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INTRODUCTION: SYMPOSIUM ON RECENT CHANGES IN THE RULES OF PRETRIAL FACT DEVELOPMENT: WHAT DO THEY DISCLOSE ABOUT LITIGATION AND THE LEGAL PROFESSION?

*Mary P. Twitchell**

At its annual meeting in January 1994, the Association of American Law School sections on Civil Procedure and Litigation combined forces to examine recent changes to the federal rules of discovery requiring lawyers to disclose automatically certain discovery materials at the beginning of the lawsuit. The program consisted of two panels. On the first panel Professors Rochelle Cooper Dreyfuss,[1] Stephen Subrin,[2] and Jeffrey Stempel[3] explored the changes from a variety of perspectives. Their presentations and the discussion that followed raised important questions about the rules themselves, the rulemaking process, and the extent to which we have, or need to have, uniform, centrally-created, transubstantive procedural rules.

Recognizing that the audience, consisting primarily of law school professors, would want to hear what full-time lawyers and judges thought of the changes, conference planners asked a second panel of federal judges and litigators to share their views. Speaking on "The Practical Implications of Discovery Reform" were Judge William O. Bertelsman,[4] Bill Lann Lee,[5] Judge Barrington Parker, Jr.,[6] Judge Norma L. Shapiro,[7] and Professor Minna Kotkin.[8]

The *Florida Law Review* is delighted to present the fruits of that meeting in this symposium issue.[9] The symposium issue includes articles elab-

* Professor, University of Florida, Chair, 1993 American Association of Law Schools Section on Civil Procedure. The members of the 1993 Civil Procedure section Executive Committee—Janice Toran, Eric Yamamoto, and Jeffrey Stempel—and Minna Kotkin, 1993 Chair of the AALS Litigation Section, deserve great thanks for their contributions in planning and organizing the meeting program.

1. Professor of Law, New York University Law School.
2. Professor of Law, Northeastern University School of Law and Associate Dean for Academic Affairs.
3. Professor of Law, Brooklyn Law School.
4. Chief Judge, United States District Court for the Eastern District of Kentucky.
5. Western Regional Counsel for the NAACP Legal Defense Fund, Inc.
6. Then a partner, Morrison & Foerster, New York City, now a federal district judge for the Southern District of New York.
7. Judge, United States District Court for the Eastern District of Pennsylvania.
8. Professor of Law, Brooklyn Law School.
9. The full comments of panelists Lee, Parker, and Shapiro are on file with the *Florida Law Review*.

orating on the talks delivered by panelists Dreyfuss, Subrin, and Bertelsman, as well as articles written by the moderators of the two panels, Stempel and Kotkin, reacting to and expanding upon the panelists' ideas. A related article by Professor Carl Tobias completes the consideration of Rule reform.[10]

An interesting split occurred among the panelists at the conference. Although conference planners had expected (and had in fact hoped for) a divergence of opinion among the panelists, we had not fully anticipated the fault line that in fact appeared between the first panel and the second in their assessment of the relative importance of the Federal Rules of Civil Procedure. Let me summarize the panel presentations and then briefly explore that gap and its possible significance.

THE FIRST PANEL

Several major points emerged from the first panel presentations:

- The automatic disclosure rules, as written, are essentially heading in the wrong direction. They will add costs in the vast majority of cases in which there would otherwise have been no discovery, yet do little to facilitate effective discovery in cases calling for discovery.

- Our rulemaking process is burdened at both the national and local levels. In both areas we have too many sources of federal procedural rules, too many layers of decisionmaking, and too much diffusion of responsibility.

- Discovery reform requires accurate knowledge about lawyer behavior. To improve the discovery process, we need better sense of the *actual* relationship between rules, facts, judicial behavior, and lawyer behavior.

- The best impetus to fact development is a clear set of rules and a sure knowledge that judges will be deciding—as opposed to "managing"—cases.

- "Transubstantive" disclosure rules leave too much to judicial discretion. Substance-specific rules that identify exactly what materials must be automatically disclosed in particular classes of cases will create quicker and more efficient discovery and restore judges to their proper roles as judicial decisionmakers.

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10. Carl Tobias, *The Transmittal Letter Translated*, 46 FLA. L. REV. 127 (1994).

Rochelle Dreyfuss's article, *The What and Why of the New Discovery Rules*,[11] sets up the problem, examining both the impact of the rules and the process by which they were adopted. If Dreyfuss regards the rules themselves as problematic, she finds their adoption process even more troubling. The very existence of the new rules is paradoxical, she argues, since they run counter to the expressed intention of various statutory plans to create laboratories for local experimentation in rule development. The imposition of a national standard for automatic disclosure at this particular moment contradicts "public choice theory, the reforms of open-government advocates, and the carefully laid plans of legal empiricists."[12] Dreyfuss suggests that the process for federal rule reform is deeply flawed. Its complex, multi-tiered nature diffuses responsibility in a way that makes it easier to ignore problems than resolve them.[13] Moreover, we are insisting on judicially-driven rules without really understanding why this is important, or how the rulemaking process might capture those benefits.[14] Rather than reforming the discovery process, she argues, our next revision probably should be of the rules process itself.[15]

In *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*,[16] Steve Subrin shows how faulty assumptions about judges, lawyers, facts, and rules made in the earliest version of discovery rules have been preserved and even magnified in the most recent set of reforms. By adhering to the notion of transubstantivity—the need to draft provisions for automatic disclosure flexible enough to cover all cases—our rulemakers have in fact removed any possibility of meaningful restraint on lawyers, since the vagueness of a rule designed to fit "all" occasions will leave lawyers with more room to act adversarially and judges with more opportunities for ad hoc case management.[17] This decrease in the possibility of public adjudication puts one of our most cherished values—the neutrality of the judicial branch—even more at risk.[18]

It is time to see whether procedure can provide more predictable justice,[19] says Subrin. For discovery to work more effectively, he advocates

11. Rochelle C. Dreyfuss, *The What and Why of the New Discovery Rules*, 46 FLA. L. REV. 9 (1994).
12. *Id.* at 10.
13. *Id.* at 22-24.
14. *Id.* at 23.
15. *Id.*
16. Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994).
17. *Id.* at 43-44.
18. *Id.* at 44.
19. *Id.* at 55.

more certainty in two arenas. In the vast majority of cases, discovery should be limited and a firm trial date set.[20] For the minority of cases that require more discovery, we should establish explicit, presumptive substantive-specific rules for disclosure in common categories of cases to reduce uncertainty, friction, game-playing, and the need for judicial management.[21]

Jeffrey Stempel, who moderated the first panel, presents his reactions and responses in *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem."*[22] Stempel attempts to put the 1993 amendments into a broader reform perspective, focusing principally on how the self-interest of various professional groups and a questionable "crisis" mentality interfere with our ability to engage in healthy procedural reform. He agrees with Subrin that two of the biggest problems with our litigation system are the steady judicial movement from case adjudication to case management, and the attempt to eliminate problems through "magic bullets" rather than the more prosaic business of day-by-day adjudication.[23] These problems are compounded by the fact that federal judges often strongly disagree on the worth of specific types of discovery, creating a wildly divergent (and typically unreported) caselaw.[24]

For Stempel, proper resolution will come through increased open, public, *structured* participation by those working in the system or affected by it.[25] Despite his own earlier support of transubstantivity, he recognizes that our current system is "characterized by de facto substance-specific procedure operating under a smokescreen of transubstantively written Civil Rules."[26] He examines Subrin's suggestion of substance-specific procedural rules in detail, concluding that the legal system (specifically, the ABA) should develop and test the presumptive discovery entitlements outlined by Subrin.[27] Further rule reform should come through publicly-constituted rulemaking bodies that consider the good of the entire litigation community.[28]

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20. *Id.* at 45.

21. *Id.* at 46-48.

22. Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem,"* 46 FLA. L. REV. 57 (1994).

23. *Id.* at 61. "[W]hen an adjudicatory system adjudicates," Stempel argues, "settlements will follow as a matter of course." *Id.* at 65.

24. *See id.* at 66.

25. *See id.* at 89.

26. *Id.* at 83.

27. *Id.* part III.C.

28. *Id.* at 96-97.

THE SECOND PANEL

The second panel was provocative both in what it said and what it did not say. The four invited panelists—federal judges Norma Shapiro and William Bertelsman, civil rights litigator Bill Lann Lee, and then-corporate attorney Barrington Parker, Jr.[29]—agreed with some of the earlier criticisms of the rulemaking process itself, emphasizing the problems created by recent reforms which leave a wide variety of procedural rules potentially applicable in every federal courtroom.[30] Paraphrasing an unidentified member of the British Parliament, Shapiro observed: "Reform, reform, reform—Enough of reform! It's bad enough already!"[31]

On the other hand, all four speakers seemed relatively sanguine about the impact of the automatic disclosure rules themselves.[32] Based on their experience, these speakers generally predicted that the new rules will at worst have minimal impact on litigation in the federal courts. At best, the new rules may help parties resolve disputes more quickly and effectively.

In his article, *Changing the Rules of Pretrial Fact Disclosure*,[33] Bertelsman offers evidence to support his belief that the change is beneficial. As a member of the Standing Committee on Practice and Procedure, Bertelsman had serious reservations about the proposed rule, so he applied the rule in his own courtroom to help him assess its practical impact on discovery behavior. After a two-year trial he reported that he had encountered none of the problems that he had expected: no one debated what "with particularity" meant and he did not have a single privilege question. Bertelsman attributes the success of the disclosure requirement to the fact that lawyers were required to meet to exchange information with the knowledge that they would soon have a Rule 16 conference with the judge. This requirement provided considerable impetus to cooperation.[34]

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29. Judge Parker is now a federal district judge for the Southern District of New York.

30. Tape of Program of Sections on Civil Procedure and Litigation, *Recent Changes in the Rules of Pretrial Fact Development: What Do They Disclose About Litigation and the Legal Profession?* held by the Association of American Law Schools (Jan. 7, 1994) (on file with the *Florida Law Review*) [hereinafter Program Tapes].

31. *Id.*

32. For a more detailed discussion of the views of those participants whose remarks are not published in this symposium, see Minna J. Kotkin, *Discovery in the Real World*, 46 FLA. L. REV. 115, 116-18 (1994). Kotkin points out that panelists Lee and Shapiro were not as sanguine about the rules as the others. *Id.* at 117-18.

33. William O. Bertelsman, *The 1994 Annual Meeting of the Association of American Law Schools: Changing the Rules of Pretrial Fact Disclosure*, 46 FLA. L. REV. 105 (1994).

34. In fact, states adopting similar rules have emphasized that the lawyers' meeting is the significant feature of the rule. *See* Robert E. Bartkus, *New Rules Intended to Reduce Friction*, 136 N.J. L.J. 782, 782 (1994) ("Although criticism of the new rules has concentrated on the requirement, set out in Rule 26(a), that makes the 'disclosure' of certain information automatic early in the case (that is, within 10 days after an initial meeting of the attorneys), the real focus of the changes should be viewed as

Underpinning the speakers' sense that the disclosure changes were not terribly important was a more fundamental sense that, in the courtrooms where they practice, the Federal Rules of Civil Procedure simply do not carry much weight. Consider these observations made by three of the panelists:

Bill Lann Lee: "In the Central District [of California] . . . I would say for most situations [we] don't even bother reading the federal rules—[we] just start with the Central District rules. And then each judge has standing orders. . . . And then when you show up with your case, you have to find out if the judge is going to suspend the rule for your particular case or not. So, what sense are these rules, in a sense that they're [a] guide to conduct?"[35]

Barrington Parker, Jr.: "[I'd like to challenge the assumption] that problems such as discovery abuses, litigation costs, and public disaffection with our profession are problems that can be made better if our will and our intellectual effort focuses on developing better rules of conduct and better rules of practice."[36] Instead, he argues, other factors drive change. In New York corporate litigation, discovery changes have been "client-driven": "Clients got tired of paying lawyer bills. . . . You're asked for budgets. You're asked to justify why you're taking these depositions, what do you expect to learn, is there any more efficient way of doing it. . . . [T]here have to be substantial economic incentives to make lawyers change their behavior. . . . And that ought to be the driving force behind rule revision."[37]

Judge Norma Shapiro: "[I want to speak today] to three propositions. One, that at the present time all this doesn't make much difference anyway. Two, we should stop changing the rules. For better or worse, they should stay the way they are for a while. And three, that the problem is civility and the Rules of Civil Procedure are not designed [to] and cannot achieve it. . . . Maybe your students know the Rules of Civil Procedure when they leave your classrooms, but lawyers, in general, don't. . . . Most of the lawyers practice in state court and [they are] surprised when I tell them that their pleading shouldn't refer to the Pennsylvania rules of civil procedure; we have other rules. . . ."[38]

Shapiro continues: "I don't know whether it's [that] the judges don't

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the conference of attorneys—set forth in Rule 26(f)—that must take place at least 14 days before the initial scheduling conference with, in this district, the magistrate judge assigned to supervise pretrial matters in the case.").

35. Program Tapes, *supra* note 30.

36. *Id.*

37. *Id.*

38. *Id.*

know [the rules] or [ ] they don't care. But no [judge] that I knew thought rules were as important as Steve Burbank and I did when I became a judge. I became a judge in 1978, [and] in 1983 we had this mandatory Rule 16 conference. So I went to my senior colleagues, [and asked] 'What are you going to do?' And they said, 'Nothing.' "[39]

Reflecting on the reactions of this group, I find myself wondering how the academic panelists could get so exercised about something that seems so insignificant to the distinguished practitioners on the second panel. Several explanations offer themselves, none entirely sufficient. The point that I want to make here is this: As different as the attitudes may seem, in fact what we have is two different descriptions of a single problem. If the first panelists are correct that we have taken a wrong turn in our attempts to reform discovery, this is exactly what we might have expected as a practical reaction—judges and practitioners find that our national efforts at discovery reform are basically irrelevant to the daily workings of the litigation system.

As both sets of speakers demonstrate, the power and significance of the national rule reform has been diluted in a variety of ways. In particular, reform is weakened through the proliferation of local rules and standing rules, and through the rulemakers' attempts to be all things to all people by allowing local districts to opt out of the rules and by framing the rule requirements in the type of vague language that permits wide latitude for attorney interpretation and judicial discretion. As Subrin accurately observes, "With current procedural uncertainty under elastic rules, amended rules, opted out rules, defaults to rules that no longer exist, local rules, civil justice reform plans, standing orders, new orders, and unpublished orders, perhaps we have pushed chaos theory a bit far."[40]

We are fortunate that the moderator of the second panel, Minna Kotkin, has crystallized her reaction to the second set of panelists in *Discovery in the Real World*.[41] Her reaction to the rules is markedly less sanguine than that of those who preceded her. Her experience of the discovery process in a federal employment discrimination clinic is so radically different from the process described by her fellow panelists that she can only conclude that she practices law in a different world.

In a passage that should be read by every rule reformer and included in every first-year civil procedure book, Kotkin describes the frustratingly slow discovery dance that she engages in with defense counsel in almost every employment discrimination claim she handles. The ritual is maddeningly predictable: while plaintiff turns over information, defense lawyers

39. *Id.*
40. Subrin, *supra* note 16, at 56.
41. Kotkin, *supra* note 32, at 115.

resist discovery, starting with requests for extensions, followed by objections based on claims of relevance and privilege. "Then begins the 'conferring' process," she writes, "often characterized by phone-tag, promises to 'get back to you,' negotiations about confidentiality orders, claims of extensive searches for supposedly nonexistent documents, inability to retrieve information by the category sought, exchanges of letters, and misunderstandings about agreements reached. What is most striking about this process is its indeterminacy. . . ."[42]

The virtual disappearance of written discovery decisions since the 1970s allows defense lawyers to continue their abusive practices: one recent, local, on point decision would do a great deal to resolve the standard relevancy and privilege disputes that she regularly encounters.[43] For Kotkin, the movement towards informal ad-hoc resolution of discovery issues benefits only the defense bar, and mandatory disclosure will do little to address the problem.[44]

Kotkin's article nicely rounds out this symposium: while her experience provides a provocative contrast to some of the views reflected by other members of the second panel, she helps flesh out many of the specific concerns raised by the other speakers. If we are to have effective discovery reform in the future we need to address the fundamental questions posed by these panelists: What are the core values that should be preserved in the regulation of discovery? Equally important: what mix of local and national rulemaking and what mix of substance-specific and substance-blind regulation will do most to further those goals?

42. *Id.* at 121-22.
43. *Id.* at 123.
44. *See id.* at 115-16.