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Discovery Innovation: Discovery Reform and Federal Civil Rulemaking

Brooke D. Coleman

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**DISCOVERING INNOVATION:
DISCOVERY REFORM AND FEDERAL CIVIL
RULEMAKING**

*Brooke D. Coleman**

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I. INTRODUCTION

Federal civil rulemaking, the process by which the Federal Rules of Civil Procedure are created and maintained, has simultaneously been described as a crisis and a crowning achievement.¹ Some have argued the rulemakers are hidebound because of their ideological background.²

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1. Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 685 (1975) (recommending changes in Supreme Court rulemaking); Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 903 (2002) (“[There are] pervasive and valid concerns about a crisis in rulemaking.”); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2070 (1989) (“Deficiencies in contemporary civil procedure notwithstanding, I view fifty years of federal civil rulemaking as a success.”).

2. Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 613-17, 636-37 (2001) (noting the conservative and defense orientation of

Others have pointed to the stability of the process and argued that, while imperfect, the system works.³ This Article departs from this binary and pragmatically turns to how the committee operates. Using the lens of discovery reform, this Article examines how the rulemaking process has evolved over the past 35 years. The ups and downs of discovery reform have inspired the committee to adopt many modern rulemaking innovations. Those innovations, this Article argues, are critical to the success of the rulemaking process because they provide rulemakers with better information. Finally, discovery reform and the committee's responsive innovations are true to the ethos of the rulemaking process, a process that was designed to be reflective, deliberative, and adaptive.⁴

II. THE FEDERAL CIVIL RULEMAKING PROCESS

The federal civil rulemaking process has evolved over time and is currently a combination of statutory mandate, official guidelines, and unofficial custom. This section will discuss the basic civil rulemaking process as well as what information the rulemakers rely on while considering rule proposals.

A. *The Steps of the Rulemaking Process*

The Rules Enabling Act of 1934 delegated authority to the Supreme Court to “prescribe general rules of practice and procedure” for the federal courts.⁵ The Court promptly appointed a committee of experts to draft and vet the rules, but it did so without providing guidance beyond that main

rulemaking and recommending greater “socio-political makeup”); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 798-801 (1991) (“[There is an] increased politicization of the civil rulemaking process.”).

3. Marcus, *supra* note 1, at 903 (“Despite the pervasive and valid concerns about a crisis in rulemaking, it concludes that some modest reform is possible, and that rulemaking’s inability to deliver revolutionary change may not be a bad thing.”); Remarks of Lee H. Rosenthal, *The Summary Judgment Changes That Weren’t*, 43 LOY. U. CHI. L.J. 471, 496 (2012) (“In the work that led to the rule changes that weren’t, the Rules Enabling Act process worked well. The Rules Committees gathered information in a disciplined and thorough way, through miniconferences in advance of formal rulemaking, through a robust public comment period, and through empirical study.”).

4. The Hon. Mark R. Kravitz et al., *They Were Meant for Each Other: Professor Edward Cooper and the Rules Enabling Act*, 46 U. MICH. J.L. REFORM 495, 517 (2013) (“That flexibility and discretion, built into the 1934 Act, has helped produce the continued and current success of the process.”).

5. 28 U.S.C. § 2072 (2016).

directive of “draft the rules.”⁶ Since then, the rulemaking process has evolved to become more transparent, multifaceted, and hierarchical.⁷

The details of the modern rulemaking process are instructive.⁸ First, an idea about a new rule or how an existing rule can be improved or changed originates within the committee or comes to the committee from an outside source.⁹ Once the civil rules committee moves an idea forward, it deliberates over the proposal in one or more of its biannual meetings.¹⁰ If the committee arrives at a proposal that it likes, it then forwards the proposal on to the Standing Committee on the Federal Rules of Practice and Procedure to ask for its approval to publish the proposal.¹¹ Assuming the Standing Committee approves the rule, it is published for public comment.¹² The committee receives comments, and if the rule is controversial enough, it might also hold public hearings to discuss the rule.¹³ Once the committee has received all of these comments, it then reconsiders the rule.¹⁴ It might tweak the rule a bit, or it might decide to forego the rule altogether.¹⁵

If the committee moves forward with the proposal, it sends the final version to the Standing Committee for its approval once again.¹⁶ Assuming the Standing Committee approves the rule change, it forwards the rule to the Judicial Conference of the United States.¹⁷ If the Judicial Conference approves the rule change, it then sends the change to the

6. Order Appointing Comm. to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1934) (“Pursuant to Section 2 of the Act of June 19, 1934, c. 651, 48 Stat. 1064, the Court will undertake the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the District of Columbia, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights.”).

7. Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 277 (2009).

8. For a detailed discussion of the rulemaking process, see generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (providing an exhaustive overview of the origins of the Rules Enabling Act and history of the rulemaking process); Coleman, *supra* note 7.

9. James C. Duff, *Overview for the Bench, Bar, and Public, The Federal Rules of Practice*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> [https://perma.cc/B325-YD5N] (last visited Feb. 19, 2018).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

Supreme Court.¹⁸ If the Court approves the change, it forwards it on to Congress, whereby under the Rules Enabling Act, Congress can vote to modify or defeat the rule.¹⁹ If Congress does not take any action, the rule becomes law.²⁰ This process takes about three years from start to finish, assuming that all goes as planned. Anywhere along the way, the rule can be tabled or defeated.

The committee members are appointed by the Chief Justice of the United States Supreme Court.²¹ There are 14 people on the committee, including a chairperson and a reporter, the latter of which does not vote.²² A member of the Department of Justice, most often the Deputy Attorney General, sits *ex officio* on the committee as well, bringing the membership total to 15.²³ The individuals who serve on the committee are experts in civil litigation. Most committee members are federal judges, but practitioners and academics serve on the committee too.²⁴

B. *The Informational Inputs of the Rulemaking Process*

The original advisory committee relied on its individual members' experiences, and it called on select members of the bench and bar for their thoughts on the 1938 version of the Federal Rules of Civil Procedure.²⁵ Over time, however, the committee has looked to additional information inputs when considering changes to the civil rules. Now, in addition to the rulemakers' own experiences, members of the committee depend on several of what this Article calls "information inputs." The main three categories of information inputs are: (i) empirical research, (ii) specialized conferences, and (iii) rulemaking research and development (rulemaking

18. *Id.* The Court considers the rule proposals and must send any proposed amendments to Congress by May 1st of the year the amendments are supposed to take effect.

19. *Id.*

20. *Id.* If Congress does not act, the rules become law on December 1st of the year the amendments are intended to take effect.

21. *Committee Membership Selection*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> [<https://perma.cc/8GVU-6NYZ>] (last visited Feb. 19, 2018).

22. *Committee on Rules of Practice and Procedure Chairs and Reporters*, ADMIN. OFFICE OF THE U.S. COURTS, 1-2 (Oct. 1, 2017), http://www.uscourts.gov/sites/default/files/2017_committee_roster_0.pdf [<https://perma.cc/UQV8-SS8M>].

23. *Id.* at 2.

24. *Id.* at 1-2.

25. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 725-30 (1998). The rules were circulated for comment to a select group of attorneys and judges on two occasions (May 1936 and April 1937) during that four-year period. *Id.*

R&D). This section will briefly describe each of these inputs and provide examples of when the committee has used them.

First, the committee often relies on empirical research.²⁶ This research can take many forms ranging from brief reports to lengthy studies. It can also arise internally—either by request of the committee to outside parties or by request to individual members or a sub-committee—or it can arise externally—when an outside party provides the committee with its research as part of a proposal for a rule change or as part of its support for the same.²⁷

The internal research is inspired by committee request. The committee might ask the Federal Judicial Center (FJC) to study an issue over which it is deliberating. For example, following the Supreme Court’s decisions in *Twombly* and *Iqbal*, the committee asked the FJC to study how the decisions impacted motion to dismiss rates.²⁸ Or, the committee might rely on someone closer to the committee like a committee member, sub-committee, or staff member. For example, the committee asked then-Chair Judge Rosenthal’s rules clerk, Andrea Kuperman, to similarly follow the *Twombly* and *Iqbal* decisions, which she did.²⁹ This kind of empirical work is directed by the committee and is therefore quite specific and controlled.

External empirical research is less predictable because individuals or entities that are seeking a specific rule change or that are advocating against or in support of a proposed rule change provide the information.

26. Kravitz et al., *supra* note 4, at 514–15 (“The result is a modern approach to rulemaking that heavily relies on empirical study by the Federal Judicial Center and the collection of information through national and regional conferences and calls for comment.”).

27. *How to Suggest a Change to the Rules of Practice and Procedure and Forms*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-suggest-change-rules-practice-and-procedure-and-forms> [https://perma.cc/KZ2L-LAM2] (last visited Mar. 9, 2018).

28. Mark R. Kravitz, et al., Advisory Comm. on Fed. R. of Civ. P., Report of the Civil Rules Advisory Comm. to the Standing Comm. on the Rules of Practice and Procedure 54 (May 2, 2011) in Agenda Materials from the Comm. on Rules of Practice and Procedure, 217 (June 2-3, 2011), <http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-june-2011> [https://perma.cc/NV8X-BUBB] (“The [Civil Rules Committee’s] approach to pleading practice remains what it has been since 2007. The Committee will closely monitor developing practice, it will encourage and heed further rigorous empirical work, and it will listen carefully to the voices of bench, bar, and academy. Procedural ferment is exciting, but it does not justify an excited response.”); *see generally*, Joe S. Cecil et al., *Motion to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules*, FED. JUD. CTR. (Mar. 2011), <https://www.fjc.gov/sites/default/files/2012/MotionIqbal.pdf> [https://perma.cc/MQF7-KQ6D] (last visited Mar. 7, 2018).

29. Memorandum from Andrea Kuperman, Rules Law Clerk to Judge Lee H. Rosenthal, to Civil Rules Committee 1-2 (Apr. 15, 2010), http://www.uscourts.gov/sites/default/files/andrea_kuperman_iqbal_memo_april_2010_1.pdf [https://perma.cc/MFR5-UNWM].

This means the information is the product of an agenda that is sometimes, at least initially, external to the committee's agenda. Sometimes this work will be included in a request for the committee to take on a rule amendment. For example, the Institute for the Advancement of the American Legal System at the University of Denver and the American College of Trial Lawyers Task Force on Discovery conducted a joint project that resulted in a number of proposals that it shared with the committee (and included in the reports and studies).³⁰

In other cases, external empirical research might be provided to the committee during the comment period on an already proposed rule change.³¹ For example, during the notice and comment period for the 2015 discovery amendments, Microsoft representatives testified about the rule, providing the committee with a visual aid detailing how much documentation Microsoft preserves for potential litigation versus how much documentation it actually used in trial.³² The committee does not request this external empirical research, but it often uses the information in its deliberations.

In addition to empirical research, the committee receives information inputs from specialized conferences. In these conferences, the committee invites experts to present and engage about a topic the committee is considering. The most notable of these conferences was the 2010 Duke Conference, where the Civil Rules Committee invited elite practitioners, judges, and academics to broadly consider the civil justice system, but specifically discovery reform.³³ There have been several other conferences, however, covering subjects ranging from class actions to e-discovery.³⁴

30. Brittany K.T. Kauffman, *Initial Disclosures: The Past, Present, and Future of Discovery*, AKRON L. REV. (forthcoming Spring 2018).

31. See, e.g., *Archived Rule Comments*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/archived-rules-comments> [https://perma.cc/735E-YU99] (last visited Mar. 12, 2018).

32. See Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Before Judicial Conf. Advisory Comm. on Civil Rules, 79–81 (Jan. 9, 2014), <http://www.uscourts.gov/file/9446/download> [https://perma.cc/BYP5-KRG3]. Microsoft's attorney David M. Howard stated:

To put it another way, for each page that is actually used in evidence, we produce 1,000 pages, review 4,000 pages, process 120,000 pages, and preserve over 670,000 pages. Depending on the [type] of case, we spend 30 to 50 percent of our out-of-pocket litigation dollars on discovery. In the last decade, we paid about \$600 million in fees.

Id. at 80.

33. Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1020 (2016).

34. Kravitz et al., *supra* note 4.

Finally, what this Article calls “rulemaking R&D” provides another source of information inputs for the committee. Rulemaking R&D is when the committee puts forward a proposed rule change before officially publishing it for public comments. This rulemaking R&D can arise in a range of formats. For example, from 2015 to 2016, the committee circulated a set of “rule amendment sketches” to the class action rule.³⁵ Various members of the sub-committee responsible for those “sketches” then traveled to different conferences and gatherings to garner feedback on the proposals—all of this took place well before anything had been officially considered by the committee, let alone published for public comment.³⁶ More recently, and as discussed in more detail in Section III, the committee is running pilot projects where specific district courts pilot a potential rule change and gather information and feedback about how that rule change might work.³⁷

These inputs—empirical research, specialized conferences, and rulemaking R&D—are important innovations in the rulemaking process because they have expanded the information upon which the rulemaking committee relies. The next section will focus in greater detail on how discovery reform has contributed to expanding these information inputs.

III. DISCOVERY REFORM & RULEMAKING INNOVATION

Rulemaking innovation in the form of empirical research, specialized conferences, and rulemaking R&D is now part of the civil rulemaking process. This section argues that much of this innovation is the result of discovery reform. More specifically, modern discovery reform and its successes and failures have driven the committee to look for new ways to innovate. These innovations—while imperfect—are ultimately positive because they demonstrate how nimble the rulemaking process can be. To respond to the evolving challenges of the civil justice system, the process must be willing to adapt. Through discovery reform and responsive innovation, the committee has done just that.

35. *Introductory Materials*, Rule 23 Subcomm., Advisory Comm. on Civil Rules, Mini-Conference On Rule 23 Issues, 1 ADMIN. OFFICE OF THE U.S. COURTS (Sept. 11, 2015), http://www.uscourts.gov/sites/default/files/rule_23_mini-conference_materials.pdf [<https://perma.cc/R7ET-ZM7A>].

36. Richard Marcus, *Once More Unto The Breach? Further Reforms Considered for Rule 23*, 99 JUDICATURE 56, 57-65 (Summer 2015), https://www.americanbar.org/content/dam/aba/administrative/litigation/links/2016_cads/063015_rule_23_marcus_reprint.authcheckdam.pdf [<https://perma.cc/97EC-DMAS>].

37. See *infra* Section III notes and accompanying text.

A. *Modern Discovery Reform*

The original discovery rules, namely under Rule 26, allowed for the discovery of all relevant information related to the subject matter of the litigation.³⁸ These new discovery rules did not maintain the status quo and represented the committee's sense that the rules should encourage a free exchange of information, lest there be any surprises at trial.³⁹ The Advisory Committee note to the original Rule 26 stated, "[w]hile the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation."⁴⁰ The new civil rules ushered in a new age of discovery, where each party could obtain the information it needed, limited only by objections of attorney-client privilege and relevance.⁴¹

But, that was 1934. By the time the rules committee convened in the late 1970s and early 1980s, there was a growing sense, if not reality, that the civil justice system could no longer bear the pressure created by unfettered discovery.⁴² It is this change that ushered in modern discovery reform.

This section will detail five primary periods in discovery reform by highlighting the major change made to the discovery rules during each period. This Article will then identify and examine the consequential or corresponding rulemaking innovations adopted by the committee. While not all rulemaking innovations are the direct product of discovery reform, this section will show that discovery reform is at least partly responsible for the committee's adaptive responses within modern civil rulemaking.

The five primary discovery reform periods are as follows: (i) the 1983 amendments to the scope of discovery under Rule 26(b)(1); (ii) the 1993 amendments adopting mandatory initial disclosure in Rule 26(a)(1); (iii) the 2000 amendments modifying mandatory initial disclosure under Rule 26(a)(1); (iv) the 2006 electronic discovery amendments; and (v) the

38. FED. R. CIV. P. 26(a).

39. See Subrin, *supra* note 25, at 710; Edson R. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 216–19 (1937).

40. FED. R. CIV. P. 26(b)(1) advisory committee's note to 1937 adoption. Similarly, in 1946, Rule 26(b)(1) was amended to clarify that parties could seek inadmissible evidence through discovery. The Advisory Committee note explained, "[t]he 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." FED. R. CIV. P. 26(b)(1) advisory committee's note to 1946 amendment.

41. Work product protection, or trial preparation material protection, was codified in 1970. FED. R. CIV. P. 26(b)(3) advisory committee's note to 1970 amendment. This codification followed the U.S. Supreme Court's decision in *Hickman v. Taylor* in 1947, where the Court ostensibly created that protection. See 329 U.S. 495, 511 (1947).

42. Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1784–85 (2015).

2015 proportionality amendments. While there were other changes made to the rules—discovery or otherwise—in each of these periods, this section will focus only on the primary changes to discovery.

B. Discovery Reform, Controversy, and Responsive Innovation

The first major changes to discovery appear in 1983. The most significant change was to amend Rule 26(b)(1) to add factors meant to assist judges in addressing what the committee called “over-discovery.”⁴³ The new language provided the first iteration of “proportionality” language, stating in part that a judge must assess whether “[t]he discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.”⁴⁴ The committee expressed concern that judges had “been reluctant to limit the use of the discovery devices” in the past.⁴⁵ This new rule language, the committee hoped, would allow the court to reduce the amount of discovery and help prevent redundant or disproportionate discovery.⁴⁶ These changes caused much controversy.

Along with—and largely eclipsing—this discovery amendment, the committee also adopted controversial amendments to Rule 11 that provided for mandatory sanctions in the event the court determined a filing was frivolous.⁴⁷ Primarily, in response to the Rule 11 amendments, but also in response to the discovery amendments, scholars criticized the information—or rather lack thereof—on which the committee relied.⁴⁸ This led to a notable study of the impact of Rule 11 by a Third Circuit task

43. FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment, subdiv. (b): Discovery Scope and Limitations.

44. FED. R. CIV. P. 26(b)(1) (1983), *reprinted in* 97 F.R.D. 165, 214-15 (1983).

45. *Id.* at 217.

46. *Id.*

47. See Bruce H. Kobayashi & Jeffrey S. Parker, *No Armistice at 11: A Commentary on the Supreme Court’s 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure*, 3 SUP. CT. ECON. REV. 93, 100–01 (1993) (discussing the evolution of Rule 11).

48. Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927 (1989) (“First, Rule 11 was amended but six years ago, and the amended Rule was avowedly an experiment. The Advisory Committee knew little about experience under the original Rule, knew little about the perceived problems that stimulated the efforts leading to the two packages of Rules amendments in 1980 and 1983, knew little about the jurisprudence of sanctions, and knew little about the benefits and costs of sanctions as a case management device.”). However, the criticism was not limited to Rule 11. *Id.* at 1928 (“[T]he 1983 amendment of Rule 11 was but one of a number of amendments, a package, moreover, that was sent to Congress only three years after another.”).

force, the results of which were published in 1989.⁴⁹ The committee did not commission this report, but it no doubt took note of the value of such empirical research.⁵⁰

The committee went back to work, and in 1993 it published another set of amendments to both Rule 11 and Rule 26.⁵¹ These amendments fared no better and incited further controversy.⁵² Indeed, even members of the Supreme Court expressed concern regarding the rules package.⁵³ Leaving to the side the changes to Rule 11,⁵⁴ the discovery rules were amended to require mandatory initial disclosures under Rule 26(a)(1).⁵⁵ These disclosures included basic information such as documents, witnesses, and damages information the parties might have.⁵⁶ The controversy over the rule was multilayered and ideologically vast: (i) it required disclosure of this information not just as it related to a plaintiff's claim or a defendant's defense, but instead as it related to the subject matter of the litigation; (ii) it assailed the adversarial system by requiring disclosure without an adversarial request; and (iii) it only required production for issues pleaded with particularity.⁵⁷ In other words, no one was happy. To mitigate this controversy, the new rule explicitly allowed for a district court to "opt out" of the rule if it was so inclined.⁵⁸ This, of

49. See STEPHEN B. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* (1989). Burbank, a strong critic of the Rule 11 amendments, served as reporter of the Task Force and principal author of the report. *Id.*

50. *Id.*

51. In the meantime, Congress and the executive branch intervened in civil litigation as well. Then-Vice President Dan Quayle famously headed a "Commission on Competitiveness" to look at the civil justice system. Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 303 (1994). Similarly, then-Senator Joe Biden led the charge toward the adoption of the Civil Justice Reform Act. *Id.*

52. *Id.* at 295 ("The 1993 revisions of the Federal Rules of Civil Procedure evoked more vigorous opposition than any rule revision ever promulgated by the Supreme Court of the United States, save the single exception of the Federal Rules of Evidence. Much, but by no means all, of the criticism has been directed at . . . Rule 26(a)(1) . . .").

53. See H.R. DOC. NO. 74, 103rd Cong., 1st Sess. 1, at 104 (1993) (dissenting statement of Justice Scalia). Justice Scalia dissented from the Court's adoption of amendments to Rule 11 (sanctions) and to Rules 26, 30, 31, 33, and 37 (discovery). Justice Thomas joined in full, while Justice Souter joined in the dissent with respect to the discovery rules.

54. The amendment to Rule 11 eliminated mandatory sanctions and added the now familiar 21-day safe harbor rule.

55. FED. R. CIV. P. 26(a)(1).

56. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment. This amendment also resulted in the splitting of the factors adopted in 1983 from Rule 26(b)(1) into Rule 26(b)(2); see also FED. R. CIV. P. 26 advisory committee's note to 1983 amendment.

57. Carrington, *supra* note 51, at 305-10.

58. Kauffman, *supra* note 30.

course, led to a lack of uniformity across the country with respect to mandatory initial disclosures.⁵⁹

The leading response to the combination of changes in 1983 and 1993 was to call for “a moratorium on ignorance and procedural law reform.”⁶⁰ Specific to Rule 26(a)(1), critics again assailed the lack of empirical evidence in support of the rule change.⁶¹ It appears that the committee found support for the rule change in two articles written by Wayne Brazil—a professor and later magistrate judge—and Judge William Schwarzer—the head of the FJC at the time.⁶² These articles were not empirical studies; they were well informed, but mostly impressionistic accounts of modern discovery. Related to the question of empirical evidence, critics also wondered why the committee acted with such haste instead of waiting to see how local courts that had adopted their own mandatory initial disclosure rules fared.⁶³ Ultimately, there was a sense that the committee acted at once with great hubris and naiveté, adopting a rule intended to achieve “cultural change” but that in reality allowed for district courts to all but ignore the rule change.⁶⁴

No moratorium was adopted, but the committee did engage in some soul searching. Following this firestorm, the committee conducted a self-study of judicial rulemaking procedures.⁶⁵ One of the main suggestions from the self-study was to urge the committee to request and use more

59. *Id.*

60. Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for A Moratorium*, 59 BROOK. L. REV. 841, 855 (1993); Mullenix, *supra* note 2, at 810 (“[When Rule 26(a) was proposed for adoption there was] virtually no empirical study of the current practice of such informal discovery, the efficacy of such experiences, or the results of informal discovery.”).

61. Burbank *supra* note 60, at 845 (“Again, there was little relevant empirical evidence. . .”).

62. Carrington, *supra* note 51, at 304 (explaining that the committee also reached out in a targeted way to certain constituents).

Drafts of a disclosure rule were circulated to law teachers and to bar groups that had expressed an interest in the work of the committee, or in the specific idea of disclosure requirements. Suggestions were received and considered, and some were adopted, notably those of an 18-member committee of the American College of Trial Lawyers.

Id. at 305-06.

63. Burbank *supra* note 60, at 845 (“[I]ndeed, the Committee repeatedly rejected pleas to stay its hand pending the evaluation of experience under local rules.”). According to Paul Carrington, “several” district courts had experimented with mandatory initial disclosures. Carrington, *supra* note 51, at 304. Yet, the rulemaking committee undertook no formalized study of how those district courts had fared.

64. Burbank *supra* note 60, at 846 (“Moreover, one would have thought both that care in drafting should produce an easily comprehensible rule and that a vehicle of cultural change should not be riddled with escape hatches.”).

65. *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 711 (1995).

empirical work before making changes to the rules.⁶⁶ With respect to discovery, the committee formed a sub-committee to examine discovery in greater detail.⁶⁷ The sub-committee and greater committee also sought out empirical research on the mandatory initial disclosure rule that had been adopted to determine how it was working in practice.⁶⁸ It received this information from both the FJC and the RAND Corporation.⁶⁹ The committee also organized a conference in Boston on rules reform that resulted in a symposium of articles that were published in the Boston College Law Review.⁷⁰ In addition to the Boston conference, the committee held a smaller conference in San Francisco.⁷¹ In other words, the committee commissioned empirical work and did broader outreach to stakeholders in the rules—judges, lawyers, and academics.

Once it had this information, the committee once again adopted another discovery reform. In 2000, the “opt-out” provision of Rule 26(a)(1) was eliminated, meaning that all federal courts would abide by a uniform mandatory initial disclosure rule.⁷² However, the scope of discovery under Rule 26(b)(1) was also modified to only include a party’s claim or defense, allowing the party to expand its inquiry regarding the subject matter of the claim upon a showing of good cause.⁷³ This “diluted disclosure rule,”⁷⁴ while characterized as modest, was still met with criticism.

Critics mainly noted that while the committee looked at empirical evidence, the rule it proposed did not line up with that evidence. Specifically, the studies of lawyers and judges who used the broader mandatory initial discovery rule—one that applied to the subject matter—found it to work quite well.⁷⁵ More generally, studies showed that, in most

66. *Id.* at 699.

67. Kauffmann, *supra* note 30.

68. *Id.* (“The Committee’s efforts were informed by empirical research that suggested that some form of mandatory disclosure was in place in a majority of the districts; that attorneys who had practiced disclosure were highly satisfied with it; and that the fear of satellite litigation with respect to disclosure was unfounded.”).

69. Stempel, *supra* note 2, at 555.

70. *Id.*

71. *Id.*

72. FED. R. CIV. P. 26(a)(1).

73. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2000 amendment, subd. (b)(1) (explaining that “[c]oncerns about costs and delay of discovery have persisted” in spite of previous revisions to the discovery provisions).

74. Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to the Hon. Alicemarie H. Stotler, Chair, Comm. on Rules of Practice and Procedure 7 (May 18, 1998).

75. Stempel, *supra* note 2, at 578 (“A fair reading of the FJC and Rand studies does not suggest that the current ‘subject matter’ scope of discovery is a particular problem.”). “Committee Member Judge Shira Scheindlin (S.D.N.Y.) . . . [e]mphasized that the empirical data available suggested that

cases, discovery was not that expensive and that it was not the nature of the discovery rules driving the cost, but the stakes of any particular case.⁷⁶ Critics also expressed concern that the committee had succumbed to effective lobbying by powerful attorney groups like the American College of Trial Lawyers.⁷⁷ Finally, there was concern that the committee had become too political.⁷⁸

There was no time for the committee to rest, however, because it was already considering the question of e-discovery and how it should be incorporated and dealt with in the federal civil rules. Even before 2000, a sub-committee on e-discovery was formed.⁷⁹ That sub-committee convened two “mini-conferences” on e-discovery in San Francisco and in New York City.⁸⁰ Various lawyers, litigation specialists, technology experts, and judges were invited to present and discuss the issues.⁸¹ The conferences were informal, invite-only, and not recorded or otherwise publicized.⁸² In 2001, the FJC conducted studies regarding judicial experience with e-discovery.⁸³ As it had with the 2000 mandatory initial disclosure rule, the committee reached out to those who had expressed interest in the issue of e-discovery.⁸⁴ This outreach was broader, however, including about 200 people.⁸⁵ The committee sought informal input on some “trial” rules in advance of the committee drafting its formal proposals.⁸⁶ Following all of this groundwork, the committee held a larger, formal e-discovery conference at Fordham Law School in New York City.⁸⁷

the current broad scope of discovery was not viewed as a problem by lawyers, citing the proceedings at the 1997 Boston College conference in particular support of this view.” *Id.* at 571. Judge Scheindlin also noted that academics and “neutral bar associations” proposed narrowing the rule to claims and defenses. *Id.*

76. *Id.* at 573-80.

77. *Id.* at 588-89.

78. *Id.* at 618 (“In short, the Advisory Committee vote on scope of discovery, despite a debate of considerable sophistication, in the end resembled Capitol Hill as much as a judicial deliberation.”).

79. Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 196 (2006).

80. *Id.* at 192.

81. *Id.*

82. *Id.*

83. *Id.* at 192-93.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

These efforts resulted in the fourth major period of modern discovery reform—the 2006 e-discovery amendments.⁸⁸ Unlike the previous discovery periods, these rules proved to be rather non-controversial. While there were some substantive debates about the normative choices within the rules, there was little or no criticism of the process itself.⁸⁹ Indeed, even a scholar who expressed general “gloom” about the rulemaking process overall noted that the e-discovery rules were a place where the committee showed its ability “to lead and innovate.”⁹⁰

This relative calm did not last long, however. The perception that discovery was still a challenge for the civil justice system pushed the committee to convene the 2010 Duke Conference on Civil Litigation.⁹¹ The conference spawned a discovery sub-committee. The conference not only allowed for in-person discussion about issues like discovery, it also produced a great deal of internal and external empirical research.⁹² This research presented a challenge to the committee and its sub-committee, however, because it was often at loggerheads. Most famously, one FJC study found that the median discovery costs for plaintiffs amounted to \$15,000 and the median costs for defendants amounted to \$20,000.⁹³ A related study determined that higher costs are associated with cases where the parties have more at stake.⁹⁴ In contrast, a survey of corporate legal counsel conducted by the Institute for the Advancement of the American

88. Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 234 (2010)

89. See, e.g., Laura Catherine Daniel, *The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against Their Codification in the Federal Rules of Civil Procedure*, 47 WM. & MARY L. REV. 663, 669 (2005) (“[B]ecause [clawback and quick-peek agreements] run contrary to the common law, pose thorny ethical dilemmas, and risk losing their force with other parties or in other fora, they should not substitute for a traditional privilege review even if ultimately condoned in the Federal Rules.”).

90. Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 449 (2013).

91. See Coleman, *supra* note 42, at 1714.

92. See 2010 Civil Litigation Conference, Empirical Research, Duke Law School (May 10-11, 2010), <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil> [<https://perma.cc/7LMV-S683>].

93. Emery G. Lee III & Thomas E. Willging, *National, Case-based Civil Rules Survey, Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, FED. JUD. CTR. 1, 35, 37 (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf) [<https://perma.cc/T3DF-N5Y4>].

94. Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis, Report to the Judicial Conference Advisory Committee on the Civil Rules*, FED. JUD. CTR. 1, 5, 7 (2010), http://www.uscourts.gov/sites/default/files/fjc_litigation_costs_in_civil_cases_-_multivariate_analysis_0.pdf [<https://perma.cc/TMW4-8XSV>]. The study found that for both plaintiffs and defendants, “a 1% increase in stakes was associated with a 0.25% increase in total” discovery costs. *Id.*

Legal System found that counsel believed that discovery costs in federal court were not proportional to the value of the case 90% of the time.⁹⁵ The potential and limits of empirical research were readily apparent.

The 2010 Duke Conference ushered in the fifth major period of discovery reform. The most notable change to the discovery rules in 2015 was revised Rule 26(b)(1).⁹⁶ The rule was amended to include proportionality within the definition of the scope of discovery.⁹⁷ Five of these factors were taken directly from Rule 26(b)(2)(C), which was a section of the discovery rules that explicitly granted the court power to limit discovery.⁹⁸ Those factors—(i) whether the “burden or expense of the proposed discovery outweighs its likely benefit,” (ii) “the amount in controversy,” (iii) “the parties’ resources,” (iv) “the importance of the issues at stake,” and (v) the “importance of discovery in resolving the issues”—were joined by one additional factor: “the parties’ relative access to relevant information.”⁹⁹

This proportionality rule was extraordinarily controversial. A detailed account of this controversy is beyond the scope of this Article.¹⁰⁰ In brief, however, people disagreed as to whether this was a simple change of moving one part of the rule to a place where it would be front of mind for judges or whether this was a complete departure from traditional discovery norms because it restricted the scope of discovery.¹⁰¹ The committee attempted to mitigate the controversy by editing its committee note to respond to some of the major concerns, but at the end of the day, the committee found itself mired in a great deal of controversy and, one might even say, some bad press.¹⁰²

Even while this controversy was brewing, however, the committee was already considering a new approach to gathering information for its

95. *Advisory Committee on Rules of Civil Procedure*, U.S. COURTS 1, 83 (Apr. 10-11, 2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf> [<https://perma.cc/TW67-AU3X>]. Another study by the American College of Trial Lawyers Task Force on Discovery found that almost half of the respondents “believed that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers.” *Id.*

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

97. *Id.*

98. FED. R. CIV. P. 26(b)(2)(C).

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

100. For a broader discussion of the controversy, see Patricia W. Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2016).

101. *Id.*

102. See *id.*; Suja A. Thomas, *Via Duke, Companies are Shaping Discovery*, LAW360 (Nov. 4, 2015), <https://www.law360.com/articles/723092/opinion-via-duke-companies-are-shaping-discovery> [<https://perma.cc/EG4R-UUWM>].

next potential set of rule proposals. Following the brouhaha over proportionality, the committee appeared keen on taking a chance with this new approach. In addition to informal and formal information gathering, commissioned empirical work, and outside empirical work, the committee is now engaging in pilot projects.¹⁰³ The committee has developed two pilot projects—one on expedited procedures and one on mandatory initial disclosures.¹⁰⁴ The latter is directly related to discovery and further along, so this Article will focus on that project.

In the mandatory initial discovery pilot, two district courts—the United States District Court for the Northern District of Illinois and the United States District Court for the District of Arizona—have implemented a rule that requires parties making mandatory initial discovery responses “[t]o disclose both favorable and unfavorable information that is relevant to their claims or defenses regardless of whether they intend to use the information in their cases.”¹⁰⁵ The project will run for three years with the goal of assessing “[w]hether requiring parties in civil cases to respond to a series of standard discovery requests before undertaking other discovery reduces the cost and delay of civil litigation.”¹⁰⁶ The project began in May of 2017,¹⁰⁷ and all indications show it is going well. While we must wait and see what the committee does with the information it garners from the pilot projects, it is undeniable that the committee is embarking on a new rulemaking R&D innovation.

C. *Rulemaking Innovation and the Rulemaking Flexibility Ethos*

The modern civil rulemaking process is consistently under a microscope, and rightfully so. It is a process that gives rise to the rules that govern how civil litigation works, and at the same time, it is a process that is uniquely open to critique due to its transparency and accessibility. What goes a bit under-studied—and perhaps even under-celebrated—is that the rulemaking process is quite flexible and adaptive. That flexibility is certainly demonstrated by the committee’s continuing rulemaking

103. *Mandatory Initial Discovery Pilot Project: Overview*, FED. JUD. CTR., <https://www.fjc.gov/content/321837/mandatory-initial-discovery-pilot-project-overview> [<https://perma.cc/EEEX3-BEMM>] (last visited Mar. 5, 2018).

104. Kauffman, *supra* note 30.

105. *Mandatory Initial Discovery Pilot Project Model Standing Order*, FED. JUD. CTR., (Apr. 6, 2017), <https://www.fjc.gov/content/320224/midpp-standing-order> [<https://perma.cc/DHA2-LS2C>].

106. *Id.*; see generally Kauffman, *supra* note 30 for a detailed account of mandatory initial disclosure rules and the pilot projects.

107. *Mandatory Initial Discovery Pilot Project*, *supra* note 103.

innovations. In the face of criticism—and one hopes, to create a better product—the committee has been willing to take different approaches to assessing what rules will be optimal for our justice system.

Professor Steven Gensler has noted that Charles Clark viewed the committee as a body that would “[k]eep the rules vital and young,” what Gensler dubbed “[a] fountain of youth for the Civil Rules.”¹⁰⁸ The argument goes something like this: The rules of procedure tend to harden over time because we get accustomed to them and because judges—given their discretion within the rules—tend to provide extended discussion of how the rules are used only when they decide to restrict them.¹⁰⁹ The perception of the rules is then skewed and petrified. That hardening, Clark thought, could be mitigated by a committee system that would serve as a constant check on how the rules were working on the ground and in context.¹¹⁰ In this way, the committee would provide a flexible check on the rules with the goal of keeping the rules young and lively.¹¹¹

It is in this spirit that the committee innovates its rulemaking process. While the steps of the process are quite inflexible, the information the committee seeks out and receives is not. Discovery reform has been challenging, but from that reform the committee has adapted how it approaches rulemaking. First, the committee focused on empirical research.¹¹² At the same time, it began to informally gather feedback, input, and information before embarking on major reforms.¹¹³ The response to these innovations was mixed, in part because the committee was criticized for prioritizing some empirical information over others and because the committee became viewed as more ideologically motivated.¹¹⁴ Even still, the committee continued to respond to critiques by innovating its information gathering process.¹¹⁵

That brings us to today where the committee seems uniquely poised to both satisfy its critics and create an optimal product. The pilot projects hold much promise—providing hands-on information about how a rule change might work. Moreover, the projects are deliberative and thoughtful. It remains to be seen what the committee will do with the information it receives—a risk with any empirical information. Yet, the

108. Steven S. Gensler, *Ed Cooper, Rule 56, and Charles E. Clark's Fountain of Youth*, 46 U. MICH. J.L. REFORM 593, 596 (2013).

109. *Id.*

110. *Id.*

111. *Id.*

112. *See supra* Section II.B.

113. *See id.*

114. *See* Stempel & Mullenix, *supra* note 2.

115. *See supra* notes 45 to 111 and accompanying text.

committee's latest innovations are encouraging. They reflect the best ways in which the committee should operate. To keep the rules young and lively, it must adapt.

A collection of former federal civil rulemaking chairs reflected on the information gathering process, stating:

That flexibility and discretion, built into the 1934 Act, has helped produce the continued and current success of the process. This success could not have happened without calls for improvement and suggestions for change. The Rules Committees welcome continued critical examination of the process and proposals to make it work better. The changes to the Committees' procedures, using suggestions from varied voices and sources, have improved the process, within the structure of the Enabling Act.¹¹⁶

Thus, while discovery reform will always be controversial, it has been a critical part of the evolving federal civil rulemaking process. With each major proposal, success, and failure, the committee reflected and altered its process. Without discovery reform, we might not have such robust rulemaking innovation. Hopefully, the two will continue to support and advance one another as the committee continues to respond to the evolving challenge of rulemaking reform.

IV. CONCLUSION

The basic steps of the rulemaking process have remained fairly static; yet, some critical aspects of how the rulemakers do their work have changed over time. One major area of innovation is what information the committee considers before making the rules. Discovery reform, while controversial, has driven much of the innovative tools the committee has adopted over time. This symbiotic relationship between discovery reform and rulemaking innovation is key to the success of federal civil rulemaking in the past and going forward.

116. Kravitz et al., *supra* note 4, at 517.