

## PAST AND POTENTIAL USES OF EMPIRICAL RESEARCH IN CIVIL RULEMAKING

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### INTRODUCTION

In the words of an experienced observer of and participant in the civil rulemaking process, a “group of elite lawyers and law professors who acted with little empirical evidence”<sup>1</sup> drafted the original Federal Rules of Civil Procedure (Rules).<sup>2</sup> During the first fifty years after adoption of the rules, rulemakers rarely commissioned or used empirical research to support their revisions.<sup>3</sup> Until the last decade or so,

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The Honorable David Levi, chair of the Advisory Committee on Civil Rules, discussed his views on the subject of this Article in an interview with the author. Professors Edward Cooper and Richard Marcus, reporter and special reporter, respectively, to the Advisory Committee on Civil Rules; the Honorable Fern Smith, Director of the Federal Judicial Center; Russell Wheeler; James Eaglin; Joe Cecil; and David Rauma each gave many helpful suggestions in commenting on a previous draft. Any remaining deficiencies are the author’s sole responsibility.

1 Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 782 (1993); see also Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 165 (1991) (stating that the rulemakers worked “in secret over 18 months” and that they allowed “only a brief period of public comment,” thus creating a basis for inferring that they did not seek empirical research).

2 I use the term “Rule” in this Article to refer to one of the Federal Rules of Civil Procedure. If referring to any other rules, I will specifically designate the type of rule.

3 See Maurice Rosenberg, *The Impact of Procedure-Impact Studies in the Administration of Justice*, LAW & CONTEMP. PROBS., Summer 1988, at 13, 13 [hereinafter Rosenberg, *Procedure-Impact Studies*] (“Empirical research on the functioning of procedural rules has had a slowly growing impact on the litigation process. . . . Regrettably, the examples of such impacts have not been numerous.”). Most of the examples Professor Rosenberg cited were studies of the impact of existing rules and were not necessarily designed to inform rulemakers. Notable exceptions were the Federal Judicial Center’s case management study, which the Advisory Committee cited in support of

those rulemakers, with rare but notable exceptions,<sup>4</sup> followed the lead of the original drafters and promulgated rules without the benefit of systematic empirical observation of the impact of current rules or empirical testing of proposed rule revisions.<sup>5</sup>

The tone set by the original rulemakers and their successors came under attack in the late 1980s and early 1990s when commentators decried the lack of empirical support for major rule revisions relating to Rule 11 sanctions in 1983 and Rule 26(a) initial disclosures in 1993.<sup>6</sup> One commentator called boldly for a moratorium on rulemaking and all other procedural change until a thorough, empirically focused study of past, present, and proposed procedural changes

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the 1983 amendments to Rule 16, and Professor Rosenberg's Columbia Project, which the Advisory Committee cited in support of the 1970 amendments to the discovery rules. *Id.* at 25–27. For the Federal Judicial Center study, see STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (1977). For the Columbia Project, see WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1968), and Maurice Rosenberg, *Changes Ahead in Federal Pretrial Discovery*, reprinted in 45 F.R.D. 479 (1969).

4 In addition to the examples cited *supra* note 3, a perusal of the committee notes to the rules reveals the following two references to empirical work. Both references cite the same empirical study, but in different directions, demonstrating that empirical research remains subject to differing interpretations by policymakers in the context of specific issues and proposals.

In 1980, the Advisory Committee stated its belief that “abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief.” FED. R. CIV. P. 26(f) advisory committee's notes (1980 amend.) (citing PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978)).

In 1983, the Committee adopted substantial changes to the discovery rules and opened its note with the statement that “[e]xcessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. Recent studies have made some attempt to determine the sources and extent of the difficulties.” FED. R. CIV. P. 26(f) advisory committee's notes (1983 amend.) (citing PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978), and three additional studies).

5 See Rosenberg, *Procedure-Impact Studies*, *supra* note 3, at 13.

6 See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 844, 845 (1993) (stating that “amended Rule 11 was promulgated in a virtual empirical vacuum,” and that “there was little relevant empirical evidence” regarding disclosure); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 810 (1991) (revealing 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”).

could be completed.<sup>7</sup> Another commentator, equally bold, called, equally boldly, for limiting rule changes to those supported by controlled experiments, that is, research in which cases would be assigned randomly to a litigation context in which a proposed rule would be applied or not.<sup>8</sup> Yet another commentator criticized the Advisory Committee on Civil Rules's (Advisory Committee or Committee) failure, prior to the 1993 amendment to Rule 26(a), to investigate empirically the experience of district courts with local rules regarding disclosure<sup>9</sup> and prophesied the demise of judicial rulemaking as we then knew it, maintaining that politicization of the process could not be avoided in the absence of empirical grounding for proposed rules changes.<sup>10</sup> Other commentators have called for explicit congressional authorization to create a national body that would review proposed "experimental" local rules and facilitate empirical evaluation of such time-limited local "experiments."<sup>11</sup> In 1995, a self-study committee of the Judicial Conference's Standing Committee on Rules of Practice and Procedure (Standing Committee) urged the Advisory Committees to seek and use empirical data in making decisions about proposed rules changes.<sup>12</sup>

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7 See Burbank, *supra* note 6, at 855.

8 See Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67, 73; see also Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367 (1986) ("If we are to experiment with alternatives to trials, let us really experiment; let us propose testable hypotheses, and test them.").

9 See generally Mullenix, *supra* note 6 (discussing informal discovery rules and the rulemaking procedure).

10 See *id.* at 801 ("[T]he inevitable politicization of the Civil Rules Advisory Committee foreshadows the decline of that body's role in procedural rule-drafting."). Professor Mullenix suggested that the Advisory Committee might have to forfeit the pleasures of "genteel, deliberative rulemaking" and declared that "the question remains open whether the Advisory Committee is destined to go the way of the French aristocracy." *Id.* at 802.

11 See A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1585-94 (1991); see also Carl Tobias, *A Modest Reform for Federal Procedural Rulemaking*, LAW & CONTEMP. PROBS., Spring/Summer 2001, at 283, 286-87. These authors do not appear to use the term "experiment" in the scientific or technical sense of establishing both experimental and control groups to test a proposal. See *infra* text accompanying notes 20-39.

12 See SUBCOMM. ON LONG RANGE PLANNING TO THE COMM. ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONF. OF THE U.S., *A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING*, reprinted in 168 F.R.D. 679, 699 (1995) [hereinafter SELF-STUDY].

After these critiques—and perhaps spurred by them<sup>13</sup>—the Advisory Committee<sup>14</sup> often solicited and otherwise encouraged empirical studies regarding proposed rules changes. Since 1988, the Committee frequently has consulted the Federal Judicial Center (FJC or Center)<sup>15</sup> and occasionally contacted private research organizations<sup>16</sup> for assistance in examining the current operation of the rules.<sup>17</sup> Empirically

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13 This Article does not attempt to trace the root causes of increased use of empirical data in rulemaking. In general, calls for empirical research appear to have become an integral part of the policymaking culture. See, e.g., Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71, 91 (“[T]he best way to define something as a problem ‘in our profoundly numerical contemporary culture’ is to measure it.” (quoting DEBORAH A. STONE, *POLICY PARADOX AND POLITICAL REASON* 136 (1988))).

14 The Advisory Committees on Criminal Rules, Bankruptcy Rules, Appellate Rules, and Evidence Rules also have used empirical evidence on occasion, and this Article will discuss some of those uses. The Standing Committee rarely initiates the drafting of proposed rules. Recently, however, the Standing Committee has taken the lead in researching the need for rules relating to attorney conduct and has commissioned empirical work to support that effort. See Daniel R. Coquillette & Marie Leary, *Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct* (Sept. 1997) (unpublished manuscript, on file with the author).

15 The Federal Judicial Center is an agency of the judicial branch of the federal government created by Congress in 1967 to, among other purposes, “conduct research and study of the operation of the courts of the United States, and to stimulate and coordinate such research and study on the part of other public and private persons and agencies.” 28 U.S.C. § 620(b)(1) (1994). Congress also authorized the Center, if “consistent with the performance of the other functions set forth in this section, to provide staff, research, and planning assistance to the Judicial Conference of the United States and its committees.” For a historical-political account of the creation of the Center, including the centrality, in the minds of both Chief Justice Warren and Administrative Office of the Courts Director Warren Olney III, of the proposed Center’s research function, see Russell R. Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, *LAW & CONTEMP. PROBS.*, Summer 1988, at 31, 31–53.

16 See, e.g., DEBORAH R. HENSLER, NICHOLAS M. PACE, BONITA DOMBAY-MOORE, BETH GIDDENS, JENNIFER GROSS & ERIK K. MOLLER, *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* (2000); James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 613 (1998). Both of the above studies were encouraged and used by the Advisory Committee in its deliberations on its 2001 proposals to amend Rule 23 and its 2000 amendments to the discovery rules, respectively.

17 In addition to soliciting empirical research, the Committee routinely contacts national bar groups, such as the American Bar Association’s Section of Litigation and the American College of Trial Lawyers to obtain their views about proposed rules. Interest groups routinely attend Committee meetings, monitor Committee actions, and present testimony or informal commentary on proposed rules.

trained staff of the Center, usually the author, attend Advisory Committee meetings and public hearings to provide information to the Committee in regard to empirical questions that may arise in the course of deliberations. Based on the author's perspective developed in the course of representing the Center at Advisory Committee meetings and presenting Center research to the Committee, this Article will discuss some of the advantages, disadvantages, potential benefits, and distinct limitations of conducting empirical research to inform the rulemaking process. For the most part, the Article draws on specific examples of research conducted during rulemaking. Typically, the Center undertook the research discussed below at the request of the Advisory Committee for the express purpose of examining empirical questions posed by rulemakers as they contemplated changes in the rules.

Part I examines more closely the commentators' calls for rulemakers to seek and use empirical data to inform their deliberations. It discusses the variety of empirical research designs that researchers might use to generate meaningful information. Most importantly, Part I distinguishes experimental research designs, which can produce powerful inferences about causal relationships, from more limited designs, such as observational field investigations and case studies.

Part II describes fourteen recent examples of the Advisory Committee's use of empirical research conducted at its behest. In the course of describing the research, this Part explores specific instances of linkages between the research and the proposed rules.

Part III reviews the examples described in Part II and discusses patterns that emerge from recent uses of empirical research in drafting and promulgating amendments to the Federal Rules of Civil Procedure. Part III focuses on the timing of requests and reports, designs used in conducting the research, the underlying research questions, and the main purposes served by the requests. In addition, Part III analyzes and summarizes outcomes of the rulemaking proposals and notes any apparent relationship between the proposed rules and legislative proposals. It also explores elements of the current rulemaking process that facilitate and limit the type of research that can be conducted, such as term limits for Committee members and chairs and time limits on conducting the research.

Part IV analyzes the potential benefits of and limits imposed by employing experimental research to support rulemaking. It asks what conditions would permit experimental studies of proposed rules as opposed to studies of the impact of rules already enacted. Specifically, this Part calls attention to the need for the Standing Committee

and the Advisory Committee to consider seeking general congressional authorization to permit the Standing Committee to adopt experimental rules to test the prospective impact of a proposed rule change before a final rule is considered. Part IV concludes with a call for the Standing Committee and the various advisory committees to consider revising the paradigm they use for adopting major rules changes and to consider creating a mechanism for conducting experimental research in appropriately limited circumstances.

I. WHAT IS EMPIRICAL RESEARCH AND WHAT TYPES OF EMPIRICAL RESEARCH HAVE COMMENTATORS SOUGHT FOR THE RULEMAKING PROCESS?

“Empirical research” is used in this Article to refer to information collected through systematic observation and experience (in contrast, for example, to information derived through theory or logic).<sup>18</sup> Ordinarily, one speaks of such experience and observation as research (as opposed to anecdote) only if a researcher systematically selects representative or otherwise appropriate cases for study, documents the observations, and applies the same criteria to describing each separate observation, generally using a predetermined set of questions, sometimes referred to as a research protocol, survey instrument, or questionnaire.

Research typically involves testing hypotheses generated by previous research, by academic theories, or, in the Center’s experience, by policy questions of importance to the judiciary. Generally, an empirical statement is one that can be proven wrong.<sup>19</sup> Empirical research designs encompass experimental research, quasi-experimental research, observational studies, and case studies. Research methods include surveys and focus groups. Empirical research can take place in the field, in a laboratory, or even in a library setting. Samples of subjects to be studied can be selected on a random basis or for the convenience of the researcher. Empirical research can be reported on a quantitative or qualitative basis. Those terms will be defined and discussed below, with examples.

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18 See W. PAUL VOGT, *DICTIONARY OF STATISTICS AND METHODOLOGY: A NONTECHNICAL GUIDE FOR THE SOCIAL SCIENCES* 95 (2d ed. 1999).

19 See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993) (“Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.” (quoting Michael D. Green, *Expert Witness and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 *Nw*

### A. *Research Design*

#### 1. Experimental Research

For purposes of this Article, the primary distinction to be drawn is between experimental (including quasi-experimental) research designs and non-experimental research designs. The key element of a controlled experiment is that it generally involves the random assignment of cases to experimental treatment and control groups in which participants, including judges, will or will not be subject to the proposed rule, procedure, or program.<sup>20</sup> The goal is to assess whether a particular treatment (embodied, for example, in a draft rule) has the predicted effect. Random assignment to treatment and control groups has the effect of making the groups equal before the treatment is applied.

Statistical methods allow the researcher to test the hypothesis (generally framed in the negative, that the treatment does not work) and state the probability that any observed differences in outcomes can be attributed to chance and not to the treatment. If the number of cases is sufficiently large, the researcher can speak of results as being statistically significant at a ninety-five percent level, the benchmark chosen by most scientists for making such a statement.<sup>21</sup> This means that there is less than a one in twenty probability that a putative causal relationship occurred by chance.<sup>22</sup> This quality of experimental research—“the extent to which the results of a study . . . can be attributed to the treatments”—is generally referred to as internal validity.<sup>23</sup> Whether the results can be generalized or applied to other contexts, which researchers denote as external validity, depends on

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20 See FED. JUDICIAL CTR., EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW 17–18 (1981).

21 See ANTHONY PARTRIDGE & ALAN LIND, A REEVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN 22 (1983).

22 A finding of statistical significance, however, does not mean that a relationship is necessarily important or meaningful. It simply means that enough cases were examined to rule out the effects of chance. See David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83, 124 (2d ed. 2000) (stating that “significant differences are evidence that something besides random error is at work”). The terms “practical” or “substantive” significance refer to the strength of a relationship. See VOGT, *supra* note 18, at 219, 283. In designing an experiment and framing hypotheses, a researcher will generally structure the experiment so that the relationships to be tested are meaningful.

23 VOGT, *supra* note 18, at 143.

the extent to which the other situations are similar to the context in which the research was conducted.<sup>24</sup>

Experimental research can be conducted in the field or in a laboratory setting.<sup>25</sup> A good example of a procedural field experiment is the U.S. Court of Appeals for the Second Circuit's 1974 implementation of a program for attorneys, before briefing and arguing an appeal, to participate in a mandatory conference with an attorney employed by the court. The court worked with the FJC to construct an experiment to test the program, which is called the Civil Appeals Management Program (CAMP).

The court first identified all cases that might benefit from a mandatory conference. To provide a comparative foundation for the research, the court then mandated that a conference be held in a portion of the cases (the experimental group) and not in the remaining cases (the control group).<sup>26</sup> Using docket numbers, the court assigned the first case to a court attorney, the next case to another court attorney, and the third case to the control group until a sufficient number of cases were in the experiment.<sup>27</sup> Researchers then measured the effects of the program on the rate of settlement, the time required for the appeals, the quality of briefs and arguments, and on the attorneys' satisfaction with the program.<sup>28</sup> In comparing case out-

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24 *Id.* at 105.

25 Laboratory research is beyond the scope of this Article. Social psychologists and other social scientists have conducted extensive laboratory research that is highly relevant to the legal system. For an overview of such research, see IRWIN A. HOROWITZ, THOMAS E. WILLGING & KENNETH S. BORDENS, *THE PSYCHOLOGY OF LAW* (2d ed. 1998). Journals, such as *Law and Human Behavior*; *Psychology, Public Policy & Law*; and *Law & Psychology Review*, often publish the results of laboratory experiments and literature reviews summarizing such results. For a recent example that illustrates the scope of such research, see Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 *PSYCHOL., PUB. POL'Y & L.* 622 (2001).

Some journals focus on publishing empirical work arising out of studies of the legal system. They include the *Journal of Legal Studies* (a publication of the University of Chicago Law School); *Judicature* (American Judicature Society); *Jurimetrics: The Journal of Law, Science, and Technology* (Section of Science & Technology Law, American Bar Association); *Law & Social Inquiry* (American Bar Foundation); and *Law & Society Review* (Law & Society Association).

26 See PARTRIDGE & LIND, *supra* note 21, at 1–3. For earlier analyses that proved to be less conclusive, see JERRY GOLDMAN, AN EVALUATION OF THE CIVIL APPEALS MANAGEMENT PROGRAM: AN EXPERIMENT IN JUDICIAL ADMINISTRATION (1977), and Jerry Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedural Reform*, 78 *COLUM. L. REV.* 1209 (1978).

27 PARTRIDGE & LIND, *supra* note 21, at 23–24. Exceptions were made for excluded cases, consolidated cases, and cases related to an earlier appeal. *Id.* at 24–28.

28 *Id.* at 5–8.



come information from the two sets of cases and data from surveys of both sets of attorneys, researchers attempted to sever any association with other known or unknown factors (such as the identity of the judges, the type of case, and any local rules or practices) that might affect the outcome.<sup>29</sup> The researcher could then identify the differences in the outcomes of the two sets of cases, apply the appropriate statistical tests, and determine whether any differences are attributable to the mandatory conference.

The CAMP research experience suggests that experimental research, for all its benefits, may not be a sport for the short-winded. The CAMP studies encompassed two separate data gathering operations and nonetheless yielded somewhat inconclusive results: FJC researchers suggested almost a decade after the program began that “a balanced decision for most other courts of appeals would be to institute CAMP-like programs but not to go full speed.”<sup>30</sup> Later experimental evaluation of a CAMP-like program in another circuit produced a precise measure of the savings in judicial resources attributable to the program,<sup>31</sup> giving the policymakers information from which to make a judgment about whether a program that does the work of approximately one appellate judge is justified.<sup>32</sup> That study took between three and four years from the time of the court’s request for research until the Center provided final results to the court.<sup>33</sup>

Another form of experimental research uses a *quasi-experimental* research design. In a quasi-experimental design, the researcher generally does not attempt to control the assignment of cases but does attempt to manipulate variables to create two or more distinct groups

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29 *Id.* at 21–22.

30 *Id.* at 11.

31 See JAMES B. EAGLIN, THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS (1990). That report evaluated a program begun in 1982. *Id.* at 1. By 1990, variations of the CAMP program had been implemented in the Second, Eighth, Ninth, and District of Columbia Circuits. *Id.* at 41. Currently, there are court-staffed mediation or settlement conference programs in all of the courts of appeals except for the Federal Circuit. JUDITH A. MCKENNA, LAURAL L. HOOPER & MARY CLARK, CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 26–32 (2000).

32 See EAGLIN, *supra* note 31, at 41–42 (standing for the proposition that the request was made in 1995).

33 See *id.* at 1. The Center provided interim results to the court on an ongoing basis. The first request was in early 1985, and the Center communicated final results to the court in February 1989. E-mail from James B. Eaglin, Research Division Federal Judicial Center, to Thomas E. Willging (Jan. 14, 2002).

for comparing the effects of a treatment.<sup>34</sup> For example, in studying offers of judgment under Rule 68, an FJC researcher surveyed attorneys in two distinct sets of cases, those that had settled and those that had been tried.<sup>35</sup> Manipulating those variables allowed the researcher to draw clear comparisons, but not make causal attributions.<sup>36</sup>

Experimental research enables the researcher to assess whether the treatment caused the behavior that was predicted at the outset of the experiment. In the opinion of many researchers, an experiment is the only research design that so enables the researcher.<sup>37</sup> Others disagree and assert that statistical methods can sometimes be used to generate causal inferences based on an analysis of multivariate relationships, that is, relationships involving three or more variables.<sup>38</sup> Putting this debate to one side, one of the leading legal-social researchers has captured the consensus that “[w]ithout doubt, the most powerful and reliable way to investigate the impact of a legal rule, procedure, program, or other intervention is to conduct a controlled experiment.”<sup>39</sup>

Professor Rosenberg’s summary of experimental field research showed the methodology to have been rarely used outside the laboratory. In addition to the CAMP experiment, Rosenberg described four other research projects that qualified as experiments.<sup>40</sup> Two of the

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34 VOGT, *supra* note 18, at 230–31.

35 JOHN E. SHAPARD, *LIKELY CONSEQUENCES OF AMENDMENTS TO RULE 68, FEDERAL RULES OF CIVIL PROCEDURE 3–5* (1995).

36 *Id.* at 5.

37 See FED. JUDICIAL CTR., *supra* note 20, at 15 (“Experiments are designed to test the cause-and-effect relationship [between two or more variables].”); VOGT, *supra* note 18, at 35 (“Most people who use the term ‘causal conclusion’ believe that an experiment . . . is the *only* design from which researchers can properly infer cause.”).

38 See VOGT, *supra* note 18, at 35, 184.

39 Rosenberg, *Procedure-Impact Studies*, *supra* note 3, at 14.

40 For other examples of experimental research and evaluations of programs in the legal system, see *id.* at 17–19 (New Jersey experiment testing mandatory pretrial conferencing for cost and quality differences); *id.* at 20 (Ontario experiment testing mandatory pretrial settlement conference for impact on settlement rates); *id.* at 22–23 (Kentucky experiment with impact of judicial case management on the cost, time, and quality of justice); and *id.* at 23–25 (North Carolina experiment assessing impact of court-annexed arbitration program on cost, delays, and other factors).

Apparently using a restrictive definition of “true” experiments, Professor Walker added two simulated laboratory experiments to the list. Walker, *supra* note 8, at 70 & n.15 (citing Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, LAW & CONTEMP. PROBS., Autumn 1998, at 13, 13); *id.* at n.16 (citing SAUL M. KASSIN, *AN EMPIRICAL STUDY OF RULE 11 SANCTIONS* (1985)). For some reason, Professor Walker did not classify his own laboratory experiments within his definition of “true” experiments. See *id.* at 69 n.6. See generally JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975) (reporting

studies involved state courts, and one involved a Canadian court. None took place before 1960. Since 1988, the frequency of experimental field research appears to have increased somewhat but remains relatively infrequent in comparison with the nonexperimental research approaches discussed in Part II.<sup>41</sup>

Significantly, most or all of the experimental field research reported above relates to testing case management approaches or programs, such as the use of alternative dispute resolution, pretrial conferences, and appellate conferencing programs. None of the experimental studies focused on the workings of a single procedural rule, such as the class action, discovery, or sanctions rules. While the Rule 68 offer of judgment studies dealt with a single rule, that rule works like a settlement program. Creating experiments to test rules that are an integral part of the litigation process may raise issues that do not occur when an entire program is applied to or withheld from experimental and control groups. For example, to apply or not apply

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the results of a series of laboratory experiments testing assumptions and hypotheses related to adversarial and inquisitorial systems of justice). Perhaps the distinction is that the latter set of experiments did not directly involve participants in the legal system. For further discussion of the extent of laboratory experiments relating to the legal system, see *supra* note 25.

41 A thorough account of experimental and nonexperimental research in relation to civil rulemaking would exceed the scope of this Article. Recent research products of the FJC and the RAND Corporation's Institute for Civil Justice suggest that use of experimental methods has increased since 1988 but remains a modest portion of the rulemaking-related research described in Part II. Note that all of the following research relates to broad case management programs, such as mediation and offers of judgment, rather than specific procedures, such as motions, sanctions, or other components of the litigation process. See, e.g., EAGLIN, *supra* note 31; JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL McCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VALANA, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 21 (1996) (describing random assignment to experimental and control groups in the Southern District of New York and the Eastern District of Pennsylvania); E. ALLAN LIND, ARBITRATING HIGH-STAKES CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT (1990) (reporting results of experimental study of arbitration in a single district court); SHAPARD, *supra* note 35, at 3-5 (describing survey design for attorneys involved in federal litigation in all Federal districts); DONNA STIENSTRA, MOLLY JOHNSON & PATRICIA LOMBARD, REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at 215-54 (1997) (describing experimental field study of the CJRA Early Assessment [Mediation] Program in the Western District of Missouri); see also Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1492-95 (1994) (describing the random assignment method used to study early neutral evaluation program in the Northern District of California).

a modified class action, sanctions, or a disclosure rule to every other case seems to require intruding into the litigation process in an extraordinary manner and imposing novel demands on judges and litigators. In addition, concerns about ethical and legal fairness may inhibit experimental research. Such concerns will be addressed in Part IV.<sup>42</sup>

## 2. Nonexperimental Observational Research

Nonexperimental observational research designs call for a researcher to observe subjects, often in a natural setting.<sup>43</sup> Most empirical legal research is of this type, whether the subjects be cases, attorneys, or litigants. Specifying the empirical questions, formulating research hypotheses, and creating written protocols add systematic rigor to the enterprise. One type of observational research involves examining legal documents or other legal proceedings and using a research protocol to ask the same questions regarding each case file or legal document. For example, in the FJC's empirical study of special masters, researchers examined docket sheets in a sample of cases in which the court appeared to have considered appointing a special master. In those cases, researchers reviewed the docket sheets and materials in the court's file to determine whether an appointment was made, under what authority, for what purpose, and so forth.<sup>44</sup>

Observational research differs from experimental research in that any testing of the effect of a treatment does not take place under conditions that the researcher controls. For that reason, nonexperimental observational designs generally cannot yield findings of causal relationships among variables. Differences in the outcomes of various types of cases, for example, may be caused by variables unrelated to the type of case, such as the location of the court, the experience of the attorneys, and, typically, a host of variables that are difficult to identify and control.

Observational research, however, under certain conditions may be used to generate findings that apply to an entire population of cases, judges, attorneys, or other participants in the legal system. If a sample of subjects has been selected randomly from the population, the researcher can use statistical methods to calculate the extent to

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42 See also *infra* text accompanying notes 383–93.

43 See VOGT, *supra* note 18, at 197–98.

44 See, e.g., THOMAS E. WILLGING ET AL., SPECIAL MASTERS' INCIDENCE AND ACTIVITY: REPORT TO THE JUDICIAL CONFERENCE'S ADVISORY COMMITTEE ON CIVIL RULES AND ITS SUBCOMMITTEE ON SPECIAL MASTERS 81–83 (2000) [hereinafter FJC SPECIAL MASTERS' STUDY].

which the findings pertain to the population as a whole. For example, in the special master study mentioned above, Center researchers selected a random sample of a national population of civil cases that contained docket entries referring to special masters.<sup>45</sup> Based on that sample, the researchers were able to state with precise confidence levels the estimated minimum and maximum rates at which federal judges considered appointing a special master in various types of cases during the study period.<sup>46</sup>

### 3. Case Studies

The case study represents another type of research design that legal-empirical researchers sometimes use. The assumption is that “the example (the ‘case’) is in some way typical of the broader phenomenon,”<sup>47</sup> but that is only an assumption. In addition, it is difficult to generalize a case study to the broader universe of cases.<sup>48</sup>

A case study should not be confused with the study of published opinions in a given case. An empirical case study will generally involve examining the documents in the litigation (including, but not limited to, published opinions), interviewing attorneys and perhaps judges, and examining all available sources of information about the case.<sup>49</sup> Case studies can advance knowledge of the legal process by providing an intensive and detailed look at the processes used by attorneys, judges, and courts to manage litigation. Similarities and differences in approaches uncovered during case studies might provide hypotheses that researchers can explore further by using quantitative research designs.

Some examples of case studies in civil litigation include research on class action litigation. In one such study, researchers selected a set of ten state and federal class action cases on the basis of their case type (mass tort or consumer cases involving small individual losses), whether they had been certified and resolved as class actions, whether they had been substantially terminated, and whether the participants

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45 *Id.*

46 *See id.* at 17–21 (providing a table showing incidence by the nature of suit and text discussing confidence intervals); *see also id.* at 83–92 (providing a statistical discussion and a table showing confidence intervals for all nature of suit classifications).

47 VOGT, *supra* note 18, at 34.

48 *See id.* at 34–35.

49 *See, e.g.,* S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS 9–11 (2000) (describing the methods used to study the cases selected); Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 485–87 (1991) (discussing the use of comparative case studies in asbestos litigation).

were willing to speak on the record with researchers.<sup>50</sup> In another study, the object was to compare bankruptcy and limited-fund class action approaches to resolving mass tort litigation.<sup>51</sup> In these studies, the small number of cases would limit the power of statistical tests, and/or the absence of a control group would preclude making causal statements. Including comparable cases may add a systematic element and allow the researcher to identify and discuss similarities and differences in policy-relevant variables, such as the approach used by the court to review a proposed class settlement.

Case studies may in some instances be the only research design available for examining a phenomenon that occurs infrequently. In those circumstances, a series of case studies may represent a powerful research design. For example, a series of case studies recently examined mass tort settlement class actions.<sup>52</sup> At the outset of that study, researchers had been able to identify only five recent class actions that could be described as mass tort settlement class actions.<sup>53</sup> Accordingly, that study should be seen as presenting data about the universe of mass tort settlement class actions during the 1990s and not just about a representative sample of such cases.

## B. Research Methods

### 1. Surveys

Typically, the method of choice in both experimental and observational studies is a written survey, using an instrument such as a questionnaire that is administered systematically to the research subjects, who may be judges, lawyers, litigants, or other participants in the legal system.<sup>54</sup> Or, as mentioned above, the subject of the research may be the case and its documents. Administering the survey may also take the form of in-person interviews, telephone interviews, or examining

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<sup>50</sup> See HENSLER ET AL., *supra* note 16, at 138–39 (describing case selection for study of ten consumer and mass torts class action cases).

<sup>51</sup> See GIBSON, *supra* note 49.

<sup>52</sup> See JAY TIDMARSH, *MASS TORT SETTLEMENT CLASS ACTIONS* (1998).

<sup>53</sup> *Id.* at 20–24.

<sup>54</sup> See, e.g., Elizabeth C. Wiggins, Thomas E. Willging & Donna Stienstra, *The Federal Judicial Center's Study of Rule 11*, FED. JUDICIAL CTR. DIRECTIONS, Nov. 1991, at 3, 28–35 [hereinafter *FJC Rule 11 Study*] (conducting a survey of judges' experiences with frivolous litigation and their opinions regarding Rule 11 sanctions); Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 528–29 (1998) [hereinafter *FJC Disclosure & Discovery Study*] (conducting a survey of attorneys about experiences in terminated federal cases and opinions about proposed reforms).

the case file and documents. Administering a written questionnaire may involve using electronic media, such as the Internet or facsimile transmission, to distribute the survey and record responses.

## 2. Focus Groups

Judges and other legal policymakers often need reliable information about the needs and interests of litigants. Rarely do non-attorney litigants participate in formal hearings on proposed rules changes. To formulate hypotheses or to reach tentative qualitative conclusions about a subject, researchers sometimes employ focus groups, collections of six to twelve individuals to discuss a particular subject through a structured interview conducted by an experienced researcher-facilitator.<sup>55</sup> For example, when the Advisory Committee asked the Center to develop illustrative plain language notices for use in class actions, the Center used focus group techniques to identify typical potential class members' understandings of class actions,<sup>56</sup> legal forms, legal terminology, and other aspects of notice.<sup>57</sup> Focus groups might also be useful in gathering information about the impact of court procedures on litigants or jurors.<sup>58</sup>

## 3. Literature Reviews

One additional method deserves comment even though it does not involve conducting original empirical work. A literature review consists of a "systematic survey and interpretation of the research findings (the 'literature') on a particular topic. . . ." <sup>59</sup> Providing background data on a subject that has been studied empirically in laboratory experiments and otherwise, such as the effects of jury size on jury decisionmaking, gives the policymaker the perspectives of social scientists without the need for a major study. For example, to support the Advisory Committee's recent examination of discovery,

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<sup>55</sup> See VOGT, *supra* note 18, at 114.

<sup>56</sup> Participants were screened with the goal of obtaining a group that would have the capacity to understand such notices and would be challenged by the task. For example, each member of the group had no less than a high school education and no more than a college education. Those who had been involved in litigation or were working for a law firm were excluded.

<sup>57</sup> For an overview of the Center's work, see the FJC's website, <http://www.fjc.gov>. "Class Action Notices" information can be found at this website by accessing the "Current FJC Activities" page.

<sup>58</sup> See generally RICHARD A. KREUGER & MARY ANNE CASEY, *FOCUS GROUPS: A PRACTICAL GUIDE FOR APPLIED RESEARCH* (3d ed. 2000) (presenting a guide and reference manual for the use of focus groups in research purposes).

<sup>59</sup> VOGT, *supra* note 18, at 163.

the Center conducted a thorough review of empirical research on the subject.<sup>60</sup>

### C. *Research Setting*

Field research refers to research that takes place in a “naturally occurring” setting “that is not a laboratory or library.”<sup>61</sup> A field experiment is one type of field research, and observational research is often also referred to as field research.

### D. *Sampling*

In most types of empirical research, the goal is to study a sufficiently large sample of a population to enable the researcher to make statistically sound inferences about the total population from which the sample was drawn (for example, a “survey”).<sup>62</sup> However, in some observational field research, the researcher may need to select cases or other objects of study other than randomly. For example, the random selection of cases might produce an insufficient number of opportunities to observe the particular object of interest within the time and budget allocated for the research. Researchers refer to a sample selected on the basis of available resources as a convenience sample to distinguish it from a random sample. Field studies based on a convenience sample do not allow the researcher to generalize, that is, to make statements about the entire population under consideration. Often, the point of such empirical research is simply to observe and describe systematically the phenomenon of interest. Such descriptive research may also generate hypotheses for later testing.

The Center’s research on class actions is a good example of observational field research based on a convenience sample.<sup>63</sup> The study

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60 See Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 787 (1998). Another example is the Center’s literature review summarizing both social science and legal materials for the Mass Tort Working Group, which the Chief Justice created at the behest of the Advisory Committee. *E.g.*, THOMAS E. WILLGING, APPENDIX C: MASS TORTS PROBLEMS AND PROPOSALS: A REPORT TO THE MASS TORTS WORKING GROUP, in REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, reprinted in 187 F.R.D. 328 (1999).

61 VOGT, *supra* note 18, at 111.

62 See, *e.g.*, *id.* at 286.

63 See Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74 (1996) [hereinafter *NYU Empirical Analysis*] (surveying class action case files in terminated cases in four federal districts). The original version of the study, with a complete set



could have been based on a sample of class actions filed nationwide, but considerable time, logistical support from clerks' offices and computer systems administrators, travel, and personnel resources would have been required to study cases spread across ninety-four federal districts. Center researchers instead chose to examine cases in four districts that exhibited high levels of class action activity. Recognizing that these courts may not be representative—indeed, they were selected precisely because they showed the promise of having an uncharacteristically high number of class actions—the researchers had to caution the reader that “[e]ach district should be viewed as a separate entity and the data from the four districts should be viewed as descriptive—four separate snapshots of recent class action activity.”<sup>64</sup> By focusing on four courts with high reported rates of filing, Center researchers and the Advisory Committee traded the ability to generalize about class actions for the ability to collect data and report their findings within approximately one year from the date the Advisory Committee requested the study.

#### *E. Measurement*

Empirical research can be further divided into quantitative and qualitative studies. The Center's class action study described above presents a good example of a quantitative observational field study. Researchers examined approximately four hundred class action case files in cases denominated as class actions that terminated within a two-year period and systematically recorded information about numerous variables.<sup>65</sup> Similarly, the Center conducted an extensive study of Rule 11 sanctioning activity in five federal district courts that were selected because their computerized dockets facilitated data collection on Rule 11 cases.<sup>66</sup>

Qualitative field research often uses the case study design to examine in depth the manifestation of a particular phenomenon in a single case or set of cases. Interviewing judges, attorneys, and other participants in the legal system is a typical method for eliciting qualitative information.

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of figures, tables, and appendices was published as THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (1996) [hereinafter FJC EMPIRICAL STUDY OF CLASS ACTIONS].

64 *NYU Empirical Analysis*, *supra* note 63, at 84.

65 *See* FJC EMPIRICAL STUDY OF CLASS ACTIONS, *supra* note 63, at 180–85.

66 *See FJC Rule 11 Study*, *supra* note 54, at 2.

In short, empirical researchers draw from a host of research approaches that can assist rulemakers in determining whether and how to craft new rules to address identifiable problems. More than one design and method can be used at a time. Often complementary methods achieve different purposes. For example, in studying special masters, the Center was asked to report on the incidence of the use of special masters and to quantify the frequency with which special masters played various pretrial and post-trial roles.<sup>67</sup> In addition to these quantitative questions, the Committee was interested in knowing more about the quality of special masters' activities in performing those roles.<sup>68</sup> For the quantitative aspects of the study, surveying a nationwide sample of the cases seemed appropriate; for the qualitative aspects, interviews with judges and lawyers in a targeted subset of the sample seemed more appropriate.<sup>69</sup> The final product weaves together elements of survey and case study methods to present both a quantitative overview of all cases and a closer qualitative look at selected cases.<sup>70</sup>

#### F. Commentators' Calls for Research

In contrast to the variety of designs and methods available for studying the legal system in action, empirically sophisticated commentators appear to have focused on a small subset of available designs and methods. As noted in the Introduction, one commentator explicitly called for the Advisory Committee to perfect the civil rulemaking process by adopting a "program of restricted field experiments" that would enable the Committee "to predict the impact of proposed changes to the Federal Rules of Civil Procedure."<sup>71</sup> Implementing true experiments "in a small number of U.S. district courts" would, according to this commentator, reduce the costs of rulemaking when

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67 See FJC SPECIAL MASTERS' STUDY, *supra* note 44, at 2–3, 15–17.

68 See *id.*

69 See *id.* at 13–15.

70 See *id.* at 2–3, 15–17. Along similar lines, the Center's Rule 11 study combines a quantitative field study in selected districts with a nationwide survey of judges' opinions about the need for, and operation of, Rule 11. *FJC Rule 11 Study*, *supra* note 54, at 2. The RAND study of class actions combines quantitative estimates of the incidence of class actions with case studies and field interviews. See HENSLER ET AL., *supra* note 16, at 49–68, 138–39.

71 Walker, *supra* note 8, at 67. Professor Walker uses the term "restricted" in a geographical sense to make clear that such experiments need not be conducted on an unrestricted or national basis. See *id.* at 75–76. The proposal would not apply to "amendments intended only to clarify existing Rules." *Id.* at 76.

one takes into account “the cost of subjecting persons to rules of dubious quality.”<sup>72</sup>

Another commentator decried the “ignorance” of the rulemaking bodies, specifically their “studied indifference to empirical questions.”<sup>73</sup> While less explicit or universal about the research designs to be employed, this commentator advocated “empirical evidence on the operation of the Rules or proposed amendments” and put a premium on knowledge that “concerns alternative reform strategies and their likely impact.”<sup>74</sup> In 1995, the Standing Committee’s Subcommittee on Long Range Planning recommended that “[e]ach Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available, and should use these data to decide whether changes in existing rules should be proposed.”<sup>75</sup>

Amended Rule 11 (the 1983 version) and amended Rule 26(a) (the 1993 version) were the culprits that led to Professor Burbank’s call for a moratorium on rulemaking.<sup>76</sup> Each of those amendments dramatically revised national rules and precipitated major changes in civil litigation. With no equivalent national rules in operation at the time of the Rule 26(a) amendment,<sup>77</sup> his call for a study of the impact of the proposed rule amounts to a call for experimental field research. This is true because the only direct way to study a rule’s impact is to put it into effect, either on an experimental basis or across the board.

In either the Rule 11 or Rule 26(a) contexts, conducting a controlled field experiment of the type described earlier in this Article

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72 *Id.* at 76.

73 Burbank, *supra* note 6, at 841; *see also* Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 335 (1991) (advocating that “more should be done to encourage and to utilize empirical work in judicial rulemaking”).

74 Burbank, *supra* note 6, at 841–42.

75 SELF-STUDY, *supra* note 12, at 699. The Long Range Plan adopted by the Judicial Conference did not expressly comment on the use of empirical research in the rulemaking process. The report recommended that “[r]ules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.” JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS, *reprinted in* 166 F.R.D. 53, 118 (1995).

76 *See generally* Burbank, *supra* note 6 (discussing rulemaking in the context of amendments to Rules 11 and 26(a)).

77 Three federal district courts had on their own initiative adopted local rules providing for disclosure in civil cases. *See* Mullenix, *supra* note 6, at 813–20.

would be difficult if not impossible.<sup>78</sup> Ideally, studying the impact of an inchoate proposed rule would require experimental testing of the proposal in districts that are randomly selected, not self-selected. Developing reliable information concerning the impact of the proposed sanctions and initial disclosure rules would seem to have depended on adopting one or both of the rules in one or more districts on an experimental basis. A control group using the standard procedure in the same districts would have been needed to provide a basis for comparison. To remove the effect of variation among judges, each judge would have to have been asked to apply both experimental and control procedures to cases selected randomly, without knowing the merits or procedural context.

One could, of course, have surveyed judges and lawyers and have asked them to predict the impact of the proposed rule on hypothetical future cases, but such responses would necessarily have produced subjective responses with limited internal and external validity. In the context of initial disclosure, studying an analogue of the proposed rule in a local district or a state court might be the most one could hope for.<sup>79</sup>

Thus, there seems to be a disconnect between the calls for empirical research and the range of designs available to researchers. Commentators have concentrated their efforts at prodding the civil rulemakers to undertake experimental studies of proposed amendments to the Federal Rules of Civil Procedure.<sup>80</sup> This is not to say that these commentators rigidly adhere to a call for controlled experimental work in all contexts. Each has also shown an appreciation for empirical research designs that are not experimental<sup>81</sup> and would undoubtedly

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78 See *supra* text accompanying notes 20–39 (describing a controlled field experiment).

79 See Mullenix, *supra* note 6, at 813–20 (discussing three district courts that implemented local rules requiring informal discovery before formal discovery).

80 See, e.g., Stephen B. Burbank & S. Jay Plager, *Foreword: The Law of Federal Judicial Discipline and the Lessons of Social Science*, 142 U. PA. L. REV. 1 (1993); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683 (1998) (relying on nonexperimental empirical research); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455 (1993) [hereinafter Walker, *Comprehensive Reform*]; Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis*, 23 J. LEGAL STUD. 569 (1994) [hereinafter Walker, *Avoiding Surprise*].

81 See, e.g., Burbank & Plager, *supra* note 80, at 16 (1993) (finding a descriptive quantitative and qualitative field study to be “the first rigorous study of the experience under the 1980 Act”); *id.* at 19 (finding the “number and variety of methods employed were impressive” even though none were experimental); Mullenix, *supra* note 80, at 683 (1998) (relying on nonexperimental empirical research); Walker, *Compre-*

find the use of nonexperimental empirical research approaches to be an improvement over then-current practices. Nonetheless, at least one commentator quite explicitly has posited experimental research designs as the gold standard for rulemakers to employ.<sup>82</sup> We now turn to a description of the empirical research that rulemakers have commissioned and used in the last decade or so.

## II. WHAT TYPES OF EMPIRICAL RESEARCH HAVE THE CIVIL RULEMAKERS SOUGHT AND USED, AND HOW OFTEN?

The last decade or so has witnessed dramatic changes in the rulemaking process. The 1988 amendments to the Rules Enabling Act required that Advisory Committee and Standing Committee meetings “shall be open to the public,”<sup>83</sup> after “sufficient notice.”<sup>84</sup> Responding to recommendations from judges and scholars that “rules changes be predicated on a sounder empirical basis,” the advisory committees increased “their requests for assistance from the Federal Judicial Center to conduct research on litigation practices and the impact of the rules.”<sup>85</sup> As this Part reveals, the Advisory Committee on Civil Rules, in particular, has established a pattern of continuing consultation with the FJC and other empirical researchers about empiri-

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*hensive Reform*, *supra* note 80, at 476–89 (1993) (calling for rulemaking to obtain adequate information to assess the costs and benefits of proposed rules changes by using social science methods, apparently not limited to controlled experiments); Walker, *Avoiding Surprise*, *supra* note 80, at 593 (1994) (suggesting as an adequate interim measure that “economic analysts could furnish an acceptable basis for civil rule making by grounding their generalizations on systematic observations, a standard less demanding than hypothesis testing”).

82 Walker, *Avoiding Surprise*, *supra* note 80, at 593 (suggesting that “the committee should either conduct limited field experiments incorporating the proposed changes, or the committee should wait for change until private research ventures can be completed”).

83 Rules Enabling Act of 1988, Pub. L. No. 100-702, 102 Stat. 4648, (codified at 28 U.S.C. § 2073(c)(1) (1994)).

84 *Id.* § 2073(c)(2).

85 Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1680 (1995). Mr. McCabe, Assistant Director for Judges Programs, Administrative Office of the United States Courts, and Secretary to the Judicial Conference Standing Committee, listed five areas in which the Advisory Committee requested FJC research: a study of Rule 11 before the 1993 amendments, a study on “the use and operation of protective orders under Rule 26(c), offers of settlement under Rule 68, consensual settlement of class actions under Rule 23, and the effect of mandatory disclosure under the 1993 amendments to Rule 26. *Id.* at 1680–81. He also noted that the Advisory Committee on Criminal Rules “considered the results of the Federal Judicial Center’s study on cameras in the courtroom before approving amendments to Rule 53.” *Id.* at 1681.

cal questions.<sup>86</sup> Such consultations occur before the Committee proposes rule changes, while it reviews and hears comments on proposals that have been made, and while it deliberates about those proposals. Alongside the increased openness and interest in empirical findings, some experienced participants in the process expressed concern, perhaps even alarm, that “the openness of the process . . . may encourage factional politics.”<sup>87</sup> This Part presents research studies; Part III discusses patterns observed in those research studies and also considers aspects of the relationship between rulemaking and legislative activity.

Table 1 lists research projects conducted by the Center at the request of the Advisory Committee, including the rule in question, the type of research conducted, the date of the request, and the date of the final report. This Part then summarizes the background and purpose of each project and describes links between research findings and proposed rule changes. Relying primarily on official Committee notes and published minutes, the discussion concentrates on links between findings and proposals that the rulemakers identified in the course of their deliberations. Each project is presented in the same format. Note that a considerable amount of Center research dealing with procedural matters lies beyond the scope of this Article because it was not the subject of a request by the Advisory Committee (though often the subject of a request by another Judicial Conference committee).<sup>88</sup>

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86 See, e.g., *infra* notes 89, 101, 119, 149.

87 Carrington, *supra* note 1, at 165; see also Mullenix, *supra* note 6, at 830–36.

88 See, e.g., JOE S. CECIL & THOMAS E. WILLGING, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706 (1993); LAURAL L. HOOPER, JOE S. CECIL & THOMAS E. WILLGING, NEUTRAL SCIENCE PANELS: TWO EXAMPLES OF PANELS OF COURT-APPOINTED EXPERTS IN THE BREAST IMPLANTS PRODUCT LIABILITY LITIGATION (2001); MOLLY TREADWAY JOHNSON & CAROL KRAFKA, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS (1994); MCKENNA ET AL., *supra* note 31; ROBERT J. NIEMIC, MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS (1997); ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS (1996).

TABLE 1. TIMING AND TYPE OF RESEARCH REQUESTED OF THE FEDERAL JUDICIAL CENTER BY THE ADVISORY COMMITTEE ON CIVIL RULES

Federal Civil Rule Involved	Research Approaches	Date of Request	Date of Report	Est. Yrs.
12(b)(6): Motion To Dismiss for Failure To State a Claim	Observational field study reviewing a random sample of terminated 1985 cases in two district courts and comparison with studies conducted in 1975 and 1978	November 1988	Spring 1989	0.5
56: Summary Judgment	Observational field study based on random sample of docket entries and filings in six district courts selected for convenience, comparing rates and activities with data from 1975 and 1986 studies	1989-1990 (est.)	1991	1.5
11: Signing of Pleading; Sanctions	Observational field study reviewing docketed Rule 11 activity in terminated cases in five district courts selected for convenience	January 1990	May 1991	1.5
11: Signing of Pleading; Sanctions	Observational field study surveying all district judges regarding their experiences with Rule 11 sanctions	Spring 1990	May 1991	1.0
11: Signing of Pleading; Sanctions	Observational field study surveying a sample of attorneys and district judges regarding their experiences with the 1993 amendments to Rule 11	Spring 1995	Summer 1995	0.3
26(c): Protective Orders	Observational field study surveying activity identified from electronic docket records in three district courts selected for convenience	November 1992	April & October 1994	1.5-2.0
68: Offer of Judgment	Quasi-experimental field study surveying attorneys in four sets of two hundred cases (contract, tort, civil rights, other), one hundred of which settled and one hundred of which went to trial	October 1993	April 1994 & 1995	0.5-1.5
47(a): Attorney Voir Dire	Observational field study surveying a random sample of one hundred and fifty district judges; comparison with similar FJC survey conducted in 1976-1977	Spring 1994	October 1994	0.5
23: Class Actions	Observational field study surveying all identifiable class actions terminated in a convenience sample of four districts during a two year period between 1994 and 1996	April 1994	Fall 1995	1.5
23(c)(1): Class Action Notices	Observational field study of pilot group of nonlawyer FJC employees; four focus groups composed of persons with high school or college education	March 2000	August 2001	1.5
26-37: Discovery	(1) Observational field study surveying 2000 attorneys in a random national sample of 1000 closed civil cases; (2) Literature review of empirical studies	October 1996	September 1997	1.0
53: Special Masters	(1) Observational field study surveying docket entries for a 136 case sample randomly generated from a national population of approximately 445,000 electronic docket sheets; (2) Observational field study interviewing judges and attorneys in a non-randomly selected subset of the above sample	October 1998	October 1999 & April 2000	1.0-1.5

Federal Civil Rule Involved	Research Approaches	Date of Request	Date of Report	Est. Yrs.
26, 34, and 37: Electronic Discovery	Observational field study surveying convenience sample of magistrate judges to identify candidates for approximately twenty civil case studies of cases with significant discovery of computer-based evidence; case studies to include analysis of filed documents and interviews of judges and attorneys	October 1999	Pending	N/A
23: Class Actions (Effects of <i>Amchem</i> and <i>Ortiz</i> )	(1) Observational field study surveying docket sheet activity to determine rate of class action filings before and after the <i>Amchem</i> and <i>Ortiz</i> decisions; (2) Observational field study surveying attorneys in class actions to determine the perceived effects of <i>Amchem</i> and <i>Ortiz</i>	December 2001	Pending	N/A

### A. Rule 12(b)(6) Study

#### 1. Committee Request

The Advisory Committee requested this study at about the time commentators began to call attention to the need for empirical work to support the rulemaking process.<sup>89</sup> In November 1988, the Committee reviewed and discussed a draft proposal to abrogate Rule 12(b)(6).<sup>90</sup> The purpose of the proposed change was to reduce or eliminate motions that were unproductive in the sense of not contributing to the disposition of the case.<sup>91</sup> One commentator had opined, tongue-in-cheek, that Rule 12(b)(6) “was last effectively used during the McKinley administration” and that “it is in a sense a revolving door device, rarely dispositive.”<sup>92</sup> In the reporter’s note accompanying the proposed abrogation of Rule 12(b)(6), Professor Carrington

89 See generally Symposium, *Empirical Studies of Civil Procedure, Part I*, LAW & CONTEMP. PROBS., Summer 1988, at 1 (reviewing the contemporary condition of the empirical study of civil procedure); Symposium, *Empirical Studies of Civil Procedure, Part II*, LAW & CONTEMP. PROBS., Autumn 1988, at 1 (reporting on more recent empirical studies of particular procedural devices, and considering the relation between empirical study and substantive consequences of procedure). For an overview of the articles in both parts of the symposium, see Paul D. Carrington, *Foreword: The Scientific Study of Legal Institutions*, LAW & CONTEMP. PROBS., Summer 1988, at 1, 1–11; see also Rosenberg, *Procedure-Impact Studies*, *supra* note 3, at 17–29 (emphasizing the importance of empirical research on the functioning of procedural rules); Walker, *supra* note 8, at 72–77 (emphasizing the need for a systematic plan for data collection to provide information for guiding the future development of the rules).

90 See THOMAS E. WILLGING, *USE OF RULE 12(B)(6) IN TWO FEDERAL DISTRICT COURTS* 1 (1989).

91 *Id.* at 2.

92 ARTHUR R. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 8 (1984).



suggested that the Committee “consider whether additional data might be gathered that would illuminate the questions raised by the proposal.”<sup>93</sup> The Committee in turn asked the FJC to conduct such a study.

## 2. Research Methods

FJC researchers examined docket sheets and case files in approximately three hundred terminated cases in each of two federal district courts: the District of Maryland and the Eastern District of Pennsylvania.<sup>94</sup> The courts were selected based in part on convenience<sup>95</sup> and not as representative of all district courts.

## 3. Findings and Linkage with Rules Proposals

In those two courts, Rule 12(b)(6) motions led to final disposition of three percent of all cases, a decline from the six percent rate found in 1975 in those same courts.<sup>96</sup> Though not a large percentage of the cases, the number of cases was sufficient to persuade the Committee that Rule 12(b)(6) continued to serve a useful purpose. The Committee considered the Center’s data at its April 1989 meeting and decided not to change Rule 12(b)(6).<sup>97</sup>

### B. Rule 56 Summary Judgment Study

#### 1. Background

During the early and mid 1980s, commentators expressed concern that Rule 56, as interpreted, might be inhibiting the utility of summary judgment because of uncertainty about how Rule 56 should be applied.<sup>98</sup> Whether the 1986 Supreme Court decisions in a trilogy

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93 WILLGING, *supra* note 90, at 2.

94 *Id.* at 7.

95 In addition to their geographical convenience, these two courts had been part of an earlier FJC study of motions practice. See PAUL R.J. CONNOLLY & PATRICIA A. LOMBARD, *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS* 4 n.10 (1980). Having baseline data on Rule 12(b)(6) motions enabled the researchers to compare results within the same two courts over a period of time. See WILLGING, *supra* note 90, at 5–7.

96 See WILLGING, *supra* note 90, at 9. The study also found that Rule 12(b)(6) motions led to the disposition of individual defendants in an additional two percent of the cases. *Id.* at 8.

97 See *id.* at 3.

98 See, e.g., JOE S. CECIL & C. R. DOUGLAS, *SUMMARY JUDGMENT PRACTICE IN THREE DISTRICT COURTS* 1 (1987); William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, reprinted in 99 F.R.D. 465 (1984).

of cases cured that perceived inhibitory effect was of concern.<sup>99</sup> If those decisions had not facilitated summary judgment practice, the case for revising Rule 56 might be strengthened.<sup>100</sup>

## 2. Committee Request

Around 1989 or 1990, building on an earlier request for data that predated the 1986 Supreme Court decisions,<sup>101</sup> the Committee asked the Center for data on trends in the filing, disposition, and appeal of summary judgment motions.

## 3. Research Methods

Center researchers examined docket entries and filings in six federal district courts. Three districts were selected because they had been included in previous studies; the other three districts were chosen because of the perception that they restricted summary judgment practice.<sup>102</sup>

## 4. Findings and Linkage with Rules Proposals

The principal finding was that the filing of summary judgment motions in nonprisoner civil cases increased between 1975 and 1986, but did not exhibit any statistically significant increases between 1986 and 1989.<sup>103</sup> Without expressly referring to these findings, the Committee proceeded to publish a proposed rule revision in August 1990.<sup>104</sup> As stated in the proposed Committee notes, the purpose of the proposed changes was

to enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that . . . can have but one outcome—while at the same time assuring that parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters.<sup>105</sup>

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99 CECIL & DOUGLAS, *supra* note 98, at 2–3.

100 *See id.*

101 The product of that request was the study by Cecil & Douglas. *Id.*

102 Joe. S. Cecil, *Trends in Summary Judgment Practice: A Summary of Findings*, FED. JUDICIAL CTR. DIRECTIONS, Apr. 1991, at 11, 11.

103 *See id.* at 12–13.

104 *See* COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE, *reprinted in* 137 F.R.D. 53, 141 (1990).

105 *Id.*, *reprinted in* 137 F.R.D. 53, 146.

## 5. Aftermath

Proposed changes in Rule 56 were recommended by the Advisory Committee and forwarded to the Judicial Conference by the Standing Committee. The Judicial Conference, however, rejected the proposal at its September 1992 meeting. Judge Keeton, the chair of the Standing Committee reported that

some members of the Conference had argued that the summary judgment rule was working well in its present form and that judges had become familiar with the language of the rule and the current case law. [He also] detected a criticism by some Conference members that too many changes were being proposed in the rules.<sup>106</sup>

Judge Pointer, the chair of the Advisory Committee on Civil Rules, added that “some members seemed not to like the case law on Rule 56 and might not have wanted to enshrine it in the rule.”<sup>107</sup>

### C. Rule 11 Sanctions Study

#### 1. Background

From the time of its adoption in 1983, revised Rule 11 raised an intense controversy about the exact nature of the duty imposed by the amended rule, and whether the rule was being applied in a way that would chill creative advocacy, have a disproportionate impact on civil rights litigants, or generate extensive satellite litigation.<sup>108</sup> Much of the controversy appeared to arise from amended Rule 11’s mandate that the court faced with a violation of the rule “shall impose . . . an appropriate sanction.”<sup>109</sup>

Motivated by the controversy and by conflicting interpretations of the operation of Rule 11,<sup>110</sup> Center researchers undertook two studies of Rule 11 before being asked by the Advisory Committee to conduct additional studies. The first Center-generated study examined the purposes and standards that federal judges brought to the administration of amended Rule 11. Social psychologist Saul Kassin employed

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106 Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., Meeting Minutes, Dec. 17, 1992, 1992 WL 739926, at \*1.

107 *Id.*

108 For an extensive bibliography of the books, monographs, and articles discussing Rule 11, see COMM. ON THE RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., CALL FOR COMMENTS, *reprinted in* 131 F.R.D. 335, 350–59 (1990) [hereinafter CALL FOR RULE 11 COMMENTS].

109 FED. R. CIV. P. 11.

110 See THOMAS E. WILLGING, THE RULE 11 SANCTIONING PROCESS 15 (1989) (stating that “the issues [surrounding Rule 11] have evolved from automatic support or opposition to the rule to more refined questions about its operation”).

an experimental design in which he presented ten hypothetical scenarios based on ten recently published cases to sitting district judges.<sup>111</sup> Overall, Kassin found “a good deal of interjudge disagreement over what actions constitute a violation of the rule, only partial compliance with the desired objective standard,” and “a continued neglect of alternative, nonmonetary” sanctions.<sup>112</sup> He also found that a “clear majority of respondents believed that deterrence is the primary purpose of Rule 11 sanctions” and that “judges who embrace a compensatory rationale are the most likely to grant a Rule 11 motion for attorneys’ fees.”<sup>113</sup>

The second Center-generated Rule 11 study was a primarily qualitative field study, based on interviews with judges and attorneys regarding Rule 11 sanctions proceedings in which they had been involved.<sup>114</sup> Among other findings, that study reported that “little evidence was found that [Rule 11] sanctions have a chilling effect on creative advocacy or unpopular causes”;<sup>115</sup> that “[s]atellite litigation occurs primarily in cases involving large compensatory sanctions awards”;<sup>116</sup> that “legitimate complaints from lawyers about surprise and lack of due process can be accommodated without elaborate satellite evidentiary hearings”;<sup>117</sup> and that “Rule 11 has begun to achieve its goal of deterring frivolous filings.”<sup>118</sup>

## 2. Committee Request

In 1990, the Advisory Committee initiated a thorough review of Rule 11. As one component of its review process, the Committee asked the Center to conduct an empirical study of the current operation of the rule. The Committee also issued a public call for comments in which it asked, among other things, for information about the amount of satellite litigation generated by Rule 11, the extent to which Rule 11 activity has been concentrated in specific types of cases or on particular types of litigants, and the amount of judicial variation in sanctioning practices.<sup>119</sup>

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111 SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 11–15 (1985).

112 *Id.* at xi.

113 *Id.* at x.

114 *See* WILLGING, *supra* note 110, at 17.

115 *Id.* at 8.

116 *Id.* at 3.

117 *Id.* at 7.

118 *Id.* at 11.

119 *See* CALL FOR RULE 11 COMMENTS, *supra* note 108, reprinted in 131 F.R.D. 335, 345–50.

### 3. Research Methods

The Center conducted an observational field study of Rule 11 activity in five federal district courts by identifying cases with references to Rule 11 or sanctions in the court's electronic docketing system—a compilation of all the docket entries for all pending and recently closed cases. Researchers examined and coded the files in each district, producing five separate snapshot-like descriptions of Rule 11 activity in those five districts.<sup>120</sup>

The Center also conducted a survey of all district judges about their experiences and opinions relating to Rule 11. The Center reported to the Advisory Committee the results of both studies in May 1991.

### 4. Findings and Linkage with Rules Proposals

On June 13, 1991, the new chair of the Advisory Committee, District Judge Sam C. Pointer, Jr., in a memorandum to the chair of the Standing Committee, indicated that the FJC study, written comments, public testimony, and various articles and reports lend support to the propositions, among others, that Rule 11:

- (1) “has tended to impact plaintiffs more frequently and severely than defendants,”
- (2) “has too rarely been enforced through non-monetary sanctions,” and
- (3) has caused litigants and judges to spend a “not . . . insignificant amount of time to deal with Rule 11 motions, the great majority of which were not granted.”<sup>121</sup>

The above findings each have counterparts in specific findings detailed in the FJC study.<sup>122</sup> The Committee's findings, in turn, can be linked with specific amendments. This is not to assert that the Center's findings are the sole cause or even a primary cause of related amendments to the rules. The Committee had multiple sources, in addition to the Committee members' own experiences with and opin-

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120 See *FJC Rule 11 Study*, *supra* note 54, at 2.

121 *Id.* at 4–5 (quoting Letter from the Honorable Sam C. Pointer, Jr. to the Honorable Robert E. Keeton, Chairman, Standing Committee (June 13, 1991) (as revised after the Standing Committee's July 18–20 meeting)).

122 See *id.* at 3–4. In addition, the finding on non-monetary sanctions may have been linked with Saul Kassin's finding that a “clear majority of [judge] respondents believed that deterrence is the primary purpose of rule 11 sanctions,” KASSIN, *supra* note 111, at x, and that disparities in treatment of the same case may have reflected differences in judges' “beliefs about the purposes served” by imposing sanctions. *Id.* at 29–32.

ions about Rule 11. In many, if not all, instances, the Center's findings were corroborated by the testimony of witnesses at a public hearing, by other empirical studies,<sup>123</sup> or by other sources.

The Committee's overall findings relating to the 1983 rule's impact on plaintiffs appear to have directly supported the 1993 amendments to Rule 11—specifically the reference in Rule 11(b)(2) to “claims, defenses, and other legal contentions”<sup>124</sup> and the listing in Rule 11(c)(1)(A) of “the challenged paper, claim, defense, contention, allegation, or denial.”<sup>125</sup> Also, the addition of a separate section (amended Rule 11(b)(4)) to deal with denials of factual contentions seems attributable to the finding that Rule 11 sanctions were more frequently sought against and imposed on plaintiffs.

The Committee's finding regarding non-monetary sanctions led to amended Rule 11(c)(2) which imposes a number of constraints on awarding monetary sanctions in the form of attorneys' fees and costs to the party seeking sanctions.<sup>126</sup> Most importantly, Rule 11(c)(2) clarified that deterrence, not compensation, was the primary purpose of the rule.

The Committee's finding regarding the time required for satellite litigation has a direct counterpart in the safe harbor created under Rule 11(c)(1) for litigants who withdraw contentions after receiving notice of a proposed Rule 11 motion.<sup>127</sup>

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123 See, e.g., STEPHEN B. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* (1989) (reporting the findings and recommendations of the task force on the actual implementation of Rule 11); Lawrence C. Marshall, Herbert M. Kritzer & Frances Kahn Zemans, *The Use and Impact of Rule 11*, 86 *Nw. L. Rev.* 943, 985–86 (1992) (revealing that research supported by American Judicature Society is substantially similar to that of the Center).

124 FED. R. CIV. P. 11(b)(2).

125 *Id.* 11(c)(1)(A). Before the 1993 amendments, Rule 11 referred in general terms to “a pleading, motion, or other paper.” FED. R. CIV. P. 11(c)(1)(A), *reprinted in* 28 U.S.C.A. *FEDERAL RULES OF CIVIL PROCEDURE RULES 1–11* (West 1992) (Rule amended 1993).

126 Fed. R. Civ. P. 11(c)(2); see also BURBANK, *supra* note 123, at 36–45 (discussing the findings on sanctions).

127 See FED. R. CIV. P. 11(c)(1)(A). Judge Pointer made that connection in his testimony to Congress in support of the 1993 amendments to Rule 11: “[W]e believe the FJC studies amply support our conclusion that there has been an excessive and unproductive amount of Rule 11 activity. To be sure, the ‘safe harbor’ will reduce the risks to a litigant for initially including a questionable claim or defense.” *Proposed Amendments to the Federal Rules of Civil Procedure: Hearings Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong. 9 (1993) [hereinafter *Hearings*] (testimony of the Hon. Sam C. Pointer, Jr.).

In addition to the findings mentioned above, the Center found that the “majority of those targeted by Rule 11 activity had an opportunity to oppose the imposition of sanctions; however, judges sometimes failed to provide procedural safeguards when acting *sua sponte*.”<sup>128</sup> The amended rule addressed that deficiency by adding a requirement of “notice and a reasonable opportunity to respond” as a precondition to imposing sanctions.<sup>129</sup>

The Center’s survey of judges led to findings that both supported and undermined the Committee’s proposed amendments.<sup>130</sup> Judge Pointer did not directly cite findings based on the survey. We summarized the findings in these terms:

Most judges find the rule moderately effective as a deterrent but have found other case management devices more useful in deterring groundless litigation. In addition, a sizeable minority have seen some negative impact on the conduct of litigation. Yet a great majority of judges believe that overall Rule 11 has had a positive effect on litigation in the federal courts and wish to retain the 1983 language of the rule.<sup>131</sup>

The Center’s report on the survey cautioned the reader to “[r]ecall that the judges were surveyed before the Advisory Committee proposed the new revisions, so this last finding does not reflect the judges’ preference for the 1983 language over the proposed revised language.”<sup>132</sup> In addition, the survey found that “[m]ost judges do not find groundless litigation to be a problem in counseled cases in their districts.”<sup>133</sup> On the crucial point of whether Rule 11 should remain mandatory or be made discretionary, survey results provided ambiguous answers. One could emphasize survey findings that supported the rulemakers’ efforts to deal with satellite litigation by loosening the mandatory aspects of Rule 11, or one could emphasize findings that supported retaining the status quo. The Standing Committee decided to loosen the standard by changing the operative language of Rule 11(c) from “shall” to “may.” The Advisory Committee had proposed retaining the mandatory term “shall.”<sup>134</sup>

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128 *Hearings*, *supra* note 127, at 3.

129 FED. R. CIV. P. 11(c).

130 *See FJC Rule 11 Study*, *supra* note 54, at 28.

131 *Id.*

132 *Id.*

133 *Id.*

134 REPORT ON ISSUES AND CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE FROM SAM C. POINTER, JR., CHAIRMAN ADVISORY COMMITTEE ON CIVIL RULES, TO HONORABLE ROBERT E. KEETON, CHAIRMAN STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (May 1, 1992), *reprinted in* 146 F.R.D. 519, 522–25 (1993).

In dissenting from the Supreme Court's transmittal of the 1993 amendments to Rule 11 to Congress, Justice Scalia cited the FJC survey as showing that "80% of the district judges believe Rule 11 has had an overall positive effect and should be retained in its present form."<sup>135</sup> In testifying before Congress in support of the proposed amendments, Judge Pointer referred to Justice Scalia's opposition and referred to the FJC survey as finding that "the great majority of district judges believe that Rule 11 . . . has been a valuable tool, albeit less effective than some of the other management techniques available to the courts."<sup>136</sup>

## 5. Outcome and Aftermath

Amended Rule 11 went into effect on December 1, 1993. To reverse some of the amendments to Rule 11, the House of Representatives included provisions to that effect in the Attorney Accountability Act of 1995, which it passed.<sup>137</sup> That Act would have made Rule 11 sanctions mandatory, required that sanctions be adequate to compensate injured parties, eliminated the "safe harbor," and made Rule 11 applicable to discovery.<sup>138</sup> In passing the bill, the House subcommittee responsible for drafting it relied heavily on the same portions of the FJC survey of judges that Justice Scalia had cited.<sup>139</sup> Dissenting members of the House asserted that "[b]ecause it is of such recent vintage, the Federal Judicial Center has not had time to study how the revised Rule 11 is working."<sup>140</sup>

After the House's action in 1995, the Advisory Committee asked the Center to update its findings on Rule 11 and to "elicit judges' current views based on their experience with the 1993 amendments."<sup>141</sup> The Center identified representative samples consisting of 148 federal district judges and 1130 federal trial attorneys. Questionnaires solicited opinions about the major provisions of the Attorney

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<sup>135</sup> Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 507, 509 (1993) (Scalia, J., dissenting).

<sup>136</sup> *Hearings*, *supra* note 127, at 9.

<sup>137</sup> H.R. 988, 104th Cong. (1995).

<sup>138</sup> *See id.* § 4. Rule 11(d) excluded discovery activity from the terms of Rule 11, leaving discovery sanctions to be governed by the discovery rules, including Rule 37. FED. R. CIV. P. 11(d) advisory committee's note.

<sup>139</sup> *See supra* text accompanying notes 135-37; *see also* H.R. REP. NO. 104-62, at 9-10 (1995).

<sup>140</sup> H.R. REP. NO. 104-62, at 9-10.

<sup>141</sup> JOHN SHAPARD, GEORGE CORT, MARIE CORDISCO, THOMAS WILLGING, ELIZABETH WIGGINS & KIM McLAWIN, REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE (1995) [hereinafter FJC 1995 RULE 11 SURVEY].



Accountability Act of 1995 as described above. Responses “suggest that a majority of attorneys and judges generally oppose the [House’s] proposed changes to Rule 11.”<sup>142</sup> The only exception is that a “majority of judges and defendants’ attorneys, and a near majority of plaintiffs’ attorneys, believe that the purpose of Rule 11 should encompass compensation of parties injured by violations of Rule 11 as well as deterrence of such violations.”<sup>143</sup>

No changes have been made in Rule 11 since the 1993 amendments, either by the Advisory Committee or by Congress.

#### D. Rule 26(c) Protective Orders Study

##### 1. Background and Committee Request

In May of 1990, the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee held hearings concerning the extent to which courts were permitting parties to restrict access to information obtained through discovery and relevant to public health and safety by issuing protective orders allowing discovery documents to be sealed or otherwise kept private. Around the same time, several bills concerning protective orders and sealed settlement agreements were introduced in the House of Representatives.<sup>144</sup> FJC staff monitored the hearings and prepared memoranda describing unresolved empirical questions that seemed central to the debate.<sup>145</sup>

In the hearings and in the media, members of Congress and interested groups of citizens raised concerns about the extent to which federal courts issued protective orders under Rule 26(c) that prevented the public from learning about hazardous substances and

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142 *Id.* at 2.

143 *Id.*

144 *See, e.g.*, Federal Court Settlements Sunshine Act of 1991, H.R. 3803, 102d Cong.; Federal Sunshine in Litigation Act of 1990, H.R. 2017, 101st Cong.; Act Prohibiting Court Orders Which Limit the Availability of Information, H.R. 129, 101st Cong. (1989); *see also* FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 102–03 (1990) (advocating the use of protective orders to protect “sensitive materials”); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 459 (arguing that current discovery rules are sufficient to deal with current problems); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 462–63 (1991) (discussing certain reform proposals dealing with changes in the discovery regime).

145 *See, e.g.*, Memorandum from Elizabeth Wiggins, Joe Cecil, and James Pettler to William B. Eldridge (Oct. 27, 1992) (on file with the author) [hereinafter Memorandum] (describing the above background and defining the empirical questions).

products that were the subject of litigation.<sup>146</sup> Some also raised concerns about the extent to which the parties accomplished the same result by stipulating that product-related information would not be disclosed after discovery or settlement.<sup>147</sup>

Developments in Congress, as well as the Center's work and interest in the subject, were communicated to the Chair of the Advisory Committee.<sup>148</sup> At its November 1992 meeting, the Advisory Committee invited the Center to conduct an empirical study.<sup>149</sup> The Committee noted a caution that even "[i]f a study fails to find widespread difficulties with protective orders," it will nevertheless be "difficult to be confident that there are no problems."<sup>150</sup> The "first tentative results" of the Center's work were presented to the Committee at its April 1994 meeting.<sup>151</sup> Center researchers presented an interim report to the Committee at its October 1994 meeting.<sup>152</sup>

## 2. Research Methods

As in the Rule 11 study, Center researchers identified cases involving protective order activity by examining codes in the court's electronic docketing system that referred to protective order motions, stipulations, or orders.<sup>153</sup> They then obtained more detailed information about a random sample of cases that involved protective order activity from each district by recording information from docket sheets and case files.<sup>154</sup> Tracking the Committee's interests, researchers collected information about the incidence of protective order activity, the use of stipulated agreements compared with contested or uncontested motions, the number of motions granted and denied, the stated objectives of protective orders, the frequency with which

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146 *E.g.*, *Court Secrecy: Examining the Use of Secrecy and Confidentiality of Documents by Courts in Civil Litigation: Hearing Before the S. Subcomm. on Courts and Administrative Practice of the Comm. on the Judiciary*, 101st Cong. 124-25 (1990) (statement of Diane Weaver).

147 *E.g.*, *id.* at 155 (statement of Paul K. McMasters).

148 *See* Memorandum, *supra* note 145, at 4.

149 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S. 5 (Nov. 12-14, 1992).

150 *Id.*

151 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Comments on Proposed Rules (Apr. 28-29, 1994), *available at* <http://www.uscourts.gov/rules/Minutes/cv4-28.htm> (last visited Feb. 12, 2002).

152 *See* ELIZABETH C. WIGGINS & MELISSA J. PECHERSKI, PROTECTIVE ORDER ACTIVITY IN THREE FEDERAL JUDICIAL DISTRICTS: INTERIM REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES I (1994) (on file with the author).

153 *Id.*

154 *Id.*

protective orders are modified or dissolved, and the types of cases in which protective orders are granted.<sup>155</sup>

### 3. Findings and Linkage with Rules Proposals

In October 1993, the Advisory Committee published for public comment a preliminary draft of proposed changes to Rule 26(c).<sup>156</sup> The thrust of the proposed changes was “to dispel any doubt that a court has the power to modify or vacate a protective order” and to set out standards to guide courts in exercising that power.<sup>157</sup> One theme that emerged from the Committee discussion of the public comments was that there was a “continuing paucity of systematic empirical evidence about the use, modification, and effects of protective orders.”<sup>158</sup> At its April 1994 meeting, the Committee deferred its proposal and expressed to Congress the hope that “a pending Federal Judicial Center survey of several district courts on the use of protective orders would provide helpful empirical data on current practices.”<sup>159</sup> At that same meeting, the Committee received “the first tentative results” of the FJC study and noted that it showed “a substantial rate of protective order activity, more often involving contested motions than stipulations” and “suggest[ed] the need to examine the common belief that ‘most’ protective orders result from agreement among the parties.”<sup>160</sup>

The FJC presented its interim report at the Committee’s October 1994 meeting. As gleaned from the minutes of the Committee’s discussion of that report,<sup>161</sup> the following findings are of interest:

- “there was protective order activity in a range of 4.7% to 10.0% of all cases” in the three districts studied;
- “[m]ost protective order activity is initiated by motion, not by stipulation of the parties; the highest figure for initiation by party stipulation was 26%”;

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155 *Id.* at 1–2.

156 COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED RULES, *reprinted in* 150 F.R.D. 323, 383 (1993).

157 *Id.* at 387 (Committee Note).

158 Civil Rules Advisory Comm., *supra* note 151.

159 Letter from the Honorable Patrick E. Higginbotham, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, to the Honorable Herb Kohl, U.S. Senate (Aug. 25, 1994) (on file with the author).

160 Civil Rules Advisory Comm., *supra* note 151.

161 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Rule 26(c) (Oct. 20–21, 1994), *available at* <http://www.uscourts.gov/rules/Minutes/cv10-20.htm> (last visited Feb. 12, 2002).

- “the rate of hearings on motions was highly variable: in the District of Columbia, it was 12%, in Eastern Michigan, 59%, and in Eastern Pennsylvania, 2%”;
- approximately 40% of the motions resolved in the three districts were granted in whole or in part, and an approximately equal percentage were denied [while the balance were not ruled on];
- contract, civil rights, and “other statutes” comprised “large portions” of the cases in which “an order was entered to restrict access to discovery materials”; “personal injuries accounted for 8% or 9% of the total, depending on the district”; and
- protective orders “were modified or dissolved, whether by court order or agreement in very few of the cases.”<sup>162</sup>

At its October 1994 meeting, the Committee revised its proposed rule, adding to Rule 26(c)(1) “an express provision recognizing and confirming the common practice of entering protective orders on stipulation by the parties.”<sup>163</sup> The Standing Committee adopted the Advisory Committee’s recommendation and transmitted it to the Judicial Conference of the United States with a recommendation that it be sent to the Supreme Court for submission to Congress. After intense lobbying by public interest groups favoring public access to discovery materials involving public health and safety,<sup>164</sup> the Judicial Conference voted to strike the language in proposed Rule 26(c)(1) that would have expressly permitted stipulated protective orders.<sup>165</sup> The Judicial Conference then voted to return the matter to the Advisory Committee for its consideration without any directive as to whether or not stipulated protective orders should be permitted.<sup>166</sup> The Advisory Committee recommended, and the Standing Committee approved, publishing for comment the version returned by the Judicial Confer-

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162 *Id.*

163 *Id.*

164 *See, e.g.,* Richard J. Vangelisti, *Proposed Amendment to Federal Rule of Civil Procedure 26(c) Concerning Protective Orders: A Critical Analysis of What It Means and How It Operates*, 48 BAYLOR L. REV. 163, 165–66 (1996) (“Under intense pressure from right of access advocates, the Judicial Conference rejected the proposed amendment.”); *id.* at 183–84 (further describing the intensity of the lobbying effort, including reference to front page attention in the *New York Times* followed by prominent nationwide media coverage); Michael McCauley, *Proposed Rule Changes Threaten To Increase Court Secrecy*, NAT’L B. ASS’N MAG., Feb. 1996, at 31, 36 (describing the proposed changes, soliciting comments, and offering an “an activist kit about the proposed secrecy rules”). These interest groups do not appear to have participated in the rulemaking process prior to this stage.

165 Reporter’s Note, Rule 26(c), *in* Advisory Comm. on Civil Rules, Agenda Book, § III.B (Washington, D.C., Apr. 18–19, 1996) (on file with author).

166 *Id.*

ence, including the provision on stipulated protective orders.<sup>167</sup> At its October 1996 meeting, the Advisory Committee noted the “substantial controversy” concerning the protective order proposal and held it “for further study in conjunction with the broader study of discovery issues to be launched over the next year.”<sup>168</sup>

Linkages between the results of the FJC study and the rules proposals remain unclear. After the FJC report, the Committee added a controversial reference to stipulated protective orders in the proposed rule. While the Committee expressed surprise that the FJC had found such a modest percentage of protective orders entered by stipulation, perhaps the quantification of that activity called the Committee’s attention to an aspect of the current practice not covered by the original draft. The Committee change, ironically, appeared to do little more than authorize a practice that FJC showed to have been used in a substantial minority of cases involving protective orders.

#### 4. Outcome and Aftermath

The Advisory Committee conducted an extensive review of discovery rules between 1996 and 1999. The Committee decided not to include changes to Rule 26(c) in the amendments that went into effect on December 1, 2000. The Committee reasoned that “richly experienced lawyers, from all fields of practice, find no need to change present protective-order practice.”<sup>169</sup> The Committee acknowledged that “some members of Congress see a need.”<sup>170</sup> Congress has not adopted any related legislation.

### *E. Rule 68 Offers of Judgment Study*

#### 1. Background

Rule 68 permits “a party defending against a claim” to serve an offer on the adverse party “to allow judgment to be taken against the defending party for the money or property or to the effect specified in

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<sup>167</sup> COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED RULES, *reprinted in* 163 F.R.D. 91, 140–41 (1995).

<sup>168</sup> Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Chairman’s Remarks (Oct. 17–18, 1996), *available at* <http://www.uscourts.gov/rules/Minutes/cv10-1796.htm> (last visited Feb. 12, 2002).

<sup>169</sup> Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Rule 26(c) (Mar. 16–17, 1998), *available at* <http://www.uscourts.gov/rules/Minutes/10348civilminutes.htm> (last visited Feb. 12, 2002). The Committee also cited the FJC’s “sophisticated and helpful study.” *Id.* at 39.

the offer.”<sup>171</sup> If the adverse party does not accept the offer and does not obtain a judgment “more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.”<sup>172</sup> By its terms, the rule is not available to parties making claims. Rule 68, part of the original 1938 Federal Rules of Civil Procedure, appears to have been rarely used, at least until the 1980s. Around that time, interest in promoting settlement increased,<sup>173</sup> and proposals to expand the reach of Rule 68 were introduced as part of the rulemaking process.<sup>174</sup> These proposals would have broadened the scope of Rule 68 by including claimants’ offers to settle and by defining “costs” to include attorneys’ fees. After considerable debate and criticism, the proposals were shelved.<sup>175</sup>

## 2. Committee Request

In 1992, Judge William W. Schwarzer, then Director of the FJC, published an article proposing changes in Rule 68. Judge Schwarzer summarized the “principal objections” to the 1983 and 1984 proposals as “that fee-shifting offers of judgment could have a devastating im-

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171 FED. R. CIV. P. 68.

172 *Id.* The Supreme Court has interpreted the term “costs” to include the liability the defending party might otherwise have to pay the opposing party’s attorneys’ fees under some fee-shifting statutes, including the Civil Rights Attorneys’ Fee Awards Act of 1976, which define the award of fees as part of the “costs” of the action. *See* *Marek v. Chesny*, 473 U.S. 1, 9 (1985).

173 *See* FED. R. CIV. P. 16(c) advisory committee’s note (1983 amendment) (discussing then clause 7, now clause 9: “settlement should be facilitated at as early a stage of the litigation as possible”). *See generally* D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES (1986) (reporting on techniques of civil case resolutions without trial from the perspective of trial judges).

174 In 1983, the Committee published for comment a proposal to amend Rule 68 that would have mandated cost-shifting, including attorneys’ fees whenever a plaintiff or defendant made an offer to settle a claim that was not accepted and that turned out to be more favorable to the adverse party than the terms of a judgment obtained through litigation. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED RULES, *reprinted in* 98 F.R.D. 353, 361–63 (1983). In the face of criticism, including challenges to the committee’s authority to impose fee-shifting under the Rules Enabling Act, 28 U.S.C. § 2072 (1994), the Committee published for comment a revised rule that it described as “purely procedural” and that did “not provide for attorneys’ fee shifting but authorize[d] imposition of a sanction based on the creation of unnecessary delay and needless increase in the cost of litigation.” COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED RULES, *reprinted in* 102 F.R.D. 423, 424 (1984).

175 *See* Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, LAW & CONTEMP. PROBS., Autumn 1998, at 13, 15 and sources cited therein.

pact on plaintiffs . . . and that they could circumvent the statutory provisions for attorney fees in civil rights cases.”<sup>176</sup> The Advisory Committee reviewed Judge Schwarzer’s proposal at its November 1992 and May 1993 meetings and at its October 1993 meeting considered a proposal to adopt “a sanction that provides for limited attorney fee shifting.”<sup>177</sup> The proposed mechanism would “shift reasonable post-offer fees, but subtract the benefit that results from the difference between offer and judgment and limit the maximum award to the amount of the judgment”—a proposal that came to be known as the “capped benefit-of-the-judgment approach.”<sup>178</sup> The Committee noted that the Judicial Conference’s Court Administration and Court Management Committee had endorsed a proposal under a Senate bill that would adopt the same provision as a statute.<sup>179</sup>

At the October 1993 meeting, in addition to debating the merits of the proposed revision to Rule 68 and the intricacies of the Rules Enabling Act, the Committee debated whether to ask the FJC to study the merits of the proposal by surveying attorneys in terminated civil cases. By a vote of seven to two, the Committee defeated a motion resolving “not ask the Federal Judicial Center to undertake the proposed survey.”<sup>180</sup> The Committee then voted unanimously to “recommend that the Federal Judicial Center undertake two surveys, including one focusing on the use of Rule 68 in statutory fee-shifting cases.”<sup>181</sup> In the course of its deliberations, the Committee expressly noted that “the question of allocating responsibility between legislation and the Rules Enabling Act process is difficult” and that there “may be substantive elements to attorney fee shifting in this setting that counsel action by Congress.”<sup>182</sup>

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176 William W Schwarzer, *Fee-Shifting Offers of Judgment—An Approach To Reducing the Cost of Litigation*, 76 JUDICATURE 147, 147–48 (1992).

177 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Rule 68 (Oct. 21–23, 1993), available at <http://www.uscourts.gov/rules/Mintues/civ10-21.htm> (last visited Feb. 12, 2002).

178 *Id.* at 15. In other words, in calculating post-offer attorneys’ fees the offering party would have to offset the difference between the offer and the more favorable judgment. In addition, a plaintiff would only have to pay the opposing party’s post-offer attorneys fees up to the amount of any judgment that was less than the unaccepted offer; a plaintiff would not be at risk of having to pay anything beyond the amount of the judgment. If the plaintiff were to receive no judgment, there would be no liability for fees.

179 *See id.* at 14.

180 *Id.* at 18–19.

181 *Id.* at 19.

182 *Id.* at 18.

Professor Thomas Rowe, an Advisory Committee member from 1994 to 2000, conducted a computer-simulated study of the effects of different versions of Rule 68 on the negotiating behavior of attorneys and law students.<sup>183</sup> There was no formal Committee request for his study.

### 3. Research Methods

FJC researchers sent questionnaires to approximately 2000 attorneys from a sample of 800 federal civil cases that had terminated about one year earlier. Half of the cases had settled and the other half had been tried.<sup>184</sup> Approximately 55% of those attorneys responded.<sup>185</sup> Those questionnaires sought the attorneys' opinions about Rule 68 and their specific recollections and estimates from the terminated case of the cost of litigation, settlement options, and possible application of variations of Rule 68 proposals. The sample concentrated on the approximately 30% of civil cases in which the parties were likely to have faced a choice between settlement and trial and focused on four types of cases: contract, tort, civil rights, and other. Within those four groups, researchers selected 100 cases that ended in trial and 100 that ended in settlement. A separate questionnaire was used for civil rights cases to test the effects of Rule 68 in that type of case.

In Professor Rowe's study, a simulated civil rights claim arising out of a mistaken address drug bust provided the framework for attorneys to respond to three alternative versions of Rule 68. Participants were volunteers who were randomly selected from the roles of the national Inns of Court. One hundred seventy attorneys, approximately 8.5% of those solicited, participated.<sup>186</sup>

### 4. Findings and Linkage with Rules Proposals

A threshold finding goes to the issue of whether the incentives in Rule 68 to settle cases are worth pursuing. Researchers found sub-

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183 Thomas D. Rowe, Jr. & David A. Anderson, *One-Way Fee Shifting Statutes and Offer of Judgment Rules: An Experiment*, 36 JURIMETRICS J. 255, 263 (1996) (discussing alternative interpretations of Rule 68 in connection with the Civil Rights Attorneys' Fees Awards Act); see also David A. Anderson & Thomas D. Rowe, Jr., *Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?*, 71 CHI.-KENT L. REV. 519, 525-26 (1995) (discussing how proposed changes would impact the likelihood of settlement).

184 See SHAPARD, *supra* note 35, at 3-5 (describing the research methods).

185 *Id.* at 5.

186 Rowe & Anderson, *supra* note 183, at 263.



stantial opportunities for rulemakers to accomplish much in terms of reducing the costs of litigation by improving incentives to settle. The study found that the median expenses of sampled civil cases that went to trial was \$35,000 per party compared to median expenses of \$10,000 per party for sampled civil cases that settled.<sup>187</sup> Moreover, “about 40% of all tried cases could have settled, and 15%–20% very likely would have settled if the parties simply had engaged in more negotiation.”<sup>188</sup> As to the timing of settlement, the findings suggested that “a fee-shifting offer-of-judgment rule might lead the parties in about 60% of the cases that would settle anyway to settle more quickly and might save up to 50% of expenses in half of those cases.”<sup>189</sup>

Professor Rowe’s study of alternative versions of Rule 68 also produced useful threshold information. Rowe and Anderson concluded that “the interpretation of Rule 68’s influence on § 1988 attorneys’ fees can have a significant effect on litigation bargaining.”<sup>190</sup> Interpreting “Rule 68 ‘costs’ to include post-offer attorneys’ fees normally paid by plaintiffs under § 1988” would produce the most impact: “Under this construction, plaintiffs would accept offers 31% below their no-Rule-68 bottom line, and defendants would make offers 9% below their no-Rule-68 bottom line.”<sup>191</sup>

As to the related question of impact of existing Rule 68 on civil rights plaintiffs, the FJC study found that “risk aversion is common among civil rights plaintiffs,”<sup>192</sup> and that “existing Rule 68 may exacerbate the risk aversion of civil rights plaintiffs . . . [but] only in limited circumstances.”<sup>193</sup>

As to attorneys’ opinions about proposals to amend Rule 68, almost three-fourths of the attorneys who responded to the FJC survey “favored amending Rule 68 to permit offers from both parties and to include more significant incentives.”<sup>194</sup> Surprisingly, “[e]ven in civil rights cases, in which Rule 68 is often said to operate entirely to the benefit of defendants, almost 50% of plaintiffs’ attorneys favored retaining the basic approach of the existing rule, while only 27% favored abolishing the current rule.”<sup>195</sup> A key finding, however, is that

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187 SHAPARD, *supra* note 35, at 6–8.

188 *Id.* at 2.

189 *Id.* at 12.

190 Rowe & Anderson, *supra* note 183, at 273.

191 *Id.*

192 SHAPARD, *supra* note 35, at 16.

193 *Id.* at 17.

194 *Id.* at 2.

195 *Id.* at 3.

“attorneys have strong opinions on both sides of the issue.”<sup>196</sup> The strength of the opposing attorneys’ opinions may have contributed to the decision to abandon the proposals. The Committee also faced serious uncertainty about the viability of these exceedingly complex proposals as well as serious concerns about its power under the Rules Enabling Act to enact fee-shifting amendments.<sup>197</sup>

## 5. Outcome and Aftermath

At its March 20–21, 1997 meeting, the Advisory Committee concluded that “it may prove wise to defer further consideration [of Rule 68 proposals] pending developments in Congress.”<sup>198</sup> Ending a fifteen-year saga on as cheery a note as possible, the Committee’s reporter predicted that “Rule 68 may yet provide the occasion for exploring means of cooperating with Congress in matters that involve the Civil Rules but that may best be addressed through the exercise of congressional power to make substantive law.”<sup>199</sup> Loosely stated, the ball is in Congress’s court and the Committee’s research and debates are available to assist Congress. None of the congressional proposals to amend Rule 68, most notably those in the “Contract with America” proposals, have been adopted.<sup>200</sup>

### *F. Rule 47(a) Attorney Participation in Voir Dire Study*

#### 1. Background

Rule 47(a) currently provides that “[t]he court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination.”<sup>201</sup> In the event that the court conducts the examination, it has the choice of permitting the parties “to supplement” the court’s examination or to “submit to the

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196 *Id.*

197 For a thorough discussion of the questions and concerns the Committee’s reporter had about the proposals, see generally Edward H. Cooper, *Rule 68, Fee Shifting and the Rulemaking Process*, in REFORMING THE CIVIL JUSTICE SYSTEM 108–49 (Larry Kramer ed., 1996).

198 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S. (Mar. 20–21, 1997), available at <http://www.uscourts.gov/rules/Minutes/cv3-97.htm> (last visited Feb. 11, 2002).

199 *Id.*

200 See Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317, 317 (1998) (“The early weeks of the newly Republican Congress in 1995 may turn out to have been a high-water mark for the idea of English-style, loser-pays attorney fee shifting in America.”).

201 FED. R. CIV. P. 47(a).

prospective jurors such additional questions of the parties or their attorneys as it deems proper.”<sup>202</sup> A 1977 FJC study found that “approximately three-fourths of federal district judges conduct voir dire examination without oral participation by counsel.”<sup>203</sup>

From time to time, legislation had been introduced in Congress to establish a right for attorneys to participate in voir dire. At its October 1994 meeting, the Advisory Committee called attention to continuing efforts of senators and representatives to enact such legislation and to Judicial Conference opposition to such efforts.<sup>204</sup> Citing the need for attorneys to develop information to justify the use of peremptory challenges—a need created by the Supreme Court in a series of cases attempting to control challenges made on the basis of racial, ethnic, or gender stereotypes<sup>205</sup>—the Committee drafted proposed rules that would permit attorney participation in voir dire.<sup>206</sup> During the course of its deliberations, the Committee indicated that without its action, “the lawyers who have addressed the Committee will return to Congress to renew longstanding efforts to secure legislation.”<sup>207</sup>

## 2. Committee Request

The Committee’s chair requested that the Center update its 1977 survey of district judges’ practices in conducting voir dire. The Committee requested the study early in 1994, and the Center presented its results at the Committee’s October 1994 meeting.

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202 *Id.*

203 GORDON BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES 6 (1977).

204 See Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Rule 47(a) (Oct. 20–21, 1994), available at <http://www.uscourts.gov/rules/Minutes/cv10-20.htm> (last visited Feb. 11, 2002).

205 *Id.* Attorneys argue that cases such as *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that it is a violation of the Equal Protection Clause for prosecution to exclude jurors based on race), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (holding that it was a violation of the Equal Protection Clause for a state to use peremptory strikes to exclude jurors on the basis of gender), spurred the need for greater participation.

206 See Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Rule 47(a) (Apr. 20, 1995), available at <http://www.uscourts.gov/rules/Minutes/min-cv4.htm> (last visited Feb. 11, 2002).

207 *Id.*

### 3. Research Methods

Center staff mailed written questionnaires to a randomly selected sample of 150 federal district judges, 124 (83%) of whom completed and returned it.<sup>208</sup>

### 4. Findings and Linkage with Rules Proposals

The 1994 FJC study found that 59% of federal district judges permitted attorneys to participate directly in voir dire proceedings.<sup>209</sup> The rate of attorney participation had more than doubled since the 1977 FJC study, a change that had occurred without any change in Rule 47(a). Significantly and surprisingly, the survey also found that district judges who permitted direct attorney participation in voir dire spent approximately the same amount of time selecting jurors as judges who did all of the questioning.<sup>210</sup> The study also found a host of mechanisms that judges use to control voir dire, ranging from general admonitions regarding improper questions to specific limits on time and manner of attorney questioning.<sup>211</sup>

The Committee cited all of the above findings during the meeting at which it decided to proceed with a proposal to amend Rule 47(a).<sup>212</sup> The Committee's published proposal also cited those findings in the proposed Committee note.<sup>213</sup> The Committee inferred from the study's findings that "judges who permit party participation have found little difficulty in controlling potential misuses of voir dire" and concluded that "the problems that have been perceived in some state-court systems of party participation can be avoided by making clear the discretionary power of the district court to control the behavior of the party or counsel."<sup>214</sup> Consistent with those findings, the Committee draft started with the proposition that "[t]he court

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208 Memorandum from John Shapard & Molly Johnson to the Advisory Committee on Civil Rules on Survey Concerning Voir Dire I (Sept. 26, 1994) (on file with author and with the Administrative Office of the U.S. Court's Rules Support Office).

209 *Id.*

210 *Id.* at 2. Notably, the median amount of time spent on voir dire increased from less than one hour in 1977 to between one and two hours in 1994. *Id.*

211 *See id.* at 5-6.

212 Civil Rules Advisory Comm., *supra* note 204.

213 COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED RULES, *reprinted in* 163 F.R.D. 139, 145 (1995). The Committee did present both sides of the participation finding: "Although a recent survey shows that a majority of district judges permit party participation, the power to exclude is often exercised." *Id.*, *reprinted in* 163 F.R.D. 139, 145 (1995) (citing Shapard & Johnson, *supra* note 207).

214 *Id.*, *reprinted in* 163 F.R.D. 139, 145 (1995).

shall conduct the voir dire examination of prospective jurors.”<sup>215</sup> The proposed rule continued by providing that “the court shall also permit the parties to orally examine the prospective jurors to supplement the court’s examination within reasonable limits of time, manner, and subject matter, as the court determines in its discretion.”<sup>216</sup>

## 5. Outcome and Aftermath

Prior to publication for public comment, the Committee faced an unprecedented attempt to have the Judicial Conference mandate that the proposals not be published, an attempt that was rejected by the Judicial Conference “[a]fter spirited discussion.”<sup>217</sup> At the public hearings, “[a]lmost all of the many federal judges who commented on the proposal spoke in opposition,” voicing as a “common theme, . . . the fear that they will lose control if they lose the unlimited right to deny any lawyer participation in voir dire.”<sup>218</sup> The Committee decided to shelve the proposed rule change and to encourage the FJC, “[which] seems receptive—to put voir dire on its educational agenda for new judges and for judge workshops.”<sup>219</sup> The Committee noted that there “may be some room for systematic experimentation to test the information provided by the FJC survey of federal judges.”<sup>220</sup> Neither the Advisory Committee nor the FJC has taken action on the latter proposal.

The Committee reported at its October 6, 1997 meeting that the Committee “did urge the Federal Judicial Center to frame its sessions for new judges to stress the importance of party participation. This has been done. Judge Higginbotham, the former chair of this Committee has spoken on the topic at several meetings.”<sup>221</sup>

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215 *Id.*, reprinted in 163 F.R.D. 139, 144–45 (1995).

216 *Id.*, reprinted in 163 F.R.D. 139, 145 (1995).

217 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S. (Nov. 9–10, 1995), available at <http://www.uscourts.gov/rules/Minutes/min-cv11.htm> (last visited Feb. 11, 2002).

218 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Rule 47(a) (Apr. 18–19, 1996), available at <http://www.uscourts.gov/rules/Minutes/cv4-1896.htm> (last visited Feb. 11, 2002).

219 *Id.* at 5.

220 *Id.*

221 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Agenda Items (Oct. 6–7, 1997), available at <http://www.uscourts.gov/rules/Minutes/cv10-97.htm> (last visited Feb. 11, 2002).

### G. Rule 23 Class Actions Study

#### 1. Background

Advisory Committee activity concerning Rule 23 class actions has followed multiple paths in varying phases over the past decade. For clarity and simplicity, we present this complex set of proposals within the framework of these phases, which have roughly followed the tenure of chairs of the Committee.

#### 2. Phase One

After almost a generation following amendments to Rule 23 in 1966, momentum for change began to build in the late 1980s.<sup>222</sup> The catalyst for Committee action appeared to have been a March 1991 directive from the Judicial Conference that the Committee “study whether Rule 23, F.R.C.P., should be amended to accommodate the demands of mass tort litigation.”<sup>223</sup> Judge Sam C. Pointer, Jr. chaired the Advisory Committee at that time and had also served on an American Bar Association Section of Litigation committee that had studied class actions and issued an extensive report in 1986.<sup>224</sup> The recommendations included eliminating the three subdivisions of Rule 23(b), treating notice and opt-out provisions of Rule 23(c) on a case-by-case basis, authorizing pre-certification rulings on motions to dismiss or for summary judgment, facilitating early judicial management of class actions, and permitting appellate review of the certification ruling by permission of the court of appeals.<sup>225</sup> The Committee drafted a proposed rule revision that incorporated many, if not all, of the recommendations contained in that report.<sup>226</sup>

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<sup>222</sup> For a brief history of the interlude between 1966 and Committee action to review Rule 23, see FJC EMPIRICAL STUDY OF CLASS ACTIONS, *supra* note 63, at 78–81.

<sup>223</sup> JUDICIAL CONFERENCE OF THE U.S., REPORT OF PROCEEDINGS 33 (1991). The Judicial Conference’s action in turn originated in a report of the Ad Hoc Committee on Asbestos Litigation, appointed by the Chief Justice of the United States in September 1990. AD HOC COMM. ON ASBESTOS LITIGATION, REPORT 37 (1991). The Ad Hoc Committee’s first recommendation was that the Judicial Conference “[e]ndorse in principle the proposition that Congress should enact a national legislative scheme to come to grips with the impending disaster relating to resolution of asbestos personal injury disputes.” *Id.* at 27.

<sup>224</sup> ABA SEC. OF LITIG., REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON CLASS ACTION IMPROVEMENTS, *reprinted in* 110 F.R.D. 195 (1986).

<sup>225</sup> *Id.*, *reprinted in* 110 F.R.D. 195, 199–200 (1986).

<sup>226</sup> See Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., 3–5 (Nov. 12–14, 1992). “The current draft is based in large part on a 1986 report of the Litigation Section of the American Bar Association.” *Id.* at 4.

### 3. Phase Two

In June 1993, the Standing Committee deferred action on the Committee's proposal, citing the press of other business<sup>227</sup> and the anticipated appointment of new members to the Committee. Judge Patrick Higginbotham assumed the chair of the Advisory Committee at its October 1993 meeting and scheduled a series of intensive meetings and symposiums designed to educate the Committee on all aspects of contemporary experience with Rule 23. The Committee identified and called on selected practitioners, academics, and judges to recount their experiences with the current rule and to point out areas that needed attention. Conferences were held at Southern Methodist University, the University of Pennsylvania, the University of Alabama, and New York University. The Committee asked the FJC to conduct empirical research and later encouraged researchers from RAND to address the subject as well, yielding reports that will be highlighted below. Judge Higginbotham shepherded a series of proposals through extensive revisions and into publication<sup>228</sup> before his term expired in 1996.

### 4. Phase Three

Judge Paul Niemeyer assumed the Advisory Committee chair in October 1996 and presided over a period of public comment that yielded more than 1500 pages of written statements and testimony and over 700 pages of transcripts of oral testimony.<sup>229</sup> This round of revision produced a single rule change, creating a procedure to petition a court of appeals to allow an interlocutory appeal of a decision granting or denying class certification.<sup>230</sup> At Judge Niemeyer's request, the Chief Justice appointed a working group to consider fur-

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227 See discussion *supra* Parts II.C (Rule 11 Sanctions), II.D (Rule 26(c) Protective Orders), and II.H.1 (Rule 26(a)(1) Protective Orders).

228 See COMM. ON THE RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED RULES, *reprinted in* 167 F.R.D. 535, 559-66 (1996).

229 The proceedings are compiled into four volumes. ADVISORY COMM. ON CIVIL RULES, JUDICIAL CONFERENCE OF THE U.S., WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 (1997) [hereinafter WORKING PAPERS]. Volume one covers proposed rules and minutes of committee meetings as well as appendices reproducing the Center's empirical study and Professor Edward Cooper's article entitled *Challenges to the Rulemaking Process*. Volume two contains written comments submitted to the Committee. Volume three contains transcripts of hearings held in Philadelphia, Dallas, and San Francisco. Volume four consists of written statements of witnesses who testified at the hearings.

230 See FED. R. CIV. P. 23(f).

ther actions relating to mass torts, including the possibility of further changes in the class action rules.<sup>231</sup>

#### 5. Phase Four

Judge Niemeyer also began the process of further revisions in Rule 23 that remain in process. Judge David F. Levi became the Committee chair in 2001. In that year, the Standing Committee published several proposed changes for comment,<sup>232</sup> and the Advisory Committee scheduled hearings in San Francisco, Washington, and Dallas between November 30, 2001 and February 4, 2002.

#### 6. Phase Five

In June 2001, the Advisory Committee and the Standing Committee decided to defer publication of several proposed Rule 23 changes so that the Advisory Committee could consider them further.<sup>233</sup> The proposal dealt with overlapping and competing class actions. The Advisory Committee sponsored a conference at the University of Chicago on October 22–23, 2001 to consider those pending proposals along with those published for comment.

#### 7. Committee Requests

There were no requests for empirical study during Phase One. The Committee chair opted at that time to proceed on the basis of the Committee's collective experience and the Section of Litigation report. At the outset of Phase Two, however, the Committee expanded the scope of its review and undertook to develop a research program on class actions, "working initially with the Federal Judicial Center."<sup>234</sup> The Committee's schedule called for interim reports at the University

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231 See ADVISORY COMM. ON CIVIL RULES, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE U.S. AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (1999), *reprinted in* 187 F.R.D. 293 (1999). The report recommended, among other things, that the Chief Justice appoint an Ad Hoc Committee on Mass Torts to recommend legislation, rule changes, and case management approaches. *Id.*, *reprinted in* 187 F.R.D. 293, 296 (1999). No action was taken on this recommendation, leaving consideration of class action rules changes with the Advisory Committee.

232 COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED RULES, *reprinted in* 201 F.R.D. 560, 586–718 (2001) [hereinafter 2001 PROPOSED RULES].

233 Standing Comm., *DRAFT Minutes*, June 2001, at 19 (on file with author).

234 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Rule 23 (Apr. 28–29, 1994), *available at* <http://www.uscourts.gov/rules/Minutes/cv4-28.htm> (last visited Feb. 11, 2002). Judge Higginbotham appointed a research subcommittee



of Pennsylvania in February 1995, and at New York University in April 1995, with a final report to be prepared in time for the Committee's deliberations at the University of Alabama in November 1995.

During Phase Four, in March 2000, the Advisory Committee's subcommittee on class actions asked the FJC to develop illustrative forms of notice to a class communicating the required information in plain language. The Center provided interim reports to the subcommittee at its January 2001 meeting and to the Committee at its April 2001 meeting. Notices were posted on the FJC's web site in August 2001 in conjunction with the Committee's publication of proposed revisions to Rule 23(c).

Phase Five has included informal discussion about potential research projects relating to competing and overlapping class actions and settlements. In December 2001, the Committee asked the Center to gather data on class action filing trends and to survey lawyers to gather data about the effects of *Amchem Products, Inc. v. Windsor*<sup>235</sup> and *Ortiz v. Fibreboard Corp.*<sup>236</sup> on class actions in federal courts.

## 8. Research Methods

Professor Edward Cooper, the Committee's reporter, developed an extensive "wish list" of empirical questions to guide the Center's research effort.<sup>237</sup> The topics on the list were: Individual Actions and Aggregation: Routine Class Actions; Race to File; Representatives: Who? Whence? Why?; Time of Certification; Certification Disputes; Plaintiff Classes; Defendant Classes; Issues Classes and Subclasses; Notice; Opt-Outs and Opt-Ins; Individual Member Participation; Settlement; Trial; Small Claims Classes; Fee-Recovery Ratios; Overlapping Classes; Counterclaims and Discovery; and Res Judicata.

To address this wide-ranging list of issues, the Center staff proposed to study all cases that had terminated within the most recent two-year period in four district courts that had high levels of activity and two district courts with medium levels of activity. Major unanticipated difficulties in identifying terminated class action cases in the

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consisting of Circuit Judge Anthony Scirica, District Judge David Doty, Professor Thomas Rowe, and Professor Edward Cooper.

<sup>235</sup> 521 U.S. 591 (1997) (holding that a class certification failed to satisfy the requirements of Rule 23).

<sup>236</sup> 527 U.S. 815 (1999) (holding that "applicants for contested certification" under Rule 23 need to demonstrate that the class action fund is limited "by more than the agreement of the parties"); see also *infra* Part II.K.

<sup>237</sup> An evolved version of Professor Cooper's empirical questions can be found at Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 42-52 (1996).

first two districts led to a modification of the proposed study, limiting it to four districts with high levels of class action activity.<sup>238</sup> With that modification, Center reports were presented as scheduled.

Data from a 1987–1990 district court study of judicial time spent in managing various aspects of different types of civil and criminal cases were used to identify the amount of judicial time various types of class actions typically took.<sup>239</sup> A case study of class activity in the breast implant litigation was proposed for the indefinite future.<sup>240</sup>

## 9. Findings and Linkage with Rules Proposals

Rather than review the voluminous findings in the study, this Section will document the findings referred to in the proposed Committee notes to revisions of Rule 23 and in discussions of empirical data during Committee deliberations. The Committee note to the 1996 proposed revision described in phases two and three, above, stated generally that the FJC study “provided much useful information that has helped shape these amendments.”<sup>241</sup>

A key concept in the proposed revision required distinguishing among claims that could stand on their own, claims that required aggregation to support their viability, and claims where “the probable relief to individual class members” might not justify “the costs and burdens of class litigation.”<sup>242</sup> Informing this approach was the FJC’s finding that “median individual recovery figures . . . ranged from \$315 to \$528 . . . far below the level that would be required to support individual litigation.”<sup>243</sup>

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238 See FJC EMPIRICAL STUDY OF CLASS ACTIONS, *supra* note 63, at 197–98.

239 See *id.* at 22–23, 95–97, 199.

240 This aspect of the proposal led to two Center studies of settlement class actions. See generally GIBSON, *supra* note 49 (studying mass tort limited fund class action settlements); TIDMARSH, *supra* note 52 (investigating five cases in which Rule 23 was used to obtain settlements of tort class actions). For a full study of the breast implant litigation, see generally HOOPER ET AL., *supra* note 88.

241 COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., *supra* note 228, reprinted in 167 F.R.D. 535, 560 (1996).

242 *Id.*, reprinted in 167 F.R.D. 535, 559 (1996).

243 *Id.*, reprinted in 167 F.R.D. 535, 561 (1996); see also FJC EMPIRICAL STUDY OF CLASS ACTIONS, *supra* note 63, at 84–85. At the low end of the scale, Committee discussions sometimes focused on anecdotes like “an overcharge of 2 cents a month imposed by a telephone company for 12 months on 2,000,000 customers.” Civil Rules Advisory Comm., *supra* note 218. The Committee in that instance considered the FJC data which found nine of 150 certified class actions in which individual recoveries were valued at less than \$100, three of which were valued at less than \$25, with the lowest being \$16. “But it was responded that very small claims cases do in fact exist.

The 1996 proposals included a provision to certify class actions “for purposes of settlement, even though the requirements of subdivision [23](b)(3) might not be met for purposes of trial.”<sup>244</sup> During deliberations on that proposal, this author specified for the Committee that the FJC study found that “of 150 certified classes, 60 were certified only for settlement.”<sup>245</sup>

Regarding notice and the opportunity to opt out, the Committee note reported that “the Federal Judicial Center study suggests that notices of settlement do not always provide the clear and succinct information that must be provided to support meaningful decisions whether to object to the settlement or . . . whether to request exclusion.”<sup>246</sup> In the 2001 proposed revision,<sup>247</sup> the Committee states that the notice to the class “must concisely and clearly describe in plain, easily understood language” the relevant rights and consequences that flow from class certification.<sup>248</sup> In conjunction with the publication of that proposed revision, the Center has published on its web page illustrative securities and product liability notices written in plain language.<sup>249</sup>

Regarding the timing of the class certification decision, both the 1996 and 2001 proposals contain language designed to alter the “as soon as practicable” provision in the current rule. Both versions cite the FJC study’s uncovering of “many cases in which it was doubtful whether determination of the class-action question was made as soon

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At least in some parts of the country very small claims classes are filed in state courts and removed.” *Id.*

244 COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., *supra* note 228, *reprinted in* 167 F.R.D. 535, 559 (1996).

245 Civil Rules Advisory Comm., *supra* note 197. In *Amchem v. Ortiz*, 521 U.S. 591 (1997), the Supreme Court concluded that settlement is relevant to class certification after citing the FJC study for the proposition that “the ‘settlement only’ class has become a stock device.” 521 U.S. at 618; *see also* FJC EMPIRICAL STUDY OF CLASS ACTIONS, *supra* note 63, at 146 (“A large number of these cases were settlement classes which were certified simultaneously with the preliminary approval of a proposed settlement.”).

246 COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., *supra* note 228, *reprinted in* 167 F.R.D. 535, 564 (1996); *see also* FJC EMPIRICAL STUDY OF CLASS ACTIONS, *supra* note 63, at 132–34.

247 *See supra* Part II.G.5.

248 COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED RULES, *reprinted in* 201 F.R.D. 586, 604–05 (2001). The Committee note references the FJC study. *Id.*, *reprinted in* 201 F.R.D. 586, 607–08 (2001).

249 Judge David Levi’s memorandum transmitting the proposed revisions refers the reader to the FJC’s illustrative notices. *Id.*, *reprinted in* 201 F.R.D. 586, 594 (2001). The illustrative notices can be found at <http://www.fjc.gov> under Current FJC Activities: Class Action Notices (last visited Jan. 28, 2002).

as practicable after commencement of the action.”<sup>250</sup> The FJC study found that overall “approximately two out of three cases in each of the four districts had rulings on either a motion to dismiss, a motion for summary judgment, or a sua sponte dismissal order” before any ruling on class certification.<sup>251</sup> The proposed Committee note indicates that “[t]he party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified.”<sup>252</sup> To conform with the practice found in the FJC study, a practice the Committee deemed to be valuable, the Committee proposed the substitution of “at an early practicable time” for “as soon as practicable.”<sup>253</sup>

The FJC study found a handful of cases in which there was no notice and hearing before the court approved a classwide settlement.<sup>254</sup> Without referring directly to the FJC findings, the proposed 1996 revision added a hearing requirement to Rule 23(e) “to confirm the common practice of holding hearings as a part of the process of approving dismissal or compromise of a class action.”<sup>255</sup>

In proposing a discretionary interlocutory appeal as new Rule 23(f), the Committee cautioned that “[p]ermission to appeal should be granted with restraint” because “[t]he Federal Judicial Center study supports the view that many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings.”<sup>256</sup>

In Phase Four, the Committee proposed a new set of rules dealing with appointment of counsel and awarding attorneys’ fees. In the Committee note to proposed Rule 23(g), the Committee referred to the FJC study’s finding on the time between the filing of the action and rulings on certification to support the proposition that setting

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250 2001 PROPOSED RULES, *supra* note 232, *reprinted in* 167 F.R.D. 560, 607–08 (2001); *see id.*, *reprinted in* 167 F.R.D. 560, 564–65 (2001).

251 FJC EMPIRICAL STUDY OF CLASS ACTIONS, *supra* note 63, at 32.

252 2001 PROPOSED RULES, *supra* note 232, *reprinted in* 167 F.R.D. 560, 608 (2001).

253 *Id.*, *reprinted in* 167 F.R.D. 560, 604 (2001). The Committee note discusses at considerable length reasons judges may have for deferring the decision on class certification. *Id.* at 607–10.

254 FJC EMPIRICAL STUDY OF CLASS ACTIONS, *supra* note 63, at 146–47.

255 COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONF. OF THE U.S., PROPOSED RULES, *reprinted in* 167 F.R.D. 523, 565 (1996) [hereinafter 1996 PROPOSED RULES]. The 2001 proposals contain a hearing requirement in Rule 23(e)(1)(C), which “confirms and mandates the already common practice of holding hearings as part of the process.” 2001 PROPOSED RULES, *supra* note 232, *reprinted in* 167 F.R.D. 560, 619 (2001).

256 FED. R. CIV. P. 23(f) advisory committee’s note; *see also* NYU *Empirical Analysis*, *supra* note 63, at 87–92.

aside time for appointing counsel “should not often present difficulties.”<sup>257</sup>

In proposing a new rule regarding procedures and standards for awarding attorneys’ fees, Rule 23(h), the Committee cites the RAND report for the proposition that “[f]ee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions.”<sup>258</sup> The Committee also cited the same report for the proposition that a “fundamental focus is the result actually achieved for class members.”<sup>259</sup>

## 10. Aftermath

Of the 1996 proposals, the interlocutory appeal provision of Rule 23(f) was the only change adopted. It went into effect on December 1, 1998. Proposals relating to factors affecting the certification of class actions, including settlement class actions, have been deferred but not discarded. In December 2001, the Committee asked the Center to conduct research relating to the need to revive proposals to clarify the criteria for certifying settlement class actions. Proposals published for comment in August 2001 are pending hearing and further review by the Advisory Committee and the Standing Committee. They include the proposals discussed above dealing with the timing of certification, the clarity of notice, the review of settlements, the appointment of class counsel, and the award of fees. None of these appear to be controversial. The Phase Five proposals remain under Committee consideration.

### *H. Rules 26 to 37 Discovery Study*

#### 1. Background

In December 1993, what one commentator described as “perhaps the most contested discovery changes in the history of the Federal Rules” took effect.<sup>260</sup> Most of the controversy centered on the disclosure rules.<sup>261</sup> Because Congress had adopted the Civil Justice Reform Act of 1990, which called for a five-year period of exploratory use of

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<sup>257</sup> 2001 PROPOSED RULES, *supra* note 232, reprinted in 167 F.R.D. 560, 640 (2001).

<sup>258</sup> *Id.*, reprinted in 167 F.R.D. 560, 646 (2001).

<sup>259</sup> *Id.*, reprinted in 167 F.R.D. 560, 650 (2001).

<sup>260</sup> Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 549 (2001).

<sup>261</sup> *See id.* The amendments barely escaped congressional rejection. *See* Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 767–68 (1998) and sources cited therein. For a summary of related discovery rules changes proposed and adopted in 1993, *see id.* at 764–68.

various cost and delay reduction approaches as adopted by local district courts, the Committee had good reason not to propose making the 1993 Rule 26(a)(1) disclosure rules mandatory across all districts.<sup>262</sup> Instead, the 1993 Rule permitted courts, by local rule, to exempt all or particular types of cases from disclosure requirements or to modify the information to be disclosed.<sup>263</sup> The result was what came to be referred to generally as a “balkanization” of federal discovery practice.<sup>264</sup>

In 1996, the American College of Trial Lawyers recommended to the Committee a proposal to limit the scope of discovery to matters relevant to the claims and defenses in a case.<sup>265</sup> Rule 26(b)(1) at that time permitted discovery into all matters relevant to the “subject matter” of the litigation.<sup>266</sup>

## 2. Committee Request

At his first meeting as Chair of the Advisory Committee in October 1996, Judge Paul V. Niemeyer gave priority to the issue of discovery revision. He announced that “[t]he time may have come to consider changes [in discovery rules] more fundamental than those made in recent years.”<sup>267</sup> Judge Niemeyer appointed a discovery subcommittee,<sup>268</sup> outlined a possible three-layered approach to discovery, including the American College of Trial Lawyer’s proposal,<sup>269</sup> laid out a plan for gathering information and convening a conference the following September,<sup>270</sup> and discussed with FJC staff the type of research the Center might be able to provide.<sup>271</sup> The FJC research results would be presented at the September 1997 conference proposed by Judge Niemeyer.

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262 See FED. R. CIV. P. 26(a) advisory committee’s note.

263 See *id.*

264 See generally Marcus, *supra* note 261, at 770–72.

265 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., New Business (Apr. 18–19, 1996), available at <http://www.uscourts.gov/rules/Minutes/CV4-1896.htm> (last visited Feb. 5, 2002).

266 FED. R. CIV. P. 26(b)(1) (amended 2000).

267 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Chairman’s Remarks (Oct. 17–18, 1996), available at <http://www.uscourts.gov/rules/Minutes/CV10-1796.htm> (last visited Feb. 5, 2002).

268 *Id.*

269 See Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Discovery (Oct. 17–18, 1996), available at <http://www.uscourts.gov/rules/Minutes/CV10-1796.htm> (last visited Feb. 5, 2002).

270 See *id.*

271 See *id.*

### 3. Research Methods

The Center's approach to research on discovery was two-pronged. To capture the rich history of empirical work on discovery, Center researchers reviewed the empirical literature on the subject.<sup>272</sup> To document current activity, the Center, working with the discovery subcommittee then chaired by District Judge David F. Levi, proposed to survey attorneys in 1000 recently terminated federal cases, seeking information about the amount and cost of discovery in those cases, the type and costs of any problems faced during various discovery events, and the perceived effects of initial disclosure, expert disclosure, and other aspects of the 1993 amendments. In addition, the Center and the subcommittee decided that the questionnaire should solicit the attorneys' opinions about the need for discovery reform and the most promising approaches to any needed reforms.<sup>273</sup>

### 4. Findings and Linkage with Rules Proposals

As with the class action findings, the results of the discovery research are too detailed to be included here. In general, the survey found that attorneys reported:

- discovery expenses were typically quite modest, representing about 3% of the amount at stake in the litigation;<sup>274</sup>
- discovery occurred in 85% of the cases studied and discovery problems occurred in almost half of those cases; expenses associated with such problems represented about 4% of overall litigation expenses;<sup>275</sup>
- high levels of discovery problems and expenses were associated with high stakes, complex, contentious, or discovery-laden litigation (but did not occur in all such cases);<sup>276</sup>
- initial disclosure was being widely used and in cases in which it had any effect, the process worked as intended to reduce ex-

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<sup>272</sup> The product of that review was published as part of the September 1997 Boston College Symposium Conference on Discovery Rules. See McKenna & Wiggins, *supra* note 60, at 787–807.

<sup>273</sup> The product of the survey research was initially published by the Center as THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES (1997) [hereinafter FJC DISCOVERY PRACTICE, PROBLEMS, AND PROPOSALS], and a later version was included in the *FJC Disclosure & Discovery Study*, *supra* note 54.

<sup>274</sup> FJC DISCOVERY PRACTICE, PROBLEMS & PROPOSALS, *supra* note 273, at 4.

<sup>275</sup> *Id.* at 2–5.

<sup>276</sup> *Id.* at 4.

pense and delay without interfering with fair resolution of cases;<sup>277</sup> and

- the majority of attorneys wanted a uniform national rule governing disclosure.<sup>278</sup>

a. Initial Disclosure

For district judges, the proposal to remove the right of local districts to opt out of the requirements of Rule 26(a)(1) represented the most controversial aspect of the proposed changes. In the debate over whether to repeal, modify, or extend the then-current rule to the national level, the Advisory Committee considered several alternatives. The first was the version of Rule 26(a)(1) that had been adopted in 1993, which required disclosure of witnesses or documents that were “relevant to disputed facts alleged with particularity in the pleadings.”<sup>279</sup> The Committee noted that “initial studies . . . find [the 1993 amendments] effective. The Federal Judicial Center study is the most recent and detailed.”<sup>280</sup> More specifically, Committee members observed that the FJC study showed that “initial disclosure . . . rather often succeeds in reducing cost or delay, or promoting settlement, or leading to better outcomes.”<sup>281</sup>

Despite the FJC findings on the effectiveness of the 1993 amendments, the Committee responded to concerns expressed by judges and attorneys in districts that had opted out of the 1993 amendments. In the interests of uniformity and avoiding a battle among judges, lawyers, and members of Congress like the one that accompanied the 1993 amendments,<sup>282</sup> the Committee adopted a “middle-ground proposal” that was expressly designed to “eliminate the ‘heartburn’ that arises from requiring disclosure of the identity of unfavorable witnesses and documents.”<sup>283</sup> Thus, the Committee adopted a version that limited the required disclosures to witnesses and documents that the disclosing party “may use to support its claims or defenses.”<sup>284</sup>

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<sup>277</sup> *Id.* at 2.

<sup>278</sup> *Id.* at 3.

<sup>279</sup> FED. R. CIV. P. 26(a)(1)(A), (B), *reprinted in* FEDERAL CIVIL JUDICIAL PROCEDURES AND RULES 132 (West 1999) (Rule amended 2000).

<sup>280</sup> Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Disclosure (Mar. 16–17, 1998), *available at* <http://www.uscourts.gov/rules/Minutes/0398civilminutes.htm> (last visited Feb. 5, 2002).

<sup>281</sup> *Id.*; *see also FJC Disclosure & Discovery Study*, *supra* note 54, at 562–65 (discussing the perceptions of initial disclosure’s effects).

<sup>282</sup> *See supra* notes 260–65 and accompanying text.

<sup>283</sup> Civil Rules Advisory Comm., *supra* note 280.

<sup>284</sup> FED. R. CIV. P. 26(a)(1)(A) & (B).



At the meeting in which the discovery proposals were approved in their final form, Judge Levi, then chair of the discovery subcommittee, noted that he had been “surprised by the support expressed for initial disclosure”<sup>285</sup> and “learned that disclosure is practiced more widely than we had thought.”<sup>286</sup> He argued for “a uniform national procedure to enforce national substantive law.”<sup>287</sup> Judge Levi observed that the Committee had “heard opposition from many judges, but they have not had the information we have had . . . . When empirical work can be done, we have had it done.”<sup>288</sup> In the end, the Committee accepted the compromise “middle-ground” version, and it went into effect on December 1, 2000 with little apparent fanfare.<sup>289</sup>

FJC data from the survey of attorneys and from other sources supported the Committee’s decision to seek a uniform national rule.<sup>290</sup> The Committee cited prior FJC data to support the empirical proposition that “[a] striking array of local regimes in fact emerged for disclosure and related features introduced in 1993.”<sup>291</sup> The Committee observed specifically that “[l]awyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rules changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes.”<sup>292</sup>

The Center provided a less controversial form of assistance to the Committee in helping to determine which broad categories of cases should be excluded from the Rule 26(a)(1) disclosure requirements.<sup>293</sup> These “low-end exclusions” represented the types of cases in which discovery was unlikely. By surveying local rules promulgated

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285 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Motion: Rule 26(b)(1) (Apr. 19–20, 1999), available at <http://www.uscourts.gov/rules/Minutes/0499civilminutes.htm> (last visited Feb. 11, 2002).

286 *Id.*; see also *FJC Disclosure & Discovery Study*, *supra* note 54, at 559–61 (discussing the prevalence of initial disclosure activity).

287 Civil Rules Advisory Comm., *supra* note 285.

288 *Id.*

289 An archive of rules submitted for Supreme Court approval can be found at <http://www.uscourts.gov/rules/archive.htm> (last visited Feb. 11, 2002).

290 *FJC Disclosure & Discovery Study*, *supra* note 54, at 588–91.

291 FED. R. CIV. P. 26 advisory committee’s notes (2000 amendment) (discussing purposes of amendments) (citing D. STIENSTRA, FED. JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS’ RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (1998)).

292 *Id.* (citing FJC DISCOVERY PRACTICE, PROBLEMS, AND PROPOSALS, *supra* note 273, at 44–45).

293 For a listing of the categories excluded, see FED. R. CIV. P. 26(a)(1)(E).

under Rule 16 and under the 1993 disclosure rules and listing all exclusions, the FJC gave the Committee's reporter systematically-collected information about district courts' practices in excluding cases. Using case filing statistics, the Center was able to estimate the percentage of all civil cases—approximately 33%—likely to be affected by the exclusions.<sup>294</sup>

#### b. Scope of Discovery

For members of the bar, the most controversial and contentious aspect<sup>295</sup> of the Advisory Committee's proposals to revise the discovery rules involved narrowing the scope of discovery from matters "relevant to the subject matter involved in the pending action"<sup>296</sup> to matters "relevant to the claim or defense of any party,"<sup>297</sup> subject to expansion by court order to allow discovery of any matter relevant to the subject matter.<sup>298</sup> The Committee supported its position, in part, by referring to the FJC study's finding that "[n]early one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions."<sup>299</sup> Of course, as Professor Thomas Rowe, a member of the Committee, observed in citing the same data, "two-thirds [of the attorneys surveyed] did not express this view."<sup>300</sup> Moreover, the lawyers surveyed by the FJC ranked narrowing the scope of discovery fifth out of six types of reforms presented for their consideration.<sup>301</sup> Had the proposed rule been in effect at the time of the survey, attorneys estimated that it would have reduced litigation expenses by about 12%.<sup>302</sup>

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294 See FED. R. CIV. P. 26 advisory committee's notes (2000 amendment) (subdivision (a)(1)) (referring to the FJC estimate that the exemptions amount to about one-third of all civil filings).

295 See *supra* notes 260–65 and sources cited therein.

296 FED. R. CIV. P. 26(b)(1), *reprinted in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 133 (West 1999) (Rule amended 2000).

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

298 *Id.*

299 FED. R. CIV. P. 26 advisory committee's notes (2000 amendments) (subdivision (b)(1)); see also *FJC Disclosure & Discovery Study*, *supra* note 54, at 584–87 (discussing changes likely to reduce discovery problems and expenses).

300 Stempel, *supra* note 260, at 578; see also *infra* note 325 and sources cited therein.

301 *FJC Disclosure and Discovery*, *supra* note 54, at 586–87.

302 *Id.* at 584–85 tbl.35.

### c. Duration of Depositions

The Committee amended Rule 30(b)(2) to limit depositions to “one day of seven hours”<sup>303</sup> unless the parties stipulated or the court ordered otherwise.<sup>304</sup> The FJC study found that the typical deposition in the surveyed cases took three hours and that three-quarters of the cases had depositions that averaged five hours or less.<sup>305</sup> In response to a discovery subcommittee request, the FJC examined its survey database further and found that for those relatively few attorneys (sixty-nine of 572, or 12%) who reported that depositions lasted too long, the median length of the deposition was seven hours.<sup>306</sup> Ten percent of the overlong depositions lasted twenty-four hours or more.<sup>307</sup> Also, in response to a subcommittee request made during the course of its drafting, FJC staff examined local district court rules limiting the length of depositions and found that the length of depositions in those districts did not differ from those in districts without such local rules.<sup>308</sup> The Committee adopted the limit of seven hours, a number tailored to fit below a level that some attorneys had found problematic.

### d. Number of Depositions

The Advisory Committee considered but decided against lowering the presumptive number of depositions below the ten per side permitted by Rule 30(a)(2)(A). The Committee noted that the “FJC study shows that most cases involve far fewer depositions than [ten].”<sup>309</sup> In deciding not to lower the limit, the Committee observed that it had no indication that ten depositions per side is too many.<sup>310</sup>

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303 FED. R. CIV. P. 30(d)(2).

304 *Id.*

305 *FJC Disclosure & Discovery Study*, *supra* note 54, at 571.

306 Memorandum from Thomas E. Willging to the Discovery Subcommittee 3 (Dec. 22, 1997) (on file with author).

307 *Id.*

308 MARIE CORDISCO LEARY & THOMAS E. WILLGING, NUMERICAL AND DURATIONAL LIMITS ON DISCOVERY EVENTS AS ADOPTED IN FEDERAL LOCAL RULES AND STATE PRACTICES 10–11 (1998) (on file with author).

309 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Number of Depositions (Mar. 16–17, 1998), *available at* <http://www.uscourts.gov/rules/Minutes/0398civilminutes.htm> (last visited Feb. 5, 2002); *see also FJC Disclosure & Discovery Study*, *supra* note 54, at 571 (Table 24 shows that 75% of cases had seven or fewer depositions).

310 *See* Civil Rules Advisory Comm., *supra* note 309; *see also FJC Disclosure & Discovery Study*, *supra* note 54, at 573 (Table 25 indicates that 4% of attorneys reported there were too many depositions in surveyed cases).

The Committee also commented that the “fact that most cases are completed with far fewer [than ten] depositions tends to support the conclusion that the stated limit has not encouraged parties to take more depositions than they otherwise would.”<sup>311</sup>

e. Discovery Cutoffs

In its study of courts participating in the evaluation of the Civil Justice Reform Act of 1990 policies, RAND found that reported lawyer work hours on a case were significantly lower and the time to disposition of a case was significantly shorter in districts with smaller median numbers of days to the discovery cutoff.<sup>312</sup> RAND asserted that these findings supported the policy of adopting shorter discovery cutoffs to reduce costs and delay.<sup>313</sup> In its survey, the FJC was unable to replicate those findings despite using case-specific measures of discovery cutoffs and case duration.<sup>314</sup>

The Committee considered and decided not to adopt any of several alternatives for setting a date after which discovery would be cut off. The Committee made reference to RAND and FJC data during its deliberations, but its decision seemed to hinge primarily on the difficulty of setting firm trial dates to accompany any discovery cutoff and the belief that an early discovery cutoff made little sense without an early firm trial date.<sup>315</sup>

I. Rule 53 Use of Special Masters Study

1. Background

Rule 53 authorizes courts to appoint special masters in exceptional cases. The framework of the rule “appears to contemplate the traditional activity of a special master in holding evidentiary hearings and issuing reports with factual findings to facilitate a trial.”<sup>316</sup> Although no empirical data existed until recently, it was apparent to sophisticated observers that the functions for which courts appointed special masters had grown far beyond the limited reach of Rule 53.<sup>317</sup>

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311 Civil Rules Advisory Comm., *supra* note 309, at 37.

312 See Kakalik et al., *supra* note 16, at 666–67.

313 See *id.* at 680–81.

314 See *FJC Disclosure & Discovery Study*, *supra* note 54, at 557–59.

315 See Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Discovery Time Cut-off (Mar. 16–17, 1998), available at <http://www.uscourts.gov/rules/Minutes/0398civilminutes.htm> (last visited Feb. 5, 2002).

316 FJC SPECIAL MASTERS’ STUDY, *supra* note 44, at 1.

317 See, e.g., Edward H. Cooper, *Civil Rule 53: An Enabling Act Challenge*, 76 TEX. L. REV. 1607 (1998).

At the suggestion of two local district court Civil Justice Advisory Groups in 1993, the Advisory Committee began to consider revising the rules to accommodate various uses of special masters.<sup>318</sup> The Committee debated various approaches, including possible amendments to Rules 16 or 53, over a span of four meetings before deciding that there was “no apparent need for imminent action.”<sup>319</sup>

## 2. Committee Request

At its December 1998 meeting, Judge Niemeyer appointed a subcommittee to “make a recommendation whether Rule 53 reform should be pursued.”<sup>320</sup> The Committee noted the need to “form a clear picture of the seeming wide variety of present practices,”<sup>321</sup> and Judge Niemeyer indicated that it would be “appropriate to ask the Federal Judicial Center to undertake any study that can be designed in consultation with the Subcommittee.”<sup>322</sup> The Center and the subcommittee designed a research plan that would produce preliminary data on the incidence of special master activities for the October 1999 meeting and a final report for the April 2000 meeting.

## 3. Research Methods<sup>323</sup>

This study was based on cases in which special master appointments were considered. For the first phase of the study, a sample of 136 cases in which special master activity was recorded on a docket sheet was extracted from a population that included approximately 445,000 terminated civil cases. Incidence of appointment was estimated based on this sample. Information from case files in the sample of cases was collected to respond to questions relating to the circumstances of the appointment, the nature of the special masters’ duties, the type of person appointed, and other issues related to the operation of Rule 53.

In Phase Two, researchers conducted telephone interviews of judges and attorneys in a portion of the sample of cases. These interviews were designed to address qualitative questions regarding how

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318 *Id.* at 1608 n.6.

319 *Id.* at 1609.

320 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Copyright Rules: Related Rules 65, 81 (Nov. 12–13, 1998), *available at* <http://www.courts.gov/rules/Minutes/1198civilminutes.htm> (last visited Feb. 5, 2002).

321 *Id.*

322 *Id.*

323 For a discussion of the methods used, see FJC SPECIAL MASTERS’ STUDY, *supra* note 44 at 13–15, 81–92.

the rule worked in practice, the goals of the appointment, their effectiveness, problems encountered, and the need, if any, for a rule change.<sup>324</sup>

#### 4. Findings and Linkage with Rules Proposals

The threshold question before the Committee was whether to proceed with revising Rule 53. Though appointing a special master was rarely raised, occurring in less than three cases per 1000, the raw number of cases, more than 600 cases per year, impressed the Committee as “not a rare or inconsequential event.”<sup>325</sup> Moreover, the “wide range of activities from pretrial through trial and on to post-trial work . . . suggests there is at least room to expand Rule 53, which focuses only on trial uses.”<sup>326</sup> The Committee concluded that the FJC data “suggest a need to update Rule 53 to cover pretrial and post-trial activity”<sup>327</sup> and decided to proceed with revising Rule 53 “while the FJC goes on with [Phase 2 of] its study.”<sup>328</sup>

The Committee drafted a revised rule that clarified the authority of judges to appoint pretrial and posttrial masters, citing the FJC study as confirming the premise for the revision.<sup>329</sup> In the Committee note, the drafters start with the proposition that “Rule 53 is revised to reflect changing practices in using masters”<sup>330</sup> that “[a] study by the Federal Judicial Center documents the variety of responsibilities that have come to be assigned to masters.”<sup>331</sup>

The Center report addressed the question of how appointments at the pretrial and post-trial stages came to pass under a rule that did not provide for them. The answer was that “[c]onsent and acquies-

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324 For a listing of the research questions, see *id.* at 12–13.

325 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Rule 53 Subcommittee 37 (Oct. 14–15, 1999), available at <http://www.uscourts.gov/rules/Minutes/1099mnCV.pdf> (last visited Feb. 5, 2002); see also FJC SPECIAL MASTERS' STUDY, *supra* note 44, at 3, 15–21 (discussing the incidence of the special master appointment).

326 Civil Rules Advisory Comm., *supra* note 325, at 37; see also FJC SPECIAL MASTERS' STUDY, *supra* note 44, at 4–5, 52–64 (discussing why special master rules are working despite their limits).

327 Civil Rules Advisory Comm., *supra* note 325, at 38.

328 *Id.*

329 2001 PROPOSED RULES, *supra* note 232, reprinted in 201 F.R.D. 560, 670 (2001) (stating that “[t]he Federal Judicial Center did a study that . . . confirmed that special masters often are used for purposes not clearly contemplated by Rule 53”).

330 *Id.*, reprinted in 201 F.R.D. 560, 693 (2001).

331 *Id.*, reprinted in 201 F.R.D. 560, 694 (2001) (citing FJC SPECIAL MASTERS' STUDY, *supra* note 44).

cence appear to be the driving forces.”<sup>332</sup> The proposed Rule 53(a)(1) would provide that “a court may appoint a master . . . (A) [to] perform duties consented to by the parties.”<sup>333</sup>

The proposed revision calls for the order appointing a special master to specify “the circumstances, if any, in which the master may communicate *ex parte* with the court or a party.”<sup>334</sup> In presenting the proposal to the Standing Committee, the Advisory Committee’s reporter “pointed out that the Federal Judicial Center’s study of masters in the district courts had revealed that *ex parte* communication between a master and either the court or the parties are the focus of continuing concern but may be very beneficial in certain circumstances.”<sup>335</sup> He went on to say that *ex parte* communication was “the single most difficult problem cited by interviewees” in the FJC study.<sup>336</sup>

Despite the lack of empirical data, the Committee proposed a major change in special master practice, namely the removal of authority to appoint a special master to review facts and present a report in a jury trial. Center research found, somewhat ironically, that special masters were infrequently appointed for trial purposes, the original core purpose of Rule 53 appointments.<sup>337</sup> In none of the cases studied intensively in Phase Two did the appointments contemplate testimony before a jury by a special master.<sup>338</sup> Seven cases were studied, four of which involved bench trials and the other three of which involved court-appointed experts under Federal Rule of Evidence 706.<sup>339</sup> The Committee’s rationale, however, deemphasized any empirical issues. The Committee concluded that the “practice intrudes on the jury’s province with too little offsetting benefit” and that the trial master’s evidence taking would be insulated from the jury and perhaps even from a reviewing court.<sup>340</sup>

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332 FJC SPECIAL MASTERS’ STUDY, *supra* note 44, at 5.

333 2001 PROPOSED RULES, *supra* note 232, *reprinted in* 201 F.R.D. 560, 683 (2001). The proposed Committee note addresses the question of acquiescence by urging courts to “be careful to avoid any appearance of influence that may lead a party to consent to an appointment that would otherwise be resisted.” *Id.*, *reprinted in* 201 F.R.D. 560, 695 (2001).

334 *Id.*, *reprinted in* 201 F.R.D. 560, 686 (2001).

335 Standing Comm., *supra* note 233, at 27.

336 *Id.*

337 *Id.*

338 *See* FJC SPECIAL MASTERS’ STUDY, *supra* note 44, at 24–25.

339 *Id.*

340 2001 PROPOSED RULES, *supra* note 232, *reprinted in* 201 F.R.D. 560, 696–98 (2001).

## 5. Aftermath

The proposed rule is pending. Written comments were due by February 15, 2002. No one commented on Rule 53 at the first hearing, which was held in San Francisco on November 30, 2001. Apparently, the proposed rule has not generated any controversy. The Advisory Committee was expected to review the proposed rule at its May 2002 meeting. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference at their 2002 meetings, and if approved by the Supreme Court and transmitted to Congress by May 1, 2003, the proposed amendment would go into effect on December 1, 2003, unless Congress intervenes.<sup>341</sup>

### *J. Rules 26, 34, and 37 Electronic Discovery Study*

#### 1. Background

In October 1999, the Discovery Subcommittee of the Advisory Committee identified “electronic discovery”—that is, the discovery of computer-based evidence such as e-mail, databases, and Internet activity—as an area of growing concern for practitioners and judges alike.<sup>342</sup> Several proposals had been floated in the legal literature to refine the definition of “document” found in Rule 34 or to specifically address problems associated with electronic discovery in Rule 26. During 2000, the subcommittee held two “mini-conferences” with practitioners, judges, and technical experts to explore the problems further and determine whether amendment of the rules was either necessary or desirable.<sup>343</sup>

#### 2. Committee Request

There being no consensus on the subcommittee or from the mini-conferences as to whether amendment of the rules was necessary, the subcommittee asked the FJC to conduct case studies to determine whether existing discovery rules helped, hindered, or had no

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<sup>341</sup> See 28 U.S.C. § 2074(a) (1994).

<sup>342</sup> Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Discovery 23–28 (Oct. 14–15, 1999), available at <http://www.uscourts.gov/rules/Minutes/1099mnCV.pdf> (last visited Feb. 5, 2002).

<sup>343</sup> Richard Marcus, reporter for the subcommittee, detailed the status of the discussion and listed more than thirty ideas for rule amendments relating to electronic discovery derived from the legal literature, the mini-conferences, and other sources. Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, LAW & CONTEMP. PROBS., Spring/Summer 2001, at 253, 274–79. These preliminary ideas for rules amendments have not been placed on the subcommittee or committee’s agenda for formal consideration as of January 2002.



effect on the discovery of computer-based evidence, as distinct from discovery overall.<sup>344</sup>

### 3. Research Methods

FJC researchers surveyed magistrate judges during the summer of 2000 to identify recently closed cases in which electronic discovery was prominent, in which the documents filed with the court were publicly available for study, and in which the participants would likely be willing to be interviewed about their discovery experience. The survey also gathered informal data on the frequency and type of problems associated with electronic discovery. Approximately twenty cases were identified as candidates for study. Researchers have studied and coded discovery-related documents filed in these cases to identify types of evidence sought, types of problems encountered, and rules implicated. They have also developed interview protocols to elicit data from both judges and counsel related to specific issues identified by the subcommittee.

### 4. Findings and Linkage with Rules Proposals

As of January 2002, this project was still underway, and there are no findings to report. Center staff expect to present a preliminary report and analysis to the subcommittee in the autumn of 2002.

#### *K. Class Actions—Study of the Effects of Amchem and Ortiz*

##### 1. Background

As part of its 1996 proposals to amend Rule 23, the Advisory Committee proposed to add as Rule 23(b)(4) a settlement class action, that is, one in which “the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.”<sup>345</sup> While the proposal was pending, the Supreme Court decided the case of *Amchem Products, Inc. v. Windsor*,<sup>346</sup> in which it reversed in part a Third Circuit opinion holding that the fact of settlement was irrelevant to determining whether a class should be certified under Rules 23(a) and 23(b)(3).<sup>347</sup>

“Settlement is relevant to a class certification,” the Court held, in that a district court confronted with a request for settlement-only class

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344 See Civil Rules Advisory Comm., *supra* note 342, at 28.

345 1996 PROPOSED RULES, *supra* note 255, reprinted in 167 F.R.D. 523, 559 (1996).

346 521 U.S. 591 (1997).

347 *Id.* at 609–11.

certification “need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.”<sup>348</sup> The Court went on to hold that “other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.”<sup>349</sup> The Court acknowledged the Advisory Committee’s proposal to amend Rule 23 to “expressly authorize settlement class certification,” noted the “voluminous public comments—many of them opposed to, or skeptical of, the amendment,” and concluded that the Court would “consider the certification at issue under the Rule as it is currently framed.”<sup>350</sup> Issues relating to the validity of the proposed amendment were necessarily left for another day.

After the Court’s decision, the Committee discussed the “difficulties and opportunities” presented by *Amchem* and by consensus decided to “defer further consideration of settlement classes.”<sup>351</sup> In part, the Committee wished to “to gain the benefit of greater experience.”<sup>352</sup>

After *Amchem*, the Supreme Court decided *Ortiz v. Fibreboard Corp.*,<sup>353</sup> which further restricted the ability of parties to settle mass tort litigation on a global basis by interpreting narrowly Rule 23(b)(1)(B)’s applicability to limited fund settlements.<sup>354</sup> One commentator concluded, for example, that “the Supreme Court’s decision in *Ortiz* raises serious doubts about whether the Court would ever uphold a limited fund class action settlement of mass tort claims.”<sup>355</sup>

## 2. Committee Request

Against this backdrop, the Advisory Committee faced the question of whether to revive its proposal to establish standards for settlement class actions that might be less restrictive than those imposed by the Supreme Court. Anecdotal evidence supported conjecture that the Rule 23 standards were having the effect of driving class actions into state courts. To assist in its impending decision whether to rec-

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348 *Id.* at 619–20.

349 *Id.* at 620.

350 *Id.* at 619.

351 Minutes, Civil Rules Advisory Comm., Judicial Conference of the U.S., Rule 23 (Oct. 6–7, 1997), available at <http://www.uscourts.gov/rules/Minutes/cv10-97.htm> (last visited Feb. 5, 2002).

352 *Id.*

353 527 U.S. 815 (1999).

354 *See id.* at 864–65.

355 GIBSON, *supra* note 49, at 28.

ommend reviving the settlement class issue, in December 2001 the subcommittee on class actions asked the Center to examine empirically the possible effects of *Amchem*, *Ortiz*, and related developments in federal class action litigation on the filing and disposition of class actions in the federal courts.

### 3. Research Methods

At the time of this writing, it is too soon to specify precisely the research designs to be employed in carrying out this study. Two observational field designs are being given serious consideration. The first would entail an electronic search of all docket entries for at least two years before the Third Circuit decision in *Amchem* up to the end of 2001 to identify class actions and determine any trends in the filing of class actions in federal court in various types of cases. The second design would involve surveying attorneys who have appeared in recently terminated class actions and ask about the effects of *Amchem* and *Ortiz* on the ability to resolve on a global basis the issues that gave rise to the litigation.

### 4. Findings and Linkage with Rules Proposals

There are no findings to date. The expectation is that the findings will be used to inform the threshold decision about whether or not to revive the settlement class issue and draft a proposed rule.

Having detailed the major research efforts conducted at the request of the Advisory Committee, it seems appropriate to turn to an analysis of the patterns revealed by these summary case histories.

## III. PATTERNS AND PRACTICES IN USING EMPIRICAL RESEARCH IN CIVIL RULEMAKING

This Part reviews the research summaries presented in Part II and discusses some patterns that emerge. It summarizes the timing, purposes, and types of the research and examines its impact in relation to its intended purposes. Special attention will be paid to the relationship of the research to the rulemaking process, as well as to related legislative activity.

### A. *Type and Timing of Research*

The first and clearest conclusion is that none of the research conducted was, or could reasonably have been, experimental. The closest approximation was a retrospective quasi-experimental design for the offer-of-judgment research, but even that design could not be consid-

ered experimental in the sense of imposing prior controls that would enable the results to support causal inferences.<sup>356</sup>

Observational field studies using surveys were the most frequently used research designs and methods. This combination was used in eleven of the twelve completed studies, and the twelfth was a quasi-experimental field study that used survey methods. All twelve studies were retrospective, that is, studying the effects of existing rules. A few surveys (for example, discovery, Rule 68) included questions about proposals. None focused on the prospective application of rules proposals that had not been adopted.

Typically the field studies started with electronic searches of docket records to identify cases and records that were then studied in depth. Three written surveys sought specific information about a responding attorney's experience in a recently-closed case. Another sought attorneys' opinions at a general level, and three sought judges' opinions at a general level. Telephone interviews of attorneys and judges complemented case-file information in one study (special masters). Focus groups of potential class members supported the effort to study and improve class action notices.

The timing of the research also followed a clear pattern.<sup>357</sup> Typically, the Center presented written research reports, sometimes in a preliminary form, to the Advisory Committee within a year from the date the Committee requested the work. For the twelve completed projects described in Table 1, the average time from request to first report was one year. The average time from request to final report was 1.2 years. In all but one instance, the final report was delivered within 1.5 years; in the one instance, the final report took two years.

Further use of the data continued, of course, as long as the Committee had a proposed rule under consideration. The Committee frequently asked researchers to address questions that arose during the drafting and hearing stages. Databases created during the research process presented a ready resource for responding to new questions.

Why did the Committee not request experimental research? The conclusion seems unassailable that the time available to the rulemakers for most empirical studies of matters of interest does not

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<sup>356</sup> In that study, Center researchers surveyed attorneys in cases that had settled and compared their responses to those of attorneys in cases that had gone to trial. Though the analysis is comparative, the assignment of cases to the two conditions is not controlled, the vantage point is retrospective, and one cannot determine causal relationships using such an approach. The research, of course, does not purport to address causal relationships. *See generally* SHAPARD, *supra* note 35, at 3–5 (describing survey construction, sampling, and analysis).

<sup>357</sup> *See supra* tbl.1.

permit the use of controlled experiments on a prospective basis. We have few examples from which to extract empirical data about the time needed to conduct experimental research. Anecdotal information from the studies of CAMP-type procedures indicate that experimental research can consume between three and ten years.<sup>358</sup> Even then, assuming that the empirical issues present close questions—which should be the case, if the research and the consequent suspension of equal protection of the laws are to satisfy ethical norms discussed below<sup>359</sup>—the results may be inconclusive and variable from one court setting or local legal culture to another.

As the rulemaking process has evolved, generally a request for research arises around the time the Chair of the Advisory Committee or a critical mass of its membership have decided that a particular rule is a prime candidate for amendment. Such intuitions generally arise from personal experience, from the urgings of an interested constituency, or from a sense of urgency created by congressional action that might preempt present and future rulemaking. Whatever the source, requesting research makes sense, either to test the feasibility of and support for a particular measure, or to accumulate the information necessary to craft a workable rule. In the long run, having the ability to obtain specialized research information helps the rulemakers develop a recognized expertise in drafting rules. Such a reputation may in turn solidify congressional commitment to the Rules Enabling Act process.<sup>360</sup>

With requests for research coming from the Committee at the same time as active efforts to revise the rules or to draft competing statutes are underway, the pressure mounts to conduct what Center researchers like to call “quick and clean” (as opposed to “quick and dirty”) research. An additional source of pressure flows directly from the brief terms that Advisory Committee members and especially the chair serve. In recent years, members of the Committee have been appointed to three-year terms that may be renewed once. Chairs have

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358 Recent examination of case management principle under the Civil Justice Reform Act adds another anecdote. While the study was not a controlled experiment, it required many of the elements of an experiment, including complex design issues, selecting courts for inclusion and for comparison, and monitoring the progress of cases through the system. That study took approximately six years from the date of the statute to the date of publication of the results of the study of ten pilot courts. *See generally* JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL McCAFFERY, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996).

359 *See infra* notes 383–93 and accompanying text (outlining the ethics of experimentation).

360 *See infra* notes 376–79.

generally been appointed to a three-year term, with a possible one-year extension.<sup>361</sup> The term of the chair roughly equals the cycle for rulemaking. Thus, “[a] Chair with a three-year term . . . can see a project through only if it commences at the outset of his or her tenure.”<sup>362</sup> To fit within that cycle, research must be reported to the Committee within a year.

The discovery project, discussed in Part II.H, represents a good example of the timing necessary to complete a rule revision within the term of a single chair. Judge Niemeyer started the process in October 1996, and the revised rule went into effect on December 1, 2000. The additional year beyond the ordinary three-year term afforded the chair and the Committee barely enough time to explore the issues, commission research, and conduct a conference before drafting and publishing rules. Conducting an experiment could not possibly fit into that time frame. If experimentation is to be considered, new approaches will have to be devised, as will be discussed in Part IV.

### B. *Underlying Research Questions and Purposes*

Research requests appear to have centered around three broad types of questions. These questions typically relate to the purposes of the undertaking. The three broad types of questions concern issues relating to the frequency of certain practices, to the presence or absence of support for rule revision, and to the mechanical workings of the current rules.

First, on several occasions, rulemakers have approached the Center at the outset of a proposed rule change, though rarely before the reporter has drafted a proposed amendment for internal Committee consideration. In this context, the Committee usually wishes to obtain data that will help it decide whether the subject should be addressed in earnest. The Committee has asked how often a rule such as Rule 12(b)(6) has been used successfully, how summary judgment activity has changed (or not) over time, how much satellite litigation accompanies Rule 11 activity, how much contested protective order activity occurs, how often judges allow attorneys to participate in *voir dire*, and how often special masters serve pretrial or post-trial roles. In those instances, the research product may have helped the Committee

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<sup>361</sup> A self-study subcommittee of the long-range planning committee of the Judicial Conference recommended that the term for chairs of the advisory rules committees be extended to five years. SELF-STUDY, *supra* note 12, reprinted in 168 F.R.D. 679, 697 (1995). The recommendation “was discussed with the Chief Justice on December 13, 1995.” *Id.*, reprinted in 168 F.R.D. 679, 681 (1995).

<sup>362</sup> *Id.*, reprinted in 168 F.R.D. 679, 697 (1995).

decide whether to proceed and, if it decided to continue, how to define which provisions of a rule should be amended.

Occasionally, as in the Rule 12(b)(6) context, research results may provide a reason not to proceed at all. More often, though, the rulemaking process appears to have built momentum by the time the research has been completed, as in the Rule 56 proposals, and empirical support for or against the Committee's approach may have little effect.

Considerations of various sorts, ranging from pressure from outside interest groups to the introduction of proposed legislation by members of Congress, may have an impact on the Committee's need for empirical research, as appears to have been the case in the studies relating to protective orders and voir dire practices. In those instances, the Committee used the research to refine the issues. Using empirical information about the workings of a rule can contribute to demonstrating specialized knowledge and objectivity that in turn may help the Committee withstand challenges to its exercise of Rules Enabling Act authority.

Occasionally, the Committee has decided after more extensive work, at times with the direct intervention of the Judicial Conference, to abandon an effort, as it did with Rule 68 offers of judgment, protective orders, and attorney participation in voir dire. Research probably had some impact on the Rule 68 decision, but interest group activity in opposition to Committee proposals seems to have dominated the protective order and attorney participation in voir dire decisions. These experiences suggest limits in the ability of empirical research findings to insulate empirically grounded proposals from challenges arising from other interests and values. Empirical data generally ground specific proposals in reality, but data sometimes fail to illuminate the primary values at stake or the primary reason for taking action or not.

Giving prominence to nonempirically-supported values is to be expected in a rulemaking process in which interest groups play an important role. Even in those instances in which findings are rejected for unquantified—and perhaps unquantifiable—reasons, empirical research serves a purpose. When rulemakers have decided to depart from an empirically-driven proposal, they generally have seen themselves as obligated to articulate reasons for doing so. For example, in modifying the disclosure requirements of Rule 26(a)(1) despite empirical research validating their effectiveness, the Committee chose to

draft a proposal that might achieve a consensus and produce uniformity of national rules.<sup>363</sup>

Central to the purpose of conducting empirical research on disputed or doubtful propositions is the risk of turning up data that are unwelcome. At times, such data may be incompatible with proposals that the Committee developed before the research ended. Typically, the research and the Committee's deliberations proceed simultaneously. Research data may or may not move the Committee away from a proposal.

On at least one occasion, opponents of a proposed, published rule cited Center research in opposition to the Committee's proposal. That instance involved the so-called "just ain't worth it" proposal regarding class actions, which would have called for judges to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation."<sup>364</sup> Numerous witnesses opposed that provision. A small fraction of the opponents cited the FJC's finding that the median recovery per class member ranged from \$315 to \$528 to support their arguments that most class actions provided non-trivial recoveries to individual class members.<sup>365</sup> The Committee abandoned the proposal.

Second, the Committee has with increasing frequency asked the Center to develop a nuanced examination of how a particular rule operates in the civil litigation context. These requests seem designed to assist the Committee in deciding how, not whether, to amend a rule. Examples include the Center's studies of Rule 11 sanctions, class actions, discovery, and special masters.<sup>366</sup> On each occasion, the reporter has specified thoughts about the direction in which reform might proceed and provided a roadmap for the research. Given this degree of coordination, it is not surprising that many, but certainly not all, of the research findings fit into the rulemaking plan.<sup>367</sup> Occasionally, as with the questions dealing with overlapping or duplicative

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363 See *supra* notes 280–85 and accompanying text.

364 1996 PROPOSED RULES, *supra* note 255, reprinted in 167 F.R.D. 560, 559 (1996); see also *supra* notes 242–44 and accompanying text (discussing the FJC finding regarding the size of claims).

365 For the reporter's summary of those comments, see 1 WORKING PAPERS, *supra* note 229, at 331–50. See, for example, the summary of Alan Black's statement: "The FJC study shows that if the '\$2' claims class exists, it is very rare." *Id.* at 332.

366 See, e.g., FJC DISCOVERY PRACTICE, PROBLEMS, AND PROPOSALS, *supra* note 273; FJC SPECIAL MASTERS' STUDY, *supra* note 44; *FJC Disclosure & Discovery Study*, *supra* note 54.

367 Cf. Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2211 (1989) (discussing the importance of "the kind of close working relationship between the researchers and the Rules Committee that



class actions, available research tools may not always be able to match the sweep of the empirical questions.

In discussing rules proposals that stirred serious challenges, one should not overlook a function that contextual research may play in responding to such challenges. Empirical research may give the Committee objective data to cite in support of its proposals. The Committee's use of Center data on initial disclosure to support the amendments to the discovery rules that went into effect in 2000 represents a prime example, as discussed above.<sup>368</sup> Though Rule 11 changes and class action proposals stirred heated debates, empirical research presented answers to some objections from interest groups.

Third, sometimes the Committee has asked the Center to conduct research that appears to be designed to test the support for a given proposal or a general approach to revising a rule. For example, in asking the Center to survey all federal district judges to elicit their views on Rule 11 sanctions, the Committee sought and obtained a product that might have proved to be useful in steering its way through a thicket of competing interests. At the least, no district judge could argue that his or her views were not solicited.<sup>369</sup> Similarly, in considering the question of whether to expand attorney participation in *voir dire*, the Committee was caught between competing interests of district judges and influential members of Congress. Consulting the judges and documenting their practices seemed a necessary, but as it turned out not a sufficient, step in seeking Judicial Conference support.<sup>370</sup>

Research on Rule 68 offers of judgment provides another example in which a specific proposal needed the test of outside review. Exploring the effects of a complicated formula in the context of an already complex set of fee-shifting rules seemed indispensable to further action. A controlled field experiment may have been a viable way to test the effects of the proposal. In the absence of such an experiment, uncovering attorneys' strong views for and against the proposals

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the discovery project had" and indicating that "[f]or the most productive results, that type of relationship is essential").

<sup>368</sup> See *supra* Part II.H.4.a.

<sup>369</sup> See *supra* notes 131–37, 141–44 and accompanying text (analyzing two surveys of judges). Ironically, dissenting justices argued that the committee had ignored those views. See *supra* note 135. In hindsight, however, the 1993 amendments appear to have reflected accurately the views of most district judges on all but one point. See FJC 1995 RULE 11 SURVEY, *supra* note 141, at 2 (listing the single exception as a majority preference for the purpose of Rule 11 sanctions to include compensation of parties injured by Rule 11 as well as deference).

<sup>370</sup> See *supra* notes 209–22 and accompanying text (discussing *voir dire* findings and outcome).

may have provided the information the Committee needed. The Committee had once before withdrawn a Rule 68 amendment after intense partisan criticism,<sup>371</sup> and the Center's research helped corroborate the likelihood of a recurrence. We are left to speculate whether the interest groups might have altered their position had there been clear empirical data derived from a controlled experiment.

What impact has empirical research had? Do the rulemakers find it useful? That itself is an empirical question, best addressed by an objective observer outside the Center. The case summaries in Part II shed considerable light on the issue by using references to empirical work found in the minutes of meetings and in the official Committee notes. Based on those objective references and my subjective impressions, the following represents a starting point for assessing the impact of empirical research in the rulemaking process.

In general, empirical research appears to have had a substantial impact on the drafting of amended rules. As noted earlier, empirical research also has had an impact on Committee decisions on whether to proceed, in whole or in part, with proposed rule revisions. Turning to the fourteen instances in which the Advisory Committee requested that the Center conduct research, six of the rulemaking efforts ended with a Committee decision not to proceed with the proposed rulemaking.<sup>372</sup> Of the remaining eight requests (involving five rules), four studies provided data that were used in drafting amendments that went into effect.<sup>373</sup> Three studies and part of another relate to pending rules proposals regarding class actions, special masters, and electronic discovery.

For example, empirical research has had, in my opinion, a substantial impact in the discovery rule revision that took effect on December 1, 2000. The highest impact seemed to be in the area of disclosure. The Center's findings appeared to counter the misimpression, based on presentations from some interest groups, that disclosure rules were not working well. In addition, Center findings on problems of discovery, which appeared to be concentrated in the 5% of cases with the highest stakes and amount of discovery, dovetailed with the Committee's approach to identifying the relatively few cases

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371 See Rowe & Vidmar, *supra* note 175, at 15; Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 10-16 (1985).

372 Those subjects were Rule 12(b)(6) motions to dismiss, Rule 56 (summary judgment), reexamination of 1993 amendments to Rule 11 sanctions, Rule 26(c) (protective orders), Rule 68 (offers of judgment), and Rule 47(a) (attorney participation in voir dire). See *supra* Parts III.A, III.D, III.E, and III.F.

373 Those subjects were Rule 11 (two studies), Rule 23(f) (part of one study), and Rules 26-37. See *supra* Parts III.C and III.F.

that might require judicial management of discovery. In addition, Center data on the working of discovery limitations provided an ongoing resource that the reporters and members called on to inform decisions about where to draw the line. This was particularly true regarding the length of depositions. The Committee also used Center data on the numbers of depositions and the absence of reported problems with the number of depositions as part of its decision to leave existing limits intact.

Center research has had a notable impact in certain other areas, sometimes confirming a direction the Committee had already chosen and perhaps contributing data that refined proposals already formulated. For example, in the Rule 11 area, Center findings seemed for the most part to confirm conventional wisdom about satellite litigation, monetary sanctions, and disparate impact on plaintiffs. Data on the absence of hearings in a substantial number of cases may have led to more explicit hearing requirements, a matter that otherwise might have been left unstated. In the attorney *voir dire*, class action, and special master areas, Center data appear to have had an identifiable effect, as described in Part II.

Of the projects in which Center research has delved into the context of how a rule operates or a proposed rule might operate, only the study of Rule 68 offers of judgment might be considered to have had a low impact. That, however, seems to be a hindsight judgment based on knowledge that the Committee abandoned the proposal. The FJC study did provide the Committee with information supporting its decision not to proceed in the face of strong opposing forces on both sides, a contribution that seems significant.

The Advisory Committee has been selective in requesting empirical research. During the time span covered by this Article, numerous changes recommended by the Committee went into effect without special empirical study.<sup>374</sup> Clearly, the Committee has exercised judg-

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374 Such changes include nontrivial revisions to: Rule 4 regarding service of process (120 S.Ct. 50, 72–74 (1999)); 113 S.Ct. 88, 92–105 (1992)); Rule 5 regarding certificate of service, filing by facsimile, and filing of disclosures (120 S.Ct. 50, 74 (1999)); 116 S.Ct. 74, 82 (1995); 111 S.Ct. 579, 683–85 (1990)); Rule 9 regarding admiralty provisions (117 S.Ct. 76, 85 (1996)); Rule 12(a) regarding presentation of motions to dismiss (120 S.Ct. 50, 74 (1999)); 113 S.Ct. 88, 280–82 (1992)); Rule 15 regarding amended pleadings (111 S.Ct. 579, 689–90 (1996)); Rule 16 regarding pretrial conferences (113 S.Ct. 88, 284–88 (1992)); Rule 26 regarding initial disclosures (113 S.Ct. 88, 293–314 (1992)); Rule 43(a) regarding form of taking testimony (116 S.Ct. 74, 83–84 (1995)); Rule 44(a)(2) regarding proof of foreign records (111 S.Ct. 579, 701–10 (1990)); Rule 45 regarding subpoenas (111 S.Ct. 579, 711–22 (1990)); Rule 47(b) regarding alternate jurors (111 S.Ct. 579, 730–31 (1990)); Rule 50(a) regarding judgment as a matter of law (111 S.Ct. 579, 733–38 (1990)); Rule 54(d) regarding

ment in calling on the FJC's limited resources. No explicit criteria have been developed for distinguishing rulemaking proposals that need careful study and those that do not. Nor does there appear to be a need to establish criteria that might crimp the development of an evolving process. Suffice it to say that by reviewing the research requests at a general level, the primary factors appear to be the paucity of empirical information about a subject, and a need to know more about the empirical context in which a complex rule operates.<sup>375</sup>

### C. *A Note on Legislation*

To the degree that basing procedural rules on empirical analysis is an important value for our civil justice system, the experiences described in this Article strongly suggest that the rulemaking process has a decided advantage over the legislative process. Congressional deference to the rulemaking process appears to have been the dominant mode for dealing with the proposals discussed in this Article. Of the fourteen rulemaking instances examined in this Article, ten involved legislative activity at some stage of the rulemaking process.<sup>376</sup> In only one instance during the period covered by this Article (1988–2001) did Congress adopt legislation—the Private Securities Litigation Reform Act<sup>377</sup>—that altered the operation of an existing rule. In that instance, Congress created special class action rules, but limited the operation of the new rules to the subject matter of private securities litigation.<sup>378</sup>

Of course, empirical analysis of the questions deemed most important by the rules committees should not be and does not appear to have been the sole determinant of whether Congress might defer to

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attorneys' fees (113 S.Ct. 88, 384–86 (1992)); Rule 83(a) regarding local rules (115 S.Ct. 71, 83–84 (1994)); Rule B regarding attachment and garnishment (120 S.Ct. 50, 77–81 (1999)); and Rule C regarding in rem actions (120 S.Ct. 50, 77–81 (1999); 111 S.Ct. 579, 760–62 (1990)).

<sup>375</sup> Those implicit criteria and others may be gleaned from Cooper, *supra* note 237, and Cooper, *supra* note 317.

<sup>376</sup> There was no evidence that Congress had conducted or commissioned any empirical examination of the issues that were pending simultaneously before Congress and the Advisory Committee. A closer look at the legislative process might reveal such research, but none appears to have been communicated to the rulemakers and none was uncovered by this author in the course of conducting research for the Advisory Committee on many of the subjects discussed in Part II above.

<sup>377</sup> Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended at 15 U.S.C. § 77a (1994)). The statute modified the conditions for management and certification of class actions in securities litigation, altering the application of Rule 23 to such cases.

<sup>378</sup> *Id.*

new or amended rules. For many reasons, including a congressional commitment to the Rules Enabling Act process that it created, Congress might be expected to defer to the rulemaking process, at least in areas that fall fairly clearly on the “procedural” side of the long recognized if difficult-to-apply “procedural-substantive” distinction within the rulemaking process.<sup>379</sup> Any deference shown by Congress cannot be attributed solely to the rulemaking body’s capacity to commission and use empirical research. Congress, no less than the rules committee, might be expected to rely on personal experiences and impressions communicated by colleagues, witnesses, and others. As discussed above,<sup>380</sup> Congress came close to rejecting the proposed amendments to Rule 11 sanctions, which were based on empirical data, and to Rule 26 regarding initial disclosure in 1993, which were not based on empirical data. In those instances, the proposed congressional action did not appear to turn on the presence or absence of empirical research.

#### IV. EXPERIMENTAL RESEARCH IN THE RULEMAKING PROCESS

To recapitulate, commentators have called for more experimental research to support the rulemaking process.<sup>381</sup> Dramatic increases in empirical research to support the rulemaking process have occurred in the past decade or so,<sup>382</sup> but none of that empirical work involved experimental research. Yet, experimental research indisputably affords the most powerful instrument for examining legal procedures, the only design that many researchers rely on to support causal inferences. This Part discusses some of the limits of experimental research before presenting a proposal for a revision of the Rules Enabling Act designed to make the rulemaking process more open to experimental research.

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379 See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (examining the development of rulemaking under the Rules Enabling Act).

380 See *supra* notes 137–44 and accompanying text.

381 See *supra* Part II.F, notes 69–77 and accompanying text.

382 In 1988, Professor Laurens Walker counted thirty empirical studies related to rulemaking that had been conducted during the first fifty years of the Federal Rules of Civil Procedure, a rate of slightly more than one study every other year. Walker, *supra* note 8, at 69–70. During the twelve years since then, the Center itself has conducted at least twelve studies directly related to the federal rules, a rate of one per year, and certainly other research institutions have contributed a considerable number of studies. For example, see the studies supported by RAND and the American Judicature Society in *supra* notes 16, 41, 123, and 358; see also sources cited *supra* note 25 (discussing laboratory and other research).

Aside from the time and cost required for experimental research, matters of principle limit the judicial branch's willingness and ability to use these designs. A fundamental premise of our legal system—embedded in the Equal Protection Clause, expressly in the Fourteenth Amendment and implicitly in the Fifth Amendment, as well as in our collective notions of fundamental fairness<sup>383</sup>—is that like cases will be treated in like manner. To examine closely the conditions under which legal experimentation might legitimately take place, Chief Justice Warren Burger, serving in his capacity as Chairman of the Board of the FJC, appointed a blue-ribbon Advisory Committee on Experimentation in the Law.<sup>384</sup> The Chief Justice directed the Committee to examine “the propriety, value and effectiveness of controlled experimentation for evaluating innovations in the justice system.”<sup>385</sup>

The Center's Advisory Committee produced a comprehensive analysis of the conditions under which experimentation might be considered and the terms under which it might be implemented. Without going into the intricacies of the ethical analyses, it is useful to restate the preconditions posited by the Committee before a judicial body would be justified in authorizing an experiment involving a component of the legal system:

- (1) The current rule or practice “must either need substantial improvement or be of doubtful effectiveness” and should not simply be an experiment “for experiment's sake.”<sup>386</sup> Amendments to conform the rules to contemporary practices or to ordain the best practices for judges to follow probably would not qualify under that standard.<sup>387</sup> Nonetheless, such rule changes might benefit from empirical research to identify and examine the practices in a litigation context and search for potential side effects. If the practice has been adopted in many courts, there is less concern about delaying a good idea but greater concern

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383 See Rosenberg, *supra* note 3, at 16–17. This is not to say, of course, that our legal system, based as it is on federalism, does not tolerate differences between state and federal procedural rules that allow like cases to be treated differently.

384 See FED. JUDICIAL CTR., *supra* note 20, at 79.

385 *Id.*

386 *Id.* at 11.

387 See, for example, the 2001 proposals to change Rule 23 (c)(1)(A)'s treatment of the timing of class certification activity. The Committee note describes the change as “consistent with the reality that courts generally make certification decisions after the deliberation required for a sound decision, as shown by the Federal Judicial Center figures” and also as “consistent with best practice.” 2001 PROPOSED RULES, *supra* note 232, reprinted in 201 F.R.D. 560, 592 (2001); see also *supra* notes 250–54 (discussing “as soon as practicable” findings).

about denying the benefits of that idea in an unknown number of cases.

- (2) There must be “significant uncertainty about the value of the proposed innovation.”<sup>388</sup> Just as in medical research, one would not withhold a known successful treatment from a sick or dying patient, one should not withhold a known beneficial legal procedure from a litigant. For example, once the Second Circuit determined that CAMP produced beneficial results without countervailing detriments, the court adopted the program.<sup>389</sup> Some courts determined that the research results from the CAMP experiment sufficed to justify adoption of similar programs. In the Sixth Circuit, an earlier evaluation of an existing program had “proved inconclusive,” and the court decided to pursue an experiment to test the benefits of the program in relationship to its costs.<sup>390</sup> When a procedure is mandated by the Constitution or by a statute, adopting a rule to implement that procedure need not be tested by experiment.
- (3) There must be “no other practical means to resolve uncertainties about the effectiveness of the proposed innovation.”<sup>391</sup> In other words, “if essential information can be obtained satisfactorily through simulation or other forms of research that do not directly affect the operation of the justice system, considerations of ethics . . . militate against a program experiment.”<sup>392</sup> For example, obtaining information about the operation of the discovery and disclosure systems by surveying counsel or judges in recently terminated cases might be seen as a less intrusive alternative to employing experimental designs.<sup>393</sup>
- (4) Finally, “the experiment must seriously be intended to inform a future choice between retaining the status quo or implementing the innovation.”<sup>394</sup> If adoption of the proposed rule appears not to be feasible because of considerations of cost, political opposition, or other impediments, conducting an experiment should not be used to temporize or otherwise delay an inevitable decision to adopt or reject the rule. On the other hand, if conducting a needed experiment requires several years of study, opposition to the merits of the proposed innovation

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388 FED. JUDICIAL CTR., *supra* note 20, at 11.

389 EAGLIN, *supra* note 31, at 1.

390 *Id.* & n.1 (adopting Local Rule 18).

391 FED. JUDICIAL CTR., *supra* note 20, at 11.

392 *Id.*

393 *See supra* notes 272–74 (discussing FJC research methods in discovery and disclosure study).

394 FED. JUDICIAL CTR., *supra* note 20, at 11.

should not require the proponents to draw back from an experiment to test the merits.

Thus, the conditions under which rulemakers might employ experimental research limit the likelihood of its use. In addition to being costly and time-consuming, experimental research must clear ethical hurdles that are not insignificant. The cumulative effect of those constraints may help explain the infrequency of its use.

Part III included discussion of the institutional limits on long-term research imposed by the brief terms served by members and chairs of advisory committees. In the research summarized in Part II, the Committee seemed to have a clear vision of the types of changes that would be desirable. When the chair and members of a committee have such clear vision of the need for change and the types of changes that might work, current methods of “quick and clean” observational survey research seem appropriate and to have served the Committee well. When, however, an innovative idea has unclear consequences, the Committee may wish to adopt an experimental approach.<sup>395</sup>

The proposal considered recently by the Advisory Committee to create a simplified set of procedures for specific sets of cases presents an example of this type of innovation. The proposal would apply truncated pretrial procedures and an early, firm trial date to cases seeking less than a specified amount of damages.<sup>396</sup> Some of the many unknowns about such a proposal would be how many cases might come within any mandatory categories, how many people would use it within any voluntary categories, and what problems litigants, attorneys, and courts might encounter when using it. Research designs traditionally used to support the rulemaking processes would not adequately detect such problems. Survey research would of necessity present totally hypothetical questions and would most likely re-

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<sup>395</sup> The Rule 68 offer of judgment proposals, for example, may also have been good candidates for experimental testing. The method of randomizing and controlling the application of the proposed rule would require some creative design work, but the proposals could have undoubtedly benefited from field experience. Coming up with an outcome measure that would distinguish between coerced and voluntary settlements would also require creative design work. Forum-shopping issues, of course, always plague such research, posing analytical problems about whether random selection of participants was successfully implemented. Had these methodological problems been overcome, experimental testing and reliable data might have softened some of the opposition that Rule 68 proposals have generated. *See supra* notes 194–99 and accompanying text (discussing Rule 68 proposals and outcome). Proposed electronic discovery rules may also be candidates for experimental testing. *See supra* note 256 and accompanying text.

<sup>396</sup> *See* Civil Rules Advisory Comm., *supra* note 325, at 32–38.



present an attempt to quantify variables that are primarily matters of opinion at best, conjecture at worst. There appear to be no existing systems in the federal courts that employ the proposed package of rules.

In the Committee's discussion about simplified procedures, this author raised the question of implementing the proposed procedures on an experimental basis.<sup>397</sup> To date, the Committee has not pursued that approach, perhaps for the same reasons it decided not to pursue the simplified procedure mechanism at all. The item remains on the Committee's agenda as of this writing. Assuming for purposes of discussion that the Committee might wish to test its proposed innovation, two fundamental reasons might inhibit pursuing an experimental approach. The first is that there does not appear to be any explicit authority for the rulemakers to issue rules that are of less than national scope. The second is that there is no mechanism in place for creating and administering national experiments.

As to the question of authority, the Rules Enabling Act vests in the judicial branch "the power to prescribe general rules of practice and procedure."<sup>398</sup> The core meaning of the term "general" would seem to preclude having inconsistent rules apply within different courts.<sup>399</sup> Yet such inconsistent application of rules is central to experimental testing of proposed rules under controlled conditions.

An argument can be made that the inherent power of the courts to govern their own affairs includes the power to create experimental rules that are being tested in a limited number of districts.<sup>400</sup> In effect, the 1993 "opt-out" provisions of Rule 26(a) created such a situa-

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397 See *id.* at 36–37.

398 28 U.S.C. § 2072(a) (1994).

399 See 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, 2079 (1989) ("'[G]eneral' should be presumed to mean that rules . . . should not be limited in their application . . . to a particular geographic area.").

400 For an argument that Article III of the Constitution vests general rulemaking power in the federal courts, see Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993). For a contrary view, see Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 724–31 (1995), and for a rebuttal, see Linda S. Mullenix, *Judicial Power and The Rules Enabling Act*, 46 MERCER L. REV. 733 (1995). This debate took place in the context of the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–482 (1994), in which Congress explicitly authorized local district courts to study various approaches to reducing costs and delays. Congress also explicitly created pilot and demonstration courts that were to study specific programs in a systematic way. See §§ 104–105 of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5097.

tion, albeit without any national control over the local decisionmaking process. The inherent authority argument, however, calls for acting in the face of the statutory limit that rules be of general applicability. That, in turn, raises the question of whether Congress has the power to limit the rulemaking authority,<sup>401</sup> a point that is beyond the scope of this Article.

An argument can also be made that the Judicial Conference has the power to create experimental rules as part of its statutory duty to “carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use . . . .”<sup>402</sup> Indeed, the “now or hereafter in use” language suggests authority to study proposed rules that the Judicial Conference has not put into effect.

On the other hand, commentators have urged that creating an explicit process for testing experimental rules should be done in conjunction with Congress, through legislative action.<sup>403</sup> Given the overlap in power and jurisdiction over procedural issues between Congress and the rulemakers, creating explicit statutory authority to conduct experiments appears to be the prudent course. The examples of overlapping rule and statutory proposals encountered in Part II reveal that Congress has repeatedly deferred to the Rules Enabling Act process it created. Congress would presumably be more likely to defer to the experimental process if it had played a role in its creation than if the courts were to proceed unilaterally.

As to the question of the mechanism for adopting and monitoring experimental rules, no organized system exists. Commentators have presented proposals to create such a system,<sup>404</sup> but such proposals have posited local rules and individual local district courts as the catalysts and proving grounds for experimentation. Indeed, many—perhaps too many—innovations originate at the district and even the chambers level. The question, however, is whether such uncontrolled “experiments” should be adopted on a national level. Local districts or chambers are not in a position to evaluate the workings of their rules under controlled conditions. As Professor Leo Levin, former Director of the FJC, observed, district courts may be serving as “very busy

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401 See generally Burbank, *supra* note 379 (examining congressional authority over rulemaking).

402 28 U.S.C. § 331.

403 See, e.g., Levin, *supra* note 11, at 1585–86 (discussing a proposal for experimentation by local rule); Tobias, *supra* note 11, at 286 (discussing a proposal for Judicial Conference approval of experimental local rules).

404 See, e.g., Levin, *supra* note 11, at 1590–93 (commentary on assuring productive systems); Walker, *supra* note 8, at 76.

laboratories . . . but virtually no one is collecting data.”<sup>405</sup> In addition, data from local courts that have voluntarily adopted an innovation may have acted out of an idiosyncratic local legal culture. Other courts may not see themselves as similarly situated. Data from such local experiments may simply not be applicable on a national level.

Professor Levin recommended creating a new committee of the Judicial Conference to supervise and administer a program of experimentation that would involve both reviewing proposals brought to the committee as well as pursuing “initiatives suggested by the committee.”<sup>406</sup> Taking Professor Levin’s proposal to its logical conclusion would entail creating or empowering a national body, a component of the Judicial Conference, to formulate and adopt experimental rules to be tested on a national level. Because the function of reviewing and approving experimental rules rests so heavily on skills already used effectively by the Standing Committee with the assistance of the advisory committees, the proper locus of the power would seem to reside in the Standing Committee. Designing a new entity seems likely lead to competing claims for authority to draft and promulgate national rules.

Vesting the power to review proposed experiments in the Standing Committee, or any national body would be likely to exacerbate the tension between the value of uniform national rulemaking and the value of autonomy for local courts to administer and manage their own caseloads. Randomly assigning a court to test an experimental treatment can be expected to impose demands on that court’s resources. Those demands may lead those courts to seek to opt out of a proposed experiment. Opting out, however, defeats the principle of random assignment. Without attempting to resolve this dilemma, it is important to note that the federal courts’ tradition of local autonomy represents another hurdle to conducting experimental research on a national level.

As shown earlier, expressions of interest in experimental testing of proposed rules have been rare and episodic to date. Ethical constraints circumscribe the opportunities for experimentation even further. There is no reason to expect that a mechanism for creating

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<sup>405</sup> Levin, *supra* note 11, at 1581–82. Professor Tobias suggests congressional adoption of a 1991 proposal to amend Rule 83 to permit experimental local rules if approved by the Judicial Conference. See Tobias, *supra* note 11, at 286. For the proposed 1991 amendment to Rule 83, which was not adopted, see COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED RULES, *reprinted in* 137 F.R.D. 53, 152–55 (1991). A proposed experimental local rule would be limited to a period of five years or less. *Id.*, *reprinted in* 137 F.R.D. 53, 153 (1991).

<sup>406</sup> Levin, *supra* note 11, at 1589–90.

national rule-based experiments would be used so frequently that it would tax the capacity of the Standing Committee and its advisory committees. Accordingly, what is needed is a statute that would vest the power to create experimental rules in the Standing Committee. If the demand exceeds the capacity of the Standing Committee, that would be the appropriate time to consider other alternatives.

In summary, moving from the rhetorical calls for experimental research into the reality of implementing experimental research demands an operational mechanism for suggesting, reviewing, implementing, and monitoring rule-based experiments.<sup>407</sup> Such a mechanism needs to be created at a national level and to have expertise in rulemaking. With appropriate authority from Congress and assistance from the FJC and the Administrative Office of the United States Courts, the Standing Committee could serve those functions. In a common-law fashion, the Committee would develop expertise in identifying appropriate subjects for experimentation, establishing means of randomly selecting courts to participate, reviewing proposed research designs, selecting control groups, setting time limits on the experiments, and reviewing the data. Such a mechanism could draw on infrequently-used experimental research tools that can enhance our knowledge of the impact of proposed rules on litigants, attorneys, and courts.

Creating such a mechanism will require that rulemakers shift their expectations about the timing of major rules changes. Members and chairs might serve as catalysts for long-term projects that their successors will pick up and conclude. This change in roles would allow the committees, in appropriate situations, to contemplate calling for experimental testing of controversial proposals before enacting a new national rule. Having such a mechanism would present another option for coping with proposed rules changes, proposals that offer no empirical basis for conclusions about their expected effects.

Reserving experimental study for significant and debatable rule changes coincides with ethical limitations on experimentation in the law. Using experimentation sparingly also promotes conservation of scarce rulemaking and research resources. On those occasions when the Standing Committee finds experimental research on proposed rules appropriate, the end result should be highly likely to improve both the quality of rules adopted and the quality of our knowledge of the justice system.

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407 See *supra* notes 358–64 and accompanying text.