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Federal Civil Rulemaking, Discovery Reform, and the Promise of Pilot Projects

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In a memorable scene from the movie *The Princess Bride*, the criminal mastermind Vizzini peers over the Cliffs of Insanity to see that the Dread Pirate Roberts is indeed still alive. Flustered, Vizzini states, “He did not fall! Inconceivable.” Inigo Montoya, with a puzzled look, addresses Vizzini and observes, “You keep using that word. I do not think it means what you think it means.” We could say the same about discovery reform.

Judges, lawyers, academics, and federal civil rulemakers bandy about the phrase “discovery reform” as if we agree to its meaning—we don’t. Consider the basic story that lawyers tell about discovery and how that story uniquely depends on which side of the “v” they sit. On one side, plaintiffs’ attorneys argue that defendants are not forthright in discovery because they engage in gamesmanship to avoid disclosing information. On the other side, defense attorneys argue that plaintiffs ask for too much information, often with a goal of coercing settlement. Because of these positional and attitudinal differences, discovery reform simply cannot mean the same thing to both sides.

This divide begs the following question: How should the federal civil rulemaking process respond to calls for “discovery reform” when the problem about which both sides of the Bar are complaining—a so-called “discovery crisis”—is so differently defined? In other words, how does the Civil Rules Committee solve what is a multi-layered set of problems with one set of reforms when those problems, as defined, are often diametrically opposed?

Over the past thirty years, the committee has tried in vain to be responsive and to reform discovery, but by its own account, it has failed.¹ The committee is now embarking on a new adventuresome experiment to achieve that elusive reform: Pilot Projects. The first pilot project—which has already been initiated—is directly related to discovery. A second planned pilot project—one that is only in the planning stages and not yet up and running—is more generally focused on reducing litigation cost and delay. These pilot projects, while still in their infancy, hold much promise for federal civil

¹ See Jeffrey S. Sutton & Derek A. Webb, *Bold and Persistent Reform: The 2015 Amendments to the Federal Rules of Civil Procedure and the 2017 Pilot Projects*, JUDICATURE (Autumn 2017), at 13.

rulemaking and for successful reform. In the age of alternative facts and indeed alternative definitions of a problem, the pilot projects provide an opportunity to objectively test a rule change before it is broadly implemented. Stakeholders in our civil justice system may not ever agree on how to define the discovery crisis, but pilot projects may help bring about a unified solution.

I. Federal Civil Rulemaking and Discovery Reform

The federal civil rulemaking process—the process by which the Federal Rules of Civil Procedure are drafted and amended—has been in place for over eighty years. For over a third of that time, the Civil Rules Committee has been occupied with how to fix civil discovery. This section will review the basic steps of the federal civil rulemaking process and discuss how that process has intersected with modern civil discovery reform.

A. Summary of the Federal Civil Rulemaking Process

The Rules Enabling Act, adopted in 1934, delegated responsibility for adopting rules to govern federal trial and appellate courts to the Supreme Court of the United States.² The Supreme Court delegated that responsibility to an Advisory Committee made up of an elite set of practitioners and academics. That committee drafted the first Federal Rules of Civil Procedure that were officially adopted in 1938.

Over time, the process by which the rules are adopted and amended evolved. The rulemaking process can take about three years from start to finish, guided by a combination of federal statute, official guidelines, and informal custom. The modern rulemaking process is multilayered; instead of one Advisory Committee, there is now a Standing Committee on the Federal Rules of Practice and Procedure that oversees five separate advisory committees: appellate, bankruptcy, civil procedure, criminal procedure, and evidence. Those committees are responsible for originating and adopting changes to their respective rule systems.

In the civil rulemaking process, the modern committee voting membership is comprised of seven federal judges (one who serves as chair), one state court judge, four practitioners, and one academic. An academic also serves as reporter (a non-voting role), and the Department of Justice also has a member who sits *ex officio*. The Civil Rules Committee considers proposals received both from inside and outside of its committee, meeting on a bi-annual basis to discuss and adopt potential rule changes. Once it has approved a rule change, the proposal is sent to the Standing Committee for its approval, and if approved, published and circulated for public comment. After garnering public feedback, the committee considers the comments and decides whether to alter the rule, table the rule, or move forward. If the committee moves forward with the rule, it is sent to the Standing Committee and then the Judicial Conference of the United States for approval by those bodies. After Judicial Conference approval, it is sent to the Supreme Court. If the Supreme Court approves

² 28 U.S.C. § 2072 et seq. (2018).

the rule proposal, it then forwards it to Congress. Congress then has until December 1 of that year to reject or modify the proposal. If Congress fails to act, the rule becomes law.³

B. Modern Discovery Reform

The Civil Rules Committee's foray into discovery reform began in the late 1970's. Since then, it has consistently considered and periodically implemented rule changes aimed at making civil discovery more efficient. That reform has been, in a word, bumpy. This section will provide an overview of the major discovery reforms the committee has undertaken during the last thirty-five years and the response to those changes. While it is not a complete picture of the work the committee has done in the realm of discovery reform, it is an instructive context for understanding the promise of the pilot projects.

The 1938 discovery rules, namely under Rule 26, allowed for the discovery of all relevant information related to the subject matter of the litigation. 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. The Advisory Committee note to the original Rule 26 stated, "While 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."⁴ The new civil rules ushered in an age of discovery where each party could obtain the information it needed, limited only by objections of attorney-client privilege and relevance.⁵

But that was 1934. By the time the rules committee convened in the late 1970's and early 1980's, there was a growing sense, if not reality, that the civil justice system could no longer bear the pressure created by unfettered discovery.⁶ It is this change that ushered in modern discovery reform.

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."⁷ The new language provided the first iteration of "proportionality" language, stating in part that a judge must assess whether "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and

³ U.S. Courts, *Overview for the Bench, Bar, and Public*, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public>.

⁴ 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, "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." FED. R. CIV. P. 26(b)(1) advisory committee's note to 1946 amendment.

⁵ 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).

⁶ Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1784–85 (2015).

⁷ FED. R. CIV. P. 26 advisory committee's note to 1983 amendment, subdivision (b): Discovery Scope and Limitations.

the importance of the issues at stake in the litigation.”⁸ The committee expressed concern that judges had “been reluctant to limit the use of discovery devices” in the past.⁹ This new rule language, the committee hoped, would “guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry”¹⁰ These changes caused much controversy, in part because they represented a shift from the discovery ethos of the past, but mostly because they accompanied an incredibly controversial amendment to Rule 11 that imposed mandatory attorney sanction in the event the court determined the filing was frivolous.

The controversy over the amendments to Rule 26(b)(1) and Rule 11 ushered in the second set of major discovery rule changes in 1993. Again, Rule 11 and Rule 26 were amended in tandem. If one thought the 1983 amendments were controversial, it was only because they hadn’t yet seen the firestorm over the 1993 amendments.¹¹ While Rule 11 was changed to provide greater discretion to courts in imposing sanctions,¹² the discovery rules were amended to require mandatory initial disclosures under Rule 26(a)(1).¹³ These disclosures included basic information such as documents, witnesses, and damages information the parties might have.¹⁴ The disagreement over this rule change came from all sides. Defense lawyers worried that 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. To some, this “civil *Brady* rule” felt antithetical to civil litigation’s adversarial ethos. On the other hand, plaintiffs’ lawyers worried that it only required production for issues pleaded with particularity, language that could be gamed to decrease actual disclosure. To mitigate this controversy, the new rule explicitly allowed for a district court to “opt out” of the rule.¹⁵ This, of course, led to a lack of uniformity across the country with respect to mandatory initial disclosures, as nearly half of the federal district courts opted out of the provision.

⁸ FED. R. CIV. P. 26(b)(1) (1983), reprinted in 97 F.R.D. 165, 214-15 (1983).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 295 (1994) (“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). . .”). In addition, members of the Supreme Court expressed concern regarding the rules package. See H.R. DOC. NO. 74, at 104 (1993) (dissenting statement of Justice Scalia), reprinted in 113 S.Ct. (Preface) at 581. 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.

¹² The 1993 version of Rule 11—the version still in place today—provides that sanctions are discretionary and meant to serve a deterrent, not punitive, purpose. In addition, the revised Rule 11 provided for a 21-day safe harbor in which a litigant could pull an offending paper without consequence.

¹³ FED. R. CIV. P. 26(a)(1).

¹⁴ 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 FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment.

¹⁵ FED. R. CIV. P. 26(a)(1).

The academic response to these two sets of rule changes was scathing. Steve Burbank, a renowned scholar on federal court rulemaking, famously called for a “a moratorium on ignorance and procedural law reform.”¹⁶ The primary theme of this criticism was that there had been little or no empirical evidence upon which the committee relied.¹⁷ Specific to Rule 26(a)(1), critics again assailed the lack of empirical evidence in support of the rule change.¹⁸ In fact, even though the committee had access to the experience of local state courts that had adopted similar mandatory initial disclosure provisions, it had neither sought out nor utilized any of that empirical evidence.

While there was no moratorium on civil rulemaking, the committee clearly heard and absorbed this criticism. Consequently, it engaged in self-reflection both formally through a self-study and informally through committee discussions. In its self-study, the committee took heed of one of the ongoing suggestions regarding its process—the committee should request and use more empirical work before engaging in rule reform.¹⁹ With respect to discovery, the committee formed a subcommittee to examine discovery in greater detail. That subcommittee, along with the greater committee, also sought out empirical research regarding the mandatory initial disclosure rule to determine how it was working in practice. It received this information from both the Federal Judicial Center and the RAND Corporation. In addition, the committee held conferences in major cities where it could interact with members of the Bar, judges, and the academy over potential rule proposals.

This additional research and outreach led to another round of discovery changes 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. The disclosures, however, were limited to claims or defenses being made by the disclosing party, meaning that information that might be helpful to the other side did not have to be automatically disclosed.²⁰

¹⁶ Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for A Moratorium*, 59 BROOK. L. REV. 841, 855 (1993); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 810 (1991) (stating that when Rule 26(a) was proposed for adoption there had been “virtually no empirical study of the current practice of such informal discovery, the efficacy of such experiences, or the results of informal discovery”).

¹⁷ Apparently, the committee relied on two law review articles penned by Wayne Brazil, a professor and later magistrate judge, and Judge William Schwarzer, who at the time was the head of the Federal Judicial Center. These articles, while informed by important experience, were nothing more than anecdotal and impressionistic.

¹⁸ Burbank, *supra* note 16, at 845 (“Again, there was little relevant empirical evidence . . .”).

¹⁹ Daniel R. Coquillette, *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, 699, 711 (1995).

²⁰ This change mirrored changes to the scope of discovery under Rule 26(b)(1), which was also modified to only include a party’s claim or defense, allowing the party to expand its inquiry to the subject matter of the claim upon a showing of good cause. The Committee note explained that “[c]oncerns about costs and delay of discovery have persisted” in spite of previous revisions to the discovery provisions. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 1993 amendment, subdivision (b)(1).

This “diluted disclosure rule,”²¹ 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—that applied to the subject matter—found it to work quite well. More generally, studies showed that discovery was not that expensive in most cases and that the stakes of any particular case—not the nature of the discovery rules—drove the observed higher costs. Critics also expressed concern that the committee had succumbed to effective lobbying by powerful attorney groups like the American College of Trial Lawyers and, in essence, had become too politicized.²²

Even while this storm was still brewing, however, the committee was already at work on its next set of reforms—electronic discovery. A subcommittee on electronic discovery had been formed well before 2000.²³ That subcommittee convened two “mini-conferences” on electronic discovery, in San Francisco and in New York City, where various lawyers, litigation specialists, technology experts, and judges were invited to present and discuss the issues.²⁴ In addition, in 2001, the Federal Judicial Center conducted studies regarding judicial experience with electronic discovery.²⁵ As it had with the 2000 mandatory initial disclosure rule, the committee reached out to those who had expressed interest in electronic discovery. This outreach was larger, reached more people, and included sets of informal proposals with actual rule language. The committee’s research and study culminated in a larger, formal electronic discovery conference at Fordham Law School in New York City.²⁶

These efforts resulted in the 2006 electronic discovery amendments. Unlike the previous reform efforts, 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. Indeed, even a scholar who expressed general “gloom” about the rulemaking process overall noted that the electronic discovery rules were a place where the committee showed its ability “to lead and innovate.”²⁷

²¹ Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to the Hon. Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure 7 (May 18, 1998).

²² Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 571 (2001). (“emphasiz[ing] that the empirical data available suggested that the current broad scope of discovery was not viewed as a problem by lawyers”); *id.* at 578 (nothing that “[a] fair reading of the FJC and Rand studies does not suggest that the current ‘subject matter’ scope of discovery is a particular problem”); and *id.* at 618 (arguing that “[i]n 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”).

²³ Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 67 (2006).

²⁴ *Id.*

²⁵ *Id.* at 68.

²⁶ *Id.* at 70.

²⁷ Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 449 (2013).

This relative calm did not last for long. The perception that the civil justice system was still in a crisis, and that discovery was a major cause of this discord, led the committee to convene the 2010 Duke Conference on Civil Litigation. 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.²⁸ This research presented a challenge to the committee (and the subcommittee that it appointed following the conference) because the research was often at loggerheads. Most notably, one Federal Judicial Center study found that the median discovery costs for plaintiffs amounted to \$15,000, and the median costs for defendants amounted to \$20,000.²⁹ A related study determined that higher discovery costs are meaningfully associated with cases where the parties have more at stake.³⁰ In contrast, an Institute for the Advancement of the American Legal System survey of corporate legal counsel found that counsel believed that discovery costs in federal court were not proportional to the value of the case ninety percent of the time.³¹ The potential and limits of empirical research were readily apparent.³²

Regardless of the conflicting data, the 2010 Duke Conference ushered in more discovery reform. In 2015, revised Rule 26(b)(1), the most notable of changes to the discovery rules that year, was adopted. The rule was amended to include proportionality within the definition of the scope of discovery. Five of these factors were taken directly from then-Rule 26(b)(2)(C), which was a section of the discovery rules that explicitly granted the court power to limit discovery. Those factors—whether the “burden or expense of the proposed discovery outweighs its likely benefit,” “the amount in controversy,” “the parties’ resources,” “the importance of the issues at stake,” and the “importance of discovery in resolving the issues”—were joined by one additional factor: “the parties’ relative access to relevant information.”³³

²⁸ See 2010 Civil Litigation Conference, *Empirical Research*, <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil>.

²⁹ Emery G. Lee III & Thomas E. Willging, FED. JUDICIAL CTR., *Case-based Civil Rules Survey, Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules 2* (2009), <https://www.fjc.gov/sites/default/files/2012/DisSurv1.pdf>.

³⁰ Emery G. Lee III & Thomas E. Willging, FED. JUDICIAL CTR., *Litigation Costs in Civil Cases: Multivariate Analysis, Report to the Judicial Conference Advisory Committee on Civil Rules 5, 7* (2010),

<https://www.fjc.gov/sites/default/files/2012/CostCiv1.pdf>. 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.*

³¹ U.S. Courts, Advisory Committee on Rules of Civil Procedure—April 2014, at 83, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf>. 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.*

³² For a discussion of how social science explains why these study outcomes differed, see Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1107-08 (2012).

³³ FED. R. CIV. P. 26(b)(1).

This new proportionality rule was extraordinarily controversial. A detailed account of this controversy is beyond the scope of this brief.³⁴ At bottom, 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 would severely restrict the discovery obtainable by plaintiffs. 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.³⁵

Even while this controversy was brewing, the committee was considering a new approach to gathering information for its next potential set of rule proposals. Following the brouhaha over proportionality, the committee seemed even more keen to take a chance with this new approach. The experience with discovery reform, long and challenging, has led the committee to a new frontier—pilot projects.

II. Pilot Projects

In addition to information gathering and formal empirical work, the committee is now engaging in pilot projects. The committee has developed two pilot projects—one on mandatory initial discovery and one on expedited procedures. The former is directly related to discovery and farther along, so while this brief will discuss both projects, it will focus mostly on the project that is well underway—the Mandatory Initial Discovery Pilot Project (MIDP).

Judge David Campbell, chair of the Standing Committee, described the goal of the pilot projects as “advanc[ing] improvements in civil litigation by testing proposals that, without successful implementation in actual practice, seem too adventuresome to adopt all at once in the national rules.”³⁶ In other words, prudence in rulemaking might now require some hands-on experimentation. Indeed, one committee member observed when discussing the prospect of pilot projects that “[a] pilot will provide the data to support broader ... innovations.”³⁷ On June 6, 2016,

³⁴ For a broader discussion of the controversy, see Patricia W. Hatamyar 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 (2015).

³⁵ See *id.*; Suja Thomas, *Via Duke, Companies are Shaping Discovery*, LAW360 (Nov. 4, 2015, 2:41 PM), <https://www.law360.com/articles/723092/opinion-via-duke-companies-are-shaping-discovery>.

³⁶ The pilot projects grew out of another subcommittee created by the Civil Rules Committee. That subcommittee, chaired by Judge David Campbell (D. Ariz.), included members from both the Civil and Standing Rules Committee. Civil Rules Advisory Committee Minutes (Apr. 14, 2016), at p. 18, http://www.uscourts.gov/sites/default/files/2016-04-14-civil_rules_minutes_final_0.pdf. Judge David Campbell, former Chair of the Civil Rules Committee and current chair of the Standing Committee, chaired the subcommittee. Other members include Judge Jeffrey Sutton (6th Cir.), Judge John Bates (D.D.C.), Judge Paul Grimm (D. Md.), then Judge Neil Gorsuch (10th Cir., now Supreme Court Justice), Judge Amy St. Eve (N.D. Ill.), John Barkett (attorney, Shook, Hardy & Bacon), Parker Folse (attorney, Susman Godfrey), Virginia Seitz (attorney, Sidley Austin), Edward Cooper (professor, University of Michigan Law School and Civil Rules Committee reporter), and Judge Phillip R. Martinez (W.D. Tex).

³⁷ *Id.* at 22.

the Standing Committee approved the two initial projects the Civil Rules Committee proposed, which Chief Justice Roberts then touted in his 2016 Year End Report.³⁸

A. Mandatory Initial Discovery

While the 1993 broad version of the mandatory initial disclosure rule was not uniformly adopted and the 2000 uniform rule was limited in scope, it did not dissuade other jurisdictions from requiring broad mandatory initial discovery. State courts in Arizona and Colorado, as well as courts in other countries, like Canada, reported sustained success with a broad initial disclosure rule.³⁹ The subcommittee, after engaging in discussions with individuals working in each of these jurisdictions and after looking anew at some of the data from its initial attempt at the rule, decided to pursue a pilot project that would implement broad mandatory initial discovery.

I. The Pilot District Courts

In the MIDP, two district courts—the United States District Court for the District of Arizona and the United States District Court for the Northern District of Illinois—have implemented a rule that requires parties making mandatory initial discovery responses “to 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.”⁴⁰ The project will run for three years with the goal of assessing “whether 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.”⁴¹

In Arizona, the MIDP officially launched on May 1, 2017.⁴² Arizona was chosen because the judges were willing to do it, but also because Arizona state courts had adopted a similar rule almost twenty-five years prior. A survey of Arizona lawyers found that seventy-three percent of lawyers who litigate in both Arizona state and federal courts prefer state courts, while only forty-five percent of lawyers practicing in state and federal courts across the country prefer state over federal court.⁴³ The consensus has been that the state courts’ mandatory initial discovery provisions explain, in large part, Arizona lawyers’ preference for state court. Hence, Arizona federal court judges were amenable to trying what has ostensibly worked so well in their home-state courts.

In contrast, the state courts in Illinois do not have a mandatory initial discovery provision. The MIDP project, which launched in the Northern District of Illinois on June 1, 2017, was thus a bit

³⁸ Judicial Conference Committee on Rules of Practice and Procedure, *Standing Rules Committee Minutes* (June 6, 2016), at 9, http://www.uscourts.gov/sites/default/files/st06-2016-min_0.pdf. The Judicial Conference also approved the projects. Judicial Conference Committee on Rules of Practice and Procedure, *Standing Rules Committee Minutes* (Jan. 3, 2017), at 3, http://www.uscourts.gov/sites/default/files/st01-2017-min_0.pdf.

³⁹ *Id.*

⁴⁰ Mandatory Initial Discovery Pilot Project Model Standing Order, <https://www.fjc.gov/content/320224/midpp-standing-order>.

⁴¹ *Id.*

⁴² Civil Rules Advisory Committee Minutes (Apr. 25, 2017), at p. 23.

⁴³ *Id.*

more challenging. However, the committee felt it important to go to a jurisdiction that had not yet used the rule to best test its effect. While the Northern District of Illinois signed on for the pilot, only seventy-five percent of the judges are participating, which could be viewed as a bad sign for the project.⁴⁴ The advantage of this participation rate is that, in addition to testing the rule in a jurisdiction that is not familiar with it, testing it with a control group of judges who are not participating will allow for an empirical analysis of intra-district differences between participating and non-participating judges.

2. The Pilot Projects in Action

Before the MIDP launched in 2017, the Federal Judicial Center, in collaboration with the Civil Rules Committee, created a set of template documents to help courts implement the project. The documents include a [standing order](#), [user's manual](#), and [checklist](#).

The standing order is the definitive document. It provides the specific rule requirements with respect to (1) the court's authority to adopt the order; (2) the required disclosures; (3) the scope of those disclosures; (4) the timing; (5) logistics of disclosure; and (6) exceptions. Both districts participating in the MIDP have adopted this standing order.

First, the order specifies that Rule 26(a)(1) no longer applies. Instead, under the court's "inherent authority to manage cases, Rule 16(b)(3)(B)(ii), (iii), and (vi), and Rule 26(b)(2)(C)," the parties are required to produce the disclosures set forth in the standing order.

Second, the information to be produced includes the following:

- Names, and if known, contact information for "all persons who you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess;"
- Names, and if known, contact information for "all persons who you believe have written or recorded statements relevant to any party's claims or defenses," and, subject to privilege or work product protection, provide a copy of each such statement;
- "[D]ocuments, electronically stored information, tangible things, land, or other property known to you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses;"
- For each claim or defense, a statement of "the facts relevant to it and the legal theories upon which it is based;"

⁴⁴ Judicial Conference Committee on Rules of Practice and Procedure, *Standing Rules Committee Minutes* (Jan. 3, 2017), at 10, http://www.uscourts.gov/sites/default/files/st01-2017-min_0.pdf.

- A “computation of each category of damages claimed by you, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered;” and
- Any “insurance or other agreements under which an insurance business or other person or entity may be liable to satisfy all or part of possible judgment in the action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment.”

Third, the scope of information parties must produce is notably expanded from current Rule 26(a)(1) to what is “relevant to the parties’ claims or defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims or defenses.”⁴⁵ In other words, parties are required to produce information that might be unfavorable to them. That information must be based on “information that is reasonably available to [the party],” but as with other discovery, the party must supplement as it becomes aware of additional information.

Fourth, the timing of discovery shifts. Each party must produce the information required within thirty days after the first pleading filed in response to the opposing party’s complaint, counterclaim, or third-party complaint. The standing order accelerates that deadline. It provides that parties must file these responsive pleadings as required under Rule 12(a)(1)-(3) even if they have already filed a Rule 12(b) pre-trial motion to dismiss. This contrasts with the current rule which allows for the responsive pleading to be delayed until the court disposes of the Rule 12(b) motion to dismiss. However, the judge may defer the obligation to produce the initial disclosures while she considers motions to dismiss based on subject-matter jurisdiction, personal jurisdiction, sovereign immunity, absolute immunity, or qualified immunity—the argument being that those issues require resolution before getting to the merits (and thus, discovery).

Fifth, the discovery mechanics are modified. The parties still cover mandatory initial discovery in their Rule 26(f) meeting and are further encouraged to include a summary of that conference in their Rule 16(b) report to the judge. Included in that report should also be any disputes that have been resolved or any open disputes—the idea being that with early intervention from the judge, costly disputes can be avoided. As to form of production, hard-copy documents are to be produced like they are kept in the usual course of business. Electronically stored information (“ESI”) is more complicated; for ESI, the parties are required to meet and confer to agree on form of production as well as the range of searches, preservation parameters, and appropriate custodians. If the parties do not agree on form of production, each party must produce the information in a form requested by the opposing party, or if there is no form specified, in “any reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party.”⁴⁶ If the parties cannot agree on any of these issues, they must present a single unified motion

⁴⁵ Mandatory Initial Discovery Pilot Project Model Standing Order, *supra* note 40.

⁴⁶ *Id.* at Section C.2.d.

to the court (or if the court thinks it better, participate in a single conference call). Finally, instead of producing the documents, the parties can provide a descriptive list. In response to that list, the opposing party can request more information and it can request to inspect, copy, test, or sample the information under Rule 34.

Sixth and finally, the standing order applies to all civil cases, with the following exceptions: (1) cases already exempt under Rule 26(a)(1)(B);⁴⁷ (2) Private Securities Litigation Reform Act cases; (3) patent cases controlled by local rule; and (4) multidistrict litigation cases. In addition, when producing information under the mandatory initial discovery standing order, the parties may limit the scope of their production based on privilege or work product. If a party does so, however, it must—unless the parties or court order differently—describe those disclosures on a privilege log. Finally, if a party objects to production based on proportionality, it must provide a “fair description” of what it is withholding.

In addition to the standing order, the Federal Judicial Center and the committee have created a user’s manual that contains practical information and guidelines for attorneys who are practicing in the pilot districts. There are also additional reference materials available on the pilot project website, including a video panel discussion among Arizona lawyers and judges who have previously practiced under a similar state-court discovery rule.⁴⁸

B. Expedited Procedures Pilot Project

In addition to the MIDP, the committee is planning an Expedited Procedures Pilot Project (“EPPP”).⁴⁹ This pilot appears to be more ambitious than the mandatory initial discovery project, and largely for that reason, it is not nearly as far along.

First, the project plans to implement a set of procedure “components.” Those components include (1) prompt case management conferences in every case; (2) firm caps on the amount of time allocated for discovery (those caps are set by the court at the conference and can be extended only once for good cause and on a showing of diligence by the parties); (3) prompt resolution of discovery disputes by telephone conference between the parties and the judge; (4) a 60-day deadline

⁴⁷ Rule 26(a)(1)(B) excludes the following: “(i) an action for review on administrative record; (ii) a forfeiture action in rem arising from a federal statute; (iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; (v) an action to enforce or quash an administrative summons or subpoena; (vi) an action by the United States to recover a benefit payments; (vii) an action by the United States to collect on a loan guaranteed by the United States; (viii) a proceeding ancillary to a proceeding in another court; and (ix) an action to enforce an arbitration award.” FED. R. CIV. P. 26(a)(1)(B).

⁴⁸ Dawn Bergin et al., *Mandatory Initial Discovery Pilot: A Discussion of Practice and Effects* (Apr. 6, 2017), <https://www.fjc.gov/content/321102/midpp-panel-video>.

⁴⁹ Federal Judicial Center, *Expedited Procedures Pilot Project: Overview*, <https://www.fjc.gov/content/320247/expedited-procedures-pilot-project-overview>.

for decisions on dispositive motions to commence after the reply brief is filed; and (5) the setting (and holding) of firm trial dates.⁵⁰

Second, the project plans to measure the success of the procedure components. If it can be measured, the pilot hopes to first assess the level of compliance with the procedure components in each pilot district. The measurable goals are ambitious, including setting trial dates within fourteen months of case filings in ninety percent of civil cases and setting trial dates within eighteen months in the remaining ten percent of civil cases. The pilot also hopes to achieve a twenty-five percent reduction in the number of categories of cases in the pilot district’s “dashboard” that are decided more slowly than the national average. (The “dashboard” is a tool that the Committee on Court Administration and Case Management uses to measure disposition times in all 94 district courts across different categories of cases and compare each metric to the national average.)

Third and finally, the pilot plans to implement training programs for judges to properly manage these new components. At the beginning of the three-year pilot, the Federal Judicial Center will conduct a one-day training session and then follow up with additional training sessions every six months to a year. In addition, judges in the pilot districts will meet quarterly to discuss best practices and possible improvements to ensure they meet the pilot goals. During these quarterly meetings, the goal is to make judges from outside the district available for consultation. Finally, the committee will convene at least one bench and bar conference per year to discuss the pilot project with the lawyers and judges who are using it.

Unlike the mandatory initial disclosure project, the goal of the EPPP is not necessarily to amend the Civil Rules. That does not mean the project is small-scale. Judge Bates explained that “the purpose [of the expedited procedures pilot] is to demonstrate the values of active case management.”⁵¹ The goal, Judge Bates elaborated, is to do nothing less than “promote a culture change.”⁵²

Whether that culture change will be achieved is yet to be seen and relies largely on whether the project gets off the ground. So far, the Eastern District of Kentucky is confirmed to participate in the EPPP.⁵³ As of April 2017, other districts—the Eastern District of Pennsylvania, the Southern District of Texas, the District of Utah, and the District of New Mexico—are possibilities, but are not yet confirmed. As will be discussed below, in addition to getting districts to participate, there are

⁵⁰ Civil Rules Advisory Committee Minutes (Apr. 14, 2016), at p. 25, http://www.uscourts.gov/sites/default/files/2016-04-14-civil_rules_minutes_final_0.pdf.

⁵¹ Civil Rules Advisory Committee Minutes (Nov. 16, 2016), at p. 21, http://www.uscourts.gov/sites/default/files/2016-11-03-civil_rules_minutes_final_0.pdf.

⁵² *Id.*

⁵³ Judicial Conference Committee on Rules of Practice and Procedure, *supra* note 44, at 10. *See also* Civil Rules Advisory Committee Minutes (Apr. 14, 2016), *supra* note 50, at 23.

empirical challenges to this particular pilot project. Even still, there appears to be a strong commitment to launching this pilot project and hopefully others.

III. The Future of Reform—Promise and Challenges

Undoubtedly, federal civil rulemaking is a difficult task. At the same time, there are valid criticisms of the rulemaking process.⁵⁴ The silver lining in all of this is that the process is a flexible one. That malleability allows the rulemakers—if they are willing—to be responsive to the concerns and criticism they hear. This is why the pilot projects are so very promising. They show not only a willingness on the part of the rulemakers to innovate, but also a willingness, and perhaps even an eagerness, to respond constructively to the past.

Starting the pilot projects smack dab in the middle of discovery also demonstrates that the committee—while more recently accused of being too timid—is not afraid to wade into controversial waters. Fully aware that plaintiffs and defendants do not agree on the exact parameters of discovery reform, the pilot project attempts to build consensus around fairness and transparency. By requiring parties to share what they have at the outset and by streamlining the process for both production and disputes about that production, the MIDP may just demonstrate that not all rules have to be partisan. It might be inconceivable that defendants and plaintiffs will agree on a rule change, but it is not impossible.

That said, there are challenges inherent in the pilot projects. The primary concern is how the pilot projects will be measured, and thus, how the evidence produced by the projects will be used by the committee. In the past, the committee has relied selectively on empirical work when pushing forward with a rulemaking agenda. For example, one major criticism of the proportionality amendments was that there was empirical evidence showing a need for those changes, but also plenty of evidence showing that no change was necessary. Thus, there is reason to be cautiously optimistic when it comes to how the pilot projects will be used. The success of the projects may be difficult to measure as an empirical matter, and even if such measurements are made, the committee may not use the information felicitously.

Broader challenges also abound, especially as relates to ambitious projects like the Expedited Procedures Pilot Project. First, it is difficult to convince judges and entire districts to participate in these projects. While the value of the projects is apparent, the cost of commitment to them is equally visible. The committee originally hoped to recruit at least five pilot courts to participate in each project.⁵⁵ The MDPP fell well short of that, and it does not look like the Expedited Procedure

⁵⁴ See generally Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261 (2009) (challenging the structure of civil rulemaking and its implications for access to justice); see also Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016) (examining the elite nature of federal civil rulemaking).

⁵⁵ Judicial Conference Committee on Rules of Practice and Procedure, *supra* note 44, at 10 (“The original goal was to have least five pilot courts participating in each project. The Pilot Projects Working Group sought diversity among

Pilot Project will get any closer. As noted in the Civil Rules Committee recent meeting minutes, “[e]ven some Committee members have found it difficult to persuade other judges on their courts that they should participate in one of the projects.”⁵⁶ If close colleagues are facing difficulty in convincing each other to participate, other pilot projects may have difficulty getting off the ground.⁵⁷

Second, even if the pilots launch, timely assessment of the success of various projects is a challenge. The Federal Judicial Center has cautioned the committee that measuring the impact of either pilot project will take some time. For example, Federal Judicial Center researcher Emery Lee explained to the committee that “[c]ases that terminate early in the project period will not reflect the effects of the project. Many cases that are affected by the project will not conclude until some time after the formal project period closes.”⁵⁸ In other words, the value of the project may not be measurable until long after the already lengthy project has ended.

Finally, the how of assessing the projects may also present challenges. An exchange between Emery Lee from the Federal Judicial Center and the Standing Committee at their January 2017 meeting demonstrate that the committee and the FJC are wrestling with a number of challenges in how to assess these projects. The MDPP and EPPP are different with respect to what they are measuring, meaning that two sets of data with different requirements are being collected. With the EPPP, it might be a bit easier because the FJC will track motion practice and discovery disputes, which are apparent on the dockets. The success of the MDPP will depend not just on disposition times, but also on attorney impressions. That means the FJC will have to survey attorneys—a good source of information, but one that is also susceptible to bias. There is also the question of what to compare this data to—for example, when the FJC looked at eight districts and 3,000 civil cases in a previous study, it found significant variance among district courts when it came to setting trial dates. In fact, in about forty-nine percent of those cases, no trial date could be found. The EPPP would require a short and firm trial date, but the question of how to measure the success of those attempts without something to compare it to remains an issue. Finally, if the projects take an easier route and only assess the projects within and not across districts, there is the risk of selection bias because the judges opting in to a project may already use certain procedures and believe them to be effective.⁵⁹

participating courts, in terms of both size and geography, and had initially sought participation from all active and senior judges on each court.”)

⁵⁶ Civil Rules Advisory Committee Minutes (Apr. 14, 2016), *supra* note 50, at 23.

⁵⁷ For example, in the January 2017 meeting, Judge Donald W. Molloy, Chair of the Advisory Committee on the Criminal Rules and also a district judge in Montana, expressed concern about the District of Montana participating in the MDPP. “Judge Molloy expressed concerns about the standing order, which Judge Grimm confirmed was mandatory due to the need to ensure consistent measurement. Judge Molloy stated that the complexity of the standing order, and the bar’s negative response to the attempt in the early 1990s to make initial discovery mandatory, were—although not dispositive—concerning to the District of Montana.” In the end, Montana did not participate. Judicial Conference Committee on Rules of Practice and Procedure, *supra* note 44, at 10.

⁵⁸ Civil Rules Advisory Committee Minutes (Apr. 14, 2016), *supra* note 50, at 24.

⁵⁹ Judicial Conference Committee on Rules of Practice and Procedure, *supra* note 44, at 11.

In sum, the pilot projects are no panacea, but they look to be a step in the right direction. The rulemaking committee members are diving into something different and ambitious, and for that alone, they should be commended. While we wait to see whether the pilot projects will bear useful fruit, all indications so far are good. The pilot projects demonstrate the committee's willingness to innovate, but they also reflect an acknowledgment that reform requires good information. Hopefully, that information is forthcoming and worth the wait.

About the Author

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