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## Presentation of Paper

**Professor Robert Casad**

*Editor's Note: The following is a presentation of Professor Paul Carrington's paper entitled, Recent Efforts to Change Discovery Rules: Do they Advance the Purposes of Discovery? The paper is reprinted in its entirety beginning on page 456 of this issue. Professor Carrington was unable to attend the conference due to Hurricane Floyd. The italicized portions of the following denotes Professor Casad's own commentary.*

There have been for some time movements afoot to reform the discovery provisions of the Federal Rules of Civil Procedure.<sup>1</sup> Sometimes the purposes of reform and indeed of discovery itself have been unclear. Why do American courts, virtually alone in the world, empower lawyers instead of judges to investigate disputed facts? The reality is that discovery is more deeply rooted in our legal and political culture than many who bear the costs of it care to acknowledge.

*Professor Carrington's first topic is the advent of discovery in private law enforcement. While much of the practice and diction of discovery was known to the English Court of Chancery, discovery was not a major feature of American law until the 1938 Federal Rules of Civil Procedure were promulgated.*

Anyone writing procedural rules on a clean slate in 1936 would have done as Judge Clark and his drafting committee chose to do in rejecting the traditional practice of code pleading then prevalent in most states. In adapting discovery for general use, the draftsman acted on a premise supplied to us in the 18th Century by the Enlightenment. That premise is that cases ought to be decided on the facts and the law and not as a consequence of the skill or luck of the parties' representatives in jousting or Sumo—a sport initially devised as a method for dispute resolution, or word games such as common law or code pleading. That idea of the Enlightenment has been seriously discussed by a number of scholars. Few, if any, advocates of discovery reform would question that premise.

The discovery rules elevated the law enforcing role of the federal courts. Not only were federal courts committed to enforcing law and civil cases, but they were assured of being more able to investigate and discern facts in

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dispute than any courts have ever been. The private bar, serving as officers of the courts, were effectively commissioned to use the court's subpoena power to investigate a wide range of possible unlawful conduct.

By the mid-1960s, the federal courts had replaced administrative agencies as the preferred means for enforcing much of our national law. Unlike administrative agencies and other political bodies in any government anywhere, the federal courts, their juries, and the private bar serving them were almost invulnerable to political manipulation, intimidation, or bribery in any of their many forms. The federal district court was therefore as close to a level playing field as any public forum has ever been. Armed with the contempt power, the federal courts were indeed a daunting threat to anyone considering a possible violation of the national law potentially injurious to the rights of others. Law enforcement in civil cases, not mere dispute resolution, became the primary business of the federal courts. Primarily enforced through civil litigation were laws deterring trade practices injurious to markets in goods and fraud injurious to investment markets, laws protecting civil rights and civil liberties, and laws protecting the environment. Where other countries relied upon administrative bureaucracies to protect the public interest in these large and important areas, America relied primarily upon its courts because they proved to be more effective.

State courts and legislatures in most states soon perceived this effect and replicated the federal practice in their state courts. We have, by means of Rules 26 through 37 and their analogues in state law privatized a great deal of our law enforcement, especially in such fields as antitrust, trade regulation, consumer protection, securities regulation, civil rights and intellectual property. More frequently than before, American lawyers were giving their clients the unwelcome advice that unlawful conduct harmful to others would likely be detected and the law enforced. In short, American law became surprisingly effective. Private litigants in America thus do and do more effectively much of what in other industrial states is done by public officers working within an administrative bureaucracy. This development coincided with the steady rise in the rights consciousness of the American people.

This development was entirely consistent with American political traditions. At least since the time of Andrew Jackson, many and sometimes most Americans had been skeptical about the ability of bureaucratic government to protect the individual interests of ordinary citizens from the predations by those with greater wealth and economic power. That skepticism was repressed during the progressive era and by the New Deal when most of the federal bureaucracies were created, but it was confirmed a thousand times in the first half of this century that regulatory agencies tend to be co-opted by those whom they regulate.

As a result, we have, since about 1950, acted on the belief that, if individuals of modest standing and resources are to secure protection from predation by those possessing the means of exploitation, private civil litigation is the best means available to them. Congress and state legislatures have, therefore, been disinclined to create new regulatory



bureaucracies and have generally expressed regulatory purposes by imposing civil liability on predatory conduct they mean to deter. Legislators and their constituents have known that, however numerous their many deficiencies, the private bar and the jury cannot be bribed, intimidated, or socialized by the incentives of status and class association and are more likely than bureaucracies to enforce the rights of individuals without fear or favor. Discovery has been an essential instrument in the shift from bureaucratic to private regulation.

Unsurprisingly, those receiving the unwelcome advice that their misdeeds are detectable by private counsel find discovery and the uniquely American form of private law enforcement to be objectionable. Many American firms perceive themselves to be victims of discovery, and the knowledge that discovery can result in the exposure of corporate misdeeds is a major reason why foreign firms doing business in the United States tend to despise American courts and why they strenuously resist the introduction of that practice in their home countries.

Not so many years ago, our economy seemed to be in disarray. Vice President Quayle was put in charge of a commission to restore the competitiveness of American business. Among the concerns his group expressed was the high legal cost inflicted on our entrepreneurs. The long-standing grievance of the Chamber of Commerce and like organizations against discovery was again voiced. Not observed by the Quayle Commission was the fact that the higher legal costs paid by American firms are balanced by higher taxes paid in Europe and Japan by firms in those countries that are more heavily regulated by administrative offices and agencies. Senator Biden seemingly sought to steal a march on the Vice President and sought the help of the Brookings Institution to prepare a quick study leading to the enactment of the ill-considered Civil Justice Reform Act of 1990.<sup>2</sup> The principal effect of that legislation was to encourage local experimentation by federal district courts in their management of pretrial litigation. The discovery rules were modified in 1993 to accommodate the experiments being conducted pursuant to the act. The period prescribed for such experiments has come to an end. It is again time for those responsible for the federal civil rules to revise them and to reflect current understanding and practice. It seems almost certain that revisions will be made next year, and proposals to that effect are presently percolating through the elaborate system by which rule changes are accomplished.

*Incidentally, as an aside, the proposed changes in the Federal Rules of Civil Procedure passed their first hurdle when the Judicial Council approved them. They will now be sent to the Supreme Court, and next spring the Supreme Court will decide what it wants to do. If the Supreme Court approves them, they will be sent to Congress, and, if Congress does nothing, they will become the law by the end of next year.*

As the Quayle Commission report tends to demonstrate, there is a chronic tendency of business firms who are targets for litigation to conflate procedural reform with tort reform. Those who cannot hope to secure relief by the legislative abrogation of the rights of the citizens who are suing them may seek to achieve that result by the more

devious means of impeding their adversaries' access to the evidence needed to establish their claims. Nevertheless, there may be some merit in some proposals for substantive law reform intersecting with discovery. For example, there is at least some merit in eliminating the occasion for expensive document searches in products liability cases. It is in the public interest that corporate officers have discussions of risks unfettered by the threat of liability imposed on the basis of intramural discussions. Tort liability is a useful incentive to manufacturers to make prudent decisions about the risks to users of their products, but it may be counterproductive to that purpose to impose or increase the liability on the basis of communications between officers of manufacturing firms discussing such risks candidly. Neither liability nor damages ought to be framed in such a way that candid internal discussion has substantial adverse consequences for the firm. For that reason, the substantive law of product liability should perhaps be reformed to make the manufacturer's subjective state of mind irrelevant. Such a reform would materially reduce the cost of discovery in products liability cases, for there would then be no point in searches through storehouses of documents looking for the proverbial smoking gun that is nothing more than an expression of concern about apparent hazards.

It is, however, contrary to public interest to allow manufacturers' legitimate concern for the consequences of socially counterproductive document searches to drive a substantial reform of discovery practice having broader ramifications for the enforceability of rights. We should keep clearly in mind that discovery is the American alternative to the administrative state. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.

*At this point in his paper, Professor Carrington talks about some of the problems associated with discovery practice currently, and one of them is the proliferation of local discovery rules whereby different courts in the same state or different federal courts in the federal system have significantly different rules relating to discovery. He considers that an adverse feature of current discovery that should be changed. In fact, that is one of the changes that the proposed new rules will make for the federal courts; eliminate the provision that allowed local district courts to opt out of some of the disclosure provisions. We'll get to that more in a minute. That's the next subject he takes up; disclosure.*

Much of the brouhaha in federal rule making has to do with the provision of 26(a)(1) requiring parties and their attorneys to disclose at the outset evidence in their possession bearing on issues raised by the pleadings.<sup>3</sup> That provision was introduced into the rules in 1993 as a device for enabling lawyers to plan and manage discovery. The 1993 provision contained a local option or opt-out provision and the rule is promulgated chiefly because several local districts wanted to experiment with that requirement and that would have been in violation of the rules if it hadn't been amended.<sup>4</sup> The evidence on the utility of the disclosure requirement suggests that the reform was mildly useful when tried, but it didn't really have any major consequences. The rulemakers are inclined to make a modified disclosure provision a part of the national rules. Some lawyers and



judges are strongly opposed.

Lawyer opposition is generally rooted in their attachment to the adversary tradition. Is it the fear that some of their clients will feel betrayed if they turn over to adversaries evidence harmful to their clients' causes? That objection is one that has been advanced to prior reforms designed to pursue the Enlightenment aim of applying law to facts. Those clients who would be exposed to just liability tend to be the first to insist on the adversary tradition that allows counsel to impede the presentation of just claims or defenses by opponents. The duty of the lawyer is to be an adversary within such rules as may be proscribed. It is not a proper purpose of procedural rules to pit adversaries against one another or to reward the party with the most effective advocate.

Some states are ahead of federal courts in the use of disclosure requirements. I have no data on their experience, but, unless further study reveals costs and benefits that are so far unrevealed, a state ought to consider adopting a disclosure requirement like Rule 26(a)(1) but without expecting that any substantial change in cost or delay will result.<sup>5</sup>

*Next he talks about judicial case management. Anxiety about the requirement that parties disclose evidence before they're requested by an adversary raises a separate issue regarding the proper role of court and counsel in preparing cases for trial. In recent decades, federal judges have with increasing frequency practiced case management. The practice is not unknown in state courts. It requires that cases be assigned to individual judges promptly at the filing so that each judge can manage his or her case. The aim is to prevent the — this is his word — metastasization of disputes, especially disputes over discovery matters.*

It has been pointed out that judicial case management is a misnomer. It is more accurately denoted as judicial management of lawyers. Few would contend for a return to the adversary tradition as it was known prior to the advent of discovery. It was implicit in the 1938 rules that the role of the advocate would be modified to impose a limited duty of cooperation in the investigation of facts in dispute. Such a duty was not novel. It had been long known to equity practice. Nevertheless, the breadth of the discovery rules substantially enlarged the duty of counsel as an officer of the court to cooperate.

Of course, there have always been clients who preferred lawyers who neglected their public duty to protect their private interests, and the lawyers for such clients have powerful incentives to neglect their duties. That is especially likely to be so for lawyers representing parties asserting groundless claims or defenses. By enlarging their professional duty, the 1938 rules enlarged the pressures on such counsel to misuse the process. There seemed to have been, as a result, a gradual erosion of the conduct of lawyers engaged in discovery practice that became noticeable in the 1960s. Judicial case management was the judges' response to the diverse tactical ploys employed by lawyers to gain illicit advantages. Among the illicit means sometimes employed were the imposition of costs on adversaries by excessive or pointless discovery, stonewalling, and burying adversaries in a blizzard of useless disclosures. Such tactics can be controlled

and even eliminated by prudent management of big and bitterly contested cases in which they are most likely to appear.

Judicial case management is, however, in its more extreme form, a costly radical transformation of the American legal tradition. It is sometimes explained as a mere adaptation of judicial practices commonly found on the continent of Europe or in Japan. In important respects, it is, but the suitability of civil law practice in the United States is dubious. Courts in civil law countries are not generally used for the wide range of political and regulatory purposes that American courts are employed for. Judges in those countries are selected at a very early stage in their professional careers and, therefore, have no political roots and no connections to interest groups. In addition, there is no right to jury trial in civil cases underscoring the importance of individual access to a disinterested finding of fact by lay persons. For these reasons, the civil law example is one to be followed only with the greatest caution.

The Civil Justice Reform Act was not cautious, however, in promoting more aggressive case management.<sup>6</sup> Its authors appear to suppose that judicial management might be the key to the presumed if not demonstrable problem of cost and delay. The votes are now in, and it is clear that judicial management is not a magic bullet to achieve the stated aims of the act. The data generated indicates that judicial management has oversold, that heavy management in the mine run of cases is a waste of time or worse. The misdirection of a judge's time and energy is a waste with extended consequences. Because judges are scarce resources, their misuse results in losses felt elsewhere. The one most important and indispensable duty of trial judges is to try cases, thus to enforce the law and to concentrate the minds of parties on the settlement of their disputes in the shadow of the law. If judicial case management reduces the availability of judges to conduct trials, that's an important loss.

*Professor Carrington then notes some unwelcome consequences of judicial case management and concludes, however, that these unwelcome consequences of judicial case management do not suggest the wisdom of a return to the days when counsel were free to abuse or impede discovery. Rather, they suggest that case management techniques should not be employed routinely in the absence of evidence that there are abuses to be prevented that cannot be controlled by other means and, thus, that real benefits can be secured. Judicial involvement in pretrial litigation should be the exception and not the rule.*

Given appropriate incentives, lawyers can manage pretrial litigation in most cases with minimal involvement of judges. The Civil Justice Institute data suggests the first and most essential incentive to be provided by the court is a reasonably firm trial date. Such a date should, with rare exception, be set by conference call within hours after an issue is joined. While it's generally desirable that the date be sooner rather than later, there is no need for justification for haste so urgent that it deprives the parties of a full opportunity for discovery. Nor is there justification for refusing modest postponements necessitated by surprise discovery. But, with those qualifications, it can be said that the single most



important deed a district judge can perform in the administration of pretrial litigation is to set a trial date and stick as closely to that date as possible.

With a credible trial date, the lawyers can in most cases plan discovery without the participation of a judge. The discovery conference described for the federal practice under Rule 26(f) generally works when employed for such intended purposes, it especially works if counsel comply with the disclosure requirements set forth in Rule 26(a)(1).<sup>7</sup> Those disclosures, however much they may be despised by lawyers who perceive them as undermining their relations with clients, establish a framework for planning discovery without undue delay. If such disclosures are not made, planning by lawyers is impeded and the obvious alternative is for the court to step in and manage the case, a step that is, in the end, more a derogation of the role of counsel and the parties than it is compliance with the modest disclosure requirements. The Civil Justice Institute data suggest that a state revising its practice rules in light of recent federal experience should retain the substance of both 26(f) and 26(a)(1), making them the source of the discovery plan fit to the case that will control the conduct of pretrial litigation in all but the rare case.

*Then he makes some other suggestions of specific measures that states might want to consider like limiting the number of interrogatories and limiting the time for discovery; obvious measures of that sort.*

Practice under the 1938 rules was characterized by an absence of the application of sanctions under Rule 36. Weak enforcement by courts contributed to the problem of abuse and delay by counsel. While the sanction's provisions were strengthened by the addition of Rule 26(g), it remains true that federal judges have been reluctant to punish lawyers for playing hostile games with discovery.<sup>8</sup> A likely reason for this weakness is that judges were lawyers once and identify with pressures felt by lawyers to aggressively protect interests of clients even at the expense of performance of duties to the court. Another reason is that an application of sanctions creates satellite litigation on the appropriateness and the measure of the sanction. The unhappy federal experience with sanctions under Rule 11 has likely reinforced the disinclination of many judges to impose sanctions on the abuse of discovery, so a state considering these issues should therefore give serious attention to other possible incentives to cooperate other than sanctions.<sup>9</sup> In particular, consideration should be given to the application of the English rule on shifting attorneys' fees to the resolution of discovery disputes. This would mean that, whenever a court ruled on a discovery issue, the prevailing party would be entitled automatically to reasonable attorneys' fees to compensate for the cost of litigating the issue. The demerit of the English rule in this application of final judgments is that it unduly chills the assertion of claims and defenses, but that is just the result desired with respect to discovery disputes. It would provide counsel with an additional reason to give his or her client for not contesting a discovery issue that there would be an additional cost associated with an unsuccessful contention. If the English rule were adopted for this limited purpose, the civil rules committee ought to consider the use of an English style taxing master, which he describes as an expert who can determine what the appropriate fees

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should be.

*He talks more about the changes in the scope of discovery. This is another thing which will be changed in the proposed new rules. Changing it from the present rule which says you can have discovery as to any matter relevant to the subject matter of the action to any matter relevant to a claim or defense in the action, a somewhat narrower definition. He also talks about a number of other specific nuts and bolts reforms. I commend to you to read this article about them.*

*I did want to sum up his last statements.*

Another outstanding issue of discovery meriting discussion by state rulemakers is the controversy regarding the practice of suppressing discovery material as part of a settlement, especially in mass tort litigation. It is argued in favor of the practice that parties should not be permitted a free ride on expensive discovery conducted in earlier like cases involving the same adversary. To preserve such material for use in subsequent similar cases deprives the party against whom it is used of the settlement bargaining chip represented by the cost of discovery. The diseconomies of redundant discovery, though, should be avoided if possible. The bargaining chip in question is not one the law ought to be at pains to protect because it has no relationship to the merits of the claims or defenses. It reflects instead the unavoidable but regrettable deficiencies of the legal process. For this reason, I suggest that the discovery rules should generally obligate parties to produce discovery materials produced in other like cases even if those cases were resolved short of trial. I have particularly in mind transcripts of depositions, responses to interrogatories, data compilations, tangible things, and other like items that are not privileged and not subject to a work product protection.

*This is his conclusion:* Taken together, the changes suggested here would substantially reduce the involvement of judges in the conduct of pretrial litigation. While it is unlikely that these changes would materially reduce the evils of cost and delay, they might affect marginal improvements, and it seems almost certain that they would not contribute to any increase in cost or delay. It bears reiteration that the most important steps to be taken by judges are to set a reasonably firm trial date, provide reasonable and tailored parameters to the time for discovery, and rule promptly on discovery disputes. Beyond those steps, the judges should not go, except in the rare case too complex to be managed by counsel. They should then concentrate their efforts on judging cases, not managing lawyers.

*Thank you on behalf of Paul Carrington.*

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## Notes

1. See FED. R. CIV. P. 26-37.





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## *Discovery Controversies*

2. *See* Civil Justice Reform Act of 1990 (CJRA), (Pub. L. 101-650, Title I, Dec. 1, 1990, 104 Stat. 5089).
3. *See* FED. R. CIV. P. 26(a)(1).
4. *See id.*
5. *See id.*
6. *See* Civil Justice Reform Act of 1990 (CJRA), (Pub. L. 101-650, Title I, Dec. 1, 1990, 104 Stat. 5089).
7. *See* FED. R. CIV. P. 26(a)(1), (f).
8. *See* FED. R. CIV. P. 26(g).
9. *See* FED. R. CIV. P. 11.