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Stephen N. Subrin

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# FISHING EXPEDITIONS ALLOWED: THE HISTORICAL BACKGROUND OF THE 1938 FEDERAL DISCOVERY RULES†

STEPHEN N. SUBRIN\*

*False and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at the trial. . . . All this is well recognized by the profession, and yet there is a wide-spread fear of liberalizing discovery. Hostility to "fishing expeditions" before trial is a traditional and powerful taboo.*

—Edson R. Sunderland, *Foreword to* GEORGE RAGLAND, JR.,  
DISCOVERY BEFORE TRIAL at iii (1932).

*[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying the opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation . . . .*

—Hickman v. Taylor, 329 U.S. 495, 507 (1947) (Murphy, J.).

Prior to the Federal Rules of Civil Procedure ("Federal Rules"), discovery in civil cases in federal court was severely limited.<sup>1</sup> The Federal Rules discovery provisions dramatically increased the potential for discovery.<sup>2</sup> Authorized by the Rules Enabling Act of 1934 ("Rules Enabling Act" or "Enabling Act"),<sup>3</sup> the Federal Rules became law in 1938.<sup>4</sup> The Rules Enabling Act was preceded by a twenty-three year battle, spearheaded primarily by a committee of the American Bar

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\* Professor, Northeastern University School of Law. A.B., 1958, Harvard University; L.L.B., 1963, Harvard University. I am grateful for the patience, hard work and skill of my students, Rachel Dimitruk and Amber Klinge. My deep thanks go out once again to my colleague, editor and friend, Judy Brown, who adds clarity by ruthless excision. Many of us will be lost if quasi-retirement dulls her pencil or eraser.

<sup>1</sup> See *infra* text accompanying notes 22-39.

<sup>2</sup> See *infra* text accompanying notes 159-218.

<sup>3</sup> Act of June 19, 1934, ch. 651, 48 Stat. 1064.

<sup>4</sup> The Federal Rules of Civil Procedure ("Fed. R. Civ. P.") became law by congressional inaction on September 16, 1938. See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 37-38 (2d ed. 1947).

Association ("ABA").<sup>5</sup> During the Enabling Act debate, discovery was largely ignored.<sup>6</sup> The *Hickman v. Taylor* quotation demonstrates how far attitudes about discovery had changed between 1932 and 1946. This paper addresses the questions of how and why the change occurred, what reservations the Federal Rules drafters and others had about the new discovery provisions and what future procedural reformers can learn from this earlier experience.

## I. THE ABSENCE OF DISCOVERY IN THE ENABLING ACT DEBATE

In 1911, Thomas W. Shelton of Virginia introduced a resolution at an ABA meeting for the creation of an ABA Committee on Uniform Judicial Procedure<sup>7</sup> in support of legislation that would empower the United States Supreme Court to promulgate uniform procedural rules for civil cases in law. The ABA resolution was vigorously opposed for over two decades, especially by Senator Thomas Walsh, a Democratic progressive from Montana.<sup>8</sup> What is perhaps most surprising in the public debate among those who most vigorously fought for and against the Enabling Act is the insignificance of discovery issues.

The proponents of the Enabling Act usually led off with an attack on the Conformity Act of 1872, which required (excepting equity and admiralty cases) that the civil procedure in each federal trial court conform "as near as may be" with that of the state in which the court sat.<sup>9</sup> They argued that many federal procedural statutes and practices justifiably took precedence over conformity to state law,<sup>10</sup> and that as a result it was extremely difficult to ascertain what procedure would apply in any given federal trial court.<sup>11</sup> According to the proponents, this difficulty cost time and money, needlessly caused appeals, and

<sup>5</sup> See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1048-98 (1982).

<sup>6</sup> See *infra* text accompanying notes 7-38. Nonetheless, discussion concerning discovery emerged during the congressional sub-committee hearings in 1938 in which the rules themselves were discussed. See *infra* text accompanying notes 235-38.

<sup>7</sup> 36 REPORT OF THE ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 50 (1911). With regard to equity rules, however, the Supreme Court had authority to promulgate rules for equity cases beginning in 1792. See CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* § 61, at 426 (5th ed. 1994) (citing Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276).

<sup>8</sup> See Burbank, *supra* note 5, at 1048-98; see also Henry P. Chandler, *Some Major Advances in the Federal Judicial System 1922-1947*, 31 F.R.D. 307, 479-85 (1963) (providing the story for this battle).

<sup>9</sup> Act of June 1, 1872, ch. 255, §§ 5-6, 17 Stat. 196, 197.

<sup>10</sup> See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2002 (1989).

<sup>11</sup> See Thomas Wall Shelton, *Uniform Judicial Procedure—Let Congress Set the Supreme Court*

forced clients, particularly interstate corporations, to retain specialized lawyers in each state.<sup>12</sup>

The proponents suggested that when the Supreme Court was empowered to make procedural rules for all federal trial courts, the states would adopt voluntarily this model for their own procedure;<sup>13</sup> hence there would be both national federal and intra-state uniformity. According to Shelton and other proponents, federal judges justifiably did not conform procedure to that of the states in which they sat, because frequently state procedures were flawed.<sup>14</sup> For years there had been complaints that both common law procedure and code procedure (patterned on the 1848 New York Field Code ("Field Code")) were too technical and interfered with cases being decided on the merits.<sup>15</sup> The proponents especially railed against the thousands of amendments to the Field Code that they blamed on the politics and inexperience of the New York state legislature. They claimed that the hands of judges were tied by rigid procedures and urged simple, flexible rules that would give the judges discretion to do justice in the individual case. None of these arguments mentioned the need to reform discovery<sup>16</sup> nor did the major opponent to the uniform federal rule movement, Senator Walsh, talk about discovery in his many speeches and writings against the Enabling Act.<sup>17</sup>

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*Free*, 73 CENT. L.J. 319, 320-21 (1911); see also Thomas Wall Shelton, *Let Congress Set the Supreme Court Free*, 75 CENT. L.J. 126, 126-27 (1912). Shelton's 1911 ABA resolution began: "Whereas, Section 914 of the Revised Statutes [the Conformity Act of 1872] has utterly failed to bring about a general uniformity in federal and state proceedings in civil cases . . ." 37 REPORT OF THE ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 434 (1912).

<sup>12</sup> See Subrin, *supra* note 10, at 2002-03.

<sup>13</sup> See *Report of the Committee on Uniform Judicial Procedure*, 6 A.B.A. J. 509, 515-16 (1920).

<sup>14</sup> As part of this argument in favor of the Enabling Act, a 1917 Senate Report started with criticism of the Conformity Act and ended by stating that the "Supreme Court will adopt rules of so simple and workable a character that they will constitute models for the various states . . ." S. REP. NO. 892, at 2, 6 (1917). The expertise and prestige of the United States Supreme Court was needed to promulgate modern, correlated, simple, flexible, uniform rules. See Subrin, *supra* note 10, at 2002-06; see also Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 956-61 (1987) (providing more complete descriptions of this argument).

<sup>15</sup> See CHARLES E. CLARR, *HANDBOOK OF THE LAW OF CODE PLEADING* 31, 34-35 (1928).

<sup>16</sup> They also did not mention other specific aspects of procedure. They did, however, speak positively about equity procedure. Perhaps one could consider their general talk of the advantages of equity procedure as implying liberal pleading standards, broader joinder of parties and issues, and enlarged discovery. See Subrin, *supra* note 14, at 956-61.

<sup>17</sup> Senator Thomas Walsh argued that equity procedure was by no means as simple and ascertainable as the proponents contended. See, e.g., *Simplification of Judicial Procedure: Hearings Pursuant to S. Res. 522 Before the Subcomm. of the Sen. Comm. on the Judiciary*, 64th Cong. 12 (1915) (statements of Thomas Walsh). See also Thomas J. Walsh, *Reform of Federal Procedure*, Address Delivered at a Meeting of the Tri-State Bar Association at Texarkana, Ark-Tex. (Apr. 23,

Walsh, selected by Franklin Delano Roosevelt to be his first Attorney General, died on his way to FDR's inauguration. This paved the way for Homer Cummings to become Attorney General, and it was Cummings who later convinced FDR to support the Enabling Act and who steered it through Congress.<sup>18</sup> Ironically, what had been a reform sponsored largely by conservatives, such as William Howard Taft and the ABA, and opposed by progressives and populists, such as Senator Walsh and the Democrats on the Senate Judiciary Committee who followed his lead, was ultimately passed as New Deal legislation.<sup>19</sup>

There are many reasons why discovery was not part of the debate over the Enabling Act. Most of the discussion related to overriding questions of politics, power and the needs of the profession.<sup>20</sup> The major proponents of the Enabling Act were largely politicians and propagandists, not procedural scholars. It is unlikely that they had a clear view of the exact procedures that would result from their efforts, although there were many hints that they were leaning to a procedure largely based on equity.<sup>21</sup> Moreover, specificity at this early stage may well have provoked the opposition of those lawyers and judges who had mastered the procedures of their home states.

## II. ANTI-DISCOVERY SENTIMENT AND THE LIMITED ROLE OF DISCOVERY PRIOR TO THE TWENTIETH CENTURY

Historically, discovery had been extremely limited in both England and the United States. At early common law, the litigation process

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1926), in S. Doc. No. 69-105, at 1-2 (1926). The major strands of the Walsh opposition argued that the Conformity Act worked better than the proponents painted; that it was usually quite easy to know what procedure applied in any given federal court; that while uniform federal rules would make it easier for the relatively few lawyers who practiced extensively in federal court, it would be much harder for the run-of-the-mill lawyer who was very familiar with state procedure but would only occasionally practice in federal court; that the Field Code worked very well in Walsh's state of Montana and in other states, and that any new procedure would be more complicated and subject to years of interpretation and confusion; that unlike England, the United States was too large and had too many regions for one national procedure; that the legislature in a democracy was a more appropriate body for drafting procedural rules; that the Enabling Act might be an unconstitutional delegation from the legislature to the courts; and that the Supreme Court members, whom Walsh labeled conservative, recluses and distant from the work of trial courts, were a particularly ill-suited group to do the tedious and practical work of drafting procedural rules. See Subrin, *supra* note 10, at 2007-09; see also Subrin, *supra* note 14, at 996-98 (providing a longer summary of the Walsh position).

<sup>18</sup> See Burbank, *supra* note 5, at 1095-98; see also Chandler, *supra* note 8, at 483-85.

<sup>19</sup> See Subrin, *supra* note 14, at 969.

<sup>20</sup> There was also debate, as Professor Stephen Burbank urged 15 years ago, concerning the substantive rules beyond the power of the Supreme Court to promulgate, not as a question of federalism but as a crucial separation of powers issue. See Burbank, *supra* note 5, at 1106-07.

<sup>21</sup> See Subrin, *supra* note 14, at 956-73.

was looked at not as a rational quest for truth, but rather a method by which society could determine which side God took to be truthful or just.<sup>22</sup> Discovery did not make sense in a world of ordeal, battle and oath-takers. Initially, the jurors themselves were people in the community who had knowledge of the facts.<sup>23</sup> Nor was there much need for discovery at the later period of the common law when the pleadings assumed such a critical role. The major purpose of single issue pleading was to reduce the case to a demurred issue that could be decided legally or to a limited question of fact.<sup>24</sup>

There were other reasons why discovery was so limited. The English barristers were centered in London. Travel was difficult. It would not have been easy for them to have participated in discovery in the counties where the assizes were held.<sup>25</sup> In addition, in both England and the United States, after the Puritan sense of community dwindled, there was a deep belief in the independence and self-sufficiency of each citizen. Indeed, the adversary system exemplified the "each person for himself" mentality. The idea that one should help opponents prepare their case was distasteful.<sup>26</sup> There was a long-standing and widely-held belief that if either side could discover the factual position of the opponent, the discovering side would perjure testimony.<sup>27</sup> Perhaps most importantly, at common law a party could neither take the stand nor force the opposing party to do so.<sup>28</sup> Because the most natural person to discover would be the opposing party, and because his or her testimony was inadmissible in law cases, discovery made little sense.<sup>29</sup>

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<sup>22</sup> See *id.* at 916.

<sup>23</sup> It was only later that jurors were to be ignorant of the facts in dispute prior to hearing testimony. See FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* § 7.2 (3d ed. 1985). <sup>24</sup> See Subrin, *supra* note 14, at 916.

<sup>25</sup> See generally WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (7th ed. 1956); THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956).

<sup>26</sup> The continuation of the depth of this resistance can be seen in the almost universal attorney opposition to mandatory discovery under FED R. CIV. P. 26(a) (amended 1993). See, e.g., Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 28–30 (1992); Rochelle C. Dreyfuss, *The What and Why of the New Discovery Rules*, 46 FLA. L. REV. 9, 19–21 (1994).

<sup>27</sup> See Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 866–67 (1933) (citing JOHN WIGRAM, *WIGRAM ON DISCOVERY* § 347 (1842)).

<sup>28</sup> See ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 207 (1952).

<sup>29</sup> See *id.* Millar asserted that it was the party's disqualification that "lent to the chancery procedure of discovery its commanding importance." *Id.* Moreover, unlike the law courts, which did not assume that they had power over non-parties except for the limited purpose of compelling discovery at trial, equity courts did have direct power over the defendant's body. That is one

The biggest systemic procedural change in the United States, after the adoption of common law systems, was the Field Code. Copied in twenty-seven states,<sup>30</sup> the Field Code engaged in some liberalization of discovery.<sup>31</sup> The Field Code permitted depositions of the opposing party: "In contrast to the Federal Rules [,however], the Code deposition was in lieu of calling the adverse party at the trial, and subject to 'the same rules of examination' as at trial. A pretrial deposition . . . was to be before a judge, who would rule on evidence objections."<sup>32</sup>

David Dudley Field distrusted authority of any kind, particularly the unelected judiciary. He despised equity, particularly its discretionary aspects, and its implicit power over the individual. As I have written elsewhere, "Field wanted to reduce the amount of documentation. Making equity trials like law trials, with testimony in open court, was a critical step in achieving the merger of law and equity. The Field Code eliminated equitable bills of discovery, and interrogatories as part of the equitable bill . . . . There were no interrogatory provisions in the Field Code."<sup>33</sup>

Unlike the drafters of the Federal Rules, Field believed that precise and verified pleadings should be used to eliminate legal and factual issues and to focus the controversy.<sup>34</sup> Field was a true nineteenth century liberal, in the sense that his greatest political goal was that each individual should be left alone and that government intervention should be kept at a minimum:<sup>35</sup> "It is not the business of government to take care of the people. The people must and will take care of themselves. This is the law of nature, which is the law of God."<sup>36</sup> It is difficult to know whether Field would have been more appalled by

reason why precursors to modern discovery—written interrogatories and depositions of parties—had their birth in equity. See JAMES & HAZARD, *supra* note 23, at 223–24.

<sup>30</sup> See CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* 14–15, 88–89 (1897).

<sup>31</sup> See GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 17–18, 334 (1932).

<sup>32</sup> Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 *LAW & HIST. REV.* 311, 333 (1988) (citations omitted). The Field Code had restrictive provisions concerning the inspection and copying of papers in the possession or control of the opposition, but the only penalty for non-compliance was that the court could, if it wanted, on motion, "exclude the paper from being given in evidence." *Id.*

<sup>33</sup> *Id.* at 332.

<sup>34</sup> See *id.* at 328–31; see also FINAL REPORT OF THE (NEW YORK STATE) PRACTICE COMMISSION, reprinted in 1 *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 290, 302–03 (A.P. Sprague ed. 1884).

<sup>35</sup> See Subrin, *supra* note 32, 314–15, 323–27.

<sup>36</sup> David Dudley Field, *Municipal Officers, Address to the Young Men's Democratic Club of New York* (Mar. 13, 1879), in 2 *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 177, 183 (A.P. Sprague ed. 1884).

expansive discovery that invaded the privacy of citizens or by the expansive role of the judiciary in overseeing and managing litigation.

Field's libertarian views explain the pejorative power of the term "fishing expedition":<sup>37</sup> to permit fishing in an opponent's mind or files, under the auspices of the judiciary, was an outrage to those who opposed expanded discovery. In 1932, in his influential study of discovery practices, George Ragland explained that "[t]he epithet 'fishing excursion for the adverse party's evidence' has been employed against the taking of depositions for discovery in every state where it has been attempted, first for the purpose of preventing the examination entirely, and failing of this, for the purpose of restricting its scope."<sup>38</sup> In his foreword to Ragland's book, *Discovery Before Trial*, Edson Sunderland stated that proponents of expanded discovery would have to overcome the "fishing expedition" argument and image:

It is probable that no procedural process offers greater opportunities for increasing the efficiency of the administration of justice than that of discovery before trial. Much of the delay in the preparation of a case, most of the lost effort in the course of the trial, and a large part of the uncertainty in the outcome, result from the want of information on the part of litigants and their counsel as to the real nature of the respective claims and the facts upon which they rest.

False and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at the trial. Under such a system the merits of controversies are imperfectly understood by the parties, are inadequately presented to the courts, and too often fail to exert a controlling influence upon the final judgment.

All this is well recognized by the profession, and yet there is a wide-spread fear of liberalizing discovery. Hostility to "fishing expeditions" before trial is a traditional and powerful taboo. To overcome its subtle influence requires more than logic and learning. Experience alone can effectively meet it.<sup>39</sup>

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<sup>37</sup> See, e.g., RAGLAND, *supra* note 31, at 36, 305 (reversing an earlier ruling, a Kansas court in the late nineteenth century forbade the use of deposition procedure for what it termed "fishing expeditions") (citations omitted).

<sup>38</sup> *Id.* at 120.

<sup>39</sup> Edson R. Sunderland, *Foreword to* GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* at iii (1932).



### III. DISCOVERY IN THE FEDERAL COURTS PRIOR TO THE FEDERAL RULES

In 1935, Edson Sunderland started drafting what became Rules 26 to 37 of the Federal Rules.<sup>40</sup> Up to that time, extremely limited discovery took place in both law and equity cases in the federal courts. For law cases, the sole discovery (except the motion for a bill of particulars, which was considered a pleading device, and an equitable bill for discovery in support of a law case, a cumbersome and infrequently used device)<sup>41</sup> was provided for in two federal statutes dealing with depositions.<sup>42</sup> The two statutes also applied to equity cases.<sup>43</sup> The first statute, which was contained in 28 U.S.C. § 639, dealt with depositions *de bene esse*, or conditional depositions. It permitted depositions only in the following circumstances: "when the witness lived more than one hundred miles from the place of trial, or was on a voyage at sea, or about to go out of the United States, or when the witness was aged or infirm."<sup>44</sup> The second statute, then called 28 U.S.C. § 644, covered depositions under a *dedimus potestatem*,<sup>45</sup> which historically had been a writ or commission out of chancery empowering one to do a specific act, such as administering an oath to a defendant and recording defendant's answers to questions.<sup>46</sup> Section 644 required that such a deposition could be taken only in cases where it was "necessary to prevent a failure or delay of justice."<sup>47</sup>

To warrant the taking of such a deposition it was necessary to show 1) that the issue had been joined in a pending action,

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<sup>40</sup> See Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 7, 10 (1959). Sunderland's initial draft covered what came to be adopted as Rules 26-35. See *id.* at 10.

<sup>41</sup> See 6 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 26 App.100 (3d ed. 1997). One could use an equitable bill of discovery in aid of a legal action, but "there was a conflict of opinion as to whether a party could obtain discovery only of evidence that was relevant to the claim or defense or whether the party could obtain discovery of evidence which was relevant to any issue in dispute." *Id.* Moreover, "[t]he bill of discovery was a cumbersome proceeding. The courts were constantly burdened, with applications to settle the form, scope, and propriety of interrogatories." *Id.* (citing a Learned Hand opinion (*Pressed Steel Car Co. v. Union Pac. R.R. Co.*, 241 F. 964, 967 (S.D.N.Y. 1917)) (stating that "Judge Learned Hand pointed out the wastefulness of this procedure").

<sup>42</sup> See Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 19 (1938); see also 6 MOORE, *supra* note 41, § 26 App.100.

<sup>43</sup> See Sunderland, *supra* note 42, at 19.

<sup>44</sup> *Id.*

<sup>45</sup> See *id.*

<sup>46</sup> See BLACK'S LAW DICTIONARY 413 (6th ed. 1990).

<sup>47</sup> Sunderland, *supra* note 42, at 19.

2) that a *dedimus* was necessary to prevent a failure or delay of justice, 3) that the witness was beyond the reach of the court's process, 4) that the testimony could not be taken *de bene esse* pursuant to notice, and 5) that the application was made in good faith and not merely for discovery purposes.<sup>48</sup>

The granting of a *dedimus potestatem* was discretionary and reversible only for clear abuse.<sup>49</sup>

Both of these statutes seemed designed to obtain testimony for trial under circumstances when a witness was likely to be absent, or when critical evidence was needed for trial or to complete a pleading otherwise unobtainable, rather than to serve as pretrial discovery devices designed to ferret out information or to lock in a particular version of the facts. One could use a subpoena *duces tecum* when taking a deposition in an attempt to inspect documents, but this would work only in the same limited circumstances that a deposition could be taken.<sup>50</sup>

There were two additional rules for equity cases.<sup>51</sup> First, Federal Equity Rule 47, promulgated in 1912, stated that "[t]he court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses . . ."<sup>52</sup> The language "departing from the general rule" is a reference to Federal Equity Rule 46 that "[i]n all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules."<sup>53</sup> Despite the limitations in Rule 47, some courts evidently were willing to "in effect treat most equity cases as 'exceptional' if the counsel for the litigants agree to such procedure."<sup>54</sup>

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<sup>48</sup> 6 MOORE, *supra* note 41, § 26 App.100 (citations omitted).

<sup>49</sup> See *id.* § 26 App.100 n.11 (citations omitted).

<sup>50</sup> See Sunderland, *supra* note 42, at 20.

<sup>51</sup> See *id.*

<sup>52</sup> FED. EQ. R. 47 (1912), in GEORGE FREDERICK RUSH, EQUITY PLEADING AND PRACTICE 221 (1913).

<sup>53</sup> FED. EQ. R. 46, in RUSH, *supra* note 52, at 220-21. Under the Federal Equity Rules of 1842, equity cases in federal court had previously been decided on the basis of documents and written testimony. See Robert H. Talley, *The New and Old Federal Equity Rules Compared*, 18 VA. L. REG. 663, 667 (1913).

<sup>54</sup> Wallace R. Lane, *Federal Equity Rules*, 35 HARV. L. REV. 276, 291 (1921-1922). According to Lane, "[i]n some districts the courts strictly enforce the rule that testimony of all witnesses within the reach of subpoenas be given in open court, as the judges indicate that they prefer to hear and see the witnesses on the stand . . ." *Id.* at 291-92. Lane's footnote 66 states that "Judge Rose (Maryland), in order to hear witnesses orally, occasionally sits in advance of the trial to take the evidence of some witness who may not be available at the time of trial." *Id.* at 292 n.66.

Sunderland believed that Rule 47, like the two deposition statutes referred to earlier, could not be viewed rightly as a discovery device. "The purpose here was not discovery but obtaining proof."<sup>55</sup>

To Sunderland, the second rule—Federal Equity Rule 58, which set forth three types of discovery in equity cases—was "the only provision in the entire federal system intended for discovery."<sup>56</sup> First, Rule 58 allowed a party to file interrogatories to opposing parties for the discovery of "facts and documents material to the support or defense of the cause . . . ."<sup>57</sup> Second, a party, by motion allowed followed by a judicial order, was permitted "to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary."<sup>58</sup> Both of these provisions were limited by judicial interpretation to ascertaining facts or documents relating to the seeking party's own case but not the case of the adversary. According to Sunderland, these two types of discovery were "good for attack but not for defense. It is nothing, in fact, but the discovery available under the old chancery bill of discovery. The discovery most needed is denied, that least needed is permitted."<sup>59</sup>

Last, Rule 58 permitted a party to seek a written admission from the opponent in advance of trial of "the execution or genuineness of any document, letter or other writing . . . ."<sup>60</sup> Such requests for admissions only went to writings, as opposed to facts generally.<sup>61</sup> Moreover, one would have to know in advance about the writing to seek the admission, and, as we have seen, there was only limited discovery as to this.<sup>62</sup>

Some evidence suggests that the Supreme Court did not take advantage of opportunities to expand discovery in federal courts when it might have done so legitimately. For example, the Judiciary Act of 1789 provided that:

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<sup>55</sup> Sunderland, *supra* note 42, at 20.

<sup>56</sup> *Id.*

<sup>57</sup> FED. EQ. R. 58, in RUSH, *supra* note 52, at 224.

<sup>58</sup> *Id.*, in RUSH, *supra* note 52, at 225.

<sup>59</sup> Sunderland, *supra* note 42, at 21. Also, according to Equity Rule 58, "the party seeking an inspection of documents was required to obtain an admission from the adverse party that the documents were in his possession, custody, or control before the court would make an order for their production." 7 MOORE, *supra* note 41, § 34 App.100[2].

<sup>60</sup> FED. EQ. R. 58, in RUSH, *supra* note 52, at 225.

<sup>61</sup> See Sunderland, *supra* note 42, at 21.

<sup>62</sup> See *id.*

In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.<sup>63</sup>

The trial courts disagreed as to whether this statute permitted inspection of documents prior to trial, or only at trial. *Moore's Federal Practice* lists four federal district court cases, including one affirmed by the United States Court of Appeals for the Fourth Circuit, holding that "the court had the power to order the production of books and papers before trial as well as at the trial."<sup>64</sup> But in 1911, the Supreme Court held otherwise, deciding that the statute covered only production at trial.<sup>65</sup>

As we will soon explore, many states had broader discovery provisions than the federal system. There was the potential for the Conformity Act of 1872 to permit, if not require, federal courts to apply the more liberal state discovery provisions.<sup>66</sup> In 1885, the Supreme Court held that a New York statute that permitted the deposition of a party under circumstances broader than those permitted under the federal statutes should not apply in federal court.<sup>67</sup> Many federal courts held that the 1789 federal statute that permitted parties to force their opponents to produce books and writings at trial, and that did not apply to pretrial production, nonetheless "preempt[ed] the field so as to exclude the application in the federal courts of state laws that permitted the inspection of documents before trial."<sup>68</sup> According to Sunderland, "[t]here was no recourse to state statutes for discovery under the conformity act, because it was held that the federal statutes provided a complete system of deposition procedure, and the conformity act was therefore not applicable."<sup>69</sup>

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<sup>63</sup> 7 MOORE, *supra* note 41, § 34 App.100[1]. This was last codified at 28 U.S.C. § 636 (1946). According to Moore, this "was superseded by the Rules [FED. R. CIV. P.] and was formally repealed by the Judicial Code of 1948." *Id.*

<sup>64</sup> 7 MOORE, *supra* note 41, § 34 App.100[1] & n.1.

<sup>65</sup> See *Carpenter v. Winn*, 221 U.S. 533, 543-46 (1911).

<sup>66</sup> Act of June 1, 1872, ch. 255, §§ 5-6, 17 Stat. 196, 197.

<sup>67</sup> See *Ex Parte Fisk*, 113 U.S. 713, 720-25 (1885).

<sup>68</sup> 7 MOORE, *supra* note 41, § 34 App.100[1].

<sup>69</sup> Sunderland, *supra* note 42, at 20.

#### IV. GEORGE RAGLAND, JR. AND STATE DISCOVERY EXPERIMENTATION: A PRO-DISCOVERY OUTLOOK WITH HINTS OF DISCOVERY ABUSE

In 1932, three years before Sunderland started drafting the discovery rules, George Ragland, Jr. published his influential book *Discovery Before Trial*.<sup>70</sup> Ragland had been a Graduate Fellow and Research Associate at the University of Michigan, where Sunderland taught.<sup>71</sup> According to Sunderland, Ragland's "researches included practically everything to be found in print on the subject."<sup>72</sup> Ragland also compiled in an appendix the "statutory provisions on discovery" of every state, as well as the federal provisions and those of England, Ontario and Quebec.<sup>73</sup> The book ends with two important chapters. The first provides drafts for statutory provisions that would permit, as a matter of right, oral depositions of all parties and witnesses, and that would permit a party to require the opposition to disclose under oath "all the documents which are or have been in his possession or power, relating to any matters in question in the action."<sup>74</sup> The final chapter, entitled the "Contribution of Discovery to the General Administration of Justice," enthusiastically supports the expanded use of discovery. Charles Clark wrote a laudatory review of the book,<sup>75</sup> and the book was frequently cited by Clark, Sunderland and others as supportive of expanded discovery.<sup>76</sup>

Ragland's book provides an excellent window for viewing how far experimentation on expanded discovery had gone in the country and, perhaps more surprisingly, how little of the country had been influenced up to that time. It also reveals warning signals about discovery that Ragland significantly underplayed in his conclusions. The Judicial

<sup>70</sup> RAGLAND, *supra* note 31, at title page.

<sup>71</sup> *See id.* at iii-iv.

<sup>72</sup> *See id.* at iv (Foreword by Edson R. Sunderland). Ragland also conducted field studies in 14 jurisdictions (12 states and Ontario and Quebec) "for the purpose of ascertaining the experience of the profession with each type of device which is being used . . ." *Id.* at v (Preface by Ragland). He interviewed judges, lawyers and court officials ("hundreds" of them, according to Sunderland). *See id.* at iv, v. Sunderland described the book as representing "an extensive survey of the current practice regarding this important procedural device, in the light of its history and its logical theory." *Id.* at iv.

<sup>73</sup> *See id.* at 267; *see generally id.* at 267-391.

<sup>74</sup> *Id.* at 248. Ragland added: "Production for inspection of documents which are thus disclosed may be required from the party who has possession or control of them by notice to produce." *Id.* at 249.

<sup>75</sup> *See generally* Charles E. Clark, Book Reviews, 42 YALE L.J. 988 (1933) (reviewing GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* (1932)).

<sup>76</sup> *See, e.g., infra* note 136.

Conference's Advisory Committee on Civil Rules ("Committee" or "Advisory Committee") drafters, especially in their public pronouncements, also tended to disregard or underplay those signals.

Probably the most important change made by the Federal Rules with respect to federal discovery was to permit parties to take oral depositions of both parties and witnesses as a matter of right; moreover, such depositions would not be taken in the presence of a judicial officer ruling on objections or deciding at the time on the scope of the questioning. In his book, Ragland pointed to only seven states in which oral discovery was generally permitted from witnesses as well as parties: Ohio, Kentucky, New Hampshire, Missouri, Nebraska, Indiana and Texas.<sup>77</sup> In four of those states (including New Hampshire and Missouri, where depositions were most widespread), the deposition was before an "officer who is empowered to compel answers and to decide objections."<sup>78</sup> Moreover, in Missouri cities of greater than 50,000 inhabitants, a party served with a notice of his or her deposition could "apply to the court for the appointment of a special commissioner to supervise the examination."<sup>79</sup> In Indiana, Kentucky and Texas, "if objections arise which cannot be decided among counsel, the examination is adjourned until a ruling can be obtained from the trial court."<sup>80</sup> Piecing together the evidence in different parts of Ragland's book shows that in each of the seven states there was either an officer at the deposition who could rule on objections or the ability to adjourn the deposition when there was a dispute in order to go to a judge. Ragland wrote that:

Access to the judge, especially in larger cities, often is difficult . . . . In some of the smaller towns in Indiana, Kentucky and elsewhere, local lawyers sometimes take advantage of lawyers from the city who have come to conduct an examination for discovery. Knowing that their opponents are anxious to finish

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<sup>77</sup> See RAGLAND, *supra* note 31, at 51. Ragland noted that oral discovery was also permitted in a few other states where it had not "been used to any *considerable* extent." *Id.* at 50 (emphasis added). He also found that the taking of depositions of witnesses for purposes of discovery was more widespread in New Hampshire and Missouri than anywhere else. See *id.* at 51. He provided several reasons why the taking of depositions of witnesses is so rare even in those relatively few states where they were allowed: lawyers can usually "get voluntary statements from witnesses," *id.*; fear of "supplying ammunition for his adversary," *id.* at 52; fear of being bound by witness deposition testimony (although Ragland cites Wigmore to show that this is an unjustified fear), see *id.* at 52-53; and the "expense involved" in taking depositions, *id.* at 53.

<sup>78</sup> *Id.* at 104.

<sup>79</sup> *Id.* at 107-08.

<sup>80</sup> *Id.* at 97.

the examination and return to the city and are not apt to wait over until a rather tardy judge compels an answer, they instruct their clients to refuse to answer questions which clearly are proper.<sup>81</sup>

In addition, many states provided that adverse or opposite parties could be examined or interrogated for discovery.<sup>82</sup> New York allowed for depositions of one's own party or "any other party."<sup>83</sup> According to Ragland, "New York has the most elaborate statutory provisions for discovery before trial which exist in any of the various states, yet the actual practice thereunder is very illiberal and unsatisfactory."<sup>84</sup> One sees in New York in the pre-Federal Rules period both how restrictive some state courts were with respect to the limited discovery allowed in the state and how adversarial lawyers could be in preventing disclosure and in pushing the outer limits of permissible discovery.

Originally one could depose a party in New York only upon court order.<sup>85</sup> This was changed to depositions on notice, but with the right to move to vacate or modify the notice.<sup>86</sup> But then New York lawyers began filing motions to vacate or modify "in nearly every important case, where a notice is given, and with the practice growing of applying to the court, in the first instance . . . ."<sup>87</sup> The notice had to include, among other things, "[t]he matters upon which such person or persons are to be examined."<sup>88</sup> According to Ragland, "[t]he requirement that the subject matter of the examination be stated has caused more difficulty than any other."<sup>89</sup> The courts held that one could not add additional matters by subsequent notices so long as the first notice was

<sup>81</sup> *Id.* at 100-01.

<sup>82</sup> See RAGLAND, *supra* note 31, at 37.

<sup>83</sup> *Id.* at 37 (citing New York Civil Practice Act § 288 and *Kirman v. Fries*, 220 N.Y.S. 430 (1927)). Ragland wrote about New York's discovery practices in great detail, which was very helpful because this was the most populated state; the Chairman of the Advisory Committee, William Mitchell, practiced law there and many of the committee had New York connections; and New York lawyers were mentioned as particularly contentious in later discussions about discovery. See, e.g., William D. Mitchell, *Some of the Problems Confronting the Advisory Committee in Recent Months—Commencement of Actions—Effect of Findings of Fact in Cases Tried by Court Instead of Jury, Etc.*, 23 A.B.A. J. 966, 969 (1937). Of all the states, Ragland's Index referenced New York and Wisconsin the most. See RAGLAND, *supra* note 31, at 400, 406.

<sup>84</sup> *Id.* at 337.

<sup>85</sup> See *id.* at 67.

<sup>86</sup> See *id.*

<sup>87</sup> RAGLAND, *supra* note 31, at 68 (citations omitted).

<sup>88</sup> *Id.* at 69 (citing New York Civil Practice Act § 290; Rules of Civil Practice, Rule 121).

<sup>89</sup> *Id.* at 70. There was disagreement among the departments as to the degree of specificity required, and the Act was amended in 1923 to substitute the word "matters" for the word "issues." See *id.*

outstanding, and that a party could not serve successive notices or applications for orders while others were outstanding.<sup>90</sup>

Moreover, one department of the Appellate Division limited discovery in automobile negligence cases to ownership and control of the vehicle, denying discovery with respect to the facts of liability and damages.<sup>91</sup> Ragland reported similar restrictions in such tort actions as deceit, libel and malpractice.<sup>92</sup> In New York, a party could have discovery "only as to the issues of which he has the affirmative [defense] under the pleadings."<sup>93</sup> According to Ragland, "[s]ince the defendant can have no discovery except on his affirmative defenses, he often puts in fictitious defenses for the sole purpose of securing an examination of his adversary. Indeed several New York lawyers pointed to this as one of the chief defects in the present system."<sup>94</sup>

In addition to expanding oral depositions to all witnesses, the Federal Rules permitted a party to inspect property of another party and to inspect and copy other parties' documents. The original rule required the discoverer to move for an order "showing good cause therefor" and limited the right to inspect and copy documents to "evidence material to any matter involved in the action."<sup>95</sup> Once again, Ragland used state rules to show limitations on this type of discovery: "Insufficient remedy is afforded the party who is unable to specify particular documents in the possession of his adversary and yet desires to ascertain what documents are in his possession."<sup>96</sup> Recall that Missouri and New Hampshire were the states with the most widespread use of oral depositions. In Missouri, a party could not be forced to produce books and papers for inspection if a deposition was before either a notary or commissioner.<sup>97</sup> In New Hampshire, the lawyers disagreed whether a party deponent had to bring documents with him.<sup>98</sup> There was a similar disagreement in New York.<sup>99</sup> Ragland listed

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<sup>90</sup> See *id.*

<sup>91</sup> See *id.* at 30, 127-28.

<sup>92</sup> RAGLAND, *supra* note 31, at 30; see also *id.* at 129 (and the citations therein).

<sup>93</sup> *Id.* at 32; see also *id.* at 102.

<sup>94</sup> *Id.* at 132.

<sup>95</sup> FED. R. CIV. P. 34, 308 U.S. 645 (1938). Subsequent amendments both eliminated the need to obtain a court order and broadened the scope of what could be sought.

<sup>96</sup> RAGLAND, *supra* note 31, at 179. If a party could ascertain what documents he wanted to inspect, Ragland noted that a party could conduct limited discovery, depending on the jurisdiction, either in conjunction with a deposition or by a separate statutory provision for the inspection of documents. See *id.* at 183.

<sup>97</sup> See *id.* at 184-85.

<sup>98</sup> See *id.* at 185.

<sup>99</sup> See *id.* at 185-86.



twenty-nine states in which one could apply for an order that a party give inspection and permit copying of documents.<sup>100</sup> In six other states, one was required to make a demand on the adverse party and, upon refusal, could move for an order.<sup>101</sup> Seven other states required a petition or application in writing.<sup>102</sup>

Ragland reported several state statutes that provided for inspection of property but that "are rather limited in scope."<sup>103</sup> As for notices to admit facts, the only jurisdictions Ragland cited were England, Massachusetts, Michigan, New York, New Jersey and Wisconsin.<sup>104</sup> The courts in these states were in disagreement as to what types of facts were the proper subject for a request. A New York court "criticized the practice of covering the whole field of evidence under notices to admit," and thought that a notice with 226 separately numbered paragraphs was excessive.<sup>105</sup> Ragland observed that:

Some Wisconsin lawyers are using the device in exactly the same fashion which the New York court has criticized. They call upon their opponents to admit practically every item of evidence. Several cases were found in which as many as one hundred specific admissions had been requested. The chief use of admission procedure in such a form is as a tactical weapon, rather than as a means of eliminating undisputed items of proof.<sup>106</sup>

A discovery-skeptic both in the 1930s and today might share the concerns expressed during the Advisory Committee drafting process or in the debates about the Federal Rules:<sup>107</sup> that expanded discovery provisions, combined with the adversarial nature of lawyers and their clients and the natural desire of attorneys to earn a good living, would result in extreme attempts to resist disclosure and to discover every shred of potential evidence; that the actual utilization of discovery or

<sup>100</sup> See *id.* at 188.

<sup>101</sup> See RAGLAND, *supra* note 31, at 188.

<sup>102</sup> See *id.* Ragland stated that a "[s]pecial provision is made in many jurisdictions for inspection of documents which are referred to in the pleadings." *Id.*

<sup>103</sup> *Id.* at 190. He also noted that courts were "rather equally divided" on their inherent power to order a plaintiff to submit to a physical examination prior to trial, but that there was "one line of authority, headed by the United States Supreme Court, which has held quite flatly that courts have no such power." *Id.* at 191 (citing, among other cases, *Railway Co. v. Botsford*, 141 U.S. 250 (1890)).

<sup>104</sup> See *id.* at 195.

<sup>105</sup> *Id.* at 201.

<sup>106</sup> RAGLAND, *supra* note 31, at 201 (citations omitted).

<sup>107</sup> See *infra* text accompanying notes 159-218.

even the threat thereof would dramatically influence what cases are brought and how they are settled in ways that may not reflect the true merits of a lawsuit or potential lawsuit; that expansive discovery provisions would require courts to spend significant time ruling on discovery motions; and that expanded discovery would diminish the use and importance of trial in open court.

I have left Ragland's description of written interrogatory practice to the end because this is the place that a discovery-skeptic would have found the most cause for alarm on most of these counts. Ragland listed ten states with rules or statutes that permitted written interrogatories.<sup>108</sup> He wrote that "[o]ne of the most troublesome problems in some American jurisdictions, notably in Massachusetts, has been whether a party may file as many questions as he chooses to."<sup>109</sup> He related that in Massachusetts prior to 1929, when a thirty number limit was introduced,<sup>110</sup> there

was no limit to the number of interrogatories that might be filed. In one case, 2258 interrogatories were filed. Gradually there came into use mimeographed and printed forms which contained two, three and four hundred interrogatories. These questions were not prepared with reference to the particular case in which they were to be used, but were stock forms entirely. Their most widespread use was in automobile accident litigation. One of the purposes in using so many questions was to put each principal question in so many forms that evasion would be difficult.<sup>111</sup>

Ragland cited this justification of the form interrogatory practice from an insurance company brief in a 1929 Massachusetts case: "where plaintiffs' lawyers flood the courts with thousands of cases where merit does not exist, or is very doubtful, there is no sense or reason for the defendant trying to get up a special set of interrogatories where the same principles are involved . . ."<sup>112</sup> Ragland reported that interrogatory practice in Massachusetts "became extremely burdensome upon the courts. Almost all of the various motion hours were taken up in deciding objections to interrogatories. Oftentimes the questions asked, as applied to the particular

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<sup>108</sup> See RAGLAND, *supra* note 31, at 92. The states are Alabama, Connecticut, Florida, Georgia, Louisiana, Massachusetts, New Mexico, Tennessee, Virginia and Washington. *See id.*

<sup>109</sup> *Id.* at 93.

<sup>110</sup> *Id.* at 94.

<sup>111</sup> *Id.* at 93.

<sup>112</sup> *Id.* at 93-94.

case, were quite ludicrous. The burden on the clerk's office was surprisingly heavy."<sup>113</sup>

An additional problem with interrogatories is how difficult it is for the questioner to obtain a responsive answer. "Of course, as a practical matter," Ragland wrote, "one of the chief complaints with the written interrogatory procedure is that answers usually are so evasive as to give little enlightenment."<sup>114</sup> Ragland suggested that "[t]here are several administrative problems involved in deciding objections and compelling answers to written interrogatories," and that although a numeric limitation on interrogatories eased the burden, "there is still a considerable administrative burden upon the court in connection with interrogatories."<sup>115</sup> He ended this chapter of his book by noting the existence of the same problems under federal equity practice, quoting Wallace R. Lane: "In some instances quite as much time of the court has been taken in hearing arguments concerning interrogatories and deciding what should or should not be answered, as is occupied in the actual trial of the case."<sup>116</sup>

To Ragland's credit, although he concluded by supporting discovery in an enthusiastic way, he did not, as we have repeatedly seen, eliminate evidence of the negative aspects of discovery from his book.<sup>117</sup>

Ragland's last chapter, entitled "Contribution of Discovery to the General Administration of Justice," provided many stories and quotes from lawyers expressing their enthusiasm for expanded discovery. In so doing, he laid out the pro-discovery arguments that became the underpinnings for the pro-discovery rationale of Sunderland and others.<sup>118</sup> Here is some vintage Ragland:

<sup>113</sup> RAGLAND, *supra* note 31, at 94 (citations omitted). Ragland added that in "Washington, one hundred and sixty interrogatories were filed in one case," but he noted that reducing the number of permitted interrogatories or confining their permissible scope resulted in "less trouble" in other American states. *Id.* at 94. He also wrote that in "the few states in which both an oral examination for discovery and one upon written interrogatories are allowed, there is no need nor desire to increase the number of the written interrogatories. Rather they are used, if at all, for the purpose of obtaining a few formal admissions." *Id.* at 94-95 (citations omitted).

<sup>114</sup> *Id.* at 95.

<sup>115</sup> *Id.* at 114, 119. (citations omitted).

<sup>116</sup> *Id.* at 119 (quoting Lane, *supra* note 54, at 276, 294).

<sup>117</sup> Instead, he explained how more discovery, or a particular rule or device, would eliminate or diminish the problem. *See id.* at 94-95. For instance, he argued that combining expansive oral discovery with written interrogatories, and reducing their number, would reduce the overuse of interrogatories. *See id.* at 95. He also tied his discussion of discovery to other potential improvements in procedure, such as judicial supervision of discovery and expanded use of summary judgment. *See id.* at 217-19.

<sup>118</sup> *See infra* text accompanying notes 142-58.

Judges and lawyers in the states which allow a full and mutual discovery before trial say that it has had a salutary effect upon the whole tenor of the litigious process. Perhaps their views can best be summarized by quoting two terse sentences which are representative of the views encountered in field investigations in the various states:

"Litigation is no longer regarded as a game.

"The lawyer who does not use discovery procedure is in the position of a physician who treats a serious case without first using the X-ray."<sup>119</sup>

Both themes draw on portions of an emerging procedural philosophy whose origins may be traced to Roscoe Pound's famous speech entitled *The Causes of Popular Dissatisfaction with the Administration of Justice*,<sup>120</sup> in which Pound urged that lawyers give up their "sporting theory of justice" and that society turn to scientific legal experts to help solve the complicated problems of the new century.<sup>121</sup> Ragland similarly argued that discovery would help focus controversies on the real and disputed issues and would make trials and settlements more rational. Discovery, he urged, would greatly reduce arguments over pleadings because relevant information could be obtained through this alternative and better method. Discovery was also a means of preserving testimony:

The basic reasons why a full and equal discovery is acceptable to lawyers are that it furnishes a means of thorough preparation for trial, and that it makes possible the disposal of many cases without protracted litigation, the collection of fees earlier, and the handling of a greater volume of litigation.<sup>122</sup>

Here is how Ragland ended the narrative portion of his book:

The work of the judge is simplified in the states which employ an oral examination before trial. A considerable part of the pre-trial machinery for the formulation of the terms of the controversy becomes extra-judicial in practical operation. A great many cases are eliminated before they ever reach the trial dockets. The greater clarity in the definition of the issues

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<sup>119</sup> RAGLAND, *supra* note 31, at 251.

<sup>120</sup> ROSCOE POUND, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REPORT OF THE ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 395 (1906).

<sup>121</sup> *Id.* at 404. Pound compared law and lawyers to engineering formulas and engineers. See *id.* at 401.

<sup>122</sup> RAGLAND, *supra* note 31, at 266.

and the elimination of elements of surprise expedites the actual trial in cases which must be tried. In many respects, therefore, discovery has made a vital contribution to the general administration of justice.<sup>123</sup>

## V. CHARLES E. CLARK AND HIS PROCEDURAL VIEWS

On June 3, 1935, the United States Supreme Court appointed an Advisory Committee "to prepare and submit to the Court a draft of a unified system of rules . . ."<sup>124</sup> The fourteen person committee was composed of nine lawyers, five law professors and no sitting judges.<sup>125</sup> The two major drafters of the Federal Rules were Charles Clark, then Dean of the Yale Law School, who was named Reporter to the Advisory Committee, and Edson Sunderland, who was also named a member of the original Advisory Committee. Sunderland, a professor at Michigan Law School, was primarily responsible for the initial drafting of the rules relating to discovery and summary judgment.<sup>126</sup> Both were relative late-comers to the Enabling Act debate and not central figures in that contest.<sup>127</sup>

Clark did not write about discovery during the Enabling Act debate; indeed, prior to his appointment to the Advisory Committee, he rarely wrote about it at all.<sup>128</sup> The list of prospective procedural reforms

<sup>123</sup> *Id.*

<sup>124</sup> Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1934).

<sup>125</sup> *See id.*

<sup>126</sup> *See* Clark, *supra* note 40, at 10. On September 7, 1935, Sunderland wrote Clark that, "I hope I may be able to send you a draft of summary judgment rules within a week or two, and a draft of rules for general discovery not so long thereafter." Letter from Edson R. Sunderland to Dean Charles E. Clark (Sept. 7, 1935) (on file with the Charles E. Clark Papers, Sterling Memorial Library of Yale University, Manuscripts and Archives [hereinafter Clark Papers], Box 108, Folder 43).

<sup>127</sup> In 1926, however, Clark wrote a popular piece for the *American Mercury* on procedural reform and the Supreme Court. *See* Charles E. Clark, *Procedural Reform and the Supreme Court*, AMERICAN MERCURY, 1926, at 445. He supported the effort to reform federal procedure and urged "that its details should be worked out by experts . . ." but that the Supreme Court was "lamentably insufficient" for that task because of the pressure of their work load and because "[t]hey are removed from the tribulations of trial practice, and can be expected to manifest little more than impatience at the troubles, which doubtless seemed to them overmagnified, of the trial judge and counsel." *Id.* at 450. He supported then Chief Justice Taft's proposal that there be a commission of experts. *See id.* at 446-49.

<sup>128</sup> In 1933, Clark wrote a brief but laudatory review of Ragland's book, *Discovery Before Trial*. *See generally* Clark, *supra* note 75. From the time Clark became interested in procedure in the early 1920s, he wrote primarily about pleading and joinder questions, although in 1929 he co-authored an article about summary judgment. *See* Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1928-1929). A note on the first page stated: "This article

in Clark's 1928 *Handbook of the Law of Code Pleading* did not include discovery.<sup>129</sup> In the second edition, published in 1947, nine years after the Federal Rules became law, he wrote of discovery as one of the "new procedural devices" in his introductory chapter on history and added a new six-page section after summary judgment on "Discovery Devices."<sup>130</sup> His "black letter" introduction to this section summarized the relationship that he saw between pleading (his field of expertise) and discovery:

The inadequacy of the disclosure given by the pleadings as a basis for trial has led to the utilization of depositions and other discovery devices which allow the parties to investigate the factual basis of the litigation. Although full discussion of discovery is outside the scope of this book, the discovery mechanisms are described, since they are a necessary supplement to the system of simplified pleading supported herein.<sup>131</sup>

In 1933, two years before Clark became Reporter, he wrote positively about the potential of new and expanded discovery techniques in a brief review of George Ragland's book.<sup>132</sup> Moreover, Clark's firm commitment, along with other legal realists, to the importance of accumulating data in order to understand and act upon important legal and social-political problems was certainly consonant with what later became the expanded Federal Rule discovery provisions.<sup>133</sup>

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is an amplification of a report prepared for the Connecticut Judicial Council in the spring of 1928." *Id.*

<sup>129</sup> See CLARK, *supra* note 15, at 31-38. Although the title of the section is "Future Pleading Reform," he discussed such matters as unified courts, masters, simplified appellate practice, jury trial, summary judgment on motion and declaratory judgment. See *id.*

<sup>130</sup> See CLARK, *supra* note 4, at 567.

<sup>131</sup> *Id.* at 41, 567-72.

<sup>132</sup> See generally Clark, *supra* note 75. In 1929, Clark mentioned "discovery under modern statutes" as a topic investigated at Yale on behalf of the Connecticut Judicial Council, but he looked to trial rather than discovery for bringing out facts. See Charles E. Clark, *Methods of Legal Reform*, 36 W. VA. L.Q. 106, 112-14 (1929).

<sup>133</sup> See Subrin, *supra* note 14, at 967-68. But what Clark had written extensively about before his appointment as Reporter was the wastefulness of detailed pleadings and pleading disputes and the efficacy of expanded joinder of issues and parties. He did not think that most lawyers were sufficiently skilled to meet rigorous pleading requirements. He also did not believe that elaborate pleadings were a useful way to expose facts or narrow issues. He repeatedly looked to equity as an example of how the pleadings should permit a recitation of the plaintiff's story, whether short or long, as well as the model for the provision of expanded joinder; he complained that the Field Code stopped short of sufficiently simple pleading and broad joinder. See *id.* at 961-73. If the pleadings did not have to recite the facts of the case in any great detail, discovery perhaps becomes a natural, if not necessary, ingredient of procedure. But I have been unable to find any place where Clark makes this connection between liberal pleading and the need for

After his appointment as Reporter, Clark also wrote an article in the *Yale Law Journal* with James William Moore, entitled *A New Federal Civil Procedure, II: Pleadings and Parties*,<sup>134</sup> which was published shortly after the Advisory Committee was appointed. Clark urged once again the use of the Uniform Equity Rules of 1912 as the basis for a merged procedural system of law and equity. As he had for the previous decade, he argued for simple, flexible rules, leaving much to the discretion of the trial judge. These rules "will provide the central framework of the new structure, although many important details dealing with matters as important as evidence and appellate review, process, venue, summary judgments, declaratory judgments, *discovery*, and motion and trial practice must be left for consideration at another time."<sup>135</sup> Under the title *Miscellaneous Pleading Rules*, Clark suggested that motions to make more definite and certain, and motions for bills of particulars, "need to be supplemented by modern methods of discovery" because "they result in supplementary pleading, and are hedged about by conditions."<sup>136</sup>

On June 14, 1935, Clark sent former Solicitor and then Attorney General William Dewitt Mitchell, Chairman of the Advisory Committee, his ideas for an agenda for the first Advisory Committee meeting, adding "[p]lease, of course, use or discard this as you see fit."<sup>137</sup> Under separate cover, he sent the *Yale Law Journal* article.<sup>138</sup> Clark's memo

expanded discovery prior to his becoming Reporter. See generally Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 115 (Peninah Petruck ed., 1991) (providing a more complete summary of Clark's views on procedure).

<sup>134</sup> Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure II: Pleadings and Parties*, 44 YALE L.J. 1291 (1935) [hereinafter Clark, *New Federal Civil Procedure II*]. In the first article they wrote together, Clark & Moore argued that the Supreme Court should take advantage of the section of the Enabling Act of 1934 that permitted the Supreme Court to draft rules for a merged system of law and equity. See generally Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure I: The Background*, 44 YALE L.J. 387 (1935) [hereinafter Clark, *New Federal Civil Procedure I*]. The story of this article and its influence is told in Subrin, *supra* note 133.

<sup>135</sup> Clark, *New Federal Civil Procedure I*, *supra* note 134, at 1292 (emphasis added).

<sup>136</sup> *Id.* at 1309-10 (emphasis added) (citations, including one to RAGLAND, *supra* note 31, have been omitted in this quotation). Clark and Moore also wrote this enticing sentence in a footnote after mentioning Ragland and instructing the reader to "Compare Equity rule 58." They stated: "Treatment of this subject will be considered in an article dealing with proof." *Id.* at 1310 n.83.

<sup>137</sup> Copy of letter from Clark to Honorable William D. Mitchell (June 14, 1935), in Clark Papers, *supra* note 126, at Box 108, Folder 42. Clark attached a two-page memorandum proposing an agenda for the June 20th meeting entitled, "Meeting of the Advisory Committee of the Supreme Court of the United States on Rules of Civil Procedure, Chicago (June 20, 1935)." See *id.*

<sup>138</sup> See *id.* The article was entitled, *A New Federal Civil Procedure II: Pleadings and Parties*. See Clark, *A New Federal Civil Procedure II*, *supra* note 134.

included this question: "What action, if any, is to be taken on the following subjects: venue; process; summary judgment; motion for judgment by defendant support by affidavits; *discovery*; rules under the Federal Declaratory Judgment Act?"<sup>139</sup> His list of particular problems of detailed draftsmanship included several pleading and joinder issues, but did not mention discovery.<sup>140</sup>

Clark's reticence about discovery was probably due to several factors. He was uncertain whether discovery would be covered by the new rules and he did not consider himself a pretrial discovery expert. We have seen how little he had published about the topic. Clark later explained, in an article written after Sunderland's death, that he very much wanted Sunderland on the Advisory Committee because of his expertise in the field of pretrial practice, including discovery.<sup>141</sup>

## VI. EDSON SUNDERLAND: CHAMPION OF DISCOVERY

Ragland was by no means the only or earliest strong proponent of discovery, although his book was probably the most influential single source of support for the Federal Rules reformers. Robert Millar, the Northwestern University Law School scholar whom Clark effectively kept off of the initial Advisory Committee,<sup>142</sup> observed that "[o]ne of the few blemishes that Blackstone permitted himself to impute to the common-law system was its lack of any means of discovery."<sup>143</sup> In the late nineteenth century and early decades of the twentieth, bar associations and study commissions, particularly in the state of New York, repeatedly attempted to expand the scope of oral depositions and discovery of documents.<sup>144</sup> Fleming James had written positively about

<sup>139</sup> Copy of Letter from Clark to Honorable William D. Mitchell, *supra* note 137.

<sup>140</sup> *See id.*

<sup>141</sup> *See* Clark, *supra* note 40, at 10; *see also* Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 918 (1970) (stating that Clark knew very little about pretrial conference (Rule 16) and the deposition and discovery rules (Rules 26-37) and that Sunderland had drafted these provisions, as well as the motion for summary judgment rule (Rule 56)). Others and I have explained elsewhere how Clark kept Sunderland from being appointed as Reporter, based on what Clark thought were his misguided views on not wanting complete merger of law and equity and continuing to want federal practice to conform to state practice. But, because of Sunderland's expertise, Clark then urged Mitchell to have Hughes still appoint Sunderland to the Committee. *See* Burbank, *supra* note 5, at 1136 n.539; Subrin, *supra* note 133, at 132-37.

<sup>142</sup> *See* Subrin, *supra* note 133, at 138.

<sup>143</sup> Millar, *supra* note 28, at 201 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES 382).

<sup>144</sup> *See, e.g.*, 22 N.Y. STATE BAR ASS'N REP. 191 (1899); *see also* REPORT OF THE BOARD OF STATUTORY CONSOLIDATION OF THE STATE OF NEW YORK ON A PLAN FOR THE SIMPLIFICATION OF THE CIVIL PRACTICE IN THE COURTS OF THE STATE 12, 152-69 (1912).



discovery in 1929 and Millar had done the same in 1932, the same year as Ragland's book *Discovery Before Trial*.<sup>145</sup>

But it was Edson Sunderland whom Clark and Mitchell chose to write the summary judgment and discovery rules when the Committee commenced its drafting process in 1935.<sup>146</sup> Sunderland was a well-established scholar at Michigan Law School whom Clark, when Dean at Yale Law School, had brought to Yale to be a research associate on the Sterling Foundation between 1931 and 1933.<sup>147</sup> Since 1920, Sunderland had been writing about the glories of English procedure, including simple pleading, broader joinder of parties and claims, expanded discovery and the summons for directions. He marveled at how efficiently skilled judges and masters, and civilized, well-educated, disciplined lawyers, joined together in formulating sensible pretrial discovery. English procedure utilized summary judgment when that made sense and when necessary, participated in focused, speedy trials in which judges were very much in control, guiding juries to correct verdicts.<sup>148</sup> Early on, Sunderland realized that equity was correct in having a more flexible and expansive procedure; that England was less bound by precedents and more experimental and forward in the development of procedure; and that the average American lawyer was so bound by outdated formalistic practices that any reform initiated by the leaders of the bar would be fought by the bulk of the profession.<sup>149</sup>

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<sup>145</sup> See Robert Wyness Millar, *The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure*, 32 ILL. L. REV. 424, 448 (1937-1938). See generally Fleming James, Jr., *Discovery*, 38 YALE L.J. 746 (1929).

<sup>146</sup> See Clark, *supra* note 40, at 10.

<sup>147</sup> See *id.* at 7.

<sup>148</sup> See, e.g., Edson R. Sunderland, *An Appraisal of English Procedure*, 24 MICH. L. REV. 109 (1925); Edson R. Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725 (1926) [hereinafter Sunderland, *English Struggle*].

<sup>149</sup> See Sunderland, *English Struggle*, *supra* note 148, at 726, 739-45; Edson R. Sunderland, *Joinder of Actions*, 18 MICH. L. REV. 571 (1920). In this article Sunderland stated:

[C]onservatism in remedial law is a much more marked professional trait than conservatism in other legal fields, for the reason that the public does not understand it and cannot step in so readily and demand relief . . .

There is a further striking failure which must be charged to the legal profession in America, which grows out of the one just noted, and that is its ignorance of and indifference to improvements in procedural practice developed in other jurisdictions. It is safe to say that if a new method of treating cancer were discovered and successfully employed in England, every intelligent doctor in the world would almost immediately know about it and attempt to take advantage of it. But it is equally safe to say that if a new and successful method of treating some procedural problem were discovered in England, American lawyers as a class would remain in substantial ignorance of it for at least two generations, and would probably treat it with scornful indifference for a generation or two more . . . . As long as clients continue to come and the machinery of law continues to move, he [the American

Sunderland's articles about discovery reflected his disdain for formalistic limitations and his desire for a more common sense all-encompassing procedure. In 1933, he published *Scope and Method of Discovery Before Trial* in the *Yale Law Journal*.<sup>150</sup> He explained the limitations of pleadings and written interrogatories, limitations that are all too well-known to any litigator. Sunderland argued that the equity discovery rules discussed earlier did not go far enough towards allowing oral depositions.<sup>151</sup> Unlike Ragland, Sunderland did not suggest

lawyer] is as free from concern over the methods used elsewhere as the southern negro [sic] with his mule and little plow, who never worries about tractors or other new-fangled devices.

No better illustration of this can be found than the problem of joinder of causes of action . . . . Most of the restrictions which the law placed upon such joinder can be shown by experience to be useless. One jurisdiction has progressed here, another there. But no jurisdiction, excepting perhaps Great Britain and its dominions, has consolidated and assembled the various improvements which have been developed into an enlightened and comprehensive system, nor has there ever been any interest shown by the rank and file of American lawyers in studying the operations of new rules in this field . . . .

Sunderland, *Joinder of Actions*, *supra*, at 572. "[I]n England, English precedents seemed to have a weaker hold on the profession than in America, and the rules drawn under the Judicature Act of 1873 are so simple and reasonable that one almost wonders whether they were really drawn by lawyers." *Id.* at 584.

<sup>150</sup>Sunderland, *supra* note 27, at 863.

<sup>151</sup>*See id.* He summarized that old argument that one should not discover the opponent's case because that will invite perjury, in that party A, now knowing what party B contends, will alter testimony in order to defeat party A's contentions. "Perjury," Sunderland contended, "is one of the great bugaboos of the law. Every change in procedure by which the disclosure of the truth has been made easier has raised the spectre of perjury to frighten the profession." *Id.* at 867. He suggested that perjury perhaps was really not "so terrifying to the profession" as they pretended. *Id.* at 868.

It is easy for those who are interested in opposing change to conjure up visions of calamities which the change will precipitate, and to persuade themselves of the reality of the dangers which serve so useful in [sic] purpose as a deterrent from the course which they disapprove . . . .

[I]t is also to be observed, in the present instance, that the restrictions upon discovery not only produced an enormous amount of lucrative litigation over the application of the rules, which the reported cases abundantly show, but they preserved enough uncertainty in the trial of cases so that a lawyer might always feel confident of having a fighting chance of success no matter what side of any case he might be employed to represent.

*Id.* He suggested that if litigation remains a lottery, "modern business men will decline to use it." *Id.* at 869. Sunderland explained that many jurisdictions have provided both sides equal discovery of facts, whether to prove their own case or defeat the case of their opponent. Citing Ragland's book and his field studies, Sunderland contended that "[f]ar from encouraging perjury, unrestricted mutual discovery has been found by experience to be one of the greatest preventives of perjury." *Id.* at 872. Moreover, Sunderland contended that discovery unrestricted to the case of the party asking for it would multiply the opportunities for plaintiffs to achieve summary judgment because they would be able to show the lack of any realistic defense. *See id.* at 872-73.

oral depositions of all witnesses in this article. But in a less scholarly article written the same year entitled *Improving the Administration of Civil Justice*, Sunderland made an argument for eliminating virtually all limitations on all types of known discovery techniques.<sup>152</sup> In this article, which appeared in *The Annals of American Academy of Political and Social Science*, Sunderland previewed the wide-open, multiple discovery techniques that he drafted two years later on behalf of the Advisory Committee.

Sunderland attacked the failure of pleadings to convey meaningful information. This he attributed to what he called the "ex parte" nature of the drafting of pleadings.<sup>153</sup> "As long as each litigant draws his own statements of his position, he will endeavor to do so in such a way as to give himself the widest freedom of action at the trial and at the same time convey as little information as possible to his adversary."<sup>154</sup> Sunderland turned next to a plea for enlarged discovery: "Only by a preliminary proceeding in which each party may call upon the other to submit himself and his witnesses to interrogation under oath, can the true nature of the controversy be satisfactorily ascertained."<sup>155</sup> Among the many benefits he saw for expanded discovery were the following: the elimination of surprise; preserving testimony so it will be available in case of the death or other unavailability of a witness; diminishing the importance of pleadings; increasing "the effectiveness of the summary judgment"; focusing the trial on "the main points in controversy"; and permitting each side to assess the strengths and weaknesses of their cases in advance, frequently making trials unnecessary because of informed settlement.<sup>156</sup> Examining discovery practices among the many states, Sunderland concluded that "[m]ost of the restrictions upon the free use of discovery are not only unnecessary but cause an enormous amount of trouble to the parties and the courts in construing and applying them."<sup>157</sup>

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<sup>152</sup> Edson R. Sunderland, *Improving the Administration of Civil Justice*, in 167 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 60-83 (1933).

<sup>153</sup> See *id.* at 73-74.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 74.

<sup>156</sup> See *id.* at 74-75.

<sup>157</sup> Sunderland, *supra* note 152, at 75-76. According to Sunderland, these restrictions were the result of the "traditional feeling on the part of lawyers that discovery is a dangerous practice which encourages the production of framed-up cases and of fictitious evidence to meet the facts which the examination has brought out." *Id.* at 76. But, Sunderland argued that the opposite was true, finding that when discovery was "fully available to both parties," there were better opportunities for testing the truthfulness of witnesses. See *id.* Furthermore, when both parties have

Sunderland's last words on this subject will remind the reader of Ragland:

Lawyers who constantly employ it in their practice find it an exceedingly valuable aid in promoting justice. Discovery procedure serves much the same function in the field of law as the X-ray in the field of medicine and surgery; and if its use can be sufficiently extended and its methods simplified, litigation will largely cease to be a game of chance.<sup>158</sup>

#### VII. THE DRAFTING PROCESS: ADVISORY COMMITTEE CONCERNS ABOUT DISCOVERY AND THE REJECTION OF CONSTRAINTS

The first meeting of the Advisory Committee was on June 20, 1935. Here is what was decided:

It was agreed that such matters as the method of taking depositions, examinations before trial, discovery, and subjects of that nature, being procedural, are within the scope of the statute, but that rewriting the rules of evidence is not.

....

The consensus of opinion was also that procedure and practice in the matter of summary judgments and declaratory judgments should be dealt with by the rules.

....

It was also the consensus of opinion that the subjects of examination before trial and discovery are within the proper scope of the new rules, but that care must be taken to prevent such procedure from being used as a basis for annoyance and blackmail, and that possibly it is desirable to have such proceedings conducted by a master or magistrate having power to rule on questions in order to prevent abuse.

It was then unanimously resolved that the committee should be conservative as to the fields to be covered by the rules, but within the fields which the rules do cover the

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committed themselves, Sunderland argued, "it is exceedingly difficult for either one to shift his position by manufacturing evidence." *Id.*

<sup>158</sup> *Id.* In another portion of the article, Sunderland discussed the problems implicit in having juries decide facts, including jurors' lack of training and their being "subject to the influences of . . . [their] own opinions, prejudices, and preconceptions." *Id.* at 77. He then explained why judges should be able to summarize the evidence and otherwise advise juries. *See id.* at 77-80. The pro-judge and anti-jury tenor of the article is in keeping with the Federal Rules ideology from the conservative inception of the Enabling Act through its passage as New Deal legislation. *See* Subrin, *supra* note 14, at 943-44.

committee should go as far as may be necessary to liberalize the procedure and reach a result that will do quick and accurate justice.

. . . .

The reporter undertook at an early stage to prepare a rough outline of the subjects to be dealt with in the new rules, copies to be distributed to members of the committee.<sup>159</sup>

Sunderland was not present at this first meeting,<sup>160</sup> but he was assigned the task of drafting the summary judgment and discovery rules; he was also instrumental in what ultimately became the pretrial conference rule. So far as I have been able to ascertain (by comparing his draft with Ragland's book), his initial draft included every type of discovery that was known in the United States and probably England up to that time. The list is familiar to any American litigator, for almost every type of discovery he drafted became and remains part of the Federal Rules: oral and written depositions; written interrogatories; motions to inspect and copy documents and to inspect tangible and real property; physical and mental examination of persons; and requests for admissions. Sunderland also included a method for what we now call mandatory disclosure: a means to force the opponent to "furnish adequately descriptive lists of documents, books, accounts, letters or other papers, photographs, or tangible things, which are known to him and are relevant to the pending cause or to any desig-

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<sup>159</sup> Summary of Proceedings of the First Meeting of the Advisory Committee on Rules, Held in the Federal Building at Chicago, June 20, 1935, in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, at CI-103-42-46 (Congressional Information Service) [hereinafter RECORDS OF THE U.S. JUDICIAL CONFERENCE]. The summary also included another important decision: "It was thereupon unanimously resolved, that as the committee is acting in an advisory capacity only, no publicity be given to any action or decision taken by it, except to the extent authorized by the Supreme Court." *Id.* at CI-103-43. Clark's outline of June 28th, which he called "purely tentative in form," included a part on "Discovery and Summary Proceedings," and contemplated rules on three topics: "50. Discovery; 51. Summary Judgment; 52. Defendant's Motion for Judgment Supported by Affidavits." See Supreme Court of the United States Advisory Committee on Rules of Civil Procedure Topical Outline of Proposed Rules (June 28, 1935) 1, 5, in Clark Papers, *supra* note 126, at Box 108, Folder 43. His note said: "Liberal provisions should be drafted on all these matters. Cf. RAGLAND, DISCOVERY (1931) . . . [and two other citations]." *Id.* at 5. He then listed the Equity Rules that should be "studied and annotated" and included in the list of the federal deposition statutes. *Id.*

<sup>160</sup> See Report of Proceedings of the First Meeting of the Advisory Committee to the Supreme Court of the United States 1 (June 20, 1935), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-101-1. The transcripts of the February 20-25 Advisory Committee meetings can be found in one of two places: either in *Records of the U.S. Judicial Conference* or in the collections of papers kept by the participants which were donated to several different institutions across the country. For more information on these papers and where they may be found, see Burbank, *supra* note 5, at 532-33 n.529.

nated part thereof . . .";<sup>161</sup> but this did not become a part of the 1938 Rules.

Sunderland frankly told the Advisory Committee that he did not have precedent for the combination of liberalized discovery that he had drafted.<sup>162</sup> If one adds up all of the types of discovery permitted in individual state courts, one finds some precursors to what later became discovery under the Federal Rules; but at the time Sunderland drafted what became the federal discovery rules, no one state allowed the total panoply of devices.<sup>163</sup> Moreover, the Federal Rules, as they became law in 1938, eliminated features of discovery that in some states had curtailed the scope of discovery and the breadth of its use. During Advisory Committee meetings, Sunderland admitted that he was going further than any single jurisdiction's discovery provisions. As he commented on his discovery drafting:

There is no very well settled system which will embrace the various objects that I have sought to attain . . . . [O]ne Rule would be supported by experience in one State or jurisdiction, and another by experience in another State or jurisdiction. You cannot find justification for all of these anywhere. It is strictly an eclectic provision which I have brought in here. . . . It was an entirely new subject matter. Now I might say that I made very little use [sic] the Equity Rules or Federal statutes, because they have only in the very slightest degree provided for what I tried to do . . . .<sup>164</sup>

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<sup>161</sup> Rule 57(a), Tentative Draft No. 1, Oct. 16, 1935, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-804-22. Rule 57(a) was entitled, "Interrogatories Regarding Documents and Tangible Things." *See id.*

<sup>162</sup> *See* Proceedings of Advisory Committee on Uniform Rules of Civil Procedure for the District Court of the United States (Nov. 17, 1935), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-113-92 [hereinafter Proceedings of the Advisory Committee (Nov. 17, 1935)].

<sup>163</sup> State experimentation with expanded discovery, however, had hastened during the first five years of the 1930s. By the time Sunderland started drafting the federal discovery rules in 1935, some states had gone beyond what Ragland had reported only a few years before. For instance, in Illinois, where the oral deposition "had long been applicable to chancery causes, it was in 1933 made part of the apparatus of discovery in the unified procedure established by the Practice Act of that year." Millar, *supra* note 28, at 211-12. Requests for the admission of facts were permitted in Michigan in 1931 and Illinois in 1933. Also in 1933, the Illinois Civil Practice Act permitted a party to force the opposing party to provide a list of relevant documents and to list which they will permit inspection of and which they object to producing. *See id.* at 225. Michigan (1931) and Illinois (1933) adopted motions for summary judgment in a manner which permitted "the defendant in the case of certain designated defenses to proceed by way of motion to dismiss, even where the defense is not apparent on the face of the complaint or declaration and involves the determination of a controverted question of fact." *Id.* at 250 (citations omitted).

<sup>164</sup> Proceedings of the Advisory Committee (Nov. 17, 1935), *supra* note 162, at CI-113-92; *see also* Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L.

A brief look at what happened to Sunderland's discovery rules during the Advisory Committee's deliberations is instructive, for the drafters and other commentators touched upon many of the problems and possibilities we currently consider. The main thrust of the story is that constraints on wide-open discovery were either deleted from initial drafts or, although discussed, did not make it to a draft.<sup>165</sup>

Some members of the Advisory Committee had deep concerns about the problems inherent in liberal discovery; they also feared that discovery opponents might succeed in defeating the entire set of rules. George Wickersham died before the Advisory Committee completed its work, but prior to his death he expressed his concerns about liberal discovery.<sup>166</sup> Others echoed Wickersham's concern about "fishing expeditions," specifically that oral depositions could spin out of control unless a master was appointed to preside over depositions and rule on admissibility questions.<sup>167</sup> When Wickersham died, the Supreme Court appointed Senator George Wharton Pepper to replace him.<sup>168</sup> Here is one exchange Pepper had with Mitchell, that evidences Pepper's reservations about depositions:

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Rev. 1057, 1072 (1955). Sunderland added: "A dozen or fifteen states have a procedure along these lines. England has such a procedure. All the English self-governing dominions have a procedure of this type. . . . I think it is an advance over what any one of those states have. But I think it is not an advance over what can be found in these states taken together." Proceedings of the Advisory Committee (Nov. 17, 1935), *supra* note 162, at CI-113-92. Holtzoff compiled many quotes by Sunderland and other Advisory Committee members in this article. Holtzoff's study was "prepared for the Institute of Judicial Administration . . ." Holtzoff, *supra*, at 1057. He stated that he "is indebted to Mr. Leland L. Tolman, the Secretary of the Advisory Committee on the Federal Rules of Civil Procedure, for access to the stenographic minutes of the meetings of the Committee, which contain a great deal of valuable material and throw an illuminating light on the subject of this article. The author has drawn on these minutes to a considerable extent." *Id.* The stenographic record of the original Advisory Committee's meetings during their drafting period of 1935-1938 are available at a number of different locations. See Burbank, *supra* note 5, at 1132 n.529; see also Peter Charles Hoffer, *Text, Translation, Context, Conversation, Preliminary Notes for Decoding the Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure*, 37 AM. J. LEGAL HIST. 409, 413-14 n.22 (1993).

<sup>165</sup> This momentum toward what the drafters called "liberal" discovery gained yet more momentum in the decade after the federal rules became law, which resulted in even greater liberalization of many of the discovery rules in 1946. See *infra* text accompanying notes 239-61.

<sup>166</sup> See Mr. Wickersham's Memorandum Regarding Professor Sunderland's Draft of Rules 28 to 42, Regarding Depositions, Discovery and Summary Judgments [Dec. 18, 1935], in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-1921-25-CI-1921-27.

<sup>167</sup> See Proceedings of the Meeting of the Advisory Committee on Rules For Civil Procedure of the Supreme Court of the United States (Feb. 22, 1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-209-59-61 [hereinafter Proceedings of the Advisory Committee (Feb. 22, 1935)].

<sup>168</sup> Order, 297 U.S. 731 (1936).

**Mr. Pepper.** Mr. Chairman, I am not worried about the fishing-expedition aspect of this thing, but, in the part of the country I come from, I know perfectly well that this sort of power given to a plaintiff is simply going to be used as a means of ruining the reputation of responsible people. You bring a suit against a man, without any ground whatever—the president of some important company, the president of a utilities company or a bank or something. You take his deposition, have the reporters present, and grill him in the most unfair way, intimating that he is a burglar or murderer, or this, that, and the other. He has no redress, and the next morning the papers have a whole lot of front-page stuff. The case never goes any further. That is all that was intended.

**The Chairman.** It is too much like some of these Senate committees you used to sit on. (Laughter)

**Mr. Pepper.** Exactly; and that is where I got a taste of the kind of lawlessness that ruins people's reputations without the opportunity ever to redress the harm that is done.

I do not think there is anything worse than the use of judicial proceedings for the creation of a forum from which, through the newspapers, to harangue the public. The defendant is perfectly helpless. There is no restraint upon the examination. This business of getting a high-class man to sit there and listen in [referring to the possibility of using masters to superintend depositions] increases the audience for the publication of the slander, but that is all it does.

I do not like the attitude of mind that suggests that the thing to do is to make a vicious practice sound well or look well. It seems to me that the whole thing is vicious, and the only reason I am not worried more about it is that I am morally certain that it will never get by the Supreme Court, I do not care how you dress it up.

**The Chairman.** It is a system that is in use in a great many States in the union, and has been for year [sic].

**Mr. Morgan.** It is a system that is growing by leaps and bounds.

**Mr. Dodge.** In some way the courts must have control over the proceedings, and power to check abuses.<sup>169</sup>

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<sup>169</sup> Proceedings of the Advisory Committee (Feb. 22, 1935), *supra* note 167, at CI-209-59-CI-209-60.



Dodge continued with the theme that had emerged in the first meeting, that expanded discovery could be used as a means to black-mail people or to force settlement.

In some way there must be opportunity to apply to the court and say, "[t]his man is just summoning the president of this corporation to ransack all his books and papers and he is just keeping it going day after day to force a nuisance settlement out of the company." In three or four days the president will say, "Here, you have to settle this case. I am through with this." In some way the court must have the power to check this.<sup>170</sup>

At one point, Chairman Mitchell said in frustration: "I feel very strongly as I did before. We are going to have an outburst against this discovery business unless we can hedge it about with some appearance of safety against fishing expeditions."<sup>171</sup>

There are several examples of possible restraints on discovery that did not survive the many drafts. One way to put limits on the entire lawsuit, including the discovery stage, is to have more rigorous pleading rules and then to tie the scope of discovery to pleading allegations. Clark's initial two drafts of the pleading rules used such words as "acts," "occurrences" and "facts," before, largely at the suggestion of Senator Pepper, the committee settled upon "claim showing that the pleader is entitled to relief."<sup>172</sup> Clark's first draft had a pleading-verification requirement making the lawyer's signature on pleadings a certificate "that to the best of his knowledge, information, and belief, the matters alleged or the denials made therein are true . . . ."<sup>173</sup> Sunderland's initial draft of an oral deposition rule attempted to constrain the scope of discovery by limiting it to "any matter, not privileged, which is relevant to the pending cause as shown in the pleadings on file therein . . . ."<sup>174</sup> But Sunderland's limitation was mostly discarded. Clark wanted to de-emphasize the importance of pleadings; many of the members were wary of technical arguments over what in fact was covered by the pleadings; and some depositions might be taken prior to the completion of pleadings.<sup>175</sup> "Relevant to the subject matter

<sup>170</sup> *Id.* at CI-209-60-CI-209-61.

<sup>171</sup> *Id.* at CI-206-59. Mitchell added: "Perhaps my suggestion is not feasible. Has anyone another?" *Id.*

<sup>172</sup> See Subrin, *supra* note 14, at 976.

<sup>173</sup> *Id.* at 977 (quoting Rule 21, Tentative Draft No. 1, Oct. 15, 1935, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-803-88).

<sup>174</sup> Rule 49, Tentative Draft No. 1, Oct. 18, 1935, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-804-16.

<sup>175</sup> See, e.g., Subrin, *supra* note 14, at 962-65; see also Subrin, *supra* note 133, at 119, 139-42.

involved in the pending action," the language chosen in the 1938 deposition rule, was apt to lead to fewer discovery arguments.<sup>176</sup>

Sunderland thought that numeric limits on interrogatories were arbitrary; they were obviously not consistent with the wide-open discovery he favored.<sup>177</sup> Sunderland's first draft, which in some ways sounded like what later became the interrogatories rule, had this restraint that was later deleted: ". . . the witness shall not be required to answer and return the interrogatories unless there shall be paid or tendered to him, at the time of delivering to him the interrogatories, a fee of two dollars plus one dollar for every question in excess of twenty."<sup>178</sup>

Some members of the Advisory Committee, especially the Chairman, were extremely negative about Clark's proposal that judges, upon motion of a party or on their own, make what Clark called an "order formulating issues to be tried."<sup>179</sup> The judges were to be permitted "after hearing the parties," to find that there "is no real and substantial dispute as to any one or more of the issues presented by the pleadings," to "order such issues to be disregarded" and to specify "issues as to which there is any real and substantial dispute" to be tried.<sup>180</sup> The proposed rule, as drafted, permitted the court, acting "upon motion of any party or upon its own motion" at any time to make such an order;<sup>181</sup> consequently, such a pretrial order would be a way of limiting discovery to the remaining issues. Mitchell argued that in many districts, judges were too busy to perform the task of narrowing issues, and that giving judges "power to exclude an issue from trial, against the protest of either party, merely because the judge thinks the evidence is too flimsy . . . would produce an outcry from the bar, and might operate to impair the right to jury trial."<sup>182</sup> Clark's "order for-

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<sup>176</sup> See FED. R. CIV. P. 26(b)(1), 308 U.S. 645 (1938).

<sup>177</sup> See *supra* text accompanying notes 148-58.

<sup>178</sup> Rule 56(b)(5), Tentative Draft No. 1, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-804-22.

<sup>179</sup> Rule 38, Tentative Draft No. 1, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-804-30; Rule 24, Tentative Draft No. 3, Mar. 1936, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-809-92.

<sup>180</sup> Rule 24, Tentative Draft No. 3, *supra* note 179, at CI-809-92. A similar proposal was contained in Rule 38, Tentative Draft No. 1, Oct. 15, 1935, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-804-4.

<sup>181</sup> Rule 24, Tentative Draft No. 3, *supra* note 179, at CI-809-92. The rule began: "Wherever [sic] the court, upon motion of any party or upon its own motion . . ." *Id.* In the first tentative draft, the rule began: "After the pleadings in an action have been completed, the court may . . ." Rule 38, Tentative Draft No. 1, *supra* note 180, at CI-804-30.

<sup>182</sup> Proceedings of the Advisory Committee (Feb. 22, 1935), *supra* note 167, at CI-209-92. Mitchell was also concerned that such issue-narrowing by judges would not be subject to review on appeal. *Id.* Pepper said, jokingly I suppose, that the rule would have to be subject to impeachment of the judge "if the court uses this opportunity to suggest a settlement, and tries

mulating issues" provision became a watered down portion of Sunderland's pretrial conference rule.<sup>183</sup>

Mitchell was particularly eager to find some way to protect witnesses, and especially parties, from what he feared might be overreaching oral depositions. Several pages of the Advisory Committee transcript deal with his suggestions.<sup>184</sup> His third suggestion, relying on New York procedure, was to require the party seeking to depose to first go to a judge for permission to take the deposition;<sup>185</sup> thereafter, the judge could "specify the particular things you are going to be allowed to inquire about. He makes an order defining the things you can fish about."<sup>186</sup> But it turned out that the New York method was under attack in New York,<sup>187</sup> and Mitchell himself had doubts about his own suggestion: "I think it is quite common in New York to make applications to vacate the order. They keep bringing matters up, wanting to get it limited, vacated, and restricted, and it makes an enormous amount of preliminary litigation, which becomes quite a nuisance."<sup>188</sup>

Mitchell's first deponent-protective suggestion, in "order to palliate the opposition to this rule, and prevent abuse,"<sup>189</sup> was that when a notice of deposition was served, "if the adverse party felt that there was some abuse going to result, he could apply to the court for an order appointing a master with authority to take the evidence and rule on the admission and exclusion of evidence."<sup>190</sup> But Mitchell felt, on reflection, that "this is too broad."<sup>191</sup> His second suggestion was that an adverse party could demand a master to rule on evidence only when he, or if a corporation, its officers, agents or employees are the witnesses to be examined.<sup>192</sup>

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to make the parties settle. The thing that bothers me about these powers is that the modern judges, not wanting to try difficult cases, simply call counsel in and talk settlement to them, even when the judge does not know much about it." *Id.* at CI-206-34.

<sup>183</sup> See FED. R. CIV. P. 16, 308 U.S. 645 (1938). It listed the "simplification of issues" as one of the matters that could be considered as part of pretrial procedure. *See id.*

<sup>184</sup> See Proceedings of the Advisory Committee (Feb. 22, 1935), *supra* note 167, at CI-209-51-CI-209-77.

<sup>185</sup> *See id.* at CI-209-75.

<sup>186</sup> *Id.* at CI-209-64.

<sup>187</sup> *See id.* (statement of Mr. Lemann).

<sup>188</sup> *Id.* Indeed, Mr. Lemann said that the New York State Commission on Administration of Justice for 1934 thought that the scope of the examination should "include all relevant matters, and the elimination of any designation in the notice or order of the specific subject of the deposition." *Id.*

<sup>189</sup> Proceedings of the Advisory Committee (Feb. 22, 1935), *supra* note 167, at CI-209-74-CI-209-75.

<sup>190</sup> *Id.* at CI-209-75.

<sup>191</sup> *Id.*

<sup>192</sup> *See id.*

In May 1936, the Advisory Committee presented a preliminary draft to the Supreme Court. Forty-thousand copies were printed, and the Supreme Court and the Advisory Committee asked for comments.<sup>193</sup> The draft permitted a party, "upon whom notice to take a deposition has been served," to make "a motion to have the deposition taken before a master, with power to rule on evidence."<sup>194</sup> In discussing the preliminary draft at an ABA meeting called for that purpose, Mitchell said, "[w]e are not here to defend this draft . . ."<sup>195</sup> He cautioned that the Supreme Court had already decided to make changes in the existing system and to merge law and equity procedure, and that although "older members of the Bar may object to any change," another generation will "welcome the abolition of antiquated systems, familiarity with which demands additional labor, and which tend to obstruct rather than to improve the efficiency of our judicial system."<sup>196</sup> Mitchell added that the Supreme Court and the Advisory Committee needed members of the Bar "to give this draft thoughtful consideration, with sympathy for the difficulties of the task confronted by the Advisory Committee, and to submit to the Advisory Committee constructive suggestions for improvement."<sup>197</sup>

Mitchell was entirely forthright in asking for advice on the discovery provisions. His own concerns found their way into his address. He explained the importance of "discovery and examination before trial," and warned that "[s]ome modern rules on this subject are sure to be promulgated by the Supreme Court."<sup>198</sup> He acknowledged that it was "a pleasant feeling" to be able to "have an ace up the sleeve which can be sprung on one's adversary," but unpleasant to know that the opponent may be doing the same thing.

[W]e must admit that an efficient but well guarded system of discovery and examination before trial is essential for the proper administration of justice. Rules as liberal as those we have proposed have been in use in the English courts for

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<sup>193</sup> See Joseph R. Taylor, *Federal Procedure—The Cooperative Character Of The Present Effort*, 22 A.B.A.J. 476, 476 (1936); see also Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 556 (1939).

<sup>194</sup> Edward H. Hammond, *Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure*, 23 A.B.A. J. 629, 632 (1937).

<sup>195</sup> William D. Mitchell, *Attitude of Advisory Committee—Events Leading to Proposal for Uniform Rules—Problems on Which Discussion Is Invited*, 22 A.B.A. J. 780, 780 (1936).

<sup>196</sup> *Id.* at 781.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 782.

many years. Similar systems are in effect in some States of the Union.<sup>199</sup>

This, of course, was an exaggeration. The proposals went farther than any single system anywhere.<sup>200</sup> Otherwise, Mitchell was extremely balanced in his approach, and seems to have genuinely wanted help and suggestions from the practicing bar:

Rules on this subject should be carefully drawn to guard against abuse. On the other hand, they should be sufficiently liberal to accomplish the intended purpose. We ask particularly for careful consideration of the proposed rules on this subject. Will the Committee's proposals sufficiently guard against abuse? Should the right of examination before trial be limited to the parties, or extended to other witnesses? Any suggestions you may make based on practical experience will be gratefully received.<sup>201</sup>

The Bar definitely did not want to have masters appointed to monitor depositions and rule on evidence, and this was eliminated in the final draft that was presented to the Supreme Court and which later became law. Edward H. Hammond, who was on the legal staff of the Advisory Committee, explained that the final draft now permitted parties and witnesses to move for protective orders, and that it retained a provision that permitted "having the taking of the deposition stopped if it is not being conducted in good faith or is being conducted for the purpose of annoying, embarrassing or oppressing a party."<sup>202</sup> He also explained that this provision now extended to non-party witnesses as well. He continued:

It is thought that the provisions for the protection of parties and witnesses just mentioned will afford at least as much protection as was intended to be afforded by the master under the old rule. Furthermore, that protection will now

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<sup>199</sup> *Id.*

<sup>200</sup> See *supra* text accompanying notes 162-64. Clark noted:

The system thus envisaged by Sunderland had no counterpart at the time he proposed it. It goes very much beyond English procedure, which does not provide for general depositions of parties or witnesses. And only sporadically was there to be found here and there a suggestion for some part of the proposed system, but nowhere the fusion of the whole to make a complete system such as we ultimately presented.

Clark, *supra* note 40, at 11 (citation omitted).

<sup>201</sup> Mitchell, *supra* note 195, at 782.

<sup>202</sup> Hammond, *supra* note 194, at 631.

come directly from the court itself. There was considerable objection by the profession to the master rule, particularly to the provision giving the power to rule on evidence and it was thought that the power to exclude evidence might be so exercised as to hamper the desired freedom of discovery. The matter of costs in the way of master's fees and expenses might also act as a deterrent to the use of discovery and would give an unfair advantage to those more able to pay them.<sup>203</sup>

There was yet another possible way to ease the potential burdens of discovery. Maybe there should have been some kind of more automatic disclosure, akin to what we now call "mandatory disclosure," in which the opposition could be forced to list relevant documents. Sunderland's initial draft included a special provision for:

Interrogatories, Regarding Documents and Tangible Things[:] A party, or the agent of a party, may be required, by appropriate written interrogatories, to furnish adequately descriptive lists of documents, books, accounts, letters or other papers, photographs, or tangible things, which are known to him and are relevant to the pending cause or to any designated part thereof, and state regarding each . . . .

who has custody, whether the party is willing to permit inspection, copying, or photographing "and if unwilling, for what reason," and "the time when and the place where such inspection, copying or photographing may be had."<sup>204</sup> If the interrogated party does not list an item, or will not permit inspection, the item may not be admitted into evidence by the interrogated party. These provisions were in the preliminary rules that were shown to the bar.

You can imagine the result. Martin Conboy of the New York Bar, for instance, protested against oral depositions without requiring "the right to judicial determination of the propriety of any question before answer, particularly upon the examination of an adverse party."<sup>205</sup> He particularly scorned the idea of an adversary being forced to decide what evidence to divulge to his opponent:

As this rule goes a long way towards asking a lawyer to prepare his adversary's case, is to be applied throughout the country

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<sup>203</sup> *Id.* at 632.

<sup>204</sup> Rule 57(a), Tentative Draft No. 1, *supra* note 161, at CI-804-22.

<sup>205</sup> Martin Conboy, *Depositions, Discovery and Summary Judgments*, 22 A.B.A. J. 881, 883 (1936).

and is particularly susceptible to abuse in large cities where often trial counsel are not known to their adversaries or the judge, would it not be desirable to experiment first with a rule requiring such listing only upon order of the Court as is now provided by the English orders.<sup>206</sup>

According to Hammond, "[t]he Committee received many protests against this rule."<sup>207</sup> The Sunderland provision was eliminated,<sup>208</sup> thus adding non-adversarial disclosure to the devices that would not be used to control the system.

There were a few other important changes to discovery rules after the preliminary draft had been presented to the public, most of them related to timing. The preliminary draft permitted depositions to be taken any time after jurisdiction was obtained.<sup>209</sup> The final rule said that depositions could not be taken until after an answer had been filed, unless leave of court was obtained.<sup>210</sup> According to Hammond, this change was "thought to be a protection to defendants against fishing expeditions," in that a plaintiff cannot file "any claim which occurs to him," and then go find a real claim through depositions, and move to amend. As he noted: "The change will also enable the court to make an order confining the examination to those matters which relate to the issues as raised by the pleadings, if a motion for such an order is served under Rule 30(b)."<sup>211</sup> Moreover, Hammond reported that a simplified interrogatory rule, distinguished from the more complicated "depositions upon written interrogatories" rule, would help defendants who could no longer take depositions before they answered.<sup>212</sup> But the use of the deposition rule was somewhat broadened. It now included the use of the deposition of an absent witness, and

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<sup>206</sup> *Id.* (citations omitted). Conboy also thought that the idea of using masters to rule on evidence was perhaps a good idea. *See id.*

<sup>207</sup> Hammond, *supra* note 194, at 632. It is important to note that many members of the Advisory Committee (Clark, Wickersham, Lemann, Dodge, Olney and Mitchell) also expressed reservations and questions about this rule, including the problems of determining which documents to list, the penalty for non-production and the huge number of documents the proposed rule might encompass. *See* Proceedings of U.S. Supreme Court Advisory Committee on Rules for Civil Procedure (Nov. 18, 1935), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-115-76-CI-115-97.

<sup>208</sup> *See* Hammond, *supra* note 194, at 632.

<sup>209</sup> *See id.* at 631.

<sup>210</sup> *See id.*

<sup>211</sup> *Id.*

<sup>212</sup> *See id.* at 632-33. Similarly, Hammond reported that a "request for admissions of the genuineness of a document cannot now be made until after the pleadings are closed." *Id.* at 632. He also reported that when an admission request is not denied, it will be taken as admitted, unlike under the preliminary draft that required an express admission. *Id.*

"upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."<sup>213</sup> The requirement was now "[r]easonable notice of the taking of an oral deposition, instead of a prescribed number of days notice, is required to be given with power in the court, upon motion, to enlarge or shorten the time."<sup>214</sup> The deposition to perpetuate testimony rules gained definition and no longer permitted resorting to state practice. Hammond also reported that "[t]he rule on physical and mental examination of a party has been improved, it is hoped, especially in providing for a compulsory exchange of reports of physicians of opposing parties."<sup>215</sup> The point is this: except for the demand on the opponent to list documents and things, every major discovery device previously known anywhere in the United States, and all of those drafted by Sunderland, ended up in the final draft, and in many ways, with fewer constraining devices than he had originally drafted or than were contemplated by the Advisory Committee during its deliberations.

The Advisory Committee made its Final Report in November 1937.<sup>216</sup> The final draft of the proposed rules went smoothly from the Advisory Committee to the Supreme Court, which made some relatively unimportant changes and promulgated the Federal Rules on December 20, 1937.<sup>217</sup> The Federal Rules were reported to Congress by the Attorney General in January 1938 and they took effect, as a result of congressional inaction, on September 16, 1938.<sup>218</sup>

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<sup>213</sup> Hammond, *supra* note 194, at 632.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> See JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 0.05 (1st ed. 1947). The discovery rules in the Final Report were essentially the same as the April draft. From the April 1937 draft through the November 1937 report, until final adoption of the rules, the numbering of discovery rules and their basic content remained the same. The numbering changed between the preliminary draft of May 1936 and the April 1937 draft. The Clark Papers, *supra* note 126, have an outline, apparently compiled by a Yale librarian, of the numbers of each Federal Rule in the various drafts. The discovery rules, Federal Rules 26-37, are outlined on pages 14-16. See Clark Papers, *supra* note 126.

<sup>217</sup> See MOORE, *supra* note 216, § 0.05. The changes deleted provisions that dealt with evidentiary matters, including a rule that dealt with showing depositions to witnesses for impeachment purposes.

<sup>218</sup> See *id.*



## VIII. OTHER CONTEMPORANEOUS MISGIVINGS ABOUT EXPANDED DISCOVERY

One justifiably wonders whether the 1930s drafters heard warnings about and anticipated potential costs of an expanded pretrial discovery system. Of course they did. During their own deliberations there were misgivings about the potential for using discovery to black-mail others and to force settlement more related to the costs of discovery than to the merits of the case. Ragland's book repeatedly told stories of lawyers abusing what little discovery had already existed.<sup>219</sup>

Indeed, there were warning signs from the beginning of the Enabling Act movement. In 1922, for instance, Thomas Shelton, who was largely responsible for keeping the movement alive, wrote an article entitled *Some Plain Talk to Verbose Lawyers*, in which he said that it "does not require a retentive memory to recall that the chief complaint against the old equity rules was the costly imposition of lengthy depositions."<sup>220</sup> Wallace Lane had written a series of articles in which he questioned whether the Equity Rules of 1912 were working as well as advertised. In 1922, he wrote this about the misuses of interrogatories under the Equity Rules: "Interrogatories seem to be more generally used for 'fishing expeditions' than definitely to establish facts."<sup>221</sup> In 1932, he was particularly critical of references to the use of masters in equity cases, which "often results in a greater delay to litigants," and increases the costs.<sup>222</sup>

In October 1936, members of the patent bar were invited to address the Advisory Committee. Based on their experience with the Equity Rules, the Patent Section Committee of the ABA thought that for depositions, "it would be better, so far as patent cases are concerned, to shift the burden to the interrogating party . . ."<sup>223</sup> Before

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<sup>219</sup> See, e.g., RAGLAND, *supra* note 31, at 201. One of the examples was the interrogatory system in which the questioner could, and sometimes did, ask hundreds of questions, and the answerer attempted to reveal as little as possible (see *supra* text accompanying notes 95-98)—the same tactics that Wayne Brazil so forcibly catalogued fifty years later. See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1323-25 (1978); see also generally Wayne D. Brazil, *Civil Discovery: Lawyer's Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787; Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217.

<sup>220</sup> Thomas W. Shelton, *Some Plain Talk to Verbose Lawyers*, 94 CENT. L.J. 439, 439 (1922).

<sup>221</sup> Wallace R. Lane, *Federal Equity Rules*, 35 HARV. L. REV. 276, 295 (1921-1922).

<sup>222</sup> Wallace R. Lane, *Twenty Years Under the Federal Equity Rules*, 46 HARV. L. REV. 638, 642-43 (1932-1933).

<sup>223</sup> Transcript of Advisory Committee on Rules for Civil Procedure (Oct. 22-24, 1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 159, at CI-131-32 (testimony of Merrell

a deposition of an opposing party or its officers or agents were allowed, the court should "issue an order specifying the scope of the subject matter to be covered . . . ." <sup>224</sup> This was particularly important to protect trade secrets and "know-how." <sup>225</sup> They thought that prior to interrogatories being propounded or depositions being taken, there should be the same protection. "The purpose of this is to limit at the outset a 'fishing expedition' which might be carried on in a jurisdiction far away from that in which the action is pending." <sup>226</sup> They were also concerned that the new rules would detract from the essential goal of the Equity Rules to have trials in open court; they did not think their concerns were "peculiar to the practice of patent law." <sup>227</sup>

Also in 1936, in commenting on the Advisory Committee's preliminary draft, Judge Edward Finch of the Court of Appeals of New York was extremely critical of the proposed discovery provisions on the grounds that they unduly favored plaintiffs. He warned that they would "increase so-called speculative litigation or litigation based on suspicion rather than facts, with the hope that such fishing may reveal a good cause of action as alleged or otherwise . . . ." <sup>228</sup> Finch argued that the Federal Rules gave so many tools to those who asserted claims "that it will be cheaper and more to the self interest [sic] of the defendant to settle for less than the cost to resist." <sup>229</sup> But it was not only defendants whom Finch thought might be abused. He argued that if costs are not reimbursed to the winner:

then a poor litigant is at the mercy of a richer opponent. Thus a wealthy defendant may force a poor plaintiff with a meritorious claim to accept an unfair settlement for the reason that the further the litigation is carried the greater the expense which the plaintiff must incur, which continually reduces the amount of his actual recovery unless he ultimately can obtain reimbursement for the costs to which he has been subjected by the unjust defense. <sup>230</sup>

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E. Clark). Those testifying for the patent bar were Mr. Howe, Merrell E. Clark and Wallace R. Lane. See *id.* at CI-131-26.

<sup>224</sup> *Id.*

<sup>225</sup> See *id.*

<sup>226</sup> *Id.* at CI-131-33.

<sup>227</sup> See *id.* at CI-131-41 (testimony of Mr. Lane).

<sup>228</sup> Edward R. Finch, *Some Fundamental and Practical Objections to the Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States*, 22 A.B.A. J. 809, 809 (1936).

<sup>229</sup> *Id.* at 810.

<sup>230</sup> *Id.* at 811.

Finch also argued that "the interests of the clients are adverse to the interests of some lawyers," speculating that "[s]ooner or later, however, clients, laymen generally and taxpayers must revolt at this misuse and abuse of the right to litigate."<sup>231</sup> The following year Mitchell tried to blunt the import of Finch's critique: "It may be that in large metropolitan areas like New York City where the conditions are admittedly bad and many dishonest actions are brought in the courts, the rules relating to discovery and examination before trial offer opportunities to lawyers of low ethical standards."<sup>232</sup> In the rest of the country, though, Mitchell urged that "the rules relating to these subjects are in line with modern enlightened thought on the subject and will not be subjected to abuse."<sup>233</sup>

Some of the most trenchant criticism of the proposed new discovery rules came during hearings before the Senate Committee on the Judiciary held during the spring of 1938.<sup>234</sup> The thrust of the critique was that by superimposing equity rules onto the law side and eliminating the protections that made equity cases the exception, the new rules, and particularly the discovery provisions, were making vast intrusions on the rights of privacy of individuals and on the right to jury trial. In addition, critics argued that many of the rules went well beyond the Enabling Act's limitation that the rules were not to alter, abridge or modify substantive rights.<sup>235</sup>

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<sup>231</sup> *Id.*

<sup>232</sup> Mitchell, *supra* note 83, at 969.

<sup>233</sup> *Id.*

<sup>234</sup> See 83 CONG. REC. 4345 (1938) (statements of Sen. King). Recall that the proposed rules would become law unless Congress passed an act to stop them. Senator King of Utah, in particular, thought Congress should delay their effective date until elected officials had more opportunity to study the extent to which the new rules would void conflicting statutes. *See id.*

<sup>235</sup> The following text and notes are examples of this critique. P.H. Marshall, a Washington, D.C. lawyer, could not understand how Rule 34, which permitted the court to order inspections of one's house, did not collide with what he had been taught in law school, "that a man's house was his castle." *Rules of Civil Procedure for the United States District Courts: Hearings Before a Subcomm. of the Comm. on the Judiciary United States Senate, 75th Cong., 3rd Sess., on S.J. Res. 281, A Joint Resolution To Postpone the Effective Date of the Rules of Civil Procedure for the District Courts of the United States, Part 2, 75th Cong 29 (1938)* [hereinafter *Senate Hearings*] (statement of P. H. Marshall). Moreover, this ability to order inspections was "discretionary with the judge." Even if a legislature could enact such a rule, he argued, this had been done by the judiciary: "If the substantive law is not affected by such a rule, then I confess that I do not know what the substantive law is." *Id.* He then turned to Rule 35 which permitted the court to order a physical or mental examination of a litigant. He asked: "Can it be possible that my right to privacy is a mere procedural matter?" *Id.* He argued that the potential sanctions against lawyers in Rule 37 would chill some lawyers in vigorously representing their client's best interests. "It is a good deal like saying to a surgeon: 'Go ahead and make your diagnosis, but if it happens to be wrong you will have to pay the hospital bill.'" *Id.* at 32. Marshall was quite sure that members of the boards

Challen B. Ellis, a member of the Washington, D.C. bar, noted that the new rules went further than equity: "These rules put power in the hands of the parties which even in equity cases are only in the hands of the court."<sup>236</sup> He then gave a little lecture on the extraordinary nature of equity that was now being brought to bear in all cases:

The history of equity procedure shows that it is only to be used as an extraordinary remedy; that the courts were never intended to be given power over the person of a plaintiff or defendant, except where the parties are not dealing at arms length, or where one has an unfair advantage given by the law. The court takes charge of the person and conduct of the parties. No such thing occurs in a lawsuit. No man may be in jeopardy of his person because somebody sues him for breach of contract, for which he has a good defense. He does not submit himself to the court. He submits himself only to the jury upon evidence in open court. He can take depositions only when it is shown the witnesses are not available or cannot be brought within the jurisdiction of the court. That is fundamental.<sup>237</sup>

Kahl K. Spriggs, another Washington, D.C. lawyer, complained that the discovery provisions went well beyond equity and endangered both the right to jury trial and the right to have testimony presented

of bar associations who sent their approval for the rules to the House did not "thoroughly" understand them. *See id.* at 31.

<sup>236</sup> *Id.* at 42.

<sup>237</sup> *Id.* at 43-44. Ellis later added:

The fundamental difference between law and equity is that law is concerned with the settlement of an issue of fact by a jury and does not in any manner involve any restraint on the person of the plaintiff or defendant . . . .

Considering the tremendous powers of the chancellor and dangers of abuse, certain safeguards were thrown around an action in equity which would not be needed or appropriate in an action at law.

One of the first and most important safeguards is that equity is always an extraordinary remedy; that is, the drastic action of the court against the person of the parties may not be exercised unless that is the only way the complainant can escape irreparable injury . . . .

No one can read rules 26 to 37, inclusive, relating to discovery—appropriate only in an equity action—without seeing that they will play havoc in an ordinary action at law for breach of contract or for personal injury.

*Id.* at 46-47. Ellis did not think it made sense that just because one brought a simple contract or tort case, and not even under oath, a defendant should be subject to all of the broad discovery provisions. "The facts thus extorted from the defendant may be "relevant" although inadmissible as evidence and wholly unnecessary." *Id.* at 47 (statement of Challen B. Ellis).

orally in open court. His argument captured the fears of the opponents:

In general, the various powers of discretion reposed in the court under the new rules, together with the power of every litigant to try the case piecemeal, serve to whittle down the right of trial by jury. Heretofore the theory has been that a case may be submitted at one time through the medium of open testimony and in open court, except in the infrequent instances in which depositions are used. Now, by a kind of inquisition conducted under rule 26, interrogatories under rule 33, discovery under rule 34, and admission of facts under rule 36, together with the consequences imminent under rule 37, there is left little further to be done.<sup>238</sup>

#### IX. EARLY JUDICIAL REACTIONS TO THE DISCOVERY REFORM AND THE 1946 LIBERALIZING AMENDMENTS

Just as the Field Code had met some opposition from both the bench and the bar seeking to retain aspects of the previous common law procedure,<sup>239</sup> some lawyers and courts fought a rearguard action against the discovery revolution begun by the Federal Rules.<sup>240</sup> There were conflicting decisions on whether the permissible scope for demands for documents, interrogatories and requests for admissions were the same as or more restrictive than depositions.<sup>241</sup> Although the deposition rule's limitation was to "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether

<sup>238</sup> 83 CONG. REC. 8480-81 (1938).

<sup>239</sup> See Subrin, *supra* note 14, at 939-40.

<sup>240</sup> As Rick Marcus explained in another presentation at this conference, it took approximately three more decades for the counter-revolution to gain force. This counter-revolution resulted in several amendments that went in the opposite direction, attempting to tighten-up or deliberalize the process, including wide-open discovery. "Much as discovery had thus become central to American litigation, it is equally clear that very broad opposition to the liberality of discovery grew in the early 1970s." See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 752 n.26 (1998); *id.* §§ II, III (detailing amendment process after 1970).

<sup>241</sup> The various discovery devices had different definitions of scope, rather than the generalized discovery provisions of Rule 26 with which we are now familiar. See, e.g., L. J. Carey, *Development of Discovery Rule in Casualty Insurance Cases*, 7 INS. COUNSEL J. 31, 32 (and citations therein) (1940); Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 213-18 (interrogatories), 218-21 (production and inspection of documents), 222-24 (requests for admissions) (1942); Notes, *Scope of Pre-Trial Discovery Under the New Federal Rules*, 50 YALE L.J. 708, 708-713 (1941) (and citations therein); Ruth Gottlieb, Note, 16 ROCKY MTN. L. REV. 167, 167-73 (1944) (and citations therein); see also FED. R. CIV. P. 33, 34, 36 advisory committee notes to the 1946 amendments, in 7 MOORE, *supra* note 41, § 33 App.02[2], § 34 App.02[2], § 36 App.02[2].

relating to the claim or defense of . . ." either party, some courts added "admissibility" as a requirement and, for instance, ruled that one could not seek evidence that was hearsay.<sup>242</sup> Some courts said that a party could not seek to discover evidence for purposes of obtaining information for use in the cross-examination through the collateral impeachment of a witness who might be called at the trial.<sup>243</sup> There were disputes about the timing of discovery,<sup>244</sup> whether one could make requests for admissions that might be labeled "opinion,"<sup>245</sup> whether it mattered that the inquiring party had access to sought facts in a bill of particulars,<sup>246</sup> whether one could discover with respect to an opponents' experts<sup>247</sup> and the extent to which one could discover facts or statements that had been acquired by an opponent's lawyer in case preparation.<sup>248</sup> (This, of course, was the "work product" issue, decided in the seminal 1947 decision in *Hickman v. Taylor*.)<sup>249</sup>

There was a dispute whether the discovery devices could be used cumulatively. In one case, "[o]ne of the objections on the part of the defendant was that plaintiff had availed himself of every pre-trial procedure under the new Federal Rules of Civil Procedure." Commenting on this, the court said: "I regard this not as an objection to this examination, but rather as an indication of alertness on the part of the attorney for the plaintiff."<sup>250</sup> One federal judge limited the number of interrogatories that could be asked as a matter of course,<sup>251</sup> and another revived the old limitation about inquiring only to build one's own case but not to discover facts that supported the case of one's opponent.<sup>252</sup>

<sup>242</sup> See, e.g., *Poppino v. Jones Store Co.*, 1 F.R.D. 215, 217 (W.D. Mo. 1940); *Maryland ex. rel. Montvila v. Pan-American Bus Lines, Inc.*, 1 F.R.D. 213, 214-15 (D. Md. 1940); *Rosc Silk Mills, Inc. v. Insurance Co. of N. Am.*, 29 F. Supp. 504, 505-06 (S.D.N.Y. 1939). For additional citations, see FED. R. CIV. P. 26 advisory committee note to 1946 amendment, in 6 MOORE, *supra* note 41, § 26 App.02[2].

<sup>243</sup> See *Lynch v. Henry Pollak, Inc.*, 1 F.R.D. 120, 121 (S.D.N.Y. 1939); see also *Barwick v. Powell*, 1 F.R.D. 604, 604 (S.D.N.Y. 1941).

<sup>244</sup> See, e.g., FED. R. CIV. P. 26, 33, 34 advisory committee note to 1946 amendments, in 6 MOORE, *supra* note 41, § 26 App.02[2] & 7 MOORE, *supra* note 41, § 33 App.02[2], § 34 App.02[2].

<sup>245</sup> See *Kraus v. General Motors Corp.*, 29 F. Supp. 430 (S.D.N.Y. 1939); *Walsh v. Connecticut Mut. Life Ins. Co.*, 26 F. Supp. 566 (E.D.N.Y. 1939).

<sup>246</sup> See *Bruun v. Hanson*, 30 F. Supp. 602, 606 (N.D. Idaho 1939).

<sup>247</sup> See *Boynton v. R.J. Reynolds Tobacco Co.*, 36 F. Supp. 593, 595 (D. Mass. 1941); *Lewis v. United Air Lines Transp. Corp.*, 32 F. Supp. 21, 23 (W.D. Pa. 1940).

<sup>248</sup> See *Carey*, *supra* note 241, at 32-33.

<sup>249</sup> 329 U.S. 495, 509-14 (1947).

<sup>250</sup> *Kulich v. Murray et al.*, 28 F. Supp. 675, 676 (S.D.N.Y. 1939) (discussed in *Carey*, *supra* note 241, at 32-33).

<sup>251</sup> *Coca Cola Co. v. Dixi-Cola Lab., Inc.* 30 F. Supp. 275, 278-79 (D. Md. 1939).

<sup>252</sup> See *Poppino v. Jones Store Co.*, 1 F.R.D. 215, 218-19 (W. D. Mo. 1940).

Following the advice of the Advisory Committee, in 1946 the Supreme Court promulgated a number of amendments that went a long way toward completing the discovery revolution. Perhaps most importantly, all discovery was made subject to an overarching "scope of discovery" provision in an amended Rule 26, which was then referred back to in the other discovery rules. The main change was the addition of the now-familiar sentence: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."<sup>253</sup> The committee note to the 1946 amendment was instructive:

The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. . . . In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible . . . . *Olson Transportation Co. v. Socony-Vacuum Co.* (E.D. Wis. 1944) 8 Fed. R. Serv. 34.41, Case 2 (" . . . the Rules . . . permit 'fishing' for evidence as they should.") . . . . Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26(b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word "relevant" in effect meant "material and competent under the rules of evidence . . . ."<sup>254</sup>

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<sup>253</sup> FED. R. CIV. P. 26, 329 U.S. 854 (1946).

<sup>254</sup> FED. R. CIV. P. 26 advisory committee note to 1946 amendment, in 6 MOORE, *supra* note 41, § 26 App.02[2] (citations omitted).

Other 1946 amendments also broadened discovery or clarified a previous rule—almost always in a liberalizing direction.<sup>255</sup> For example, plaintiffs would no longer have to wait for the defendant to answer before they could depose as a matter of right; one only needed court permission if a deposition was sought prior to twenty days after commencement of the action.<sup>256</sup> Interrogatories could now be served without leave of court after ten days from commencement of suit, their scope could be as broad as the amended deposition rule, they could be served before or after a deposition of the same party, and “[t]he number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression.”<sup>257</sup> Again, the committee notes emphasized the liberalizing effects of the amendments and rebuked those courts who had limited their use and effectiveness:

The field of inquiry will be as broad as the scope of examination under Rule 26(b). There is no reason why interrogatories should be more limited than depositions, particularly when the former represent an inexpensive means of securing useful information . . . . Under present Rule 33 some courts have unnecessarily restricted the breadth of inquiry on various grounds . . . . Other courts have read into the rule the requirement that interrogation should be directed only towards “important facts,” and have tended to fix a more or less arbitrary limit as to the number of interrogatories which could be asked in any case.<sup>258</sup>

Rule 34 motions to produce, enter, copy or photograph were made as broad in scope as the new deposition rule, and the notes made

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<sup>255</sup> Some of the amendments, though, made clear that protective orders could be sought for types of discovery in addition to depositions. See, e.g., FED. R. CIV. P. 33 advisory committee note to 1946 amendment, in 7 MOORE, *supra* note 41, § 33 App.02[2] (making Rule 30(b) protective orders available to one opposing a set of interrogatories); FED. R. CIV. P. 34 advisory committee note to 1946 amendment, in 7 MOORE, *supra* note 41, § 34 App.02[2] (doing the same with respect to motions to produce and inspect).

<sup>256</sup> See FED. R. CIV. P. 26(a) 1946 amendment, 329 U.S. 854 (1946). In taking depositions under Rule 27 before an action has commenced or pending appeal, the rule was clarified to ensure such depositions could be as broad as other depositions under the rules and specifically stated that the court had the power to make orders under Rules 34 and 35. See FED. R. CIV. P. 27(a)(3) & (b) 1946 amendment, 329 U.S. 854 (1946). The court was given specific permission to appoint a person to “administer oaths and take testimony” at a deposition. FED. R. CIV. P. 28 1946 amendment, 329 U.S. 854 (1946).

<sup>257</sup> FED. R. CIV. P. 33 1946 amendment, 329 U.S. 854 (1946).

<sup>258</sup> FED. R. CIV. P. 33 advisory committee note to 1946 amendment, in 7 MOORE, *supra* note 41, § 33 App.02[2] (citations omitted).



clear that the word "designated" in the text of Rule 34 should not be used to force specification of each particular document.<sup>259</sup> And the amendment also made clear that an objection to one or more specific requests could no longer be an excuse for failing to admit or deny the remaining requests. Even within a specific request, the answerer must act in "good faith" and "specify so much of it is true and deny only the remainder."<sup>260</sup>

By the end of the first decade after the Federal Rules became law, many courts were routinely giving the discovery provisions the full scope the drafters had intended. Speaking for the Third Circuit Court of Appeals in 1946 in *Hickman*, Judge Goodrich made clear that discovery practice had entered a new world. In frequently cited language, Goodrich wrote an introduction to his discussion of the extent to which a party could gain information from an opponent and the opponent's lawyer:

As we approach the question we must discard some favorite craft notions of the advocate. We must discard, for instance, the concept that there is something close to a property right in the information which the lawyer digs up about the client's case and has in his possession. We must also discard the notion that questions from the other side can be fended off on the ground that the opponent's lawyer is simply engaged in a fishing expedition. These notions are hard to get rid of, but we take it that they are contrary to the idea of this discovery portion of the Federal Rules . . . .

The Rules probably go further than any State practice, but they are a much greater distance from the practice in some

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<sup>259</sup> See FED. R. CIV. P. 34 advisory committee note to 1946 amendment, in 7 MOORE, *supra* note 41, § 33 App.02[2] (citations omitted). The Advisory Committee cited a 1908 Supreme Court case that made clear under a prior rule that if more than "reasonable detail" were required, then the inquirer "would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have." *Id.* (citing *Consolidated Rendering Co. v. Vermont*, 207 U.S. 541 (1908)). It was not until 1970 that the "good cause" requirement was eliminated, and the rule was made to "operate extrajudicially." FED. R. CIV. P. 34 advisory committee note to 1970 amendment, in 7 MOORE, *supra* note 41, § 34 App.03[2] (citations omitted). Some courts, seizing on ambiguous language in the rule as initially promulgated, had limited Rule 36 requests for admissions to those "set forth in relevant documents described in and exhibited with the request." FED. R. CIV. P. 36 advisory committee note to 1946 amendment, in 7 MOORE, *supra* note 41, § 36 App.02[2] (citations omitted). The 1946 amendments eliminated the ambiguous language (the word "therein") and made the scope of permissible requests as broad as what was now permitted for the scope of depositions and interrogatories. See FED. R. CIV. P. 36 amendment, 329 U.S. 854 (1946).

<sup>260</sup> FED. R. CIV. P. 36 amendment, 329 U.S. 854 (1946).

States than in others . . . .

We must start any discussion of the use of discovery in a particular case from the premise that the Rules are intended to go far in making information known by one party available to the other.<sup>261</sup>

Although on appeal the Supreme Court put limits on discovery through the imposition of some protection of the lawyer's "work product," it, too, emphasized the liberal nature of the federal discovery rules: "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."<sup>262</sup>

#### X. WHAT FACTORS LED TO THE DISCOVERY REVOLUTION, DESPITE THE MANY MISGIVINGS? WHAT CAN FUTURE REFORMERS LEARN FROM THE EXPERIENCE?

Two big questions remain as we leave the discovery story in 1946. First, how, in such a relatively short period of time, did the creators of the federal discovery rules convince the legal world to exchange a "no fishing" legal universe for one that frequently seemed to require discovery fishing expeditions? Second, what can the current Advisory Committee and other would-be reformers glean from the experience?

In trying to answer these questions, it is instructive to put discovery reform in the broader context of the procedural jurisprudence of the time. For centuries, civil procedure had been evolving from technical to nontechnical, rigid to flexible, constricting to expansive.<sup>263</sup> It was considered modern to open up and broaden the system, to eliminate lines and categories and to permit the amassing of information. For Thomas Shelton, procedure should be a simple, uncluttered tunnel through which the substantive law should pass largely unscathed.<sup>264</sup> In the phrase that Charles Clark made famous, procedure should be the handmaiden, not the mistress, of justice.<sup>265</sup>

This jurisprudence complemented the legal realist movement (whose primary home was at Clark's Yale Law School) and the New

<sup>261</sup> *Hickman v. Taylor*, 153 F.2d 212, 216-17 (3d Cir. 1945), *aff'd*, 329 U.S. 495 (1946).

<sup>262</sup> *Hickman*, 329 U.S. at 507.

<sup>263</sup> See Millar, *supra* note 28, at 4-9.

<sup>264</sup> See Subrin, *supra* note 14, at 959.

<sup>265</sup> See *id.* at 962; see also generally Charles E. Clark, *Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938).

Deal whose legislation was contemporaneous with the Federal Rules.<sup>266</sup> Legal realism stressed the importance of amassing all of the facts before deciding social policy or a case. Clark himself sponsored and engaged in empirical studies about the tort system and the operation of the Connecticut courts.<sup>267</sup> At least from the time of Pound's influential speech, the theme was to eliminate the "sporting" aspect of trial work.<sup>268</sup> Sunderland's infatuation with virtually unlimited discovery complemented Clark's embrace of simplified pleading.<sup>269</sup> The integral relationship of all of the rules is an important factor in understanding the adoption of any portion of them; thus, Rule 16 on pretrial conferences and Rule 56 on summary judgments were logical companions to the new pleading and discovery rules.

By the time Clark and Sunderland began to draft, the battle for a merged system had already been won. There would no longer be equitable procedure and procedure at law as distinct entities.<sup>270</sup> As I have written elsewhere, when the same procedure applies to all cases, equity prevails.<sup>271</sup> And indeed, it was to equity, which for centuries had an embryonic discovery system, that the drafters turned.

Enlarging the potential for broad discovery seemed like a good idea at the time, and probably still is. The idea of hiding relevant facts and documents from the other side and from the judge and/or jury makes little sense,<sup>272</sup> and there are numerous examples in which broad discovery has been crucial to arriving at a just result.<sup>273</sup>

Nonetheless, there was evidence of discovery abuse and some deeply held misgivings. Why, then, were anti-discovery arguments ultimately unavailing? Let us first look at the agendas of those most

<sup>266</sup> See Subrin, *supra* note 14, at 966-69.

<sup>267</sup> See *id.* at 965.

<sup>268</sup> See *supra* text accompanying note 120.

<sup>269</sup> See *supra* text accompanying notes 134-36.

<sup>270</sup> See Subrin, *supra* note 133, at 131-32.

<sup>271</sup> See Subrin, *supra* note 14, at 960-61. When one merges the common law and the equitable systems so that the same procedure will apply to all cases, it is equity that must win. A restraining system, with rigid pleading and joinder requirements and a search for reduced issues, will not work for equity cases. These attempted to do just the opposite—to permit the judge to exercise discretion in dealing with an entire transaction of multiple parties and issues and with situations that required flexible legal thinking and remedies.

<sup>272</sup> For an explanation of the importance of discovery written during the earlier period of the Federal Rules, see generally Abraham E. Freedman, *Discovery as an Instrument of Justice*, 22 TEMPLE L.Q. 174 (1948-1949). (Abraham E. Freedman was the name of the plaintiff's lawyer in *Hickman v. Taylor*, 329 U.S. 495 (1946); I assume this is the same person, for the article is about admiralty litigation).

<sup>273</sup> See, e.g., Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246-47 (1989).

connected to the process of legal reform. None of the most important legal constituencies had much to lose from the broad discovery provisions; in fact they had a good deal to gain. For lawyers the new Federal Rules generally, and broadened discovery in particular, opened new horizons. Plaintiffs' and defendants' lawyers had the ability to create new theories and defenses and to engage in extensive discovery, for which at least some of them would be paid by the hour.<sup>274</sup> The proponents were able to say, as they repeatedly did, that these rules had gone through multiple drafts and changes and had the support of most of the organized bar.<sup>275</sup> The conservative ABA<sup>276</sup> supported the new rules, as did the Supreme Court (absent Justice Brandeis)<sup>277</sup> and the Roosevelt Administration.<sup>278</sup> The rules gave judges enlarged discretion, and for the most part, they would not be bothered by motions to initiate discovery.<sup>279</sup> The law professors at many of the most elite schools, including Clark, Sunderland and Morgan at Harvard and Dobie at the University of Virginia, who were on the Committee, had previously committed themselves to liberalizing procedure.<sup>280</sup>

Moreover, the major constituencies were concerned with much more than the discovery rules. The debate over the Enabling Act had very little to do with specific procedural rules; its focus was on issues of national uniformity and on separation of powers.<sup>281</sup> During the

<sup>274</sup> Of course, a contingent fee lawyer would also gain, for new theories and supporting discovery meant the potential for increased verdicts and more favorable settlements.

<sup>275</sup> See, e.g., *Rules of Civil Procedure for the United States District Courts, Hearing Before a Subcomm. of the Comm. on the Judiciary United States Senate, 75th Cong., 3rd Sess., on S.J. Res. 281, A Joint Resolution to Postpone the Effective Date of the Rules of Civil Procedure for the District Courts of the United States, 75th Cong. 3-4, 20 (1938)* (statements of William D. Mitchell and Edgar B. Tolman).

<sup>276</sup> On the conservative nature of the ABA during this period, see generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE* (1976).

<sup>277</sup> For one explanation of Justice Brandeis' opposition, see Paul A. Freund, *Mr. Justice Brandeis, in MR. JUSTICE 177, 191* (Allison Dunham & Philip B. Kurland eds., 2d ed. 1964).

<sup>278</sup> *Rules of Civil Procedure for the District Courts of the United States, Hearings Before the Comm. on the Judiciary House of Representatives, 75th Cong., 3rd Sess., on H.R. 8892 with regard to the "Rules of Civil Procedure for the District Courts of the United States" Adopted by the Supreme Court of the United States Pursuant to the Act of June 19, 1934 (48 Stat. 1064), 75th Cong. 3-4 (1938)* (statement of Hon. Homer Cummings, Attorney General of the United States) [hereinafter *House Hearings*].

<sup>279</sup> The exceptions were Federal Rules 34 and 35.

<sup>280</sup> See, e.g., Letter from E.M. Morgan to Clark (Feb. 28, 1935), in Clark Papers, *supra* note 126, at Box 108, Folder 41; see also ARMISTEAD M. DOBIE, *HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE* 589-90 (1928); *supra* text accompanying notes 148-58. Professors McCaskill of Illinois and Charles A. Keigwin of Georgetown, who casted doubts on the project, were not part of the "elite" nor considered "modern." For McCaskill's views, see Subrin, *supra* note 14, at 992-94; for Keigwin's views, see *Senate Hearings, supra* note 235, at 33-39.

<sup>281</sup> See *supra* text accompanying notes 7-21.

drafting process, the Supreme Court was confronted with controversial New Deal legislation, as well as with FDR's attack on the Court.<sup>282</sup> Congress, too, was dealing with the Depression and its aftermath, and during the debate in Congress, as Mitchell had actually predicted, matters other than discovery held center stage.<sup>283</sup> Injunctions, particularly in labor cases, the right to a jury trial, and what entities could sue or be sued, which was a vital topic for labor organizations and corporations, dominated the debates.<sup>284</sup>

Another important ingredient was the brilliance of the advocacy before Congress. Edgar B. Tolman, Secretary of the Advisory Committee and Editor of the *A.B.A. Journal*, breezed through the discovery rules and when asked a few questions about them, gave brief, cogent answers.<sup>285</sup> Mitchell acted with the political astuteness one would expect from a former Solicitor General and Attorney General. The advocacy was superb, if a little misleading.<sup>286</sup> The discovery rules were repeatedly touted as either merely repeating the Equity Rules<sup>287</sup> (while, as we have seen, they went well beyond them) or based on the well-accepted rules in a number of states. The new discovery rules were both dependent on the past and liberal, modern and simple. The committee notes merely listed for each rule a series of statutes or equity rules that covered the same subject, without analyzing how each rule either chose the most liberal path or went beyond it. The competing policies were not discussed in the committee notes nor did the Advisory Com-

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<sup>282</sup> For the period February 5 through July 22, 1937, an *Encyclopedia of American History* states the following: "The continued invalidation by the Supreme Court of major New Deal economic and social legislation led to the severest test of President Roosevelt's political leadership. On 5 Feb. Roosevelt submitted to Congress a plan for reorganizing the federal judiciary . . . . Announcement of the plan aroused widespread and bitter debate . . ." *ENCYCLOPEDIA OF AMERICAN HISTORY BICENTENNIAL EDITION 420* (Richard B. Morris, ed., 1976).

<sup>283</sup> Proceedings of the Meeting of the Advisory Committee on Rules For Civil Procedure of the Supreme Court of the United States (Feb. 25, 1936), in *RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra* note 159, at CI-213-84. Mitchell stated: "There are just two subjects in these rules, although I may be wrong about it, that Congress would be inquisitive about. One is the preservation of jury trial inviolate and the other is the injunction." *Id.*; *see also id.* at CI-210-58-CI-210-59. Donworth, commenting on summary judgment: "I think this is one of the most serious rules in our whole group, and it will be the one subject to the most criticism unless you throw every safeguard around the man who wants his case tried by jury." *Id.* at CI-210-58. *See, e.g., House Hearings, supra* note 278, at 17 (commenting on evidence), 51 (commenting on Norris-LaGuardia Act), 52-53 (commenting on service on unions).

<sup>284</sup> *See House Hearings, supra* note 278, at 13, 18-24, 40-46 (capacity to sue and be sued); 16-17 (jury trials); 49-50 (injunctions).

<sup>285</sup> *See id.* at 113-17, 132.

<sup>286</sup> *See id.* at 9-15 (Clark); 15-26 (Mitchell).

<sup>287</sup> Tolman stated: "These rules, therefore, contain everything that there was in the old equity rules about discovery and make them applicable to the united rules." *Id.* at 140-41.

mittee share its own concerns in the notes or with Congress. Their arguments were repeated so often and so forcefully that they became the new orthodoxy.<sup>288</sup> This made it easy to characterize opponents as old-fashioned.<sup>289</sup>

The drafters were faced with the problem of how to control the new, expanded discovery devices. As we have seen, none of the solutions seemed attractive to them. Using definitions, like an admissibility test, would cause constant disputes. Having judges decide in advance whether to permit each type of discovery and to define its scope on a case-by-case basis seemed expensive and an unwise use of judicial time. So, too, did having judges preside over each deposition. The use of masters to preside over the discovery was also expensive and gave more power to masters than committee members and others thought desirable. Arbitrary limits on discovery, understandably, seemed arbitrary. Mandatory disclosure appeared to some to fly in the face of an adversary system.<sup>290</sup> The solution the drafters adopted—a judicial protective order or a termination or curtailment if needed in a particular case—was attractive. It permitted the “fishing,” but also permitted the court to control excesses at the behest of an aggrieved party. The proponents of broad discovery, and the skeptics on the Committee who ultimately acquiesced in the rules, probably thought that their provisions for protective orders and motions to terminate or limit discovery did in fact give necessary protections.

It can be misleading to look at a reform in hindsight. Although the drafters did have large cases in mind,<sup>291</sup> I think it is fair to say that the drafters as a group would be amazed at how immense many cases now become and how prominent a role discovery plays in that process. Some things they could not have known: the advent of copying ma-

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<sup>288</sup> Even Senator King, who wanted to postpone the effective date of the rules to allow more time to study, accepted that the discovery rules were those already existent in the Equity Rules even though they went beyond those rules in virtually every respect: scope of discovery, who could be deposed, lack of requirement for permission to depose, scope of requests for admission and types of discovery permitted. He admitted that one could find examples somewhere of rules covering depositions, interrogatories, notices to admit, demands to inspect and copy and physical and mental examinations. But what the drafters did, he implied, was take all of the most liberal rules and eliminate most of their safeguards and limitations. 83 CONG. REC. 8473, 8478 (1938).

<sup>289</sup> For years leading up to the drafting of the rules, and during the deliberation on the rules, potential opponents were depicted as old-fashioned or pursuing their own selfish interests. See, e.g., *House Hearings*, *supra* note 278, at 2 (Homer Cummings); see also Subrin, *supra* note 14, at 968–69 (discussing Clark).

<sup>290</sup> See *supra* text accompanying note 206.

<sup>291</sup> The transcripts of their deliberations repeatedly recount discussions about rate-setting cases, equity litigation generally, admiralty and patent cases and potential strike suits against corporations and their officers. See Subrin, *supra* note 14, at 972–73. “When one member [Olney]

chines and computers; the huge size of law firms and litigation departments; the many factors leading to the large overhead of major firms; and the enormous growth and change in substantive law. I think the drafters also would have been surprised at the role of civil claims as, to use Professor Hazard's words, "an integral part of law enforcement in this country . . . [T]he scope of discovery determines the scope of effective law enforcement in many fields regulated by law."<sup>292</sup>

There was also an important conceptual flaw in the overall procedural outlook of the proponents of expanded discovery that made it easier for them to adopt a wide-open discovery regime without fully comprehending its consequences. Ragland and Sunderland treated facts as if they were a static, knowable item to be found; discovery was compared to an x-ray that reveals the inner nature of the body.<sup>293</sup> Because of their past experience with limited discovery, the drafters focused on failures to disclose. Consequently, their sanction provisions were for failures to permit discovery, rather than for abuses of over-discovery.

Almost sixty years later, we tend to think of discovery as both expandable and contractible. Many of the critical mixed questions of law and fact in current substantive law are pliable and open-ended. It is not self-evident how many years backwards one should look or what witnesses and documents should be included in justifiable discovery on the issues of discriminatory intent or defective products. Indeed, contemporary scientific and literary notions invite one even to be suspicious that there are objective "facts."<sup>294</sup>

We have begun to adapt to the notion of "proportionality" in discovery. A line of inquiry may be "relevant" or may "lead to admissible evidence," and yet the costs of discovery may substantially outweigh the stakes involved. Since 1983, the Federal Rules have mandated that

observed that they were drafting a code primarily for 'actions tried by the court,' rather than a jury, no one disagreed." *Id.* at 973 (citation omitted). Clark knew that the business of the federal courts, particularly in cases involving the government, was different from the normal case based on diversity of citizenship. See Subrin, *supra* note 133, at 148. Their rules borrowed heavily from equity and equity cases were notoriously large in theories, parties, documents, costs and lengths of time. See Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 36 (1994).

<sup>292</sup> Report of the Conference on the Federal Rules of Civil Procedure 3 (Mar. 30-31, 1995) (co-sponsored by the Southwestern Legal Foundation and the Southern Methodist University School of Law (Geoffrey C. Hazard, Jr., reporter)).

<sup>293</sup> See *supra* text accompanying note 158.

<sup>294</sup> See, e.g., Judith Olans Brown, et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L. REV. 457, 467-77 (1996) (discussing myths in the guise of "facts" in the context of Brandeis's brief in *Muller v. Oregon*, 208 U.S. 412 (1908)).

the amount of discovery be related to "the needs of the case, the amount in controversy, the parties' resources, [and] the importance of the issues at stake . . ." <sup>295</sup> On December 1, 1993, a new proportionality rule was added. The court may now consider "the importance of the proposed discovery in resolving the issues." <sup>296</sup> The Advisory Committee notes to the 1993 discovery amendments offered yet a third proportionality issue: the parties should craft their automatic disclosure to the degree of fact-particularity in the opponent's pleading. <sup>297</sup> In short, the entire enterprise of finding and discovering "facts" probably looks a good deal more complex and uncertain to us than it did to our procedural predecessors.

What are the lessons we should take from the saga of the discovery rules? Reformers are prone to put aside evidence and arguments that do not meet the ideal of their reform. Lawyers are good at finding arguments to support their point of view. Empirical data can be oversimplified and misused. Ragland painted a more complex picture than his conclusions supported or than those who cited him shared with others. Procedure that is defining, rigorous and complex is problematic; but simple, flexible and expansive procedures have problems of their own. Civil procedure is a field in which the component parts are interrelated: pleading, joinder, discovery, summary judgment and pre-trial conference are best viewed integrally.

We live in a procedural world that is more complicated than it appeared to Clark, Sunderland, Mitchell and their colleagues. There is a real problem: how to permit discovery "fishing" sufficient to reach just results without expeditions in which the costs of time, money and privacy outweigh the gains. Our procedural ancestors discussed discovery problems, but rejected most of the solutions. This may now be a luxury we cannot afford.

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<sup>295</sup> FED. R. CIV. P. 26(b)(2)(iii). Advisory committee notes to the 1983 amendments to this rule specifically state that Rule 26(b)(2)(iii) "address[es] the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake . . . the limitations on a financially weak litigant . . . and the significance of the substantive issues . . ." FED. R. CIV. P. 26 advisory committee notes, *in 6 MOORE, supra* note 41, § 26 App.07[2].

<sup>296</sup> FED. R. CIV. P. 26(b)(2)(iii).

<sup>297</sup> See FED. R. CIV. P. 26(a) advisory committee notes, *in 6 MOORE, supra* note 41, § 26 App.09[2]. "The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence." *Id.*