

IS NOW THE TIME FOR SIMPLIFIED RULES OF CIVIL PROCEDURE?

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On June 15, 1215, at Runnymede along the banks of the River Thames, King John agreed, in response to forceful demands of the English barons, to the restoration of the traditional English liberties included in Henry I's Charter of Liberties. The document, later denominated the Magna Carta, promised, as an early form of due process, that "no free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed . . . except by the legal judgment of his peers or by the law of the land."¹ And it included immediately thereafter the procedural promise, "To no one will we sell, to no one will we deny, or *delay* right or justice."²

Just as the Magna Carta's promise of judgment by peers under the law of the land animates current notions of due process, its promise not to sell, deny, or delay justice is the fountainhead of the stated role of the Federal Rules of Civil Procedure, which directs that the Rules "should be construed and administered to secure the just, *speedy*, and *inexpensive* determination of every action and proceeding."³ Thus beginning with the Magna Carta and continuing to now, we happily subscribe to the fundamental goal that our civil process not *delay* right or justice.

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Unfortunately, any objective evaluation of current federal civil process will inevitably lead to the conclusion that the process is functioning inadequately in its purpose of discharging justice speedily and inexpensively. One need only ask any trial lawyer whether he can try a medium-sized commercial dispute to judgment in a federal court in less than three years and at a cost of less than six figures. Is the iconic appellation of "making a federal case

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1. KING JOHN, MAGNA CARTA (1215), *reprinted in* SOURCES OF OUR LIBERTIES 17 (Richard L. Perry & John C. Cooper eds., rev. ed. 1991).

2. *Id.* (emphasis added).

3. FED. R. CIV. P. 1 (emphasis added).

out of a dispute” not the ultimate condemnation of current judicial process in federal courts? Can we understand the private bar’s flight from federal courts to arbitrations, mediations, and other methods of alternative dispute resolution as anything but the bar’s vote against the process provided by the Federal Rules of Civil Procedure?

We rightly fear the answers to these questions, which we see in our own observations and in the available empirical evidence. And because we do, I submit, the time has come for a systematic review of civil process with a genuine openness to undertaking a serious and determined effort to simplify the Federal Rules of Civil Procedure.

When I was Chairman of the Civil Rules Advisory Committee, Professor Edward H. Cooper, the Committee’s Reporter, and I initiated just such an undertaking. My tenure as Chairman, however, which had already been extended, ended in 2000, before we made much progress in this endeavor. Professor Cooper nonetheless preserved the beginnings of our effort in his essay, *Simplified Rules of Federal Procedure?*⁴ It is now time, I suggest, to revisit these beginnings and draw upon Professor Cooper’s experience and leadership to resurrect this important and necessary effort.

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With the adoption in 1938 of the Federal Rules of Civil Procedure, a new experiment in judicial process was begun. Before 1938, the rules of pleading were strict and complicated, and discovery was minimal and difficult to obtain. Charles Edward Clark, the first Reporter of the Civil Rules Committee, did not believe “that most lawyers were sufficiently skilled to meet rigorous pleading requirements” or that “elaborate pleadings were a useful way to expose facts or narrow issues.”⁵ He advocated simple, flexible rules that combined law and equity and afforded broader discovery. As George Ragland, Jr., author of the then-famous 1932 book, *DISCOVERY BEFORE TRIAL*, had observed, “[t]he lawyer who does not use discovery procedure is in the position of a physician who treats a serious case without first using the X-ray.”⁶ Both Ragland and Clark believed that greater clarity in the definition of the issues

4. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002).

5. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 711 n.133 (1998).

6. GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 251 (1932).

would be obtained by greater discovery, adopting the views of Professor Edson R. Sunderland of the University of Michigan:

False and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at the trial. . . . All this is well recognized by the profession, and yet there is widespread fear of liberalizing discovery. Hostility to “fishing expeditions” before trial is a traditional and powerful taboo.⁷

Indeed, Sunderland, who later became the principal drafter of the new discovery rules, believed that “[m]ost of the restrictions upon the free use of discovery are not only unnecessary but cause an enormous amount of trouble to the parties and the courts in construing and applying them.”⁸

Accordingly, the newly adopted 1938 Rules merged the diverse procedures for law and equity and simplified pleading, adopting what we now refer to as “notice pleading.”⁹ At the same time, they transferred the function of fleshing out complaints to discovery and an expanded motions practice. To serve this “revolutionary” new role, the scope of discovery was broadened and greatly facilitated.¹⁰ Discovery devices were granted as of right, and its scope was broad, ultimately defined to permit inquiry into information not only relevant to claims and defenses but also relevant to the subject matter involved—and the term relevant information was not limited to admissible evidence but included information “reasonably calculated” to lead to admissible evidence.¹¹ In addition, the regulation of discovery was largely transferred from the court to the attorneys for the parties. With these changes, the 1938 Rules and its subsequent amendments prescribed what would inevitably become a more protracted pretrial process.

While the 1938 Rules thus shifted procedural battles, perhaps unwittingly, from pleading to discovery, they also reassigned resolution of the battles from the court to the attorneys for the litigants.

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

8. Subrin, *supra* note 5, at 716 (quoting Edson R. Sunderland, *Improving the Administration of Civil Justice*, in 167 *ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI.* 75–76 (1933)).

9. *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 611 (2002); *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957).

10. *See* Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 *VA. L. REV.* 261, 275 (1939) (“If the term ‘revolutionary’ can be correctly applied to any part of the new rules, that part is discovery.”).

11. *FED. R. CIV. P.* 26(b) (1970).

As enigmatic as this idea would appear when considered for application in a strong *adversarial* context, it was nonetheless taken as a well-intended experiment to replace the highly restrictive pretrial process that had existed before. In addition to failing to anticipate the problems that would arise from adversaries being directed to resolve their own disputes, the idea failed to recognize that such disputes would also enhance attorney compensation.

The bench and bar were initially hesitant to move in this novel and “revolutionary” direction for resolving civil disputes, and this prompted a campaign to highlight its benefits. In a speech before the annual meeting of the State Bar of California shortly after the 1938 Rules were adopted, entitled “The New Spirit in Federal Court Procedure,” Judge Lewis E. Goodman urged those of the bench and bar who were hesitant to get with the program.¹² Judge Goodman explained:

The adroit procedural maneuvering of the earlier days in the pleading stage, often invoked to deprive a litigant of his day in court, is now relegated to the archives. . . . Thus the complaint and the answer need do no more than, in colloquial manner, state on the part of the complaining party “you did” and on the part of the answering party, “I did not.” . . . But pleadings no longer determine the issues to be tried. In effect, all they do is generally apprise the parties of the nature of the claim and the defense. Thus time and effort and expense is saved. Much of the reluctance to accept the philosophy of the new procedure was due to a failure on the part of many lawyers and of some judges to distinguish between the pleading stage in litigation and the trial preparation stage. Information in the pleadings stage is widely different from information as to evidentiary matters necessary for proper trial preparation.

Whereas simplification is made the keynote of pleadings, wide opportunity and liberality in the obtaining of information as to factual matters needed for the trial is made the keynote of the discovery rules.¹³

The new era of dispute resolution was thus launched, based on the commencement of cases with minimally articulated complaints and the provision for liberal discovery thereafter, with the idea that the case could suitably be tested for viability later in the process

12. Lewis E. Goodman, *The New Spirit in Federal Court Procedure*, 7 F.R.D. 449 (1947).

13. *Id.* at 450.

with a robust motions practice. And, as could be anticipated, discovery thus became the vogue, and experts in discovery became the successful litigators.

Over the years, more expansive discovery was authorized through a series of amendments to the Civil Rules in 1946, 1963, 1966, and 1970. The 1938 idea of shifting evaluation of the case from the pleading stage to a time after the completion of discovery was increasingly emphasized, and with the increased emphasis grew a more expensive and expansive procedural process, not only because of the expansion of discovery rights but also because of the explosive growth of recordkeeping, recorded information, and data. In addition, the self-regulation aspect of discovery contributed to new rights. Professor Paul Carrington, a professor at Duke Law School and a former Reporter to the Civil Rules Committee, observed that we now have “900,000 attorneys running about with almost unrestrained subpoena power.”¹⁴

Under the new scheme, it was anticipated that the parties would go to court infrequently to resolve discovery disputes, as they were expected to act in good faith to resolve their differences. But when aggressive discovery and motions practice became a successful approach to pursuing litigation, discovery disputes became the prime source of cost and delay. Indeed, attorney self-regulation routinely deteriorated into warlike, mean-spirited brawls. Document production often became synonymous with “flood the opposition and expense them into submission.” Depositions often became multi-day grilling sessions in which grace, manners, and gentility became the exception. Lamenting the burdens of discovery costs, the Supreme Court noted that one deposition in a defamation case “continued intermittently for over a year and filled 26 volumes containing nearly 3,000 pages.”¹⁵ And parties and witnesses, who had experienced depositions, sought to avoid them as they would the plague.

The crisis was exacerbated in no small part by the Supreme Court’s decision in *Hickman v. Taylor*,¹⁶ which directed courts to accord discovery “broad and liberal treatment.”¹⁷ In *Hickman*, the Court explained that “[n]o longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case. Mutual knowledge of all

14. Statement of Paul Carrington, Professor of Law, Duke University to author about renovating discovery, (Mar. 1997) (on file with author); accord Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997).

15. *Herbert v. Lando*, 441 U.S. 153, 176 n.25 (1979).

16. 329 U.S. 495 (1947).

17. *Id.* at 507.

the relevant facts gathered by both parties is essential to proper litigation.”¹⁸ Over the next twenty years, *Hickman*, combined with the pro-discovery mantra stated in the Rules’ amendments, led courts to resolve most doubts about the propriety of discovery in favor of providing the discovery. And the bar—and indeed soon, the public—began to complain.

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The liberalization of discovery, and its attendant costs, soon led to a multifaceted movement to restrict its broad scope. In 1976, Chief Justice Warren Burger convened the Pound Conference in order “to assess the troubled state of litigation.”¹⁹ The conference concluded that “[w]ild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm.”²⁰

In 1977, the American Bar Association (ABA) embarked on a major effort to persuade the Civil Rules Committee to restrict the broad scope of discovery delineated in Rule 26, proposing to limit discovery to “any matter, not privileged, which is relevant to the *issues raised by the claims or defenses of any party.*”²¹ This proposal was initially accepted by the Civil Rules Committee in proposed amendments. After circulation for public comment, however, it was eliminated from the final draft, along with other aspects of the ABA reform proposals.²² Three justices of the Supreme Court dissented from the eventual adoption of only minor adjustments to the Rules and the rejection of the ABA’s recommendations, suggesting that the “Court’s adoption of these inadequate changes could postpone effective reform for another decade.”²³

But the ABA proposal did not die, and it was again presented to the Civil Rules Committee by the American College of Trial Lawyers, informally in 1995 and formally in 1997. At the time, Rule 26

18. *Id.* (footnote omitted).

19. Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 9 (1992).

20. William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978).

21. Report of the Special Committee for the Study of Discovery Abuse, 92 F.R.D. 149, 157 (1977).

22. See Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 779 n.54 (1985).

23. Dissenting Statement of Justice Powell, joined by Justices Stewart and Rehnquist, 446 U.S. 997, 998 (1980).

permitted discovery relevant to “the *subject matter* involved in the pending action.”²⁴ The College proposed an amendment to the rule that would provide that “parties may obtain discovery regarding any matter, not privileged, which is related to the *claim or defense of a party*.”²⁵ The College anticipated that such an amendment would help stem the tide of emerging complaints. In 2000, the Rules Committee and the Supreme Court adopted this recommendation in part, replacing the phrase “subject matter” with “claim or defense” in Rule 26(b)(1).²⁶ The new rule, however, still provided the court with authority to order discovery into matters relevant to the “subject matter” if the party seeking such information could show good cause. The amendment was thus “designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery.”²⁷

By the late 1980s and early 1990s, even lay observers of the legal system began complaining that the costs of pretrial discovery were out of proportion to the contribution that discovery made to the dispute-resolution process. In August 1991, the President’s Council on Competitiveness issued a report claiming that the judicial system had become burdened with excessive costs and long delays. The report claimed that each year the United States was spending an estimated \$300 billion as “indirect cost[s] of the civil justice system” and \$80 billion in direct costs.²⁸ And the report blamed discovery as the chief culprit. It claimed that “[o]ver 80 percent of the time and cost of a typical lawsuit involves pretrial examination of facts through discovery.”²⁹

Congress too began to focus on the issue; in 1988, it enacted the Judicial Improvements and Access to Justice Act of 1988³⁰ with the longstanding goal that the federal court system secure the “just, speedy and inexpensive determination of every action.”³¹ Congress concluded then that

the Federal judiciary is beset by problems in all three of these areas: delay caused by rising caseloads and insufficient support

24. FED. R. CIV. P. 26(b) (1993).

25. Letter from American College of Trial Lawyers to Advisory Committee on Civil Rules (c. 1995) (on file with author).

26. FED. R. CIV. P. 26(b)(1) advisory committee’s note to the 2000 amendments.

27. *Id.*

28. Dan Quayle, *Agenda for Civil Justice Reforms in America*, 60 U. CIN. L. REV. 979, 980 (1991).

29. *Id.* at 981.

30. Pub. L. No. 100-702, 102 Stat. 4642 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

31. H.R. REP. NO. 100-889, at 23 (1988) (footnote omitted).

services; spiraling costs caused by litigation expenses and attorneys' fees; and unfair and inconsistent decision caused by the pressures placed on judges who must cope with the torrent of litigation.³²

The Act was thus enacted with the specific purpose of "modernizing" the rule-making process, to recognize and encourage alternative dispute resolution, to deal with mass disasters, and to improve the Federal Judicial Center.³³

But even with enactment of the 1988 Act, public pressure persisted, and Congress again undertook to enact legislation to reduce costs and delay in litigation. Prompted by this pressure, then-Senator Joseph Biden initiated a study by the Brookings Institution, and proposed a bill for numerous judicial "improvements" based on its findings.³⁴ Under the proposed bill, Congress intended to become significantly involved in the day-to-day management of federal cases to reduce costs and delay and to increase judicial efficiency. Alarmed by perceived threats to judicial independence, the Third Branch initiated discussions and negotiations with Senator Biden and Congress, resulting in substantial reductions of Congress's proposed intrusion. The compromise became the Civil Justice Reform Act of 1990 (CJRA).³⁵

The CJRA required each federal district to conduct self-study and to develop a civil case management plan for the purpose of reducing costs and delay in litigation.³⁶ Also, to evaluate a package of congressionally mandated management techniques, the Act provided for the establishment of ten pilot districts employing the mandated techniques and ten comparator districts, with an evaluation of the twenty districts to follow.³⁷ The Institute for Civil Justice at RAND was then retained to conduct the evaluation. Its unprecedented study of the federal courts collected data from over twelve thousand cases in twenty representative districts.³⁸ When evaluated,

32. *Id.*

33. *Id.*

34. THE BROOKINGS INST., JUSTICE FOR ALL: REDUCING COST AND DELAY IN CIVIL LITIGATION (1989).

35. Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (2006)).

36. *Id.* § 104.

37. *Id.* § 105.

38. The four reports that comprise that evaluation are JAMES S. KAKALIK ET AL., INST. FOR CIVIL JUSTICE, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); JAMES S. KAKALIK ET AL., INST. FOR CIVIL JUSTICE, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS (1996); JAMES S. KAKALIK ET AL., INST. FOR CIVIL JUSTICE, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996), available at <http://www.rand>.

the data revealed no single, easy path to reducing costs and delay. Indeed, it was striking that the study did not find much difference in the levels of judicial efficiency between the pilot districts and the comparator districts, indicating that the congressionally mandated techniques for case management yielded little improvement to judicial efficiency. Some explained that the judges involved in the mandated program did not come to the experiment with the positive attitude necessary to make the program work, and others concluded that the entire experiment was ill conceived and doomed at the outset by its vagueness.

The RAND study did, however, reveal several important facts that could be useful in guiding any future reform initiatives. *First*, the data supported the conclusion that early court intervention in the management of cases reduced delay, even though it also increased litigant costs.³⁹ *Second*, the data confirmed that setting a firm trial date early was the most effective tool of case management, reducing delay without any adverse impact on cost.⁴⁰ And *third*, the data indicated that controlling discovery by reducing its length (i.e., by establishing an early cutoff date) reduced both costs and delay without adversely affecting attorney satisfaction.⁴¹

Following the enactment in 1990 of the CJRA, although not directly responsive to it, the Civil Rules Committee did adopt several amendments in 1993 to the Civil Rules relating to case management and discovery.⁴² The case management rules focused principally on providing more explicit flexibility and guidance in entering case management orders, discovery orders, and other pre-trial orders. Most of these changes were made to Rule 16. The Committee at the time also elected to amend the discovery rules to

org/content/dam/rand/pubs/monograph_reports/2007/MR802.pdf; and JAMES S. KAKALIK ET AL., INST. FOR CIVIL JUSTICE, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996). This essay focuses on the third report, EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT [hereinafter "REPORT"].

39. REPORT, *supra* note 38, at 55 ("Early judicial case management is associated with both significantly reduced time to disposition and significantly increased lawyer work hours. Our sample data show that the costs to litigants were also higher in dollar terms, and in litigant hours spent, when cases were managed early.")

40. *Id.* at 56 ("In terms of predicting reduced time to disposition, setting a schedule for trial early was the most important component of early management. Including early setting of trial date as part of the early management package provides an additional reduction in time to disposition, but no further significant change in lawyer work hours.")

41. *Id.* at 67–68 ("Shorter time from setting a discovery schedule to discovery cutoff is associated with both significantly reduced time to disposition and significantly reduced lawyer work hours. . . . These benefits are achieved without any significant change in attorney satisfaction or views of fairness.")

42. See FED. R. CIV. P. 26 advisory committee's note to the 1993 amendments.

require mandatory disclosure of specified discoverable information. These changes, which are included in Rule 26(a), require parties to disclose up front—without the need for a request—witnesses, documents, damage computations, and expert testimony.

In 2000, the Rules Committee made more changes, which further expanded mandatory disclosure, limited the scope of discovery as of right by enacting the proposal made by the American College of Trial Lawyers, and limited the use of various discovery tools by reducing the length and number of depositions, as well as the number of interrogatories.

Finally, the Supreme Court, in its decisions, also reacted directly to problems of costs and delay in civil process. Beginning about the same time as the Pound Conference and the initial ABA effort, the decisions and language of the Court began to reflect more hesitancy toward broad discovery rules and, in a variety of ways, indicated a need to control discovery. The Court's decisions also began to focus on the benefits of enhancing pleading requirements.

For example, in a 1975 decision, the Court lamented the “potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure” and the importance of preventing parties from utilizing discovery as a means of influencing the “settlement value” of a case rather than as a means of “reveal[ing] relevant evidence.”⁴³ Several years later, in *Herbert v. Lando*, the Court noted that “mushrooming litigation costs” were in large part due to pretrial discovery, declaring that “[t]here have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus.”⁴⁴ The *Herbert* Court emphasized that discovery rules are “subject to the injunction of Rule 1 that they ‘be construed to secure the just, *speedy*, and *inexpensive* determination of every action’” and that district judges should therefore “not hesitate to exercise appropriate control over the discovery process.”⁴⁵ And it made clear that appropriate control over the discovery process meant protecting parties and persons from “annoyance, embarrassment, oppression, or undue burden or expense.”⁴⁶

43. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975).

44. 441 U.S. 153, 176 (1979).

45. *Id.* at 177 (quoting FED. R. CIV. P. 1) (emphasis added).

46. *Id.* (quoting FED. R. CIV. P. 26(c)); *see also* *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (“It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse.”); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 n.4 (1980) (“[M]any actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for pretrial discovery. The glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law.”) (internal citations omitted).

The Supreme Court also tightened qualified immunity standards in constitutional tort litigation, with a focus on the high cost of discovery, and it took a restrictive view of discovery in transnational commercial litigation so as to “protect public officials from the ‘broad-ranging discovery’ that can be ‘peculiarly disruptive of effective government,’”⁴⁷ and to “protect foreign litigants from the danger [of] unnecessary[] or unduly burdensome[] discovery.”⁴⁸

In addition to addressing the costs and delay inherent in discovery, the Court also began to address the benefits of enhanced pleading and summary-judgment procedures. In *Celotex Corp. v. Catrete*,⁴⁹ the Court noted the importance of the summary-judgment process to the protection of the rights of defendants faced with meritless claims in a notice pleading system. And in *Bell Atlantic Corp. v. Twombly*,⁵⁰ the Court addressed directly how the quality of pleading was a facet of mitigating potential abuses in discovery. It explained that “it is self-evident that the problem of discovery abuse cannot be solved by ‘careful scrutiny of evidence at the summary judgment stage,’ much less ‘lucid instructions to juries,’ . . . ; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”⁵¹ The *Twombly* Court accordingly held that a complaint must allege “enough factual matter (taken as true) to suggest that an [antitrust] agreement was made,” characterizing this requirement as a “plausibility” standard.⁵² A couple of years later, in *Ashcroft v. Iqbal*,⁵³ the Court restated the standard, holding that to survive a motion to dismiss, a complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”⁵⁴ Explaining its adjustment to the 1938 notice pleading concept, the Court stated “Rule 8 [General Rules of Pleading] marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of

47. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)).

48. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987).

49. 477 U.S. 317, 327 (1986).

50. 550 U.S. 544 (2007).

51. *Id.* at 559 (internal citation omitted); *see also id.* at 557–58 (“[S]omething beyond the mere possibility of loss causation must be alleged, lest a plaintiff with ‘a largely groundless claim’ be allowed to ‘take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value’”) (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

52. *Twombly*, 550 U.S. at 556.

53. 556 U.S. 662 (2009).

54. *Id.* at 678 (internal citation omitted).

discovery for a plaintiff armed with nothing more than conclusions.”⁵⁵

At bottom, however, these reform efforts by Congress, the Civil Rules Committee, and the Supreme Court have not taken on the larger structural problem arising directly from the 1938 experiment, and an inappropriate level of costs and delay persists in civil process.

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To learn more about the root causes of cost and delay in civil process, the Civil Rules Committee requested two studies to collect empirical data. At the Committee’s request, the Federal Judicial Center conducted a national survey of lawyers, the response to which was broad and informative.⁵⁶ The Committee also requested that the RAND Institute for Civil Justice review its massive database, developed in connection with its evaluation under the CJRA in 1990, and provide answers to particular questions about discovery that those data might reveal.⁵⁷ Both the Federal Judicial Center and the RAND Institute provided the Committee with comprehensive reports.

From the reports, as well as conferences it held in San Francisco and Boston, the Civil Rules Committee learned that the mechanism for obtaining information through discovery in connection with the resolution of civil disputes was thought to be both necessary and desirable by virtually all legal constituencies. No one in the legal community seemed to be interested in eliminating the requirement of full pretrial disclosure of relevant information.

The Committee also learned that discovery was working effectively and efficiently in the majority of federal cases. Indeed, discovery was not used in almost 40 percent of the federal cases and was used to the extent of three hours or less in another 25–30 percent of the cases.

In civil cases where discovery was actively used, however, both plaintiffs’ and defendants’ attorneys found it unnecessarily expensive and burdensome. The plaintiffs’ attorneys complained most intensely about the length, number, and cost of depositions, while

55. *Id.* at 678–79.

56. The Federal Judicial Center’s study was reported at a conference at the Boston College Law School in September 1997. See Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rules Amendments*, 39 B.C. L. REV. 525 (1998).

57. James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998).

defendants' attorneys complained most intensely about the number of documents required for production by document requests and the cost of selecting and producing them. While the data revealed that the cost of discovery in all federal cases represented approximately 50 percent of litigation costs, in those cases where discovery tools were actively employed, it represented roughly 90 percent of litigation costs.

The data also showed that trial attorneys representing both plaintiffs and defendants believed that the costs of discovery disputes would be reduced substantially by greater and earlier judicial involvement in the process. They maintained that the level of efficiency was directly proportional to the level of early judicial involvement in the process. These conclusions seemed to challenge one of the premises of the 1938 Rules experiment: that discovery could carry the burden of fleshing out claims and that the management of discovery could be managed well by the adversaries themselves. Remarkably, the Federal Judicial Center found that approximately 83 percent of all attorneys polled wanted some change to the discovery rules.

Finally, the Committee learned that early discovery cutoff dates and firm trial dates were the best court management tools for reducing costs and delay in litigation.

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From 1999 to 2000, as Chairman of the Civil Rules Committee, I began to recognize that the 1993 and proposed 2000 amendments to the Civil Rules were little more than band-aids for addressing the complaints of cost and delay in the judicial process. Litigants were still complaining and seeking to avoid court process through alternative dispute resolution.

In thinking about the problem, I had extended discussions with Professor Cooper, our Reporter, and Professor Geoffrey Hazard, who was leading the American Law Institute's effort in designing transnational rules of civil procedure. We explored what features might be considered essential to civil process, what might be considered baggage, and what a fair and inexpensive process might look like.

As a result of these discussions, Professor Cooper and I broached the idea of initiating a project to draft "simplified rules" of federal procedure to the Civil Rules Committee and to the Standing Rules Committee. All members who expressed any view welcomed the idea. Professor Cooper then wrote and presented an initial draft of

the *Simplified Rules* that would be included as supplemental rules to the Federal Rules of Civil Procedure.⁵⁸ The Civil Rules Committee was never able, however, to begin a detailed debate on the project, as my tenure ran out. But Professor Cooper's early work was not undertaken in vain, as it is preserved, and now should be employed as a starting point to revisit the 1938 experiment.

As Professor Cooper later wrote of the draft, it has as its "central feature . . . a major transfer of pretrial communication away from discovery and to fact pleading and disclosure."⁵⁹ This observation articulated a fundamental and necessary course correction to the approach taken in 1938.

The proposed draft specified a mandatory application of the Simplified Rules to all small money-damage actions and an elective application to larger money-damage actions. It would not require that the Simplified Rules be applicable to all money-damage actions or to other actions.

Substantially, the draft incorporates five basic elements, all of which neatly address known problems of costs and delay in federal civil process. *First*, the draft requires pleadings to become more detailed, enabling an early serious look at the merits of a case. Under the proposal, a complaint would state "the details of the time, place, participants, and events involved in the claim," and would have attached to it "each document the pleader may use to support the claim."⁶⁰ This approach to some degree anticipated the approach that the Supreme Court later took in *Twombly* and *Iqbal*. In *Iqbal*, for example, the Court stated:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"⁶¹

58. Cooper, *supra* note 4, at 1804–20 (reproduction of the Reporter's Draft).

59. *Id.* at 1800–01.

60. *Id.* at 1808 (quoting Draft Rule 103(b)(1)).

61. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted).

The draft also authorized the immediate disposition of some claims through the use of verified complaints and answers and a mini-summary-judgment process. Under the draft, the answer would likewise have to state the defendant's position with the same detail required for the complaint, including the factual basis for any avoidances and affirmative defenses.⁶²

Second, the draft would enhance early discovery disclosures, which would have to be made within twenty days of the filing of the last pleading. While retaining Rule 26 requirements in part, the draft would mandate a greater level of disclosure, more closely imitating what would amount to a fundamental level of discovery but without the need for a request. Combined with the enhanced pleadings, this second proposal "front-loads" pretrial communications so as to enable earlier and less expensive disposition of cases.

Third, the draft would restrict discovery, presumptively authorizing only three three-hour depositions, ten interrogatories, and only requests for documents and intangible things that "specifically identify" the matters requested.⁶³

Fourth, the draft would reduce the burden of the motions practice, requiring that all motions be combined and filed early in the proceedings—within thirty days of the last pleading⁶⁴—and providing that their filing not suspend any other time limitation established by the Rules.

Fifth and finally, the draft would require that when a complaint is filed, the clerk of the district court would have to schedule the trial of the case not later than six months after the filing date,⁶⁵ and that the trial date would be included in the summons served with the complaint.⁶⁶ This one change was found by the RAND Institute to be the single best practice for reducing costs and delay in litigation.⁶⁷

Although Professor Cooper's draft proceeds with caution—perhaps wisely—had I been able to continue with the project, I would have pressed for consideration of three additional ideas. *First*, I

62. Cooper, *supra* note 4, at 1808 (quoting Draft Rule 103(b)(2)).

63. Cooper, *supra* note 4, at 1818 (referencing Draft Rule 106(d)-(f)).

64. *Id.* at 1812 (referencing Draft Rule 104A(d)).

65. *Id.* at 1818 (referencing Draft Rule 109(a)(1)).

66. *Id.* at 1818 (referencing Draft Rule 109(b)(1)).

67. Kakalik et al., *supra* note 57, at 655 ("In our further analysis of judicial discovery management policies, we again found that a statistically significant reduction in time to disposition was associated with early management without setting a trial schedule early, and a significantly larger reduction was associated with early management that included setting a trial schedule early.").

would have asked that we consider expanding the scope of applicability for the Simplified Rules, making them *available for all* damage actions and *mandatory for a larger segment* of damage actions.

Second, I would have us explore whether incentives could be enhanced to encourage both plaintiffs' and defendants' attorneys to elect to use the Simplified Rules in all money damage actions. Making the Simplified Rules mandatory or enhancing incentives would address the problems recently identified by the 2010 Conference on Civil Litigation, which concluded that "few lawyers would opt for a simplified track and that many would seek to opt out if initially assigned to it."⁶⁸

Third, I would have initiated a discussion aimed at trimming down the scope of and practice under Rule 56, which now has become an expensive mini-trial within the pretrial phase of the larger case, resulting in disproportionate costs and delay.⁶⁹ The Supreme Court's trilogy of summary-judgment cases in the mid-1980s appears to have expanded the use of Rule 56 summary judgment and emphasized its importance in a system of notice pleading that allows broad discovery.⁷⁰ Under Simplified Rules that would place a greater emphasis on pleading, the role and scope of the Rule 56 motions practice could be reduced. Indeed, in my later years of trying cases as a lawyer, I found that it was often more efficient and less costly (and also strategically superior) to press for trial without engaging in the summary-judgment process.

* * *

As matters currently stand, federal civil process is simply too time-consuming and costly, by a large margin. While the intents and purposes of the 1938 experiment were laudable in the context in which they were conceived, it is now time to review the experiment with, I suggest, a consideration of the Simplified Rules project. Moreover, the growth of new forms of documents and new

68. JUDICIAL CONFERENCE ADVISORY COMMITTEE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 9 (2010), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Report%20to%20the%20Chief%20Justice.pdf>.

69. See D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273 (2010).

70. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

concerns about preserving them to avoid sanctions have only escalated the need for a *fundamental* reform.⁷¹ Nothing short of a serious dialogue on reform would discharge the Judiciary's current unmet responsibilities under Article III.

To be sure, it would be naive to suggest that Simplified Rules would solve all problems—today's litigation world is too complex for such a hope. But such an undertaking would refocus attention on the big picture, as was done in 1215 and 1938, and open the way to the implementation of modern thinking on our judicial process.

71. See Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 751 (2010) ("Efforts to construct gates for access to discovery must address the marriage of notice pleading and discovery that was fundamental to the 1938 Federal Rules of Civil Procedure, confronting both the difficulties it has wrought and its instrumental role in enforcing legislative and constitutional norms."); see also John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547 (2010).