, e.g., W. BRAZIL, CIVIL DISCOVERY: LAWYERS' VIEWS OF ITS EFFECTIVENESS, PRINCIPAL PROBLEMS AND ABUSES (1980); P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 1-3 (1978); J. EBERSOLE & B. BURKE, DISCOVERY PROBLEMS IN CIVIL CASES 10-39 (1980); ELLINGTON, A STUDY OF SANCTIONS FOR DISCOVERY ABUSE (Dep't of Justice 1979); D. SEGAL, SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS 9-69 (1978); J. SHAPARD & C. SERON, ATTORNEYS' VIEWS OF LOCAL RULES LIMITING INTERROGATORIES (1986); Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253, 255 (1979); Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 ARIZ. ST. L.J. 475, 475-78.

71. See, e.g., REPORT OF A TASK FORCE, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (The Brookings Institution 1989) (especially Recommendations 4-6 dealing with discovery reform); FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 99-100, 102-03 (April 2, 1990) (discussing case management, including discovery and protective orders in discovery) [hereinafter REPORT OF THE FEDERAL COURTS STUDY COMMITTEE]; see also Hazard, *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237-44 (1989) (discussing problems and attempts at discovery reform during fifty years of federal rules procedure); Mandelbaum, *Discovery Abuse: Some New Possibilities For Rescuing Sisyphus*, 12 INSIDE LITIGATION 1 (December 1989) (describing the Advisory Committee's efforts in drafting a new proposed informal discovery rule, among other discovery reform efforts).

72. See generally Brazil, *supra* note 6 (arguing that the adversarial nature of discovery creates functional and economic burdens on dispute resolution, which discovery reforms cannot remove).

of the adversarial process, the discovery provisions enable skillful practitioners, particularly in complex cases, to use extended discovery as a means of delay, harassment, or exhaustion of an opponent's resources. Another theory is that actual or threatened protracted discovery influences settlement to the disadvantage of one side of the lawsuit.⁷³ These perceptions of formal discovery have prompted a few judges, magistrates, academicians, and law reformers to propose that attorneys use informal discovery procedures more extensively to acquire fact information needed for trial.⁷⁴ These proponents further urge that "informal discovery" procedures be required as a matter of course before the attorneys undertake any formal discovery.

Still, there is virtually no empirical study of the current practice of such informal discovery, the efficacy of such experiences, or the results of informal discovery.⁷⁵ There also is no literature describing the types of cases in which lawyers elect to use informal discovery, whether the attorney discusses this choice with the client, or the extent to which opposing counsel cooperates. There are no analyses of the use of these methods and the relative ease in obtaining information needed for adequate trial preparation. There has been neither empirical research assessing the efficiency and cost savings achieved through informal discovery methods, nor any assessment of attorney and client satisfaction with informal discovery.

Discovery also is a procedural occurrence unlikely to result in reported case law. Because most formal discovery occurs outside the purview of judges, with rare intervention by the court,⁷⁶ informal discovery is even less likely to result in

73. *Id.* at 1315-20.

74. *See, e.g., id.* at 1349-50 (suggesting imposing a duty on counsel to use informal discovery methods first); Sobel, *Abbreviating Complex Civil Cases*, in CENTER FOR PUBLIC RESOURCES LEGAL PROGRAM, *ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS* 195 (S. Fine ed. 1987) (advising that an early pretrial conference should address a plan for "truncated or minimum discovery"); Moot, *supra* note 66 (describing successful instances of minimal or no discovery in actual litigation); Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 *RUTGERS L. REV.* 253, 267-69 (1985) (discussing two-stage discovery planning with first stage of minimal discovery); Pieras, *Judicial Economy and Efficiency Through the Initial Scheduling Conference: The Method*, 35 *CATH. U.L. REV.* 943, 945-46 (1986) (district court judge directs parties to learn facts from clients, independent investigation, and informal discovery); W. SCHWARZER & L. PASHOW, *CIVIL DISCOVERY: A GUIDE TO EFFICIENT PRACTICE* 8 (1988) (suggesting that formal discovery "is not necessarily the only or best means" to obtain information for possible use in litigation); *see also* T. MAUET, *FUNDAMENTALS OF PRETRIAL TECHNIQUES* 17-49 (1988) (extensive discussion of possible informal fact investigation and discovery techniques, noting "formal discovery is the most expensive way to get information"); J. MCELHANEY, *TRIAL NOTEBOOK* 13-22 (2d ed. 1987) (describing techniques of informal discovery).

75. *But see* Moot, *supra* note 66 (describing successful use of minimal or no discovery in several recent cases, including some complex cases). Many standard textbook discussions of discovery and pretrial practice also omit any suggestion of the possibility of informal discovery. *See, e.g.,* J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* §§ 7.1-7.3 (1985) (discussing possibility of and limitations on discovery prior to the commencement of a lawsuit); R. HAYDOCK & D. HERR, *DISCOVERY: THEORY, PRACTICE, AND PROBLEMS* 12-307 (1983) (outlining methods of discovery under Federal Rules of Civil Procedure 26-37); D. LOUISELL, G. HAZARD & C. TAIT, *PLEADING AND PROCEDURE* 901-11 (6th ed. 1989) (discussing mechanics of discovery without mentioning informal discovery techniques).

76. Courts typically become involved in discovery to determine the applicability of privileges and immunities, to determine the issuance of protective orders, or to impose sanctions for failure to cooperate in discovery. *See* *FED. R. CIV. P.* 26(b)(1) (scope of discovery and privileges); *FED. R.*

judicial intervention and subsequent written opinion.⁷⁷ Simply put, if lawyers now using informal discovery methods encounter problems, they simply resort to the formal discovery rules to secure needed information.⁷⁸ Thus, there is no body of case law from which to draw any generalizations about the practice or efficacy of informal discovery methods.

Informal discovery goes on all the time in practice. Some lawyers call it investigation;⁷⁹ others view it as cooperative lawyering; others call it "show and tell."⁸⁰ The question for the Advisory Committee is whether this practice is sufficiently valuable to suggest a mandatory rule of universal applicability.

2. The Practice of Informal Discovery: Show and Tell

As indicated above, the Federal Rules of Civil Procedure do not contain any explicit requirement that lawyers in civil cases resort to informal discovery prior to embarking on formal discovery under the rules. At best, under the current rules, the pretrial conference might provide a setting for the judicial encouragement of informal discovery options.⁸¹ In contrast, informal discovery normally is used in criminal procedure,⁸² and some jurisdictions have adopted a local rule for informal discovery in criminal cases.⁸³ Although proposed rule 25.1 purported to institute a "radical new rule" for civil discovery, informal discovery has been going on for some time in complex civil litigation,⁸⁴ as well as pursuant to various local rules.⁸⁵ Informal discovery also apparently is the

Civ. P. 26(b)(3) (trial preparation materials protected by work product doctrine); FED. R. CIV. P. 26(c) (protective orders); FED. R. CIV. P. 26(g) (sanctions); FED. R. CIV. P. 37 (sanctions for failure to make or cooperate in discovery).

77. There is no reported case law on informal discovery. Practicing attorneys in Florida reported knowledge of judge-imposed sanctions for noncompliance with the local mandatory informal discovery rules, but these sanctions have not resulted in reported decisional law. *See infra* text accompanying notes 134-35.

78. *See infra* notes 130-31 and accompanying text.

79. *See, e.g.*, T. MAUET, *supra* note 74, at 17-49.

80. Telephone interview with Barry Davidson, Esq. (Nov. 3, 1989).

81. *See supra* text accompanying notes 67-68.

82. *See generally Symposium on Criminal Discovery*, 68 WASH. U.L.Q. 19 (1990) (evaluating the increase in criminal discovery made available over the past 25 years).

83. *See, e.g.*, D.D.C. Ct. R. 304 ("Defense counsel shall consult with the attorney for the United States prior to the first status conference in a criminal case and shall attempt to obtain voluntary discovery of all materials and information to which the defense may be entitled"); D. MASS. R. 42 (automatic discovery in criminal cases); W.D. WASH. CRIM. R. 48 (various provisions for expediting discovery from the government and defense in criminal cases).

84. *See* MANUAL FOR COMPLEX LITIGATION § 21.422 (2d ed. 1985) ("Other Practices to Save Time and Expense").

85. *See* C.D. CALIF. R. 6 ("Early Meeting of Counsel—Report to Court—Status Conference"). This rule requires attorneys to exchange all documents then "reasonably available to a party which are then contemplated to be used in support of the allegations of the pleading filed by the party;" to exchange "any other evidence reasonably available to a party to obviate the filing of unnecessary discovery motions;" and to exchange "a list of witnesses then known to have knowledge of the facts supporting the material allegations of the pleading filed by the party." *Id.*; *see also* S.D. FLA. Ct. R. 14(A) (entitled "Pretrial Procedure in Civil Actions," rule contains same requirements as the California local rule); D. GUAM R. 235-5(a) (subsection (a) of rule entitled "Meeting of Counsel and Preparation of Proposed Scheduling Order" contains same requirements as the California and Florida rules); *cf.* E.D. PA. Ct. R. 26 (requiring exchange of medical reports in civil cases at least ten days before pretrial conference).

Judge Jaime Pieras, Jr. of the United States District Court for the District of Puerto Rico

norm in many administrative proceedings because the Administrative Procedure Act does not provide for formal discovery under the Federal Rules of Civil Procedure.⁸⁶ The differences in criminal and administrative proceedings, however, make those proceedings irrelevant to the use of informal discovery in the civil litigation context.⁸⁷

(a) Informal Discovery in Complex Litigation

Informal discovery is recommended for preliminary discovery in complex cases.⁸⁸ The *Manual for Complex Litigation* specifically recommends informal discovery as an expense- and time-saving practice and suggests that judges manage complex litigation through mandated, scheduled discovery occurring in sequences or waves.⁸⁹ The *Manual* recommends that:

Counsel provide information to opposing counsel without resort to formal discovery procedures. In particular, documentary evidence is frequently made available voluntarily by experienced counsel who know the types of documents that will likely be requested and must be disclosed. Informal interviews with possible witnesses may also be arranged; this procedure may be very efficient in obtaining background information, in conducting "first wave" discovery, and in verifying, authenticating, or explaining documents.⁹⁰

Thus, "first wave" discovery would be informal discovery, or discovery made pursuant to a local rule or standing order requiring disclosure of evidence supporting a party's allegations without the need for a formal discovery re-

exercises his authority under Federal Rule of Civil Procedure 16 to use an Initial Scheduling Conference as the forum for initiating informal discovery methods. A description of his requirement of informal discovery may be found in Pieras, *supra* note 74, at 945-54.

In addition, the Committee on Discovery for the New York State Bar Association Section on Commercial and Federal Litigation has proposed a new local informal discovery rule patterned on the Florida and California rules. See COMMITTEE ON DISCOVERY, NEW YORK STATE BAR ASSOCIATION SECTION ON COMMERCIAL AND FEDERAL LITIGATION, REPORT ON DISCOVERY UNDER RULE 26(B)(1) 17-20 (July 1989) ("Proposed Local Rule").

86. See, e.g., K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.8 (2d ed. 1978) (APA contains no provision for discovery and provisions of the Federal Rules of Civil Procedure for discovery do not apply to administrative proceedings; parties rely on prehearing conferences); B. SCHWARTZ, ADMINISTRATIVE LAW 287-88 (2d ed. 1982) (no right to discovery exists in administrative hearings, either under due process or the APA); J. STEIN, G. MITCHELL & B. MEZINES, ADMINISTRATIVE LAW § 23.02[1] (1989) ("As reflected by the APA and agency statutes and rules, no non-agency party under investigation or otherwise associated with an investigation has rights of discovery.").

87. Another possible use of informal discovery is in relation to alternative dispute resolution techniques. See Sobel, *supra* note 74, at 195-96.

88. MANUAL FOR COMPLEX LITIGATION § 21.422 (2d ed. 1985).

89. *Id.* §§ 21.421, 21.422.

90. *Id.* § 21.422. The *Manual* notes that counsel may subsequently file requests for admissions to assure that the results of informal discovery are usable at trial. In addition to recommending informal discovery as a means of saving time and expense in the preparation of complex cases, the *Manual* also suggests other creative discovery practices, such as stipulations under Federal Rule of Civil Procedure 29 (including modifications of the formal discovery rules); automatic disclosure of witnesses and documents that counsel expect to use in establishing the claims upon which they have the burden of proof; methods of reducing deposition costs; discovery from other litigation and coordination of common discovery in related litigation; joint discovery requests and responses; modified discovery responses; combined discovery requests; and conference depositions. *Id.*

quest.⁹¹ After the parties complete this informal discovery, the parties may conduct additional "waves" of discovery on the merits.⁹²

Although the *Manual for Complex Litigation* recommends use of informal discovery techniques and discovery sequencing, little is known about the actual discovery practice under these procedures.⁹³ The *Manual's* provisions generally are not mandatory,⁹⁴ but are more aspirational recommendations. The informal discovery provisions in the *Manual for Complex Litigation* have no enforcement or sanctioning provisions, so any informal discovery methods that are used in complex cases must be accomplished through a managerial judge and cooperative counsel.⁹⁵ Informal discovery techniques recommended in the *Manual for Complex Litigation* most likely are invoked in multidistrict litigation cases,⁹⁶ which comprise only a relatively small portion of the federal court caseload at any given time.⁹⁷ Thus, the experience of informal discovery in complex cases is difficult to assess in relation to a proposed rule of universal applicability across all types of civil cases.

(b) Informal Discovery Under Existing Local Rules

Under the Federal Rules of Civil Procedure, each district court may adopt local rules of practice that are not inconsistent with the general federal rules.⁹⁸ With regard to discovery matters, many district courts have adopted numerous rules and provisions governing discovery in the district.⁹⁹ The most prevalent

91. *Id.* § 21.421. This specifically excludes formal discovery requests through interrogatories, depositions, and document production under the formal rules.

92. *Id.* Stressing the efficiencies of early informal discovery, the *Manual* notes: "Although the details and formalities vary, this approach to discovery is valuable in preventing early, ineffectual discovery and in avoiding postponements that otherwise may result from belated discovery of witnesses and documents in the final pretrial processes." *Id.*

For a discussion of the concept of "wave discovery" by the Chief Judge of the United States District Court of the Northern District of California, see Peckham, *supra* note 74, at 267-76.

93. See R. MARCUS & E. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 506 (1985).

94. See Simons, *The Manual for Complex Litigation: More Rules or Mere Recommendations*, 62 ST. JOHN'S L. REV. 493, 497-98 (1988).

95. *Id.* "The creators of the *Manual* remind us that 'it is not binding law. It has no binding effect. It is only as good as the credibility of the authors and the utility of the materials.' The *Manual* asserts that its recommendations, like the Federal Rules, are examples of the court's inherent authority to manage litigation." *Id.* (quoting *MANUAL FOR COMPLEX LITIGATION* § 20.1, at 6 (2d ed. 1985)).

96. See 28 U.S.C. § 1407 (1988) (covering multidistrict litigation).

97. See 1989 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANNUAL REPORT 23.

98. See FED. R. CIV. P. 83 ("Rules by District Courts").

99. See generally REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (April 1989) (surveying the policies behind and the practice under local civil practice rules). Authorized by the United States Judicial Conference on the Recommendation of the Committee on Rules of Practice and Procedure (Agenda 6-7, September 1984), this project was "intended to address at least several needs: to provide a complete legal review of local rules for potential legal errors or internal inconsistencies; to study how rulemaking and the actual rules work in practice; and to provide a systematic review of the underlying policies of local rules." Memorandum from Judge Joseph F. Weis, Jr., Chairman, Committee on Rules of Practice and Procedure to the Chief Judges of the District Courts (April 1989) (discussing local rules on civil practice). The Reporter for the

type of local discovery rule limits the number of interrogatories,¹⁰⁰ or provides for standard or "form" interrogatories for use in certain types of cases.¹⁰¹ In addition to local rules about discovery, other modifications of discovery practice are accomplished locally through judges' standing orders,¹⁰² which may be issued for particular cases¹⁰³ or for groups of related cases.¹⁰⁴

Three district courts, Guam, the Southern District of Florida, and the Central District of California, have adopted local rules specifically designed to require informal discovery before resort to formal discovery. These local rules use the same language and provisions to require attorneys to exchange documents, other evidence, and lists of witnesses the parties expect to use at trial in support of allegations in the pleadings.¹⁰⁵ In addition, all three local rules impose a

Local Rules Project was Dean and Professor Daniel R. Coquillette; Ms. Mary P. Quires served as the project director; and Professor Stephen N. Subrin served as a project consultant.

For recent commentary on local rules, see Frank, *Local Rules*, 137 U. PA. L. REV. 2059 (1989); Napolitano, *A Comment on Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 2063 (1989); Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989).

100. See, e.g., M.D. FLA. CT. R. 3.03(a) (limiting written interrogatories to fifty); S.D. ILL. CT. R. 15(a) (limiting interrogatories to twenty, including subparts); D. MASS. CT. R. 16(a)(1) (limiting interrogatories to thirty, unless leave to file a larger number is granted by the court); D. NEV. CT. R. 190-1(c) (limiting interrogatories to forty, including subparts); M.D. TENN. CT. R. 9(a)(2) (limiting interrogatories to thirty, including subparts, with leave of court for additional interrogatories).

101. See, e.g., S.D. GA. CT. R. 8.6 (listing eight specific interrogatories to be answered by all parties to the litigation); S.D.N.Y. CT. R. 46(a) (listing restrictions on interrogatories). According to the New York rule:

At the commencement of discovery, interrogatories will be restricted to those seeking names of witnesses with knowledge or information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence, or information of a similar nature.

Id.; see also D.S.C. CT. R. 7.05-7.06 (listing standard interrogatories to be answered by all parties to a litigation). The language of the New York local rule has been substantially adopted for the proposed federal rule 25.1. See *supra* notes 31-60 and accompanying text.

102. See, e.g., Discovery Plan and Schedule for Depositions and Medical Examinations of Plaintiffs, *Cimino v. Raymark* (E.D. Tex. Nov. 9, 1989) (Civil Action No. B-86-456-CA) (Hines, Mag.) (limiting depositions to 45 minutes each), *aff'd by Order Denying Motion to Set Aside Magistrate's Report* (E.D. Tex. Jan. 3, 1990) (Parker, Dist. Ct. J.).

103. *Id.*

104. See, e.g., Standing Order for Asbestos Cases in the Eastern District of Texas (July 15, 1982) (including special standing orders regulating discovery); W.D. WASH. CRIM. R. 48, *cited in In re Amendments to Local Criminal Rules, a General Order* (August 11, 1989) (governing discovery in criminal cases).

105. See C.D. CAL. R. 6.1.1 to .1.4, 6.2; S.D. FLA. R. 14; D. GUAM. R. 235-5. With a different preamble to each local rule, the following provisions are worded almost identically in the three local rules:

1. Documents—To exchange all documents then reasonably available to a party which are then contemplated to be used in support of the allegations of the pleading filed by the party. Documents later shown to have been reasonably available to a party and not exchanged may be subject to exclusion at time of trial.
2. Discovery Schedule—To agree upon a preliminary schedule for all discovery in the matter.
3. Other evidence—To exchange any other evidence then reasonably available to obviate the filing of unnecessary discovery motions.
4. List of Witnesses—To exchange a list of witnesses then known to have knowledge of the facts supporting the material allegations of the pleading filed by the party. The

continuing obligation on counsel to advise the opposing counsel of other witnesses as they become known. These local rules mandating or "formalizing" informal discovery techniques are implemented through the general local rules on early pretrial conferences.¹⁰⁶

In Florida, several attorneys suggested that if lawyers did not cooperate in informal discovery, their cases would be delayed because judges, busy with other pressing demands, would not make themselves available to referee discovery disputes.¹⁰⁷ One practicing attorney reported that the local rule was revised in the early 1980s in response to the increase in criminal drug cases on the local federal docket,¹⁰⁸ which decreased the time available for civil cases. The lawyers prac-

parties shall thereafter be under a continuing obligation to advise opposing parties of other witnesses as they become known.

5. Settlement—To discuss, in good faith, settlement of the action.

6. Complicated Case—To discuss whether the action is sufficiently complicated so that all or part of the procedures of the Manual on Complex Litigation should be used. Counsel may propose to the Court modifications of the procedures in the Manual to facilitate the management of a particular action.

7. Report and Proposed Order—Within ten (10) days after the meeting held pursuant to this subsection, those attending are mutually obligated to file a joint Report of Scheduling Meeting setting forth: (a) a detailed schedule of discovery for each party; (b) discussion of the likelihood of settlement; (c) discussion of the likelihood of appearance in the action of additional parties; (d) a preliminary estimate of the time required for trial; and (e) any other information that might be helpful to the Court in setting the case for status or pretrial conference.

S.D. FLA. R. 14.

The California local rule requires a report to the court within fourteen days of the early meeting, C.D. CAL. R. 6.2, and the Guam rule sets no deadline for the proposed scheduling order, D. GUAM R. 235-5(b). The three rules differ beyond these basic provisions. The California rule makes no mention of sanctions for failure to comply; the Florida rule is vague with regard to compliance, *see* S.D. FLA. R. 14(a)(10); and the Guam rule suggests that the failure of a party to participate in good faith in framing of the proposed scheduling order "may result in the imposition of appropriate sanctions," *see* D. GUAM R. 235-5(b).

106. A number of particularized discovery provisions are part of local rules on pretrial conference and procedure. *See, e.g.*, E.D. CAL. R. 23.00 (recommending early discovery conferences under federal rule 26(f)); S.D. GA. R. 8.6-7 (regulating form interrogatories through local pretrial conference and order rule); C.D. ILL. R. 14 (preliminary pretrial conference should include discussion of discovery matters); S.D. ILL. R. 14 (mandatory conference on discovery); S.D. IOWA R. 16 (requiring mandatory scheduling conference including discussion of discovery matters); D. MASS. R. 16(d) (requiring conference of counsel to settle discovery objections); D. MONT. R. 235(e) (requiring preliminary pretrial conference "to discuss any problems of discovery" and "indicate in a general way the course of discovery"); D. NEV. R. 190-1 (governing discovery); N.D. OHIO R. 3.04 (encouraging pretrial discovery conferences "to reduce, in every possible way, the filing of unnecessary discovery procedures"); D.S.C. R. 7.02-7.06 (describing mandatory pretrial conference procedure under federal rule 16(b) and relationship to local discovery procedures); M.D. TENN. R. 9 (detailing procedures for discovery in civil cases, including provision for discovery conferences); D. UTAH R. 9 (providing for discovery conferences).

The abundance of local rules modifying discovery practice suggests a developed "common law" of discovery practice in the districts, apart from the overarching federal rules on discovery. The trend of these local rules is toward increased limitations and more frequent meeting of parties and judicial officers to curb over-discovery or other abuse.

107. Telephone interviews with Barry Davidson, Esq. (November 3, 1989); Mike Nachwalter, Esq. (November 13, 1989); and Bob Josefsberg, Esq. (November 14, 1989).

108. Telephone interview with Elizabeth du Fresne, Esq. (Nov. 13, 1989). Du Fresne suggested that because the Southern District of Florida is congested with drug cases, lawyers in civil cases cannot get hearings on discovery motions for approximately a year to a year-and-a-half. She said there tends to be a tremendous backup on unargued motions and that "discovery motions are the least favored on earth." *Id.* She reported that because local lawyers had to arrange discovery with-

ticed informal discovery, and a kind of common-law practice of informal discovery developed in advance of formal promulgation of the local rule. Attorneys, then, viewed the informal discovery rule as an institutionalization of practices that already had developed among attorneys handling civil cases in federal court. When the local rule requiring informal discovery finally was adopted, local lawyers generally were familiar with the purpose and practice of the rule.¹⁰⁹

In Florida and California, federal judges indicated that they were instrumental in proposing and promulgating these local rules on informal discovery in the early 1970s.¹¹⁰ They reported that their local rules on informal discovery were working very well, and that the rules "spurred attorneys to do their investigative work" and "really moved things along."¹¹¹ In both districts, federal judges reported that "all the judges use it" and are enthusiastic about it.¹¹² This judicial assessment contrasted with comments from practicing lawyers, who suggested that only twenty-five to fifty percent of federal judges in the district used the rule, while one attorney said that one-third of judges in the district did not pay attention to it.¹¹³ There is, however, no empirical data concerning the use of the local informal discovery provisions, so these reports from judges and practitioners are highly impressionistic.¹¹⁴

Of the small sample of lawyers questioned about the informal discovery rule

out judges and without rulings on discovery motions, they were quite receptive to a new rule on discovery practice.

Du Fresno stated that the impetus for the Florida local rule came from Judge King in the early 1980s. He set up an ad hoc committee to provide the court with suggestions for revising rules for discovery practice. The committee recommended changes in local rule 14, a pretrial conference rule. Among the new recommendations were a 90-day discovery conference; the requirement of a report to the court on that discovery conference; the certification of trying to work out a discovery plan or schedule; and a requirement for a scheduling order. Before revision, Florida local rule 14 did not have requirements regarding mandatory settlement discussions, exchange of documents and witness lists, or the continuing obligation to divulge witnesses. Most of these recommendations were incorporated into new local rule 14.

109. Interviews with attorneys, *supra* notes 107-08.

110. One judge for the United States District Court for the Southern District of Florida stated that when he and another judge came onto the bench, they started a movement to adopt a local rule on informal discovery. He reported that they learned of informal discovery techniques from seminars at the Federal Judicial Center and that two other judges in his district were also "big on informal discovery." Interview with Clerk's Office, United States District Court for the Southern District of Florida (Nov. 2, 1989).

Two judges in the Central District of California reported that California local rule 6 on informal discovery became a formal rule in the early 1970s. Interview with judge, C.D. Calif. (Nov. 7, 1989). Judge Mariana R. Pfaelzer, also of the United States District Court for the Central District of California and a member of the current Advisory Committee on Civil Rules, confirmed these observations concerning practice under Local Rule 6. See Memorandum from Joe Cecil to Linda Mullenix and Tom Willging, Federal Judicial Center (November 18, 1989) (regarding Advisory Committee on Civil Rules).

111. Interviews with Clerk's Office and judge, *supra* note 110.

112. Interviews with Clerk's Office and judge, *supra* note 110.

113. Interview with Barry Davidson, *supra* note 107.

114. The author spoke with four attorneys identified as primarily federal court practitioners in the Southern District of Florida. The author was unable in the short period of time in which this survey was done to contact federal practitioners in the Central District of California. This telephone sampling of local practitioners was decidedly unscientific and meant to provide preliminary information to the Advisory Committee on Civil Rules at its November 1989 meeting. The author reported these preliminary comments and suggested that further study be undertaken to explore the experi-

in Florida, three endorsed the rule and one expressed skepticism.¹¹⁵ The general tenor from these practicing attorneys was that the local rule on informal discovery was a good one when it worked well, but whether the rule worked well depended on the quality and experience of the lawyers involved in the litigation.¹¹⁶ The attorneys stated that "better" or "more sophisticated" lawyers complied with the rule; however, obstreperous opposing counsel could frustrate the spirit of the rule with technical compliance.¹¹⁷ One attorney noted that some lawyers who still prefer "trial by ambush" do not comply with the rule.¹¹⁸ There was no consensus concerning which lawyers were more likely to comply with the local rule and why. The lawyers suggested that the local rule works when the lawyers want to cooperate, but often there is pro forma compliance with the rule's reporting duty.¹¹⁹

It is difficult to assess the extent of judicial involvement with the local informal discovery rule. The responses of Florida practitioners ranged from "most judges use it and are rigorous in enforcing it" to "there is not a lot of interaction with the judge," and "the judge will become involved only if one side is not complying" and the other side files a motion.¹²⁰ The lawyers varied in their assessments of how many judges were seriously interested in the rule, and one attorney said that some judges actively encouraged compliance with the rule because it helped keep discovery motions off their calendars.¹²¹

There are no monitoring systems of attorneys' actions under the local rules. Judges typically become involved in informal discovery only if an attorney's failure to comply is called to the judge's attention through another lawyer's motion to compel compliance.¹²² The practitioners said they knew of instances in which this occurred and said the judge usually used a hearing on the motion to

ence with these two local rules. The Committee declined the suggestion for further study of practice under the local rules.

115. The attorney expressing greatest skepticism about the local rule was Mike Nachwalter. Interview with Mike Nachwalter, *supra* note 107. He stated that the efficacy of the rule depended primarily on the opposing lawyer. *Id.* If the other lawyer wants to cooperate, then the rule works. He stated that the rule is a good rule in theory, but does not work in practice because judges do not get involved early enough, if at all. *Id.* He said that the local rule 14 report is largely pro forma and perfunctory and that lawyers usually have not exchanged much, but must file under the rule anyway. *Id.*

116. Interviews with attorneys, *supra* notes 107-08.

117. *Id.* Mr. Davidson commented that state practitioners who appear infrequently in federal court think the rule is burdensome. Ms. du Fresne suggested that although most attorneys comply with the rule, they do not comply when they are dealing with an unsophisticated or truly over-worked lawyer. Mr. Josefsberg commented that there is compliance by lawyers "who know what they are doing," and that younger lawyers seem to follow the rule better than older ones.

118. Interview with Bob Josefsberg, *supra* note 107.

119. Interview with Mike Nachwalter, *supra* note 107.

120. Interviews with attorneys, *supra* note 107.

121. Interview with Elizabeth du Fresne, *supra* note 108. Du Fresne gave some examples of judicial interaction with rule 14 requirements. *Id.* She said that one federal judge would express strong disappointment at the status conference if the attorneys were not complying with rule 14. *Id.* She indicated that two other federal judges appeared before local bar groups to educate attorneys about the rule and to encourage lawyers to use it. *Id.* She also said that judges ensure compliance by being available, but there is no formal compliance system. She said she thought the rule could be improved with a formal monitoring system. *Id.*

122. Interview with attorneys, *supra* note 107.

order compliance. The attorneys indicated they believed that the full range of a judge's sanctioning powers was available to enforce compliance,¹²³ but only one attorney knew of a monetary sanction for failure to comply with the local rule.¹²⁴ Another attorney suggested that the judge could strike pleadings for failure to comply.¹²⁵

The practitioners queried about practice under the local rule estimated that eighty to ninety percent of federal litigators in the district complied with the letter of the rule,¹²⁶ but the respondents would not speculate about the non-complying ten to twenty percent, other than to characterize these attorneys as unsophisticated, recalcitrant, or wanting to conduct trial by ambush.

The Florida practicing attorneys disagreed on what materials and information parties actually divulge under the informal discovery provisions. The Florida local rule requires lawyers to meet ninety days after filing a complaint to exchange documents and witness lists.¹²⁷ The lawyers indicated that documents and witness lists do get exchanged, but a dissenting attorney said that in reality little gets disclosed because a lawyer typically does not have enough information ninety days after filing to make a meaningful exchange.¹²⁸ He suggested further that an attorney is more likely to disclose only witnesses and information already known to the other side.¹²⁹

There was further disagreement about the extent to which formal discovery occurs after compliance with local requirements on informal discovery. Some lawyers said that if there is meaningful compliance with the local rule, very little formal discovery remains to be done; other lawyers suggested that the local rule

123. Interviews with Bob Josefsberg, *supra* note 107; Elizabeth du Fresne, *supra* note 108.

124. Interview with Elizabeth du Fresne, *supra* note 108. She said that she knew of one instance of a \$1000 sanction imposed by a federal judge for an attorney's non-compliance with the 90-day rule for pretrial procedures. *Id.*

125. Interview with Bob Josefsberg, *supra* note 107.

126. Interviews with attorneys, *supra* notes 107-08. Ms. du Fresne suggested that most attorneys do comply with the local rule, but that all compliance is voluntary and that she had experienced a few instances of non-compliance. Interview with Elizabeth du Fresne, *supra* note 108. She said that some lawyers will give up very few documents and divulge only a few witnesses. *Id.* When this happened to her, she wrote a unilateral report to the court indicating that opposing counsel was "stonewalling." *Id.* She said that opposing counsel had complied with the letter but not the spirit of the rule. *Id.* The judge held a status conference and told opposing counsel he expected the lawyers to be more forthcoming with information. Opposing counsel then complied.

127. The Florida rule provides:

Within twenty (20) days after the filing of an answer by the last answering defendant, or within ninety (90) days after the filing of a complaint (whichever shall first occur) in all civil actions, except those specifically excluded by subpart 9 of this subsection, counsel for the parties (or the party if proceeding *pro se*) shall meet in person, by telephone, or by other comparable means

S.D. FLA. R. 14(A)(1), (4); see *supra* note 105 (quoting the additional provisions that require the exchange of documents and witness lists).

128. Interview with Mike Nachwalter, *supra* note 107. Nachwalter commented that under the rule lawyers are supposed to give documents and witness lists to the other side, but that the time frame is too short and the lawyers typically do not know enough about the case ninety days after filing to make this a meaningful exchange. *Id.*

129. *Id.* Nachwalter said that usually little gets exchanged because lawyers do not have much information after ninety days, and that lawyers will divulge known witnesses, but may not divulge undiscovered witnesses. He further suggested that a lawyer will give up only what is known by the other side. *Id.*

does not necessarily reduce formal discovery, but merely "focuses" it more precisely.¹³⁰ Again, the attorney least impressed with the local rule said that there is a great deal of formal discovery after informal discovery because the lawyers have not divulged much information, and therefore they typically have to do a great deal of follow-up.¹³¹

There also were mixed views about the continuing reporting duty. Some said that attorneys generally observed the continuing duty, and that it allowed the lawyers to engage in their own case management; another said that the duty was relevant only if the attorneys initially complied with the letter and the spirit of the rule; and another lawyer said that the continuing reporting duty did not work as a practical matter.¹³²

The lawyers had a number of suggestions for improving the local rule based on their experience. All believed that more active supervision by judges would improve the efficiency of an informal discovery rule. One attorney suggested a requirement that the lawyers meet with the judge a specific number of days or months before trial to discuss informal discovery.¹³³ Another attorney suggested the need for a more explicit, active monitoring mechanism.¹³⁴ In addition, this attorney suggested a contempt sanction for noncompliance and recommended that judges use sanctions more often to ensure compliance with the intent of the rule. Finally, one attorney commented that the time limits in the current Florida rule are "too quick."¹³⁵ This attorney pointed out that lawyers do not realistically know enough about their cases ninety days after filing to encourage meaningful exchange and disclosure of information. Thus, this critic favored an informal discovery rule with stages of required discovery.

The sample of Florida attorneys interviewed was too small to draw any general conclusions about the wisdom of an informal discovery rule. Their anecdotal impressions suggest positive prospects for a well-structured rule.

130. Interviews with attorneys, *supra* notes 107-08. Mr. Davidson said that the extent of formal discovery after the local rule exchange depended on the case. Interview with Barry Davidson, *supra* note 107. If the rule is followed properly, all that might remain is a "reasonably framed set of interrogatories" or very narrow document requests. He said that after informal discovery, the lawyer usually asks for "anything else" that has not come through rule 14 discovery. *Id.* Mr. Josefsberg indicated that rule 14 eliminates much subsequent discovery, if it is used correctly, although he said that the Florida lawyers nonetheless would use all the available types of formal discovery afterwards. Interview with Bob Josefsberg, *supra* note 107. Du Fresne stated that there is formal discovery after rule 14 discovery, but that rule 14 makes that discovery more focused and intelligent. Interview with Elizabeth du Fresne, *supra* note 108. She said that rule 14 does not limit the discovery an attorney normally would undertake.

131. Interview with Mike Nachwalter, *supra* note 107. Nachwalter also added that much information comes from post-rule 14 discovery because attorneys do not divulge much information initially. *Id.*

132. Interviews with attorneys, *supra* notes 107-08. With regard to the continuing reporting duty, Ms. du Fresne stated that this portion of the rule encouraged attorneys to engage in case management. Interview with Elizabeth du Fresne, *supra* note 108. Mr. Josefsberg suggested that there was a continuing duty only if there had been compliance in the first instance. Interview with Bob Josefsberg, *supra* note 107.

133. Interview with Mike Nachwalter, *supra* note 107. Mr. Nachwalter suggested that an informal discovery rule could work if there was more active supervision from the judges. *Id.*

134. Interview with Elizabeth du Fresne, *supra* note 108.

135. Interview with Mike Nachwalter, *supra* note 108.

Their comments, however, also serve to flag potential problems with a mandatory informal discovery requirement. The problems these practitioners indicated are well worth additional investigation and thought before the Advisory Committee promulgates a new, universal informal discovery rule that would apply to every civil case in federal court.

C. Problems and Unresolved Issues Concerning Mandatory Informal Discovery

The movement for promulgation of a mandatory informal discovery rule is based on at least two assumptions. The first assumption is that the current civil discovery rules are ineffective and counterproductive to their intended ends. Thus, rather than promoting free and liberal discovery of information about a case, contemporary federal practice instead encourages gamesmanship. Not only does this violate the spirit of the 1938 discovery provisions, but it frustrates the stated goals of the rules of procedure by encouraging injustice, delay, and needless expense.

The second assumption underlying an informal discovery rule is that such a rule somehow will help to cure prevailing discovery ills. In this regard, the Advisory Committee is demonstrating the triumph of hope over experience. Of all the rules of civil procedure, the various discovery provisions have been amended most frequently.¹³⁶ No matter how many times the Advisory Committee redrafts the discovery rules, discovery abuse continues unabated,¹³⁷ as lawyers create new ways to circumvent the rules. Only an Advisory Committee with an aspirational vision of professional conduct could hope that a new mandatory informal discovery provision will succeed where previous discovery reforms have failed to modify abusive lawyering tactics.

The fact that previous attempts at discovery reform have failed to curb discovery abuse should not deter further attempts to reform civil discovery to function as the rule-drafters intended. Fifty years of experience with discovery reform, however, should provide a cautionary note: the Advisory Committee might well seek the root causes for discovery abuse because cure follows proper diagnosis.

The proposed informal discovery rule presents unresolved research issues as well as several lurking problems. The tentative information elicited from local Florida practitioners, for example, suggests questions about the effectiveness of local rules. If the Florida rule was drafted to institutionalize a pre-existing local practice among attorneys because of court congestion from criminal cases, then the experience of California practitioners should be compared if the California local rule was not formulated for that reason. Before dismissing the rule on this basis, the experience of California practitioners should be examined, because the California local rule may have been adopted for a reason other than congestion

136. See generally FED. R. CIV. P. advisory committee notes (indicating dates and reasons for rule revisions).

137. See *supra* notes 70-71.

in the courts from criminal cases. Moreover, the comments of the Florida practitioners raise the following issues:

(1) To what extent is compliance with the local informal discovery rule merely technical or pro forma? What kind of information is disclosed and withheld when there is technical compliance?

(2) Have attorneys who are subject to the local rule developed techniques for avoiding compliance with the spirit of the rule?

(3) To what extent does the local rule actually reduce formal discovery? When, and under what circumstances, do lawyers believe that they must conduct responsibly further formal discovery after the opponent has made disclosures under the informal discovery rule?

(4) Under what circumstances are attorneys most likely to comply voluntarily with both the letter and the spirit of the rule? When not?

(5) If it is true that some percentage of federal practitioners simply ignore the local informal discovery rule, what happens in these cases?

(6) What is or should be the role of judicial supervision of an informal discovery rule? Should there be a monitoring system that includes sanctions? What sanctions should be available for noncooperation?

The Advisory Committee is going forward with a proposed universal informal discovery rule without having done thoughtful analysis on these issues. Rather, the Committee is proceeding with a new federal rule based largely on the Committee's good intentions and anecdotal information from a handful of practitioners and judges.

From a process standpoint, what should the Advisory Committee do before it promulgates a new universal procedural rule? Should the Committee conduct a more probing empirical study of the experience of local practitioners under existing informal discovery rules? Will such research enhance the current rule-drafting process? In addition to further empirical study of existing experience, should the Advisory Committee conduct a "procedural impact study"¹³⁸ to assess the potential consequences of its proposed rule on future cases and litigants? In this regard, what are the limitations of empiricism?

D. An Informal Reprise: What Proposed Rule 25.1 Does and Does Not Do With Regard to Civil Discovery

It is important to summarize what the proposed informal discovery rule is intended to do and not do, in light of surfacing criticism.¹³⁹ The proposed rule is titled aptly, in that it simply would require prompt disclosure of evidence to the other side. It is intended to require "show and tell," or as one commentator suggested about discovery abuse in general, to end the reciprocal games of

138. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 71, at 89-90 (calling for creation of an Office of Judicial Impact Assessment "in the judicial branch to advise Congress on, inter alia, the effect of proposed legislation on the judicial branch and legislative drafting matters likely to lead to unnecessary litigation").

139. See *infra* notes 143-77 and accompanying text (Part II).

"twenty questions" and "hide and seek."¹⁴⁰

The rule is intended to end gamesmanship in the trial preparation process. The proposed rule would require lawyers to disclose evidence and witnesses at any early stage of litigation, and to continue to disclose evidence as it became known. The imposition of sanctions for noncompliance puts bite into the new proposed rule. Thus, if lawyers did not reveal what information they had when they had it, then they could not use it at trial. The proposed rule is predicated on aspirational standards of professionalism.

The rule would not cut off or eliminate formal discovery. Attorneys still could resort to interrogatories, depositions, requests for admissions or documents, or physical and mental examinations. As with the Florida local rule, the Advisory Committee anticipated that attorneys still would need to do formal discovery after disclosure under proposed rule 25.1. The purpose of the proposed rule, however, is to reduce the amount of such formal discovery and the wasteful expense of formal discovery churning. Moreover, the rule in no way would abrogate existing privileges¹⁴¹ and immunities.¹⁴² The rule would not require lawyers to disclose documents or witnesses that the federal rules traditionally have protected.

II. THE ATTACK ON THE PROPOSED INFORMAL DISCOVERY RULE

The proposal for a mandatory informal discovery rule first was raised at the November 1989 Advisory Committee meeting. The Committee discussed the need for such a rule and authorized the Reporter to draft a proposed rule for the June 1990 meeting. Consistent with the mandate for new Advisory Committee openness, the Reporter drafted a proposed informal discovery rule and circu-

140. See Hazard, *supra* note 71, at 2240.

141. For example, the attorney-client privilege remained untouched. See FED. R. CIV. P. 26(b)(1). That rule provides:

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 claim or defense of the party seeking discovery or to the claim or defense of any 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.

Id. (emphasis added).

142. For example, Federal Rule of Civil Procedure 26 still provides for the work product immunity:

Subject to the provisions of subdivision (b)(4) [concerning expert witnesses] of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

FED. R. CIV. P. 26(b)(3). For a discussion of the history of the work product immunity, see *Hickman v. Taylor*, 329 U.S. 495 (1947).

lated it to interested persons. This initial circulation elicited a response from a public interest academician, who had attended the fall Advisory Committee meeting and there made a spirited plea for public participation in the rulemaking process.¹⁴³ This public interest advocate strenuously criticized the proposed informal discovery rule, flexing some participatory muscle that heralds similar interest group lobbying on future rule reform. This singular response seemed disproportionate to the proposed rule reform, like aiming artillery cannon at a fieldmouse.

A. *The Public Interest Critique*

There can be little doubt that the public interest law perspective inspired this initial salvo volleyed at the proposed informal discovery rule.¹⁴⁴ This perspective views litigation through a decidedly political lens that pits unempowered, resourceless individuals against big institutional litigants with vast financial resources. The public interest critique of procedural rules reflects an ideology that litigation embodies class, race, gender, and economic struggles. The basic theory of public interest partisans is that there are no such things as "facially neutral rules."¹⁴⁵ Criticism of the proposed informal discovery rule proceeds from this perspective.

The public interest criticism of the proposed informal discovery rule makes three essential points: (1) that the rule would create a tactical litigation imbalance because it would require only the disclosure of favorable evidence; (2) that the rule would have a disparate impact by supplanting formal discovery; and (3) that the rule's sanctions would not work because cases do not come to trial. These criticisms misstate the proposed rule, distort the drafters' intentions, and misrepresent the likely consequences of the proposed rule.

143. This academician was Professor Laura Macklin, Associate Director, Institute for Public Representation, Georgetown University Law Center. Professor Macklin also appeared on behalf of the clinic and presented testimony and a prepared statement urging rulemaking reform during the hearings on the Court Reform and Access to Justice Act of 1988. See Prepared Witness Statement, Professor Laura Macklin, in *Court Reform and Access to Justice Act: Hearings on H.R. 3152* (February 28, 1988), *supra* note 18, at 339-91.

144. See generally Tobias, *supra* note 22, at 271 n.2 (recognizing that the advisability and validity of public law litigation inspire controversy).

145. See *id.* at 270. Professor Tobias writes:

The public interest litigant is no longer a nascent phenomenon in American jurisprudence. Born of the need of large numbers of people who individually lack the economic wherewithal or the logistical capacity to vindicate important social values or their own specific interests through the courts, these litigants now participate actively in much federal civil litigation: public law litigation. Despite the pervasive presence of public interest litigants, the federal judiciary has accorded them a mixed reception, particularly when applying the Federal Rules of Civil Procedure. Many federal courts have applied numerous Rules in ways that disadvantage public interest litigants, especially in contrast to traditional litigants, such as private individuals, corporations, and the government.

Id. Professor Tobias defines public interest litigation as "lawsuits which seek to vindicate important social values that affect numerous individuals and entities." *Id.* at 270 n.1. This statement and the arguments of Professor Tobias's article support this author's thesis that some interest groups have retreated from the courts as forums for social change and are repositioning to achieve their goals through favorable modifications of the civil rules. See *id.* at 271 ("many courts have enforced numerous Rules in ways that have adversely affected public interest litigants").

Such mischaracterizations jeopardize the Advisory Committee's work by falsely imbuing proposed rules with political content. Equally disturbing is the prospect that if these criticisms gain public currency,¹⁴⁶ the legitimacy of the Advisory Committee will be undermined severely in its rule reform efforts.

1. The "Favorable Evidence" Criticism

The "favorable evidence" criticism is predicated on the belief that the rule requires only disclosure of so-called "favorable evidence":

As you know, Draft Rule 25.1 establishes procedures for the prompt disclosure of each party's own evidence (that is, evidence in the possession of that party, and favorable to that party), and contemplates, as a corollary, significant reductions in the use of formal discovery tools (particularly interrogatories and depositions) as of right. However, Draft Rule 25.1 imposes no obligation upon a party to disclose evidence favorable to an adversary in litigation.¹⁴⁷

This criticism basically asserts that requiring parties to disclose only evidence favorable to them would introduce a litigation imbalance that favors "information-rich" litigants and disadvantages "information-poor" litigants.¹⁴⁸ "Information-rich" litigants, of course, are large corporate or governmental institutions; "information-poor" litigants include plaintiffs who are pursuing employment, housing, and credit discrimination claims; allegations against government agencies; and product liability lawsuits.¹⁴⁹

This view of the litigation landscape pits small, individual plaintiffs against large, institutional defendants. If rule 25.1 is approved, information-poor litigants will suffer disproportionately. In addition to financial restraints, these litigants will "also be dependent on the discretion of district judges for permission to pursue fact-gathering through formal discovery."¹⁵⁰ Thus, rule 25.1 will re-

146. An example of a criticism that has gained currency through repetition is that the 1983 amendments to rule 11 have adversely impacted civil rights and public interest law litigants. *See, e.g.,* Tobias, *supra* note 22, at 302-10 (selectively surveying empirical studies of the impact of rule 11 on classes of litigants).

147. Letter from Laura Macklin to Paul Carrington, at 2 (Mar. 20, 1990). "In this respect, the draft rules differ[] substantially from Wayne Brazil's proposal in *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 348 (1978)." *Id.*

148. *Id.* at 3. The terms are Professor Macklin's. She draws the following distinction:

[P]arties who are likely to possess (or obtain through extra-judicial means) most of the information necessary to prove or defend their positions ("information-rich litigants") and parties who are not likely to possess (or secure through extra-judicial channels) most of the information necessary to prove or defend their positions ("information-poor litigants").

Id. Professor Macklin further suggests: "I suspect, although I have not seen any empirical work on this type of question, that 'information-rich' and 'information poor' litigants are likely to be unevenly distributed between various categories of cases and various types of disputants." *Id.*

149. *Id.*

150. *Id.* at 4. Professor Macklin describes current discovery procedure as imbued with inequality stemming from financial disparities:

Of course, under our current system there are similar, albeit less dramatic inequalities in access to information necessary to prove one's case. However, the current inequalities stem largely from financial limitations on the parties, and not from rules which themselves grant advantage to parties in a stronger position to secure proof outside of formal discovery. For this reason, litigants can currently use other measures, ranging from tape-recorded depositions to class actions, in efforts to overcome financial constraints on obtaining proof.

sult in "disaster" for certain classes of litigants:

I do not think that one can overestimate the potential significance of this type of shift to a discovery system premised largely on extra-judicial information gathering, obligatory disclosure of only favorable information, and sharp curtailments in formal discovery. For litigants who need formal discovery tools to prove their cases, it will be a disaster.¹⁵¹

This attack on informal discovery misstates the provisions of the proposed rule. The proposed rule nowhere says that a disclosing party would be required to disclose "favorable evidence," and it does not say that a party would be required to disclose *only favorable evidence*. The language "favorable evidence" simply does not appear anywhere in the proposed provisions and represents a straw man that allows an attack on a rule the Advisory Committee has not proposed.

The public interest advocates also tie the "favorable evidence" problem to proposed elimination of formal discovery,¹⁵² a combination of restrictions that would enhance adversarial imbalance. This criticism also misrepresents the proposed rule, which in no way eliminates formal discovery. Raising and repeating this spectre only could alarm the litigating bar about a possibility that the reform does not contemplate.

Finally, the criticism that the proposed rule would be a disaster for information-poor litigants is ironic. If anything, the proposed rule should give an advantage precisely to this class of litigants, and if an imbalance occurred, it should favor these litigants. The proposed rule is intended to induce "show-and-tell" by all parties at the risk of subsequent evidence-preclusion for noncompliance. This is intended to force institutional defendants to disclose materials that they otherwise might withhold until later in the litigation process, and thus prevent defendants from playing a financial delaying game.

Id. at 3-4.

151. *Id.* at 4. Professor Macklin proceeds to link these dire discovery consequences of the proposed informal discovery rule to rule 11 sanction problems. She draws the conclusion that a combination of these two rules will cause certain types of litigants, such as public interest litigants, to forego suing in federal court. This is a variation of the "chilling effect" argument now prevalent among rule 11 critics. See generally S. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 77-91 (1989) (evaluating the costs and collateral consequences of rule 11 implementation); LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U.L. REV. 331, 333 (1988) (supporting the general proposition that rule 11 serves as a restraint upon public interest litigation); Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1314 (1986) (discussing the potential "chilling effect" of the rule 11 amendments); Tobias, *supra* note 22, at 301-10 (examining the potential effects of and problems concerning the rule 11 amendments); Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485, 487 (1988-89) (claiming that the detrimental effects of the rule 11 amendments have been undervalued); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 191-94 (1988) (an overview of rule 11, its amendments, and its critics). The thesis is that the rulemakers are trying to use rule 11 sanctions and discovery curtailment to impede public interest litigation.

152. See *infra* notes 153-59 and accompanying text.

2. The "Supplanting Formal Discovery" Criticism

The second criticism of the proposed informal discovery rule contends that it curtails formal discovery.¹⁵³ The criticism is that the proposed rule "promotes disclosure of evidence (in lieu of some formal discovery);¹⁵⁴ contemplates "significant reductions in the use of formal discovery tools (particularly interrogatories and depositions);¹⁵⁵ involves "sharp curtailments in formal discovery";¹⁵⁶ may someday "supplant formal discovery";¹⁵⁷ and materially reduces the need for formal discovery devices.¹⁵⁸ As a result, information-poor litigants would neither have an adversary's unfavorable proof, nor would they be able to obtain such information through the usual discovery devices.

This criticism is disingenuous because it contains an element of truth that artfully raises general alarm. It is indeed the major purpose of the proposed informal discovery rule to reduce recourse to formal discovery,¹⁵⁹ but it is not true that the rule cuts off formal discovery. The rule contemplates that formal discovery would occur, but that it would be more focused, intelligent, and less inefficient.

3. The "Ineffective Sanction" Criticism

The third criticism of the informal discovery rule is that the proposed sanction¹⁶⁰ basically would be ineffective in achieving its intended ends, and instead may encourage nondisclosure and gamesmanship.¹⁶¹ The theory is that because only a small percentage of cases go to trial, "litigants (and their lawyers) may design strategies which assume they are unlikely to go to trial, and circumvent the rule in this way."¹⁶²

This criticism hypothesizes a lawyer (presumably a major institutional de-

153. See Letter from Laura Macklin to Paul Carrington, at 2 (Mar. 20, 1990).

154. *Id.* at 1.

155. *Id.* at 2. Professor Macklin also talks about discovery tools "as of right," *id.*, but it is unclear just what she means by this. Discovery is not "by right."

156. *Id.* at 4.

157. *Id.*

158. *Id.* at 5. Professor Macklin suggests, incorrectly, that informal discovery somehow would "obviate the need" for interrogatories and depositions:

Although I agree that some of the matters now covered by interrogatories and depositions would be covered by the material specified for disclosure under Draft Rule 25.1, it is not always the case that the need for such discovery devices is materially reduced by these disclosures. For example, in the several kinds of cases which require plaintiffs to accumulate and analyze statistical proof from information largely in the defendant's possession, access to the kinds of information specified for disclosure in Rule 25.1(a) (witness lists, fact summaries, expert opinions, damage computations, and record descriptions) would not obviate the need for detailed interrogatories and responses.

Id. Even if everything Professor Macklin states is true, there is nothing in the proposed rule that would prohibit the plaintiff in these circumstances from using subsequent interrogatories and depositions to obtain the information Professor Macklin described. Professor Macklin, however, suggests the opposite: that the proposed informal discovery rule would cut off and deny necessary subsequent discovery.

159. See *supra* text accompanying note 35.

160. See *supra* notes 51-55 and accompanying text.

161. See Letter from Laura Macklin to Paul Carrington, at 5 (Mar. 20, 1990).

162. *Id.*

fendant) who withholds information under the informal discovery rule, disregards the continuing disclosure requirement, and further does not cooperate in formal discovery. Yet, assuming all this stonewalling, why would the information-poor plaintiff want to settle? At that point, going to trial would favor the plaintiff because the defendant could not use evidence it had failed to disclose within the rule's time constraints. The rule is intended to penalize the non-cooperating adversary at trial by precluding late production of evidence and witnesses to prove claims or defenses. In this sense, the rule provides an incentive for the cooperative party to litigate and a disincentive for the uncooperative party to defend.

Nonetheless, this criticism seems valid in instances in which a defendant decides to withhold harmful information that would not be needed at trial and thus would not be threatened by potential exclusion. The sanctioning provision would be effective only to the extent that a defendant's defenses or counterclaims depended on withheld information.

The further criticism of the proposed sanction provision is that it would lead to wasteful satellite litigation concerning whether a litigant had revealed information in a timely fashion.¹⁶³ Although it is difficult to predict the extent of this hypothesized problem, it is also difficult to anticipate discovery disputes of a magnitude that could not be resolved by a magistrate handling discovery matters or by a judge at pretrial conference.¹⁶⁴ It is premature alarmism to forecast that the new disclosure rule would lead to additional litigation consuming "undue amounts of time and effort."¹⁶⁵

Finally, the professional vision that underlies these criticisms is disturbing. While the Reporter and the Advisory Committee were drafting a proposed rule that summons lawyers to the highest degree of professional conduct,¹⁶⁶ the critique of that rule instead portrays litigators as shrewd game players. The proposed rule is under attack because this dismal vision of professionalism precludes honest dealing. This is a vision of lawyering as *realpolitik*. It is cynical to suggest that lawyers will not comply with the new informal discovery provisions because it is not in their interests and because lawyers play hardball litigation games. The point of the proposed rule is to refocus narrow litigant interests in winning on broader systemic interests in the speedy, inexpensive, and just resolution of disputes. Moreover, the purpose of the proposed rule is to end the gamesmanship so prevalent under the current discovery rules. Ironically, the critics oppose the rule because they believe lawyers engage in discovery

163. *Id.* Professor Macklin argues: "Additionally, it seems likely that in cases which do go to trial, disputes about whether information was timely revealed, which place great emphasis on deciding when 'the information was revealed to or discovered by the disclosing party,' will consume undue amounts of time and effort." *Id.*

164. *See* FED. R. CIV. P. 16 (governing pretrial conferences); FED. R. CIV. P. 26(f) (independent discovery conference provisions). Both of these methods would continue to exist even with the proposed new rule.

165. *See supra* note 163.

166. *See* FED. R. CIV. P. 25.1 Reporter's Note (Proposed Draft, Feb. 24, 1990) ("It would depend on an elevation of the professionalism of lawyers.").

games. Thus, while the rule drafters commit the error of hope over experience, its critics commit the error of experience over hope.

B. The Call for Further Study: Is This Empirical Study Really Necessary?

One recommendation for addressing the proposed rule's identified ills is to conduct further empirical study of discovery.¹⁶⁷ The call for empirical study proceeded from a conception of litigation as pitting information-poor litigants against information-rich litigants. Professor Macklin states:

I think it is imperative, if a rule such as Draft Rule 25.1 is to be pursued, that detailed empirical evidence be gathered as to the levels and types of access that different kinds of litigants have, in different kinds of cases, to means of obtaining the information necessary to prove their cases without the use of formal discovery. I suspect that distinct patterns of uneven access would emerge in such empirical studies, varying considerably among different kinds of cases.¹⁶⁸

Professor Macklin further indicates that "studies of this type, by their very design, would need to illuminate the proof requirements of various categories of litigation. These requirements are, of course, an amalgam of statutory and judge-made law, premised on assumptions about access to evidence under our current system of formal discovery."¹⁶⁹

This recommendation would require the Advisory Committee¹⁷⁰ to analyze litigation by both case and litigant type.¹⁷¹ This assumes not only some objectively identifiable "case types," but also assumes some objectively identifiable "litigant types" and that these litigant types act similarly in certain types of cases. In addition, researchers should investigate the "means of obtaining the information necessary to prove [the litigants'] cases without the use of formal

167. See Letter from Laura Macklin to Paul Carrington, at 2-3 (Mar. 20, 1990) (discussing rule 11 and "new rule to promote disclosure of evidence (in lieu of some formal discovery)").

168. *Id.* at 3.

169. *Id.* By way of illustration, Professor Macklin explains: "In the employment discrimination area, for example, current doctrines assume that plaintiffs will have access to forms of statistical proof which rely heavily on information from the employer's files." *Id.*

170. Presumably, this would be conducted by the Federal Judicial Center, which is already disfavored because of the conclusions reached in its rule 11 empirical studies. See T. WILLGING, THE RULE 11 SANCTIONING PROCESS 169-77 (1988); see also Letter from Laura Macklin to Professor Carrington, at 2 (Mar. 20, 1990) (criticizing the conclusion that "[d]ata gathered by the Federal Judicial Center and others tend to disprove the hypothesis that sanctions are more likely to befall civil rights plaintiffs than others," based on Willging's statistics reported to the Advisory Committee).

171. This is not impossible, at least as to the first criteria. The Administrative Office of the United States Courts does keep statistics based on so-called "nature of suit" codes. This basically is a label attached to the substantive basis for the complaint in federal court, such as antitrust, bankruptcy, civil rights, contract, personal injury, statutory actions, etc. See ADMINISTRATIVE OFFICE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS Table C-2 (1989) (civil cases commenced by basis of jurisdiction and nature of suit); *id.* Table C-2A (civil cases commenced by nature of suit, 1985 through 1989); *id.* Table C-3 (civil cases commenced by nature of suit and district). There are many other tables supplied by the Administrative Office, breaking down the federal court caseload by nature of suit. See *id.* Having said this, the use of "nature of suit" codes as a basis for case-specific empirical research is fraught with problems, not the least of which are multiple-claim complaints and the broad nature of some of the Administrative Office "nature of suit" categories.

discovery,"¹⁷² a difficult empirical research design. Moreover, the call for further empirical study problematically assumes its conclusion: "I also suspect that empirical studies of differential access to evidence outside of formal discovery would tend to show individuals and other smaller litigants at a disadvantage vis-a-vis larger, more institutional litigants with greater resources."¹⁷³

Because the request for an empirical study assumes "differential access to evidence," the Advisory Committee should concede the point. Surely the Committee does not have to invoke the research apparatus of social science to prove that institutional defendants outspend and delay in litigation against less well-heeled adversaries. Thus, the called-for empirical study would validate the obvious. The proposed informal discovery rule is intended to remedy discovery abuse, not exacerbate it. Self-defining terms like "information-poor" and "information-rich" ultimately will prove disutilitarian or fallacious, because *any* litigant who refuses to divulge is "information-rich" and the opponent "information-poor." This will be true without regard to case or litigant "type."

Why then this "imperative" call for further empirical study of the nondefinable and the obvious? Requests for empirical study, although invariably well-intended by their proponents, also serve to postpone solving the problem. Empirical research is labor-intensive, slow, and prone to methodological problems that encourage disputes. Nonetheless, empirical research on rule reform is a valid enterprise,¹⁷⁴ and there are instances in which empirical study could have improved the rulemaking process. Yet, there should be more clear thinking about when such research truly will enhance rule revision. If the Advisory Committee is to commission empirical research on informal discovery, such research should study lawyers' compliance with the local California and Florida rules.¹⁷⁵ Researchers might investigate why lawyers comply or do not comply with the general federal discovery rules. An interesting empirical study could explore why some lawyers act professionally and others do not. When the Advisory Committee has "empirical" answers to those questions, the rule reformers will be better able to formulate provisions addressing discovery abuse.

Finally, the call for further empirical research on the proposed informal discovery rule suggests that partisan political agendas are infusing the rulemaking process and challenging the longstanding trans-substantive philosophy of the federal rules.¹⁷⁶ The call for a study based on "types" of litigation and "types" of litigants was little more than a request for substance-based research. The

172. Letter from Laura Macklin to Paul Carrington, at 3 (Mar. 20, 1990).

173. *Id.*

174. See generally Walker, *supra* note 20, at 75-85 (proposing increased empirical studies of federal procedural rules).

175. See *supra* notes 105-35 and accompanying text.

176. The accepted premise of the Federal Rules of Civil Procedure is that they are rules of general applicability, without regard to kinds of cases or litigants; thus, they transcend particular substantive law applications. This trans-substantive theory of the federal rules has been under attack, as is evidenced by a distinct literature. See generally Carrington, *Making Rules*, *supra* note 1, at 2067-69 nn. 1-7 (summarizing Professor Cover's criticism of the federal rules); Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 *YALE L.J.* 718, 732-40 (1975) (discussing the efficacy of the trans-substantive approach taken by the federal rules).

empirical study that the public interest advocates suggest rests on the theory that trans-substantive rules are mistaken and that rules should be case-specific. Although the recommendation was couched in a neutral-sounding request to survey the entire litigation "landscape,"¹⁷⁷ the proposed research design sought a set of rules tailored to accommodate specific partisan litigation needs.

III. THE POLITICS OF RULEMAKING

The public interest attack on the proposed informal discovery rule, presented in overblown rhetorical language, amounts to egregious overreaction. The proposed rule was and is fairly innocuous, as proposed rules go.¹⁷⁸ The criticism levelled at the rule (and implicitly at the Reporter and the Advisory Committee) is disproportionate to the suggested rule change. Under the critic's version of the rule, the adjudicative process would be thrown into cosmic imbalance favoring corporate and governmental America. This is not true, but it does suggest a kind of disturbing siege mentality.

Something else is going on here. What is happening, really, has little to do with discovery reform, and much to do with politics. With the camel's head now in the tent, the Advisory Committee can expect similar challenges to draft rules, repeated calls for dubious empirical studies, and continued criticism for fostering rules with disparate litigant impact.¹⁷⁹ The Advisory Committee now will be on the defensive. How has this come to pass, and is it a desirable change?

A. Opening the Rulemaking Process

The most recent efforts to democratize the rulemaking process occurred with the passage of the Judicial Improvements and Access to Justice Act.¹⁸⁰ During 1987-88, witnesses appeared before the House Subcommittee on Courts,

177. This request suggests by implication, of course, that this is not something the Advisory Committee already does.

178. By contrast, the proposals for reform of Federal Rule of Civil Procedure 56 (summary judgment), for example, would change substantially the language and standards of summary judgment procedure. Compare 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, 187-93 (1988) (criticizing early proposed revisions to rule 56) with Carrington, *Making Rules*, *supra* note 1, at 2121 n.18 (criticizing Stempel for premature attack on drafting efforts for this rule).

179. See Letter from Laura Macklin to Paul Carrington, at 4-5 (Mar. 20, 1990). As Professor Macklin observes:

However, if 'informal discovery' (e.g. obligatory disclosure) is ever to supplant formal discovery, then I think we must design ways to ensure that the information exchange enables both parties in the litigation to prove their case. Failing this, facially neutral rules of the type contained in Draft Rule 25.1 will have a widely, and I think predictably, disparate impact.

Id.

180. See *supra* notes 13-14 and accompanying text. This was not the first time that Congress had been lobbied to open the rulemaking process as criticisms of the secretive nature of the rulemaking process are longstanding. See generally W. BROWN, *supra* note 2, at 42-58 (discussing bills introduced in the 96th Congress that also attempted to open the process); see also Carrington, *Making Rules*, *supra* note 1, at 2073 ("Since Congress's 1974 enactment of the Federal Rules of Evidence, there has been controversy regarding the process. Some observers have gone so far as to describe a counterrevolution against rulemaking.").

Civil Liberties, and the Administration of Justice¹⁸¹ to lobby for amendment of the Rules Enabling Act, the statute authorizing judicial rulemaking.¹⁸² Although a major theoretical battleground was the proposed repeal of the Act's supersession clause,¹⁸³ interested parties also lobbied to open the rulemaking process. In particular, witnesses requested that the Advisory Committee provide earlier access to the rule-drafting process to enhance meaningful public participation.¹⁸⁴

A report by the Committee on Federal Courts of the Association of the Bar of the City of New York summarizes three major criticisms of the rulemaking process: (1) the closed nature of the rulemaking process; (2) the proliferation of a multiplicity of local rules; and (3) the continued vitality of the supersession clause.¹⁸⁵ Regarding the closed nature of the rulemaking process, the chief criticism is a lack of consultation with the practicing bar or consultation with only a limited segment of the bar. The complaint was that most practitioners were

181. See *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st & 2d Sess. 3-343 (1987-88) [hereinafter *Hearings on H.R. 3152* (testimony of witness)].

182. See *supra* notes 15-16.

183. See 28 U.S.C. § 2072 (1982). Section 2072 states, in relevant part:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions. . . .

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

* * * *

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Id. The proposed amendment to the supersession clause would have changed the language to read:

Such rules shall not abridge, enlarge, or modify any substantive right or supercede [sic] any provision of a law of the United States except any rule of practice or procedure or evidence in effect on the day before the date of the enactment of the Rules Enabling Act of 1987.

The rule was amended to read as follows:

§ 2072. RULES OF PROCEDURE AND EVIDENCE; POWER TO PRESCRIBE

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Act of Nov. 19, 1988, Pub. L. No. 100-702, tit. IV, § 401(a), 102 Stat. 4648 (codified as amended at 28 U.S.C. § 2072 (1988)). The proponents of repeal of the supersession clause thus did not prevail in Congress. For a discussion of the supersession controversy, compare Carrington, "Substance" and "Procedure," *supra* note 1, at 322-26 (drawing a distinction among statutory provisions to be superseeded) with Burbank, *supra* note 1, at 1036-46 (criticizing Carrington's view of supersession).

184. See, e.g., *Hearings on H.R. 3152* (testimony of witness), *supra* note 181, at 360-68, 389-90 (testimony and prepared statement of Prof. Laura Macklin, Georgetown Univ. Law Center); *id.* at 1321-31 (*Amendments to the Rules Enabling Acts*, a report by the Committee on Federal Courts of the Association of the Bar of the City of New York outlining three criticisms of the rulemaking process, January 1988).

185. *Id.* at 1321-31 (report of the Committee on Federal Courts). The report called for more openness in the rulemaking process and a curb on the proliferation of local rules, but did not endorse repeal of the supersession clause.

"shut out of the rulemaking process, although they were litigating on a daily basis in the federal courts."¹⁸⁶ The report states: "Similar criticisms have been directed toward the various advisory committees. Not only have there been complaints of elitism, but there also have been complaints of 'calcification' because of the infrequent turnover of membership on the advisory committees."¹⁸⁷ Other criticisms attacked the inadequate notice of committee meetings, agenda, and proposed rule revisions, as well as inadequate notice and comment periods for proposed rules.¹⁸⁸

Section 2073 of the Judicial Improvements Act delineated amendments for greater participation in the rulemaking process.¹⁸⁹ A proposed provision would have required that the Advisory Committees "consist of a balanced cross section of the bench and bar, and trial and appellate judges,"¹⁹⁰ but that provision ultimately was deleted from the final legislation.¹⁹¹ The reforms enacted require that meetings of the Standing Committee and Advisory Committees be open to the public unless a majority of the Committee determines that it is in the public interest to close the meeting.¹⁹² In addition, the new rules require sufficient notice of forthcoming committee meetings; the recording and availability of minutes; and a record of the reasons for and dissents from newly amended or promulgated rules.¹⁹³ Thus, what openness advocates lost in committee representativeness, they gained in participatory process.

Against this legislative backdrop, the Advisory Committee on Civil Rules reconvened in November 1989 under the mandates of the Judicial Improvements Act. The Committee's Reporter circulated a memorandum to Committee members raising questions about the rulemaking process and the implications of the 1988 legislation for the Committee's work.¹⁹⁴ The Reporter's concerns cen-

186. *Id.* at 1322.

187. *Id.* The charge of calcification is somewhat unfounded. Since the beginning of Justice Rehnquist's tenure as Chief Justice, membership on the Advisory Committees has been for a two-year term. If anything, these short terms and committee membership churning frustrate the development of institutional memory and lead to replowing of old ground as new members join the committees. In addition, the current Reporter has stated that it takes about three years for any particular rule reform to work its way through the multi-tiered rulemaking process. This means that a number of committee members never participate in a rule revision from beginning to end. See *Hearings on H.R. 3152*: Carrington Statement, *supra* note 1, at 1252; Carrington, *Making Rules*, *supra* note 1, at 2119.

188. See, e.g., *Hearings on H.R. 3152* (testimony of witness), *supra* note 181, at 345-68 (prepared statement of Prof. Laura Macklin).

189. A predecessor version of the draft language of H.R. 3152 was in the Rules Enabling Act of 1985, H.R. 3550, 99th Cong., 1st Sess., 131 CONG. REC. H11396-98 (daily ed. Dec. 9, 1985); see also Carrington, *Making Rules*, *supra* note 1, at 2076 n.50 ("Proposed amendments to the Rules Enabling Act aimed to make the Advisory Committee more 'representative.'").

190. Carrington, *Making Rules*, *supra* note 1, at 2076 n.50.

191. See Rules Enabling Act of 1988, Pub. L. No. 100-702, § 401, 102 Stat. 4648, 4649 (codified at 28 U.S.C. § 2073 (1990)). Of the Advisory Committee's composition, the current Reporter writes: "The Committee is now more diverse than it was, but representativeness in this context may be illusory." Carrington, *Making Rules*, *supra* note 1, at 2076-77 n.50.

192. See 28 U.S.C. § 2073(c)(1) (1990); see also *supra* note 15 (quoting statute).

193. See 28 U.S.C. § 2073(c)(1)-(d); see also *supra* note 15 (quoting statute).

194. See Reporter, Memorandum to Civil Rules Committee re Questions About the Rulemaking Process (October 18, 1989) [hereinafter Memorandum to Civil Rules Committee]. This memorandum was part of a package of materials and rule revisions the Reporter submitted to the Committee in October 1989. The Reporter stated the following purpose of the memorandum:

tered on three topics: (1) implications of the new openness requirements; (2) philosophical questions about the nature of judicial rulemaking; and (3) implications for the Advisory Committee's relationship with Congress.

1. Implications of the New Openness

With regard to the openness mandate, the Reporter acknowledged prevailing criticisms of the Advisory Committee's proceedings: that the "ancestral Advisory Committee was extremely discreet in its work"; that the Reporter worked in a "closeted" fashion; that no committee drafts circulated until a final copy was ready; that the period for public comment was brief and inconsequential; and that the Committee's position was cemented prior to public comment periods.¹⁹⁵ Summarizing, the Reporter concluded: "Thus, at times past, judicial rulemakers may have seemed to some of their public to be rather arrogant and indifferent to the views of others."¹⁹⁶

The Reporter described various efforts to expand the Committee's reach, such as public committee meetings, circulation of draft rules,¹⁹⁷ and visits with bar groups interested in rule reform.¹⁹⁸ Notwithstanding these efforts, the Reporter sought the Committee's guidance concerning draft rule revisions and open meetings. In particular, the Reporter signalled a concern about the possible effects of "soliciting views" and thereby "creating unwelcome pressure on the work of the Committee."¹⁹⁹ The Reporter identified another potential implication of this new openness—that Committee attempts at being responsive might prove counterproductive:

Indeed, perhaps implicit in any effort at openness is an obligation to be

The Rules Enabling Act of 1988 contains a number of provisions bearing on the work of the Civil Rules Committee. The Committee has not since the enactment of that law had an opportunity to discuss its implications. This memorandum is intended as brief stimulus to your thoughts as preparation for that discussion. It may be undesirable as well as unnecessary to come to closure on any of the issues, but they appear to need ventilation nonetheless. It would at the very least be helpful to the Reporter to have a better sense of the Committee's collective expectations about the scope of its (and the Reporter's efforts) to respond to the reactions of users of the Rules.

Id. at 11.

195. *Id.*

196. *Id.*

197. *Id.* at 11. The circulation of draft rule revisions seems to be a particular bane of the current Reporter. In his memorandum to Committee members, he noted that "the Reporter does circulate drafts that are, alas, sometimes perceived by observers to be the work of the Committee when they are not." *Id.* The Reporter also suggested at the November meeting that he was bothered by what he perceived as premature comment and criticism of draft rules, citing an incident described in Carrington, *Making Rules*, *supra* note 1, at 2121 n.18 ("This process sometimes leads to premature comment."). Also at the November meeting, when questioned about the extent of it, the Reporter indicated that he circulated drafts to a short list of interested persons, chiefly but not exclusively academicians. He indicated that at one time his list had been longer, but that he had shortened the circulation list because he was not getting a great deal of response.

198. Memorandum to Civil Rules Committee, *supra* note 194, at 12. Once the standing committee has approved the proposed rules, they are published for comment and hearings are announced and held in various cities. There has been a movement to hold some hearings at the same time and place of various professional meetings likely to include bar members and others interested in rule reform. See Carrington, *Making Rules*, *supra* note 1, at 2122.

199. See Memorandum to Civil Rules Committee, *supra* note 194, at 12. The Reporter further noted: "That may have been the opinion of those who held the early reporters in the closet." *Id.*

responsive to the views of persons not in the rulemaking process. Some members of the Committee may perhaps wisely prefer to minimize contact with outside views lest it assume an obligation to react to those views when tendered. Certainly there is a risk in magnifying an offense by soliciting views that are doomed to be ignored.²⁰⁰

With Congress having mandated who should be heard and when, the Reporter was now raising the more subtle, problematic question of "what does it mean to be heard?" Fueling the Reporter's concern was the constitutional tension inherent when an Article III body, namely a judicial committee, engaged in a process that closely resembled an Article I function, namely legislation-drafting.

2. Judicial Rulemaking and the Politics of Procedure

The Reporter's second concern focused on the issue of superimposing a political process on judicial branch members not accustomed to norms of legislative drafting. As the Reporter conceived the problem, "[t]he former secrecy of the Committee was highly congenial to judges and judicial institution because it is so appropriate to adjudication that involves private rights."²⁰¹ The adjudicative process is therefore a "false model" for rulemaking, because the Advisory Committee's task is to draft essentially legislative rules, not issue adjudicative judgments.²⁰² In the Reporter's view, the adjudicative function is the antithesis of the new rulemaking process: "The work product of rulemaking is not judgments, but rules that look a lot like the work product of Article I institutions."²⁰³

The question raised by the Reporter essentially was whether it was appropriate for the Advisory Committee, consisting chiefly of judicial branch members, to become more like a congressional legislative committee in its operations. The Reporter asked: "Perhaps the Committee should actively seek better information about the reactions of users of the process to the rules and to the conduct of the courts, much as Congress often does by inviting testimony, etc."²⁰⁴

200. *Id.*

201. *Or*, in other words, judges render decisions deliberately immune from the pressures of partisan interest groups. Couching this concept in a constitutional cloak, Professor Carrington observed:

Because the Court can decide only 'cases or controversies' and holds no commission in the constitutional scheme to enact laws or rules favoring or disfavoring specific groups of litigants, its role in rulemaking is to shield the process from the influence of organized groups seeking to shape the judicial process.

Carrington, *Making Rules*, *supra* note 1, at 2076.

202. See Memorandum to Civil Rules Committee, *supra* note 194, at 12.

203. *Id.*

204. *Id.* Recognizing the relative isolation of the Advisory Committee and the judiciary's lack of experience with the legislative process, the Reporter additionally suggested:

Arguably the committee has a higher duty in this regard than does Congress with respect to matters within its purview, because there is no established channel of communication, nor much in the way of organization by litigants and lawyers except through the organized bar that could be used to bring their influence to bear on the rules.

Id.

3. Relationship with Congress: Substance and Procedure

The possibility of enhanced politicization of the rulemaking process was related to the Reporter's chief worry about the appropriate relationship between the Advisory Committee and Congress.²⁰⁵ The Reporter's sense was that Congress had been exercising greater authority in rule revision and that "[i]f that practice is applied to the Civil Rules with any frequency at all, the Civil Rules will soon be decorated with special interest legislation."²⁰⁶ Having flexed its rulemaking muscle, Congress now was more accustomed to entertaining procedural rule legislation. The Reporter suggested this shift to congressional subcommittees, replete with interest group lobbying, would have predictable, dire consequences for the civil rules: "This is a fate that befell the Field Code in New York in the 19th century, and it is an accident waiting to happen to federal reform now."²⁰⁷

Viewing these developments, the Reporter identified a "substantial sea change in the last half century." For fifty years, the Advisory Committee's recommendations had carried great weight, and the Committee's secrecy was thought appropriate to this work.²⁰⁸ The Committee's unchallenged authority derived from a belief in the distinction between substantive and procedural law,²⁰⁹ and a belief that the Advisory Committee was engaged in promulgating procedural rules of general applicability. What had changed, in the Reporter's view, were recent challenges to the trans-substantive philosophy of the federal rules, challenges that inevitably would politicize the rulemaking process:

Those few who observe judicial rulemaking are far more likely today to

205. The Reporter stressed that "[a]t the moment, personal relations with both House and Senate Committees seems [sic] to be positive." *Id.* at 13.

206. *Id.* The Reporter acknowledged that Congress regularly amends the rules of criminal procedure on its own initiative. As recent examples of congressional initiative in the rulemaking process, the Reporter pointed to the 1983 amendment of Federal Rule of Civil Procedure 4, which resulted from successful lobbying by the National Association of Process Servers for favorable provisions in the rule 4 amendments, defeating versions of the rule that had gone through the Judicial Conference and the Supreme Court. See *infra* notes 255-59 and accompanying text. In 1988 Federal Rule of Civil Procedure 35, a discovery provision relating to physical and mental exams, was amended by a rider to drug legislation. This change in the procedural rule was accomplished, the Reporter stated, at the request of a single Senator and without any hearings on the change. See Memorandum to Civil Rules Committee, *supra* note 194, at 13; *infra* notes 270-75 and accompanying text. Extensive interest group lobbying in Congress concerning proposed changes in Federal Rule of Civil Procedure 68, the "offer of judgment" rule, caused the Advisory Committee to abandon its rule revision efforts. See Burbank, *supra* note 1, at 1037-40; Carrington, *Making Rules*, *supra* note 1, at 2078-79; Tobias, *supra* note 22, at 310-16. Also illustrative of interest group lobbying in Congress is a proposed amendment to Federal Rule of Civil Procedure 8, the general pleading rule, advanced by asbestos manufacturers, that would require a sample of the offensive material to be attached to the complaint. See Memorandum to Civil Rules Committee, *supra* note 194, at 13.

207. Memorandum to Civil Rules Committee, *supra* note 194, at 13; see Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 327-34 (1988).

208. The Reporter suggested, "All its actions were accepted, despite or perhaps because it was secretive and unresponsive." Memorandum to Civil Rules Committee, *supra* note 194, at 13.

209. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 464-65 (1965) (holding that, for purposes of the *Erie* doctrine, under the Rules Enabling Act, the Federal Rules of Civil Procedure govern procedure, not substance); Carrington, *Making Rules*, *supra* note 1, at 2067-87 (discussing the rulemaking procedures); Carrington, "Substance" and "Procedure," *supra* note 1, at 284-88 (discussing the difference between substance and procedure in the context of case law and the Rules Enabling Act).

see social and economic consequences in what the Committee does than were earlier generations of observers. The substance-procedure line was never clear, and was never constant in its application to different contexts; but it also may be that its meaning has changed over the years, with more matters being perceived to be substantive than may once have been true.²¹⁰

In light of these changed circumstances affecting the rulemaking process, the Reporter suggested two approaches for the Advisory Committee. First, it was essential that the Advisory Committee not become politicized nor implement any interest group agenda. The Reporter stated:

One thing it [the Advisory Committee] cannot do is to become itself into a genuine political institution with its own social and economic agenda. The Committee should perhaps redouble its resolution to stay well within its commission to improve the effectiveness of the courts in enforcing whatever commands may be uttered by Congress, but to avoid consciously effecting any social or political policy bearing on the extrinsic interests of any group of litigants.²¹¹

Second, the Reporter suggested that the Advisory Committee would do well to undertake only rule revisions "sufficiently technocratic and apolitical."²¹² In determining which rule revisions met these tests, the Reporter proposed that the Committee "listen and count the decibels."²¹³ Thus, any potential rule revision raising enough public clamor would signal both the political nature of the proposed revision and that the Advisory Committee should let the political branch, Congress, mediate the clamor.²¹⁴ As a corollary, the Reporter recommended that the Advisory Committee refer all "marginally substantive matters" to Congress.²¹⁵

B. *The Advisory Committee Dilemma*

The Reporter's *Memorandum to the Civil Rules Committee* outlines the Advisory Committee's dilemma after the 1988 Judicial Improvements Act. Congress now has mandated that the Advisory Committee open its process to enhanced participation. In essence, Congress has required the Advisory Committee to act more like a congressional committee, or else the locus of rulemak-

210. Memorandum to Civil Rules Committee, *supra* note 194, at 13-14. The Reporter suggested that the 1966 amendments to rule 23 now would probably be impossible to revise through the Advisory Committee processes because of the perceived political implications of such a rule revision. In support of this conjecture, the Reporter pointed to the recent battle of possible rule 68 amendments: "The fracas over Rule 68 tends to confirm that Rule 23 would not make it today." *Id.* at 14.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* Again sounding the alarm at the potential for increased politicization of the rulemaking process in the Advisory Committee, the Reporter noted that "[s]everal members of the Committee have suggested that it may be especially important to listen to bar groups who are the only constituencies that might have the will and capacity to protect rulemaking from being savaged by special interests." *Id.*

215. *Id.* This, of course, suggests the ability of the Advisory Committee both to calibrate decibels in some meaningful fashion, and to discern which proposed rule revisions are "marginally substantive."

ing power will shift even further into congressional hands. This forced new openness tacitly acknowledges the "sea change" identified by the Committee's Reporter: recognizing that so-called facially neutral rules are not truly neutral; that procedural rules affect substantive outcomes; and that there is no such thing as apolitical rule revision.²¹⁶

The Reporter's *Memorandum* reflects disparate visions of procedural justice. The reigning sensibility for fifty years of federal rulemaking has been an ethos of elitism and secrecy; of closeted, deliberative efforts by a committee of experts. The reigning vision of federal rules has been one of trans-substantive rules of general applicability and flexibility.²¹⁷ The contemporary critique is that rulemaking should be more democratic and include greater community representation. This critique argues that trans-substantive rules have proved disutilitarian or unfair, and therefore rules should be case- and litigant-specific.

It is apparent that the Advisory Committee cannot carry out its mandate unless it becomes more politically attuned. The Reporter's suggestion that the Committee "listen to the decibels" is troubling, however, because if the experience of the proposed informal discovery rule is any indication, the Advisory Committee should prepare for a good deal of clamor. Listening to the decibels is bound to fail because interest groups will politicize every potential rule reform. The Advisory Committee simply cannot evade political reality by shunting all controverted or "marginally substantive" proposals to Congress. If the critics are correct, then all procedural rules are more than "marginally substantive." By evading responsibility, the Advisory Committee will become insignificant in the rulemaking process.

Furthermore, if the Advisory Committee chooses to acknowledge the newly politicized nature of the rulemaking process, the Committee necessarily will be forced to retreat from the reigning vision of trans-substantive rules. Interest group lobbyists represent partisan interests and necessarily will pressure for interest-specific procedural rules. The Advisory Committee's dilemma, then, is this: On the one hand, it can largely ignore the new openness and shunt all potentially controversial rule reforms to Congress. If this happens, the Advisory Committee will become an ineffective third branch institution. On the other hand, the Advisory Committee can embrace the new openness, meet interest group demands for substance-specific rules, and retreat from more than fifty years of trans-substantive philosophy.

C. *The Rulemaking Process: Two Views*

Central to the incipient politicization of the judicial rulemaking process are the questions of who should make the rules and by what process. These questions certainly are not new,²¹⁸ but they have been reopened with fresh urgency in the context of the "sea change" in attitudes about the Federal Rules of Civil

216. *Id.* at 13-14.

217. See Carrington, *Making Rules*, *supra* note 1, at 2079-85 (discussing the principle that procedural rules should have general applicability).

218. See *supra* note 9.

Procedure. In the past, academicians have described two simplistic models of rulemaking: one a participatory model and the other less so. Each model embodies certain assumptions about the rulemaking process and the consequences of that process. These models have surfaced as competing visions of the rulemaking function, with the participatory model endorsed through the Judicial Improvements Act.²¹⁹ Because the law now requires an enhanced participatory model, the Advisory Committee will have to rethink its traditional rulemaking processes.

1. Rulemaking as a Participatory Process

The participatory model, in general, seeks to open the judicial rulemaking process to broader participation and to subject the work of the various rulemaking bodies to meaningful scrutiny.²²⁰ From this perspective, "[d]emocratic government presumes public participation in the affairs of government, and it assumes the ultimate accountability of those who govern to the public in whom sovereignty rests."²²¹ The participatory model sweeps broadly from principles of democratic government, *writ large*, to principles of rulemaking, *writ small*. In so doing, the model disregards the type of legislative or administrative nature of rulemaking.²²²

The participatory model has at least three central themes. The first theme is that a diverse, pluralistic society requires pluralism in rule promulgation. A proponent of broadening the civil rulemaking process has stated:

During this century, the business of the courts has become more diverse, their impact has expanded into new areas, people have come to recognize the importance of what they do Thus people other than judges and lawyers are closely involved with the courts and are seeking to participate in their management.²²³

This view, then, rejects rulemaking by elites with special expertise.²²⁴

The second central theme of the participatory model is that procedural rules have substantive content and consequences:

Perhaps the major impetus for re-examination of the rule-making process has been a realization that rules can have important consequences. Courts tend to look on them as a means to establish efficient procedures, but even matters appropriately defined as procedure often involve policy judgments with far reaching consequences.²²⁵

The logic is simple. If procedural rules embody policy judgments affecting sub-

219. See *supra* notes 13-16.

220. See Lesnick, *supra* note 9, at 580-84.

221. Wheeler, *supra* note 9, at 281.

222. *But see id.* (recognizing that "courts . . . are different from the other branches of government in several respects. Some of their basic purposes are anti-democratic, or at least anti-majoritarian.").

223. See *id.* at 282. This same general theme is used to dismiss the older view that rule drafting should be the province of experts. See A. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* (1949).

224. See Wheeler, *supra* note 9, at 282.

225. *Id.* at 283.

stantive interests, then participatory rulemaking is required to ensure that such policy judgments be fully informed and fair.

The third theme is that judicial rulemaking really is a "legislative process."²²⁶ One commentator described the significance of this notion:

Legislative, as used here, does not imply that rule-making necessarily belongs in the legislature. It means instead that rule-making, by its nature, is a process of developing general rules for application to a variety of specific situations. A legislative process, at least in the ideal, is characterized by broad participation by affected interests.²²⁷

The syllogism is that all legislative efforts require broad participatory process; judicial rulemaking is legislative; therefore, judicial rulemaking requires broad participatory process. Legislative process as understood in the congressional setting²²⁸ should be the model for legislative efforts, either by the executive branch in administrative rulemaking²²⁹ or by the judicial branch in judicial rulemaking. Central to this participatory model is effective access to the law-making process, including adequate notice of pending legislation, open hearings, meaningful opportunity for comment, and accountability by the lawmakers. In Congress, this means the ability of partisan interests to influence representatives accountable at the next election.

Reformers of the judicial rulemaking process consistently have urged changes to make judicial rulemaking resemble legislative branch lawmaking. These recommendations have included calls to better publicize Judicial Conference procedures; increase the representativeness of the rules committees; actively seek diverse comments; provide public hearings; permit early participation in the drafting process; open all meetings of the advisory and standing committees; provide for subsequent notice and comment on redraftings; afford published minutes and reports reflecting dissenting opinions; and allow opportunity for agenda-setting.²³⁰

After many years,²³¹ the rulemaking reformers successfully lobbied their case with Congress. Indeed, the experience of the Judicial Improvements Act makes the point nicely about the effectiveness of lobbying on legislative outcomes in Congress. Interest groups lobbied Congress for the right, in effect, to lobby the Advisory Committee, and the partisans of partisanship won the day. With regard to the rulemaking process, the reformers demonstrated that participatory process works because the Judicial Improvements Act of 1988 incor-

226. *Id.* at 285.

227. *Id.*

228. See, e.g., E. REDMAN, *THE DANCE OF LEGISLATION* (1973).

229. See Carrington, "Substance" and "Procedure," *supra* note 1, at 303-04 (contrasting rulemaking in the administrative agency setting, which is "avowedly designed to foster explicit, special substantive aims").

230. See, e.g., W. BROWN, *supra* note 2, at 103-38 (describing various proposals for reformation of the judicial rulemaking process); Lesnick, *supra* note 9, at 580-84; Wheeler, *supra* note 9, at 285-87; *Hearings on H.R. 3152* (testimony of witness), *supra* note 181, at 344-90 (witness testimony and prepared statement of Prof. Laura Macklin).

231. The last major attempt to reform the rulemaking process occurred in the 1970s as a result of dissension over promulgation of the Federal Rules of Evidence. See *supra* note 12.

porates the essential rulemaking reform proposals, except for enhanced representativeness of the Advisory Committee.²³² Having succeeded in Congress, interest groups now may take their rule reform issues to the Advisory Committee. The question remains whether the Committee, long accustomed to functioning under a judicial rulemaking model, can accommodate itself to substantially changed rules of the game.

2. Rulemaking as Undemocratic Legislation²³³

The traditional judicial rulemaking model proceeds from different assumptions, reaches different conclusions, and suffers the public-relations liability of being perceived as undemocratic.²³⁴ This model does not recognize a superior claim for participatory process based on a conflation of all types of rulemaking in all forums. Nor does this model accept that representation and enhanced participation are process values that necessarily flow from a characterization of a function as legislative.

Three perspectives, markedly different from the participatory model, characterize the traditional judicial rulemaking model. The first is a deep skepticism about the importance of the substance-procedure distinction in judicial rulemaking. Thus, where participatory advocates see procedural rules as substantive and therefore requiring broader input, the traditionalists dismiss this interpretation as unduly manipulative of both the *Erie* doctrine²³⁵ and the requirements of the Rules Enabling Act.²³⁶ From this standpoint, while it is possible to identify some "interesting and engaging questions in locating the boundaries of 'procedure,'" ²³⁷ as a practical matter this typically is not a problem. In contrast to their participatory colleagues, the traditionalists know a procedural rule when they see it. Moreover, if they have any doubts, they are more willing to assess the rule "contextually," rather than to concede universally that procedural rules have substantive effect.²³⁸ To them, procedural rulemaking, lacking substantive content or impact, can lay no special claim to participatory process. Rather, a proponent of this model concludes that where the process involves purely procedural rules, that process deliberately should be immunized from partisan

232. See *supra* notes 13-16.

233. The term and concepts are from Hazard, *supra* note 17.

234. Having skeptical reservations about the wisdom of enhanced participatory democracy is like taking pot-shots at Mom, apple pie, and the flag. See Hazard, *supra* note 17, at 1291 ("[W]ho could be against more public 'input' or more 'representative' Advisory Committees?").

235. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see *Walker v. Armco Steel Co.*, 446 U.S. 740 (1980); *Hanna v. Plummer*, 380 U.S. 460 (1965); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); see also Carrington, "Substance" and "Procedure," *supra* note 1, at 284-88, 293-99 (discussing *Erie* and Rules Enabling Act meanings of terms "substance" and "procedure"). But see Burbank, *supra* note 1 (disputing Professor Carrington's analysis of the substance-procedure distinction derived from this line of cases).

236. See *supra* text accompanying note 190; see also Carrington, "Substance" and "Procedure," *supra* note 1 (observing that the Rules Enabling Act does not give a court the ability to override political decisions made by Congress).

237. See Hazard, *supra* note 17, at 1289.

238. See Carrington, "Substance" and "Procedure," *supra* note 1, at 284-85, 326-27 (describing the principle of "variable meaning" as applied to characterizations of substance and procedure).

politics.²³⁹

The second point concerns the philosophy underlying the Federal Rules of Civil Procedure. Here the traditionalists adhere to a notion of procedural rules as formulated in 1938 with a history traceable to Pound, Field, Brougham, and Bentham.²⁴⁰ This is a vision of the rules as trans-substantive, guided by principles of generality, flexibility, simplicity, forgiveness, coherence, and judicial professionalism.²⁴¹ These core values, in turn, require an apolitical rulemaking process to ensure that rule amendments do not compromise the primary principles of trans-substantiality, generality, and flexibility. For the traditionalists, a politicized rulemaking process that results in rules accommodating partisan interests hopelessly compromises the central vision of the rules. Essentially, the disagreement between the participatory advocates and the traditionalists involves whether the trans-substantive vision of the rules has any continuing vitality or claim to legitimacy. The participatory advocates say no,²⁴² the traditionalists say yes.²⁴³

The third characteristic of the judicial rulemaking model is a fear of applying congressional branch legislative processes to procedural rulemaking. Simply stated, the traditionalists do not want their procedural rules drafted by congressional subcommittee lawyers, nor do they wish Advisory Committee efforts to resemble that legislative process.²⁴⁴ This repugnance stems from a view of the congressional legislative process as one mired in partisan lobbying, constituent influence-peddling, log-rolling, porkbarrel, and compromise. To cede procedural rulemaking to Congress or to introduce politics into the Advisory Committee process threatens the original rule reform movement of the 1930s.²⁴⁵

239. See *id.* at 282, 301-02, 304, 308, 311, 313, 315-16, 321, 323, 325 (arguing against politicization of the procedural rulemaking process and describing examples).

240. *Id.* at 299-300.

241. *Id.* at 299-307 (defining these characteristics).

242. See Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693 (1988); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 544-51 (1986).

243. See Carrington, *Making Rules*, *supra* note 1, at 2069. According to Professor Carrington: Critical analysis of the existing process shows that it is ill-suited to resolving political contests between competing groups who seek at the expense of their adversaries to advance their short-term interests in litigation outcomes. Process is therefore not competent to make rules intended to give particular advantage to, say, plaintiffs against antitrust defendants or vice versa.

Id.; see also Carrington, "Substance" and "Procedure," *supra* note 1, at 300-10, 322-27.

244. See Carrington, "Substance" and "Procedure," *supra* note 1, at 323 (inveighing against partisanship in the procedural rulemaking process); Hazard, *supra* note 17, at 1293-94 (noting that even many critics of the judicial rulemaking process, including Judge Weinstein and Professor Lesnick, are reluctant to endorse congressional promulgation of procedural rules).

245. See Carrington, "Substance" and "Procedure," *supra* note 1, at 301. Professor Carrington writes:

What reformers such as Pound had in mind was the depoliticization of judicial procedure. On the basis of experiences in England and the United States, they feared and expected that groups of prospective litigants seeking short-term advantage through the legislature would neutralize the long-term effectiveness of judicial institutions and subject them to close oversight by the legislature. The reformers had observed that neutralization is associated with the numbing complexity and rigidity of procedural law produced by a democratic pursuit of short-term interests in matters of judicial procedure.

Politicization of the rulemaking process reintroduces values antithetical to the goals of trans-substantive rules of general applicability.²⁴⁶ Thus, in discussing the Rules Enabling Act's requirement of reporting to Congress, the current Advisory Committee Reporter signals this concern:

Reporting is not necessary to protect substantive rights established by Congress, for these cannot be abridged, enlarged, or modified. Nor is it likely that Congress intended the reporting process to be an invitation to itself to consider anew even the most technocratic and apolitical provisions of any reported amendments. Unconstrained review by Congress of rule promulgations, with the substitution of congressional judgment for that of the Court, would re-politicize the rules, defeat the neutrality goals of the reform movement, fragment the rules, increase complexity, elevate cost, diminish the stature of the judiciary, and decrease the effectiveness of law enforcement, all without material compensating benefits.²⁴⁷

Critics of participatory rulemaking make two additional points. The first is that participatory proponents idealize the legislative process while disregarding uncomfortable realities, or the "bad part[s] of legislative democracy."²⁴⁸ The second is that participatory proponents tend to idealize the product of that process, while the traditionalists do not.²⁴⁹ Therefore, admirers of participatory rulemaking are unable to accept "that a quite undemocratic legislative process has proven capable of producing a very satisfactory product. Correlatively, the archetype of institutionalized democracy—the legislature—has mishandled the same work when it has gotten into it."²⁵⁰

3. Mediating the Models

These two rulemaking models are difficult to reconcile into one workable model. Participatory advocates reject the trans-substantive philosophy of procedural rules, a perspective that dictates litigation-specific revisions and partisan participation to inform that result. On the contrary, traditionalists hold paramount the principles of trans-substantive rules, a belief that compels an apolitical process conducted by expert elites operating with relative immunity from partisan pressures. The participatory advocates believe that there are no such things as neutral rules; the traditionalists believe that neutral rules are the central accomplishment of judicial rulemaking. The open-process proponents be-

246. The current Reporter for the Advisory Committee believes that the Rules Enabling Act was designed specifically to be "anti-democratic." See *id.* The Reporter stated:

The Rules Enabling Act was avowedly antidemocratic in the sense that it withdrew "procedural" law-making from the political arena and made it the activity of professional technicians. The politically responsive organs of government, the legislative and executive branches, were substantially excluded from participation in the process created by the Act, as were those familiar and important influences now often known (perhaps unjustly) by the opprobrium "special interest groups."

Id.

247. *Id.* at 323.

248. Hazard, *supra* note 17, at 1294.

249. See *id.*

250. *Id.*

lieve that the substance-procedure distinction is illusory and that there are no purely procedural rules. The traditionalists contend that while locating the boundary of the substance-procedure divide is sometimes difficult, there *are* genuinely procedural rules. The participatory advocates contend that the product of fully legislated rules is better and fairer; the judicial rulemakers believe the product is worse. The participatory proponents ask, "what could possibly be wrong with opening the rulemaking process and letting everyone interested have a say?" and the traditionalists respond, "a lot."

There is, of course, no resolution to the debate concerning the underlying philosophy of the Federal Rules of Civil Procedure, and whether that philosophy is wrong and unfair. Similarly, there can be no intelligent resolution of the substance-procedure debate, which will continue to hold unending fascination as a parlor-game for academicians. Much of the discussion regarding the rulemaking process has focused on these lofty but unresolvable theoretical issues, in the misguided notion that proper rulemaking application will flow logically from clarifying a victory in the theoretical debate. There is something surreal about these discussions.

As a practical matter, the only interesting debate is whether legislated procedural rules are in any sense better than judicially promulgated ones. Are the procedural rules that Congress enacts better than those drafted by judicial committees? Does "institutionalized democracy" provide a "more satisfactory product"? Surely these are questions that cannot be answered without agreement as to what constitutes good procedural rules, an inquiry destined to reintroduce the trans-substantive debate. But something can be said, at least, about the effects of rules legislated in different forums.

D. *Legislating Procedural Rules*

Congress and the judicial committee structure draft and promulgate procedural rules, so there is experience with procedural rulemaking in both these different branches.²⁵¹ In both forums, the rulemakers recently encountered lobbying efforts focused on proposed rule revisions. The following sections describe the results of these efforts. The argument is that this lobbying is highly effective to achieve rule modification, but the difficult question is whether the end product is laudable.

251. An interesting contrast is provided by executive branch or administrative rulemaking, where partisan advocacy is the norm. There is ample literature describing how, and to what extent, executive branch agencies become captive of the industries they regulate. See, e.g., *INTEREST GROUP POLITICS* (A. Cigler & B. Loomis eds. 1986); K. SCHLOZMAN & J. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 330-57 (1986); Gais, Peterson, & Walker, *Interest Groups, Iron Triangles and Representative Institutions in American National Government*, 14 *BRIT. J. OF POL. SCI.* 161 (1984); Salisbury, *Interest Representation: The Dominance of Institutions*, 78 *AM. POL. SCI. REV.* 64 (1984). Although administratively promulgated rules are entitled to a strong presumption of validity, see Hazard, *supra* note 17, at 1290, they are still subject to judicial review. See Carington, "Substance" and "Procedure," *supra* note 1, at 303-04.

1. Promulgating Procedural Rules in the Legislative Branch: Of Process-Servers, Psychologists, and the Public Interest Bar

Three recent examples of congressional rule revision illustrate different aspects of procedural rulemaking in that forum. The first, notorious instance is the 1983 revision of rule 4 concerning service of process.²⁵² It demonstrates how Congress can make a rule worse through its legislative efforts. The second concerns the unnoticed, unheralded addition to rule 35 of a special provision allowing psychologists to conduct mental examinations as part of civil litigation discovery.²⁵³ That experience demonstrates how Congress permits legislative enactment by stealth and the potential for the Federal Rules of Civil Procedure to become a patchwork of partisan porkbarrel. The third illustration is the successful public-interest lobbying in Congress that caused the Advisory Committee to abandon a revision of rule 68.²⁵⁴ This effort demonstrates that running interference in Congress can induce the Advisory Committee to abandon its own rule revision endeavors.

(a) Rule 4 Revision

The extensively documented legislative history of the rule 4 amendments²⁵⁵ suggests the misadventures of congressional forays into procedural rule revision. The 1983 amendments to rule 4 represented the first instance in which a procedural rule revision worked its way through the entire judicial branch rulemaking

252. The best history of this legislative process is Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1197-1212 (1987). See also Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 734-42 (1988) (describing problems with amended rule 4 and delineating proposals for further revision of rule 4 to correct these problems); Mullenix, *The New Federal Express: Mail Service of Process Under Amended Rule 4*, 4 REV. OF LITIG. 299, 300-37 (1985) (discussing amended rule 4 and surveying case law under rule changes); Siegel, *Practice Commentary on Amendment of Federal Rule 4 with Special Statute of Limitations Precautions*, 96 F.R.D. 88, 97-115 (1983) (discussing statute of limitations pitfalls and suggesting solutions); Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 70-103 (1988) (discussing rulemaking authority of Congress and the third branch, with particular reference to rule 4); Note, *Rule 4: Service by Mail May Cost You More Than a Stamp*, 61 IND. L.J. 217, 224-39 (1986) (surveying problems under amended rule 4).

253. Federal Rule of Civil Procedure 35(a), order for examination, states:

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or a mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control.

FED. R. CIV. P. 35(a).

After the Notes of the Advisory Committee on Rules to the 1970 and 1980 amendments, an "Editorial Note" indicates that the word "psychologist" was inserted after "physician" as a result of section 7047(b)(2) of Public Law 100-690. FED. R. CIV. P. 35 advisory committee's note. This editorial note also indicates that the legislative change failed to add "or psychologist's" after "physician's." *Id.*

254. See Carrington, "Substance" and "Procedure," *supra* note 1, at 283-84 (discussing failed effort to amend rule 68 in Advisory Committee and abandonment of that effort as a result of intense lobbying by the public interest bar). See generally Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REF. 425, 434-40 (1986) (urging the Advisory Committee to cease efforts to amend rule 68); Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 10-19 (1985) (describing simultaneous efforts of the Advisory Committee and congressional bills to revise rule 68).

255. See Sinclair, *supra* note 252, at 1194-1212.

apparatus and gained the approval of the Supreme Court, only to be reworked into new legislation by the Congress.²⁵⁶ The impetus for amending rule 4 was an effort, beginning in 1978, to eliminate the role of the United States Marshal's Service in process-serving.²⁵⁷ The judicial branch committees proposed revisions centering on a mail service system.²⁵⁸ When Congress received the judicial branch proposals in 1982, it enacted legislation postponing the effective date of the rule 4 amendments until October 1983, "apparently in response to lobbying efforts by various groups that asserted defects in the Supreme Court's proposal[s]."²⁵⁹

At this juncture, in response to criticisms of the judicial rule 4 proposals,²⁶⁰ Congress tried its hand at procedural rulemaking. A congressional subcommittee drafted its bill on service of process in November 1982 without the benefit of any hearings.²⁶¹ In December 1982 the subcommittee presented the bill to the House of Representatives and, without debate, it became law in February 1983.²⁶² Thus, Congress accomplished in four months the rule 4 revision that had taken four years in the judicial branch's deliberative processes. The subcommittee lawyers adopted a California model of service, reduced the role of federal marshals, broadened the category of persons who could serve process, and established mail service with time limits.²⁶³ Except for the reduced marshal's role, the congressionally drafted provisions all subsequently proved problematic,²⁶⁴ causing the Advisory Committee to revisit and redraft rule 4 in 1989-90.

What lessons are to be learned from the rule 4 congressional drafting experience? One lesson, to be sure, concerns the time pressures on congressional subcommittee staff to draft *something* in response to constituent demands. Thus, a historian of the rule 4 legislative saga commented:

256. *Id.* at 1198-1212.

257. *Id.* at 1198.

258. *Id.* at 1198-1207. Professor Sinclair lists the central features of the rule 4 revisions approved by the Supreme Court in 1982 and transmitted to Congress: (1) service by any nonparty adult; (2) limited service of summonses and complaints by marshals to in forma pauperis suits, seamen's suits, cases in which service by a marshal was authorized specifically by a statute, and cases where the court found service of process by a marshal necessary; (3) marshal service of other forms of process; (4) plaintiff responsibility for arranging service; (5) authorized service by registered or certified mail; (6) mail service as the basis for default judgment; (7) and a requirement of service of process within 120 days after the filing of the complaint. *Id.* at 1207.

259. *Id.* at 1207-08.

260. *Id.* at 1208-09. The judicial branch proposals were criticized for providing flawed mail service, for depriving litigants of effective local service procedures, and for confusion concerning time limitations. *Id.* at 1209.

261. *Id.*

262. *Id.* at 1209-10.

263. *Id.* at 1211-12.

264. *Id.* at 1212-88; see also authorities cited *supra* note 252. The need for further clarifying amendments to rule 4 prompted the Advisory Committee to revisit the rule during 1989-90, with amendments in final proposal form now transmitted to the Standing Committee on Civil Rules. See *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure, Comm. on Rules of Practice and Procedure of the United States Judicial Conference* (Sept. 1989); see also FED. R. CIV. P. 4 (Proposed Draft Mar. 15, 1990) (summons).

In the rush to find a substitute for the original draft of amendments to Rule 4's basic service of process provisions and to relieve the Marshals Service of its financial strain, Congress concocted a new rule hurriedly. The need for simplicity, combined with the concern that any effort to deal with thorny practical issues could have prevented enactment of any law, may have led to passage of a bill known to be pregnant with difficulties.²⁶⁵

Time pressure often induces Congress to act quickly, affecting the deliberative process negatively. Although the subcommittee initially set October 1983 as its own deadline for considering congressionally initiated legislation,

[p]ressure mounted, however, well before that point, as the Justice Department and the Judicial Conference of the United States urged Congress to act quickly to eliminate the stresses that were bankrupting the Marshals Service. The bill that eventually passed was not subject to hearings, and the report prepared was so rushed that it is unnumbered, having simply been read into the Congressional Record when Congress, without debate, enacted the law.²⁶⁶

The second lesson of the rule 4 experience is that the legislation must be *politically acceptable* to congressional members. This ensures that "thorny practical issues" will not delay or frustrate enactment, reducing legislation to a least-common-denominator variety:

Congressional staff charged at the time with overseeing the drafting of a new bill felt that the Justice Department did not have an agenda of substantive goals for the new legislation other than the singular focus on reducing the financial strains on the Marshals Service. . . . Moreover, the prevailing perception was that the more the draft rule attempted to address the specific operations of service, the greater the likelihood that someone in the Congress could object; hence, whereas several mechanical issues were thought to exist, none was addressed in the text of the rule.²⁶⁷

Thus, in attempting to sidestep potential objections, the congressional legislation created its own difficulties. Although it is debatable whether the judicial branch rule 4 proposals would have fared better, the congressional attempt at rulemaking generally is recognized as creating more problems than it remedied. The fact that the Advisory Committee again has had to rework rule 4 signals caution about congressionally enacted rule reforms.

(b) Rule 35 Revision

If the rule 4 experience suggests the dangers of hastily prepared rule revision, then the congressional amendment to rule 35 tells an equally interesting tale about constituent politics in Washington. Rule 35 is the federal rule governing physical and mental exams as part of civil litigation discovery. The rule authorizes a court to order the examination of a person when that person's phys-

265. Sinclair, *supra* note 252, at 1288 (citations omitted).

266. *Id.* at 1288 n.605.

267. *Id.* at n.606.

ical or mental condition is in controversy.²⁶⁸ The rule has been amended once in fifty-five years; it now requires that parties make available persons in their custody for examination and that they exchange medical reports.²⁶⁹

In 1988, however, Congress enacted a small language change in rule 35(a) to add the term "psychologist" to "physician" as a person who may conduct a mental examination.²⁷⁰ This change was inserted by one Senator at the request of a legislative aide,²⁷¹ as a rider to a criminal drug enforcement bill.²⁷² The purpose and effect of this addition was to broaden the category of persons who might conduct mental examinations as part of civil litigation discovery, because psychologists generally are not trained and certified "physicians" under the rule. The legislative rider represented a private bill on behalf of psychologists who now are eligible under the federal rules to perform this service. This rule change, accomplished simply by gaining the willing ear of a legislative aide, economically benefits a particular constituent group with only a peripheral interest in civil litigation.

The question is whether any harm was done, apart from circumventing the judicial rulemaking process and undercutting the authority of those rulemaking bodies. Two points are worth consideration. First, the addition of these examiners inadvertently gave rise to questions concerning the definition of a "psychologist" and who is qualified to perform a mental examination under the rule. Whereas the term "physician" in the rule means a medically trained, certified examiner, standards governing qualifications of psychologists vary from state to state. This issue caused the Advisory Committee to place rule 35 on its 1989-90 agenda and propose qualifying language to address the problem of psychologists' credentials.²⁷³ The discussion of this issue at the June 1990 Advisory Committee meeting suggested the difficulties in conforming congressionally enacted language to existing rule requirements.²⁷⁴

268. FED. R. CIV. P. 35; *see supra* note 253.

269. *See* FED. R. CIV. P. 35 (1970 amendment). The rule was also amended in 1987, but the notes to the rule indicate that these amendments were technical and not intended as substantive changes. *See id.* (1987 amendment).

Rule 35 gave rise to perhaps the most famous case construing the validity of the federal rules of civil procedure. *See Sibbach v. Wilson*, 312 U.S. 1 (1941); *see also* Burbank, *supra* note 254, at 432-433 (1986) (discussing *Sibbach* and the substance-procedure distinction).

270. *See supra* note 253.

271. *See* REPORT OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES (Sept. 1987) (indicating that the Advisory Committee on Civil Rules at its June 1987 meeting had "decided to go forward with Senator Inouye's proposal to amend Rule 35 to permit medical examinations to be conducted by psychologists as well as physicians," but Congress enacted its own change before the Advisory Committee was able to act). The legislative aide subsequently received a commendation from the American Psychologist Association. *See also* Carrington, *Making Rules*, *supra* note 1, at 2123-24 (noting that the rule 35 rider was the only time in fifty years Congress acted on its own to modify a rule of civil procedure).

272. *See Senate Amendment to H.R. 5210, Omnibus Drug Initiative Act of 1988, with an Amendment*, 134 CONG. REC. H11108-01 at 551 (October 21, 1988) (adding section 7047). Section 7047(b) was a conforming amendment to Federal Rule of Civil Procedure 35 to make it parallel to the provision in the criminal code to utilize psychologists. *See* 18 U.S.C. § 4247(b) (1988); *see also* Massey v. Manitowoc Co., 101 F.R.D. 304 (E.D. Pa. 1983) (permitting licensed psychologist to administer tests under rule 35).

273. *See* FED. R. CIV. P. 35 (Proposed Draft Mar. 18, 1990).

274. The Advisory Committee members ultimately abandoned an attempt to impose credentials

The second point concerns the process by which the rule 35 addition was accomplished. Although Congress enacted the rule 4 amendments with undue haste, those revisions had been percolating through the rulemaking system for some time before Congress intervened with its own legislation. Congressional action in that instance was preceded by four years of debate on service reform. In contrast, the rule 35 addition was accomplished by stealth—without notice, comment, hearings, or a record. No one inquired whether the rule change was necessary. The mechanism for accomplishing the end, a legislative rider, suggests that the addition was partisan porkbarrel unlikely to survive on its merits as legislative rule reform. The lesson of the rule 35 amendment is that lobbyists can, as the current Reporter would characterize this process, decorate the federal rules with special interest concerns.²⁷⁵ This, consequently, leaves the Advisory Committee in the difficult position of having to defer to Congress while trying to make wholecloth out of the federal rules.

(c) Attempted Rule 68 Revision

The experience of the attempted revision of rule 68 illustrates yet another dimension of the politics of rule reform. The rule 68 experience demonstrates how concerted efforts by partisans can cause the Advisory Committee to abandon a rule amendment altogether. This case suggests that when partisan interests fail to persuade the Advisory Committee of the ill-wisdom of proposed actions, sabre-rattling in Congress effectively will induce the Advisory Committee's retreat.

Rule 68, the "offer of judgment" rule, provides that a defendant (at least ten days before trial) can offer to settle a case with a plaintiff and if the plaintiff accepts, the court enters a judgment. If the plaintiff rejects the offer and goes to trial and wins a judgment less than the offer, then the plaintiff has to pay the costs incurred after the defendant made the offer.²⁷⁶ Because of perceived

qualifications for psychologists, partly in recognition of the current loose standards for qualifying expert witnesses under the rules of evidence. See FED. R. EVID. 702 (standard is if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify"). There also was discussion to the effect that the court orders an examination under rule 35, but the court is not generally in the business of assessing the credentials of the examiner chosen by the parties to conduct an examination. Discussion of Proposed Amendments to Rule 35 (June 8, 1990) (meeting of the Advisory Committee on Civil Rules).

275. See Carrington, *Making Rules*, *supra* note 1, at 2074-79; Carrington, "Substance" and "Procedure," *supra* note 1, at 282-84.

276. See FED. R. CIV. P. 68. This "Offer of Judgment" rule provides:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer

problems with rule 68,²⁷⁷ the rule became part of the Advisory Committee's agenda for 1983 revisions.

In its first round of revisions, the Advisory Committee encountered severe criticism concerning its rule 68 efforts, and withdrew its initial attempts at changing the rule.²⁷⁸ The Advisory Committee then regrouped and proposed new revisions designed to "put teeth into" rule 68.²⁷⁹ These 1984 proposals again engendered considerable disfavor from advocacy groups, particularly the plaintiffs' public interest bar, which viewed the proposed changes as an attempt to override attorneys' fee provisions in various civil rights statutes.²⁸⁰ Further exacerbating the situation, the Supreme Court held in *Marek v. Chesny*²⁸¹ that a civil rights plaintiff who rejected a settlement offer and then failed to recover a more favorable judgment at trial could not recover attorneys' fees for work done after the offer.²⁸²

The Court's decision in *Marek* was riddled with political implications because of the concurrent endeavors of the Advisory Committee and Congress to amend rule 68.²⁸³ With insight into events that would unfold during the next three years, one commentator observed:

The ACLU filed an amicus brief on behalf of the losing side in *Marek*. Several opponents of the 1984 proposal also scored the district judge in *Marek* for denying post-offer attorneys' fees to the plaintiff even though the judge himself had considered the proper settlement

Id.

277. The rule was criticized as ineffective for two reasons. First, since most recovery of "costs" excluded attorneys' fees, such recoveries under the rule tended to be nominal and not conducive to invoking the rule. Second, the rule provides for recovery only if the defendant makes an offer and the plaintiff fails to recover the offered amount; the rule does not provide for recovery in the situation in which a plaintiff makes an offer. See Burbank, *supra* note 254, at 425 n.3; Simon, *supra* note 254, at 6-7.

278. See Burbank, *supra* note 1, at 1037-39; Burbank, *supra* note 254, at 426; Carrington, *Making Rules*, *supra* note 1, at 2078-79; Carrington, "Substance" and "Procedure," *supra* note 1, at 283-84; Simon, *supra* note 254, at 10-16 (detailing history of rule 68 proposals in the Advisory Committee and reactions from constituent groups to those proposals); Tobias, *supra* note 22, at 310-19.

279. See Burbank, *supra* note 254, at 426 (citing a background memorandum to the Advisory Committee written by the then Chairman and Reporter of the Advisory Committee).

280. See generally Burbank, *supra* note 254, at 435-40 (discussing various reactions to proposed amendments to rule 68); Carrington, *Making Rules*, *supra* note 1, at 2078 ("The concern of the civil rights bar, whether expressed through Congress or directly to members of the Civil Rules Committee, the Standing Committee, or the Judicial Conference, was sufficient to cause the rulemakers to abandon the subject of Rule 68.") (footnotes omitted); Silverstein & Rosenblatt, *A Square Peg in a Round Hole: The Application of Rule 68 to Awards of Attorney's Fees in Civil Rights Litigation*, 16 CONN. L. REV. 949 (1984) (urging that the Rules Enabling Act precludes fee-shifting to encourage settlement in certain types of litigation); Simon, *Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees*, 53 U. CIN. L. REV. 889 (1984) (arguing in favor of defining rule 68 costs to include civil rights attorneys' fees); Simon, *supra* note 254, at 17-19 (discussing reaction to the 1984 proposals); Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act*, 98 HARV. L. REV. 823 (1985) (stressing the priority of the substantive rights embodied in the civil rights statutes).

281. 473 U.S. 1 (1985).

282. *Id.* at 5-12; see also Simon, *supra* note 254, at 19-24 (discussing the implications of *Marek*).

283. Justice Brennan, in his dissenting opinion, chastised the majority for meddling in rule 68 construction, arguing that "Congress and the Judicial Conference are far more institutionally competent . . . to resolve th[e] matter." *Marek v. Chesny*, 473 U.S. 1, 42 (1985) (Brennan, J., dissenting); see Simon, *supra* note 254, at 22-23.

range to be well above the amount of the defendant's Rule 68 offer. . . . These groups may well now lobby Congress to change Rule 68 without waiting for the Advisory Committee and Judicial Conference to act, or to amend section 1988 and other fee-shifting statutes to make clear that attorneys' fees are not considered "costs" for purposes of rule 68.²⁸⁴

The political fallout from the attempted rule 68 revisions, coupled with *Marek*, bears interesting lessons. Congress did indeed become the forum of choice for opponents of the proposed Advisory Committee revisions because they accurately perceived Congress as the more hospitable forum in which to lobby for the plaintiffs' public interest concerns.²⁸⁵ In response to efforts of the Advisory Committee and the invitation from the Supreme Court to revisit rule 68, legislation subsequently was introduced in Congress to modify rule 68.²⁸⁶

The parties opposed to rule 68 revision learned other lessons from this experience as well. In large measure, the rule 68 experience precipitated the movement to repeal the supersession clause, with the same parties who opposed rule 68 modification now aligned to urge repeal of the supersession clause.²⁸⁷ The supersession clause of the Rules Enabling Act states that any new, properly promulgated federal rule "supersedes" any existing contradictory rule.²⁸⁸ The theory was that if the Advisory Committee persisted in its attempts to modify rule 68 to the disadvantage of certain litigants, then that rule change should not be permitted to supersede existing substantive legislation permitting recovery of attorneys' fees.²⁸⁹ The rule 68 controversy also led to increased agitation for a more open rulemaking process, evidenced by testimony concerning amendment of the Rules Enabling Act as part of the 1988 Judicial Reform legislative package.²⁹⁰ Perhaps the biggest lesson of the rule 68 experience was that if partisans

284. Simon, *supra* note 254, at 23 n.138 (citations omitted). In addition to the ACLU, Professor Simon also identified as opponents to the 1984 Advisory Committee proposals the Alliance for Justice, and Professors Resnik and Macklin, who appeared and gave testimony at hearings on the proposed rule changes. *See id.* Some of these same groups and persons subsequently would reappear during congressional consideration of the 1988 Judicial Improvements Act to lobby for amendment of the Rules Enabling Act to open access to the judicial rulemaking process, to repeal the supersession clause of the Rules Enabling Act, to lobby the Advisory Committee for amendment of rule 11, and now to oppose the proposed informal discovery rule.

285. *See* Simon, *supra* note 254, at 24 n.142 (discussing legislation introduced in Congress subsequent to *Marek*); Burbank, *supra* note 254, at 440 n.81 (same); Carrington, *Making Rules*, *supra* note 1, at 2078 n.59 (same).

286. H.R. 3998, 99th Cong., 1st Sess. (1985).

287. *See* Carrington, "Substance" and "Procedure," *supra* note 1, at 283; Burbank, *supra* note 1, at 1036-39.

288. 28 U.S.C. § 2072 (1988).

289. *See* Carrington, "Substance" and "Procedure," *supra* note 1, at 283. As Professor Carrington observed:

Some proposed provisions were criticized as being inconsistent with the Civil Rights Attorney's Fees Awards Act of 1976, and perhaps they were. Some imagined that the rulemakers might nevertheless promulgate such a Rule [68] in order to supersede the 1976 Act, and thus use the provisions of the Rules Enabling Act to thwart the will of Congress.

Id.; *see also* Tobias, *supra* note 22, at 312-19 (discussing the history of rule 68).

290. *See Court Reform and Access to Justice Act: Hearings on H.R. 3152 (Part II)*, *supra* note 18 (letters from academicians and practicing lawyers advocating either repeal or retention of the supersession clause of the Rules Enabling Act).

are able to generate enough political heat, the Advisory Committee will desist from rulemaking altogether, which is precisely what happened with the Committee's rule 68 efforts.²⁹¹ Although some view these events as a democratic triumph of substance over procedure, others perceive the outcome as a victory for the decibel-raising school of interest group rulemaking. Whatever the perception, the reality was a retreat of the Advisory Committee in the face of concerted, noisy partisan politics.

2. Promulgating Procedural Rules in the Judicial Branch: Of Court Reporters and Rule 11

It should not be surprising that partisan politics informs legislative rulemaking, but more curious is the incursion of such partisan tactics into the inner workings of judicial rulemaking. Two recent illustrations suggest incipient problems with this developing phenomenon, one relating to interest group lobbying on behalf of court reporters, and the other regarding public interest bar lobbying on behalf of rule 11 revisions.

After the experience of the process-servers on behalf of rule 4 reform, it was perhaps inevitable that the organized fraternity of court reporters would appear before the Advisory Committee in 1990 to lobby for revision of rule 30²⁹² relating to oral depositions. The Advisory Committee now seemed prepared for the bread-and-butter issue inherent in this rule reform. The court reporters' concern centered on a proposed revision that would permit mechanically recorded depositions (including videotaped depositions) to replace the usual practice of stenographically recorded and transcribed depositions.²⁹³ This put the court reporters in the awkward position of arguing against the advantages of modern technology.²⁹⁴ The discomfort raised by the court reporters' concerns was sufficient to induce the Advisory Committee to defer consideration of immediate reform of rule 30.²⁹⁵ Rule 30 revision has not been defeated, but it has been delayed.

291. See Carrington, *Making Rules*, *supra* note 1, at 2078-79. Professor Carrington viewed the rule 68 experience as an illustration of the incursion of partisan politics into the rulemaking process: "Rulemaking in this [neutral] tradition must avoid the interest group politics that is the meat and drink of the parliaments of the world. The controversy over proposed amendments to Rule 68 recently illustrated this tenderness of rulemaking." *Id.* It is difficult to evade the conclusion that the rule 68 experience caused Advisory Committee Reporter Carrington to formulate his "decibel" test for rulemaking authority. See *supra* notes 213-16 and accompanying text.

292. A representative of the Court Reporters' Association appeared before the Advisory Committee on Civil Rules, June 8, 1990, to speak against any revision of rule 30 that would modify requirements for written transcripts in the taking of depositions. See FED. R. CIV. P. 30. The author was present at this meeting.

293. Federal Rule of Civil Procedure 30(b)(4) currently permits taking depositions by other than stenographic means upon stipulation of the parties. FED. R. CIV. P. 30(b)(4). The proposed rule revision would make this exception the normal practice. See FED. R. CIV. P. 30 (Proposed Draft Mar. 18, 1990) (discussed at June 8, 1990 meeting of the Advisory Committee).

294. To the amusement of some present, the court reporters' arguments were given some small support when, subsequent to their presentation, the tape machine recording the Advisory Committee meeting stopped and failed to record a portion of the proceedings.

295. This agreement to defer action on rule 30 revisions occurred at the Advisory Committee meeting of June 8th, 1990.

Should anyone be concerned by the court reporters' appearance before the Advisory Committee and their lobbying for economic self-interest? Probably not. But their appearance was enough to cause speculation that any potential Advisory Committee action on rule 30 might cause the court reporters to take their case to Congress, with the result that Congress would act to protect the court reporters' interest. Certainly there is now precedent for process-servers and psychologists gaining self-serving porkbarrel legislation through Congress, a lesson surely not lost on the court reporters. Thus the issue lurking in incipient rule 30 revision is not one of impartial procedural reform, but rather one of who is going to make the decisions about the appropriateness or desirability of this reform.

The lesson of the court reporters is one of pure interest-group politics. While academicians play legitimate hand-wringing theoretical games with the substance-procedure distinction applied to rule 4,²⁹⁶ it is difficult to suggest that the form of taking a deposition is anything other than a procedural matter. This is as crystalline an example of a *Hanna* housekeeping rule as the rulemakers are ever likely to encounter.²⁹⁷ As a purely procedural matter, this should be exclusively in the province of the Advisory Committee, which should be able to resolve procedural reform issues without siege from interest-group petitions. Should the Advisory Committee now retreat from rule reform in this instance because of the decibel level? Do the court reporters, the process-servers, and the psychologists now have the opportunity to dictate rule reform by the strength of their claims and the level of their clamor?

The case of the court reporters, however, is minor compared to legislative lobbying efforts underway to influence further revision of rule 11 on attorney sanctions.²⁹⁸ As part of the 1983 package of rule reforms, rule 11 was amended

296. See, e.g., Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 744-46 (1987) (rulemaking authority for modifying rule 4); Carrington, "*Substance*" and "*Procedure*," *supra* note 1, at 319-21 (concluding that service of process provision is a valid exercise of rulemaking power conferred by the Rules Enabling Act); Burbank, *supra* note 1, at 1024-26, 1041 (challenging Carrington's characterizations of rulemaking authority relating to rule 4).

297. This is not to suggest that there are not people who can make the argument, however. In the instance of depositions, one might argue, for example, that the failure of mechanical recording devices denies litigants a written record of testimony and is a potential denial of due process.

298. See FED. R. CIV. P. 11. This rule states, in pertinent part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Id. Rule 11 also authorizes the imposition of sanctions for violation of the rule:

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

because the Advisory Committee had concluded that the rule had not been effective in deterring various litigation abuses.²⁹⁹ In the words of the Advisory Committee, "[t]he amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation."³⁰⁰ The centerpiece of the amended rule was a test of "reasonableness under the circumstances" with regard to the lawyer's efforts in conducting some pretrial inquiry into the facts and law underlying the allegations of a filing.³⁰¹

If the purpose of amending rule 11 was to put teeth into the rule, the Advisory Committee achieved its goal. Since 1983, court interpretation of amended rule 11 has generated hundreds of sanctions,³⁰² as well as hundreds of district and appellate court opinions construing the amended rule.³⁰³ Despite a specific statement from the Advisory Committee that it did not intend rule 11 "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories,"³⁰⁴ the rule 11 amendments have come under increased attack as causing that very chilling effect on certain classes of litigants, particularly civil-rights plaintiffs and public-interest litigants.³⁰⁵ In response to perceived widespread dissatisfaction with the rule 11 amendments, the Advisory Committee in 1988 decided to revisit the rule.

The initial clamor over rule 11 coincided with discontent over the Advisory Committee's efforts to amend rule 68. This combination of rule revisions was perceived in some quarters as an effort to impede prosecution of certain classes of disfavored claims.³⁰⁶ This perception, in turn, fueled the lobbying efforts of

Id.

299. See FED. R. CIV. P. 11 notes of the advisory committee on rules, 1983 amendment; S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 2-4 (1985).

300. FED. R. CIV. P. 11 notes of the advisory committee on rules, 1983 amendment.

301. *Id.* The advisory note states:

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. . . . This standard is more stringent than the general good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation.

Id. (citations omitted).

302. See Tobias, *supra* note 22, at 301 ("Attorneys' vigorous use of rule 11 and its compulsory nature have already led to approximately 1,000 opinions (and to thousands more that have not been reported) under the amendment."); authorities cited *supra* note 151.

303. During the 1989-90 Term, the Supreme Court for the first time decided two cases construing amended rule 11. See *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990) (district court retains jurisdiction to impose rule 11 sanctions even after voluntary dismissal under rule 41(a); appropriate standard on review of sanctions is abuse of discretion standard; and Appellate Rule of Procedure 38, rather than rule 11, applies to possible sanctions for appealing rule 11 sanction); *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989) (attorney rather than law firm is personally responsible under rule 11 signature requirements for violations of the rule); see also Coyle, *Rule 11 Imbroglio Rages On*, 12 Nat'l L.J., June 25, 1990, at 27 (discussing the impact of *Pavelic* and *Cooter*). During the 1990-91 Term, the Supreme Court held that the same rule 11 standards applied to parties (clients), as well. See *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, No. 89-1500, 1991 U.S. LEXIS 1297 (Feb. 26, 1991).

304. See FED. R. CIV. P. 11 notes of the advisory committee on rules, 1983 amendment.

305. See *supra* note 151.

306. See Tobias, *supra* note 22, at 301-17.

the public interest bar in Congress to undo the Advisory Committee's work on rule 68, to repeal the supersession clause, and to open Advisory Committee process. These lobbying efforts succeeded in defeating rule 68 revision and in expanding Advisory Committee process, but not in repealing the supersession clause.³⁰⁷ And in all these efforts, the same interested groups appeared to lobby for their interests.³⁰⁸

At the fall 1989 Advisory Committee meeting, at least three significant events occurred. First, the Reporter asked the Advisory Committee for guidance about conduct of the Advisory Committee under the new openness mandate of the 1988 Judicial Improvements Act.³⁰⁹ Second, interest-group representatives appeared before the Committee to urge modifications of Committee procedure under the new openness mandate.³¹⁰ And third, these same representatives gave testimony about the need for rule 11 revision, calling for further empirical study of the rule's impact on classes of litigants. Thus, at the very same time the Committee was grappling self-consciously with the implications of its new openness, it simultaneously was experiencing the reality of its new politics of rulemaking.

One result of the November 1989 Advisory Committee meeting was a directive from the Committee for further empirical study of rule 11.³¹¹ Not only did the Advisory Committee request that the Federal Judicial Center conduct further empirical study of rule 11 practice, including its impact on types of cases and litigants, but the Committee invited interest-group representatives to conduct their own empirical studies to educate the Committee concerning operation of the amended rule.³¹² Further deliberation of rule 11 revision has been deferred until spring 1991, when the studies will be complete and available for analysis.³¹³ Again, this method of deliberate consideration has prompted specu-

307. See *supra* notes 15-16, 190-93, 254, 275-91 and accompanying texts.

308. See *Court Reform and Access to Justice Act: Hearings on H.R. 3152, supra* note 18, at Parts I & II (witness testimony and prepared statements); see *infra* note 310.

309. See *supra* notes 219-32.

310. Present at the Advisory Committee were Nan Aron of the Alliance for Justice; Alan Morrison of Public Citizen; and Laura Macklin, representing the Georgetown Law Center Institute for Public Representation. Professor Macklin spoke on behalf of new openness principles. Among the suggestions were a request for the Committee to create and distribute a long-term agenda for rule revision, with participation by interested persons in creating that agenda; better advance notice of meetings and enhanced participation in those meetings; circulation and distribution of early drafts of proposed rule revisions before the drafts become set in stone, or are ready for wider distribution for public hearings; and increased use of empirical studies of the federal rules. Morrison and Macklin also spoke on behalf of further rule 11 revisions, arguing that the 1983 rule amendments, in addition to having a disparate impact on civil rights and public interest litigants, are an impermissible fee-shifting statute.

311. This request was made to the Federal Judicial Center, which is conducting its third study of rule 11 sanctions. Tom Willging's latest study on rule 11 sanctioning patterns in selected district courts is forthcoming in early 1991 and will be available for Advisory Committee use during its spring 1991 meetings. In addition, the Federal Judicial Center is conducting a survey of district court judges regarding rule 11 motions and sanctions, also to be completed by January 1991.

312. The Chair of the Advisory Committee, Judge John Grady, extended this invitation to the interest group representatives present at the November Advisory Committee meeting. The author was present at this meeting.

313. The decision to defer deliberation on rule 11 revision was tentatively agreed to at the November 1989 meeting, and reaffirmed at the June 1990 meeting. It was also agreed at the June 1990

lation that lawyers and litigants frustrated with the application of rule 11 sanctioning power will take their case to Congress, as happened with rule 68.

There can be little doubt that further amendment of rule 11 is going to generate tremendous controversy and political heat from the practicing bar. It is a prime candidate to meet and surpass the Reporter's "decibel" test for referral to Congress. Is the rule 11 sanctioning power a purely procedural rule that should be promulgated through the deliberate considerations of the Advisory Committee and judicial rulemaking process? Is rule 11, characterized as a fee-shifting statute,³¹⁴ a rule affecting substantive interests and therefore more properly in the purview of congressional legislation? Does rule 11 fall into that marginal area of federal rules where the substance-procedure distinction loses meaning? It can be certain that in the ensuing months advocates will advance variations of all these themes, without consensus or agreement. But the best prophecy about rule 11 revision is that a retreat by the Advisory Committee seems inevitable, with abdication to Congress to reformulate rule 11. The question, then, is not the political reality of this eventuality, but the wisdom of this result.

CONCLUSION: TWILIGHT FOR THE ADVISORY COMMITTEE: THE LAST HURRAH?

The purpose of this Article is to note a sea change of events in the rulemaking process, to observe an emerging trend in that process, and to speculate about the potential impact of these changes. The movement for reform of the rulemaking process is not new insofar as calls for democratization of that process have re-emerged cyclically as litigant interests have been affected by particular federal procedural rules. The difference with the past, however, is that open judicial rulemaking is now the law and the Advisory Committee has entered a new era of process. How the Advisory Committee adjusts to this new reality will determine the continued importance and vitality of that body and of judicial rulemaking in the future.

There has been a quiet but subtle change in rule reform efforts. The experience of the last ten years suggests that actors in the judicial arena have become increasingly sophisticated concerning the opportunities for accomplishing advantageous rule reform through traditional lobbying efforts. Inside players now know that they are playing a two-court game: if partisan politics fails to sway the Advisory Committee concerning the wisdom of a particular rule modification, Congress is available to supply relief. Lobbying works in Congress. And what is being learned in this two-court game is that Congress can be used effectively to shut down Advisory Committee deliberations.

The Advisory Committee faces a difficult dilemma. If it does not truly open

meeting to hold hearings on rule 11 and to hold an invited-witness hearing on rule 11 in February 1991.

314. See Tobias, *supra* note 22, at 306 (concerning fee-shifting legislation in relation to rule 11). This theme was also repeated by the interest group representatives during discussion of rule 11 at the November 1989 meeting of the Advisory Committee.

its processes and meet the concerns of partisan petitioners, it seems destined to be displaced in the rulemaking function by Congress, which will give succor to those interest-group concerns. But if the Advisory Committee does capitulate to lobbying, then it inevitably will compromise its traditional role as promulgator of neutral rules of general applicability. In a sense, the seeds of destruction of the old Advisory Committee system were sowed with the enhanced participation provisions of the 1988 Judicial Improvements Act. The required new openness may signal the last hurrah for Old Guard rulemaking.

To be sure, the Visigoths are not at the gate, but the lobbyists are. How one feels about this sea change in the rulemaking process derives from one's view of legislative lobbying³¹⁵ and the appropriate role of such lobbying in the judicial rulemaking arena. Needless to say, the recent open rulemaking requirements have not addressed the fundamental tension between philosophical theories regarding that rulemaking.³¹⁶ Is it possible to reconcile the view of neutral rulemaking that disallows partisan advocacy with a view of partisan rulemaking that believes there are no such things as neutral rules?

This conundrum has led to an anomaly. Ironically, advocates of participatory process advocate partisan rule revisions, all the while couching such reform in the rhetoric of neutral rulemaking. Meanwhile, the Advisory Committee, giving continued lip service to traditional norms of trans-substantive procedure, actually pays great attention to constituent interests in particular rule reforms. Thus, while espousing a philosophy of neutral rulemaking, the Advisory Committee recognizes and heeds constituent concerns; and while espousing a theory of constituent concerns, open-process proponents nonetheless speak of rules of general applicability that they hope will favor their interests.

There is a good deal of disingenuousness in the air. If it is true, as the current Advisory Committee Reporter has written, that "we are all now Legal Realists,"³¹⁷ it would do a great deal to clear the air if all involved in the rule reform process were more forthright about whose oxen are being gored or protected. After the air is cleared, this fresh setting might provide a good opportunity to reconsider who should make procedural rules and how this ought to be accomplished. These are good questions worth debating.³¹⁸ But if the current trend toward politicization of the rulemaking process continues, it seems likely that these questions will be decided by default or politics.

Critics of the traditional judicial rulemaking process have caricatured that process as an elitist function, carried on behind closed doors, shrouded in mystery, creating non-neutral rules infused with the biases of the elitist rulemakers.

315. There is vast political science literature on lobbying and interest group politics, but less attention has been paid to judicial-branch lobbying and even less attention to lobbying judicial rulemaking, a decidedly recent phenomenon. For a sample of the interest group literature, see the sources cited *supra* note 251. The apparent lack of analysis of judicial lobbying probably stems from the view that the third branch is the antimajoritarian branch, intended to be immunized from partisan politics.

316. See *supra* text accompanying notes 218-50.

317. Carrington, "Substance" and "Procedure," *supra* note 1, at 287.

318. See Carrington, *Making Rules*, *supra* note 1, at 2113-15 (posing a similar set of questions relating to revision of rule 56 on summary judgment).

Proponents of the system have sought to portray the work of the Advisory Committee as a kind of abstract philosophical exercise, with solons operating behind a veil of ignorance, creating rules of general applicability from an original, unbiased position. As is the nature of caricature, the portraits are overdrawn.

One of the constants in the history of rulemaking reform is the repeated request from successive Advisory Committees that interested people attend Advisory Committee meetings,³¹⁹ a request that largely has gone unheeded. Committee meetings are open and in truth, the work of the Committee is tedious. But attendance at the meetings would enlighten critics concerning the extent to which Committee members debate rule revisions, regard comments on proposed changes, and hew to theories of trans-substantive rulemaking.³²⁰ As is true for much in the law, the reality of the judicial rulemaking process is somewhere in the middle. Knowledge and experience of that process would reduce the decibel level and enable rule reformers to proceed with their work.

319. The first open meeting of the Advisory Committee was in 1986. *Id.* at 2120 n.8.

320. The Reporter compiled comments of various individuals and groups for the June 1990 Advisory Committee meeting about the proposed rule revision package. Among organizations and individuals offering comments on various proposed rules were: the Public Citizen Litigation Group; the Department of Justice; the Section of Business Law of the International Bar Association; the San Francisco Bar; the National Association of Process Servers; the Securities and Exchange Commission; the National Wildlife Federation; the Philadelphia Bar Association; the Ohio Bar Association; the American College of Trial Lawyers; the District Court of Maryland; the Washington State Bar; the California Court Reporters Association; the National Shorthand Reporters Association; and various law professors, practitioners, and federal judges.

APPENDIX

Rule 25.1. Disclosure

Reporter's Draft Not Intended for Public Discussion³²¹

March 8, 1990

Reporter's Note

This draft embodies the idea that parties should disclose their own evidence early and often. Its aim is [to] eliminate many motions, interrogatories and depositions. It would depend on an elevation of the professionalism of lawyers. The basic idea is derived from Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1348 (1978), and Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721-23 (1989). Some of the language originates in the local rules of court in the Southern District of New York, the Central District of California, and the Southern District of Florida.

This draft would not require, as several of the local court rules do, that counsel have a meeting in every case. Meetings are encouraged "if feasible."

This draft contemplates significant revisions in the discovery rules occasioned by the reduced reliance on discovery to secure information. Except by leave of court, interrogatories would be limited in number, perhaps to a number as small as five or ten. Depositions presumptively would be limited in both number and length.

(a) PROMPT DISCLOSURE.

(1) To secure the just, speedy, and inexpensive determination of the action, each party has a duty promptly to disclose to every other party:

(A) the names, addresses, and telephone numbers of any persons known to have personal knowledge of any fact alleged in any pleading filed in the action;

(B) the existence, location, custodian, and general description of any tangible evidence or relevant documents, or information of a similar nature, bearing on any fact alleged in any pleading filed in the ac-

321. The current Reporter has continued his practice of labelling draft rules for the Advisory Committee with the note "Reporter's Draft Not Intended for Public Discussion," as noted here. Nevertheless, this draft version was made available to selected correspondents with the Reporter, including the author and it also was available as part of the package of materials at the June 1990 Advisory Committee Meeting. The Advisory Committee and its individual members have taken no action or position with regard to this draft rule as of the June 1990 Advisory Committee Meeting. The draft rule included here is solely the work of the Reporter.

As indicated in the notes to this Article, the Reporter is disturbed by premature comments on draft rules. See *supra* notes 3, 197. Nevertheless, the Reporter himself has commented on and made available draft versions of his own efforts, in articles he has published prior to promulgation of a rule. See Carrington, *Making Rules*, *supra* note 1 (Reporter's discussion of proposed revisions of rule 56, including an Appendix with the draft rule). Although the Reporter has written on rule 56 revision and published a draft version of proposed changes in the summary judgment rule, the Advisory Committee has yet to act on those revisions. The Reporter's Advisory Committee draft version for rule 56 also carries the label "Reporter's Draft Not Intended for Public Discussion."

tion and the identity of any such material to be used as exhibits at depositions to be noticed by the disclosing party;

(C) the computation of any category of damage and the documents or other evidentiary material on which such a computation is based; and

(D) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(2)(A) The parties shall make the disclosure required by the preceding paragraph (a)(1) within 28 days after the filing of an answer to the complaint. For cause, the court may shorten or extend this time.

(B) The duty prescribed in paragraph (1)(A) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be served and filed within 14 days after the information is revealed to or discovered by the disclosing party, but not later than 28 days before trial except by leave of court.

(b) PRETRIAL DISCLOSURE.

(1) In addition to the prompt disclosure, each party shall before trial disclose to every other party the following information descriptive of the evidence that the disclosing party will present in support of that party's claim or defense:

(A) the names, addresses, and phone numbers of all witnesses with a summary of the material facts to which each witness is expected to testify;

(B) the substance of any expert opinion with a summary of the basis for any such opinion and of the qualifications of any witness expected to present it, including a list of all prior expert appearances by that witness that have occurred within the preceding three years; and

(C) the identity and location of any exhibits.

(2) Pretrial disclosure shall be made not later than 28 days before trial, unless the court designates another time.

(c) **FORM OF DISCLOSURES; MEETINGS; FILING.** The disclosures required by this rule shall be made in writing signed by the party or counsel certifying that the disclosure is complete. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. All disclosures shall be promptly filed with the court.

(d) **NO DISCOVERY OF INFORMATION REQUIRED TO BE DISCLOSED.** No discovery of matters required to be disclosed shall be necessary to secure the information, and a party shall be protected against such discovery as provided in subdivisions (c) and (g) of Rule 26 except that an opposing party shall be entitled pursuant to Rule 30 to depose prior to trial any witness identified by the disclosing party.

(e) **EXCLUSION OF UNDISCLOSED EVIDENCE.** In addi-

tion to any other sanction the court may employ, the court shall exclude at trial any evidence offered by a party that was not timely disclosed as required by this rule. No party shall be permitted to examine that party's witness to prove facts other than those identified in the pretrial disclosure to the party's opponents, nor shall any expert witness be allowed to testify to an opinion or a basis for an opinion that was not timely disclosed, except by leave of court granted upon a showing of cause.

(f) **MISLEADING DISCLOSURE.** A party who makes a disclosure pursuant to this rule that the party knew or should have known was inaccurate and thereby misleads an opposing party to engage in substantial unnecessary investigation or discovery shall be ordered by the court to re[im]burse the opposing party for the cost, including attorneys' fees, of such unnecessary investigation or discovery and may be subject to other appropriate sanctions as the court may direct.

ADVISORY COMMITTEE NOTE

The rule is entirely new. Its purpose is to reduce materially the cost of discovery before trial. It is based on significant experience with local rules of court.

Discovery practice has become encumbered with excess motion practice and other papers to such an extent that Rules 26-37 are no longer consonant with the aims of the rules stated in Rule 1. It is the aim of this rule to eliminate much of the excess paper by calling upon the professional responsibility of the bar to substitute informal methods of exchanging information for more costly formal methods. The information required to be disclosed could be secured by adversaries under existing practice through the use of interrogatories or other discovery devices.

SUBDIVISION (a). Paragraph (1) establishes a duty of prompt disclosure of information that is customarily secured at the outset of litigation through formal discovery. The subparagraphs specify the information to be disclosed and serve in the manner of standard interrogatories.

Subparagraph (1)(D) replaces Paragraph (b)(2) of Rule 26. As with the former rule, the requirement of disclosure does not render the information admissible in evidence, and the duty of disclosure is limited to the insurance agreement, not including any application forms that may contain personal information.

Subparagraph (2)(A) sets the time for initial disclosures. That time is selected as the earliest occasion on which an exchange of information can be made with fairness to both sides. If the matter is one requiring expedited disposition, the court may shorten the time. If there are other parties belatedly served who would gain an unfair advantage or who might be unfairly disadvantaged by premature disclosures, the court may extend the time.

Subparagraph (2)(B) provides that the duty to disclose is a continuing duty. The same concept is expressed in more general terms in Rule 26(e).

SUBDIVISION (b). Paragraph (1) establishes an additional duty to disclose information that is customarily secured before trial by means of discovery or at a final pretrial conference held under Rule 16(d). In some cases, a full exchange as required will obviate the need for such a conference, or cause it to be much shorter than if the court is required to participate in the exchange.

This rule effectively requires parties to designate experts far enough in advance that the opposing parties have a reasonable opportunity to prepare a rebuttal.

SUBDIVISION (c). This subdivision prescribes the form of disclosures. A writing is required to assure the parties and counsel are mindful of the solemnity of the obligations imposed; a signature on such a disclosure is a certification that it is complete and an undertaking to correct it promptly if [n]ew information comes to light.

An informal meeting of counsel is the preferred method of exchanging the required information. This may not in all cases be feasible. In any event, the written disclosures shall be filed with the court.

SUBDIVISION (d). This precludes discovery that is redundant to disclosure under this rule. Because the purpose of this rule is to eliminate needless discovery, the court should protect parties from redundant discovery. Moreover, a party seeking redundant discovery should bear any resulting costs as provided in Rule 26(g).

SUBDIVISION (e). This subdivision provides the primary enforcement mechanism for this rule, the exclusion of evidence not disclosed. A party seeking to hide information in order to surprise an opponent at trial is exposed to the likely consequence that the trap set will be prevented from working by action of the court.

The sanction of exclusion of evidence is not alone adequate to meet all possible situations arising in the operation of the rule. A Party may also proceed under Rule 37 in an appropriate case.

SUBDIVISION ([f]). This subdivision imposes restraint on parties tempted to over-disclose or bury the opposing parties with an excess of information, as by listing many persons as possible witnesses whom the disclosing party knows or should know to have no useful information.

