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Pretrial Discovery and the Adversary System, by William A. Glaser

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BOOK REVIEWS

PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM. By William A. Glaser. New York: Russell Sage Foundation, 1968. Pp. xiii, 300. $8.75.

Since the Federal Rules of Civil Procedure became effective on September 1, 1938, 47 volumes of district court cases relating solely to the Rules have been published by one publisher[1] and an additional 38 volumes of district and appellate court cases published by another.[2] Estimating conservatively, over 50,000 pages of cases relating to the Rules have been published in these two series of books alone. Taking also those pages of scholarly contributions by Professor Moore,[3] and Messrs. Barron and Holtzoff[4] relating solely to the Rules, a minimum of 10,000 pages would be added to the computation. Sixty thousand pages later, how much do we know about how the Rules actually work?

For a number of reasons, the case law and the commentaries it has spawned bear little resemblance to the world of the attorney practicing under the Rules. For one thing, as Professor Glaser's valuable study suggests,[5] less than one-half of the motions decided by federal courts relating to pretrial discovery may even be contained in court records, let alone published in permanent volumes available to practitioners. For another, a perusal of *Federal Rules Decisions* indicates that a striking number of discovery motions are decided in the Second and Third Circuits and that a goodly number of those arise in the district courts for the Southern District of New York and the Eastern District of Pennsylvania.[6]

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1. The first volume of *Federal Rules Decisions* was published by West Publishing Co. in 1941, and contained decisions with respect to the Federal Rules from 1938 through 1941. Such has been the quickening pace of decisions with respect to the Rules that in Volume 47, published in 1970, well over half the reported cases were decided in a four month period.

2. *Federal Rules Service,* published by Callaghan and Company was first printed in 1939. It may be of interest that one of the two editors at that time was a 25-year-old lawyer named James A. Pike, who was later to achieve far more ecclesiastical than legal fame.

3. 2-7 J. MOORE, FEDERAL PRACTICE (2d ed. 1967).

4. 1-3A W. BARRON AND A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Wright ed. 1960).

5. W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 42, n.7 (1968) (hereinafter cited as GLASER).

6. Of 75 cases reported in Volume 47 of *Federal Rules Decisions,* 45 arose in the Second and Third Circuits. Of 23 cases reported from the Second Circuit, 22 were in the Southern District of New York; of 22 cases reported from the Third Circuit, 10 were in the Eastern District of Pennsylvania.

Without suggesting any lack of perspicacity on the part of the estimable judges of those districts, it may fairly be said that the silent majority of courts do not always feel bound to abide by the revealed wisdom of their northeastern brethren.[7] Additionally, numerous significant questions with respect to the Rules are not susceptible to judicial resolution. For example, which of the discovery devices are most suitable for use in personal injury actions? Which benefit plaintiffs most? What matters do counsel generally agree upon themselves without the necessity of judicial intervention? How do depositions compare with interrogatories as tools for fact-gathering? How, in short, do the discovery Rules work and how effectively are they working? As to all such issues, the reported cases and the commentaries add little to our knowledge.

It has thus been plain for some time that it would be of use to the Bar to have a less blurred picture of the effect of the Federal Rules upon practice in federal court, particularly in the pretrial stages. Now we have such a study, filled with the statistical tables, charts and the like that are the trademark of the social scientist at work, and we are much in the debt of Professor Glaser and his colleagues at Columbia University.

The background of the study is of interest. After the task of proposing changes in the Federal Rules was conferred in 1958 upon the Judicial Conference, that body and its committees decided to study the possible need for changes in Rules 26 through 37 and Rule 45 relating to pretrial discovery. The Advisory Committee on Civil Rules[8] thereupon decided to proceed along the usual route of having the relevant case law analyzed while simultaneously asking the Project for Effective Justice at the Columbia Law School to delve into areas not resolvable by reference to case law alone. This task was accomplished by the submission to a variety of counsel who had litigated the opposing sides of diverse cases[9] in federal courts throughout the country[10] of 22-page questionnaires[11]

7. I do not suggest that judges from districts other than those that encompass the cities of New York and Philadelphia share Vice President Agnew's xenophobic reactions to certain articulate residents of the northeast. See N.Y. Times, Nov. 14, 1969, at 24. However, the precedential value of district court case law has been known to diminish as the distance increases from the court being cited.

8. Dean Acheson served as Chairman of the Advisory Committee and Professor Albert Sacks as Reporter.

9. The eight principal categories of cases sampled included: personal injury—diversity, personal injury—marine breach of contract, suits under the Federal Employers Liability Act, antitrust, copyright-patent-trademark, suits under the Fair Labor Standards Act, and suits under the Miller Act. GLASER, at 45.

10. Thirty-seven of the eighty-six districts were sampled. *Id.*

11. Typical questions included were the following:

> 55. When you first analyzed your adversary's factual contentions, did you agree, tend to disagree, or disagree strongly with his view of the facts in this case?

on their use and their opponents' use of pretrial discovery. An additional group of attorneys on both sides of litigated cases were sent questionnaires and then personally interviewed for an average of 1½ hours each with respect to their answers regarding discovery.[12] Findings of the study were furnished to the Advisory Committee on Civil Rules in February 1965 and were considered by that group in proposing amendments to the Federal Rules relating to discovery which ultimately were adopted as of July 1, 1970.[13] The Bureau of Applied Research of Columbia University, under Professor Glaser's direction, prepared this book after the submission to the Advisory Committee of the findings of the study.

The book contains much that is new. Although law journals, for example, have contained numerous treatments of the much publicized conflicts that have sometimes arisen in the "race for priority" in taking depositions,[14] Professor Glaser's interviews persuasively demonstrate that in the great bulk of cases there is no race at all.[15] In only 11 per cent of the cases studied did attorneys interviewed commence *any* discovery step in the first 20 days after filing of the complaint, and in almost two-thirds of the cases counsel waited more than 50 days.[16] More significantly, in the 20-day period after the commencement of an action during which a

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56. Did the extent of agreement or disagreement on the facts change during the course of litigation?
57. If *"Yes" in response to Question 56* was the change toward more agreement or toward more disagreement?
58. When you first analyzed your adversary's view of the law governing this case, did you agree, tend to disagree, or disagree strongly with his view of the law in this case?
59. Did the extent of agreement or disagreement on the law change during the course of litigation?
60. If *"Yes" to Question 59* was the change toward more agreement or toward more disagreement?

Id. at 276.

12. *Id.* at 47.

13. The extensive and painstakingly prepared notes of the Advisory Committee to the revised discovery rules are plainly the best source of background to and justification for the new rules and hence its best "legislative history," *see,* FEDERAL RULES OF CIVIL PROCEDURE RELATING TO DEPOSITIONS AND DISCOVERY-AMENDMENTS EFFECTIVE JULY 1, 1970 (Callaghan and Co. 1970) [hereinafter referred to as AMENDMENTS]. The notes will undoubtedly be widely relied upon by the courts in their attempt to grapple with the new language of the revised rules. The frequent reference in the notes of the Advisory Committee to the "Columbia Study" relate to the survey from which Professor Glaser assembled the data for the instant book.

14. *See, e.g.,* Younger, *Priority of Pretrial Examination in the Federal Courts—A Comment,* 34 N.Y.U.L. REV. 1271-1276 (1959); *Developments in the Law—Discovery,* 74 HARV. L. REV. 940, 945-955 (1961).

15. GLASER 212-219.

16. *Id.* at 216.

plaintiff may not notice the taking of a deposition without leave of court,[17] only 16 per cent of defendants commenced any form of discovery.[18] As the Advisory Committee noted with respect to this finding, "[a] race could not have occurred in more than 16 per cent of the cases and it undoubtedly occurred in fewer."[19]

Similarly, Professor Glaser shows that despite the stern language of Rule 37 authorizing sanctions, counsel rarely rely upon sanctions to force compliance with their outstandng discovery.[20] Of 527 cases as to which interviews were conducted and 705 cases dealt with in response to the mailed questionnaire, only one resulted in a dismissal for failure to abide by the Rules. In that case, a plantiff failed to answer interrogatories. In the great preponderance of cases, the survey shows, the courts were extremely reluctant to impose any sanctions.[21] "Only a lawyer" the book concludes, "with considerable time and patience will keep pressing [for sanctions]."[22]

Other conclusions of the book are equally revealing. The possibility that pretrial discovery unduly favors rich defendants against their poorer plaintiff-opponents is considered and rejected.[23] The ability of attorneys to resolve informally most issues relating to discovery and without the necessity of judicial interference is noted[24] as is the fact that even when lawyers consider themselves put upon by their opponents they are unlikely to seek judicial assistance.[25] The book confirms the central and most useful role played by depositions in the discovery process.[26] And there is confirmation of what most lawyers might have guessed—that interrogatories are the most unpopular device because, as Professor Glaser put it, "they can embody either the best or worst qualities of discovery: some pursue information too skillfully, others too crudely."[27]

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17. *See* FED. R. CIV. P. 26(a) in effect prior to July 1, 1970.
18. GLASER 216.
19. AMENDMENTS 19. In light of this finding it is noteworthy that the proposed amendments to Rule 26 suggested by the Advisory Committee and adopted as of July 1, 1970, will eliminate any fixed priority in the discovery sequence. (Rule 27(d)).
20. GLASER 154-156.
21. *Id.* at 155.
22. *Id.* at 156.
23. *Id.* at 182.
24. *Id.* at 54.
25. *Id.* at 140.
26. *Id.* at 52, 63.
27. *Id.* at 149. One of the more revealing comments made in the survey was by the attorney who, recalling the allegedly burdensome nature of interrogatories served upon him, observed: "I recall a case where my adversary slugged me with forty-five interrogatories. I was burning but I got them all done; then I gave him 60 to do. That's when he settled." *Id.* at 152.

At the risk of carping at Professor Glaser's fine effort, however, it must be said that the book will not be read easily by those unattuned to the style of the social scientist. There is something in the tone of Professor Glaser's book which suggests that it has recently been translated—with no little difficulty—into English. In an effort, for example, to summarize the nature of litigation, Professor Glaser advises that: "After rival and biased presentations, prepared independently by the interested parties, the 'true' law and facts are found by a third actor, called 'judge'."[28] We are sometimes offered aphorisms such as "hard work pays off"[29] and some conclusions of such superlative obviousness (and lack of syntax) as: "A case with discovery lasts longer than cases without it."[30] And, on fortunately rare occasions, a paragraph such as the following is produced:

> As we would expect, when attorneys discover and get new information, more report a strengthening in their case than if they discovered without gain. Lawyers who discovered report more strengthening than do lawyers who did not discover. Compared to cases with discovery, cases with no discovery are more likely to remain unstrengthened. Discovery benefits plaintiffs and defendants in this way about equally. Our data suggest that gains of information by one side are associated with reports from the adversary that his own case became weaker, but the statistical pattern is uneven, and we cannot be certain.[31]

More substantive criticisms are suggested by Professor Glaser's treatment of some of his data. One of the least expected conclusions of the book, for example, is that pretrial discovery is associated with more rather than less surprise at trial.[32] This conclusion is based upon answers to an interview question ("Did your side encounter surprise at the trial?") asked of counsel for plaintiffs and defendants in the same case. Professor Glaser reports that 29 per cent of plaintiffs and 26 per cent of defendants who discovered and obtained new evidence report they were surprised at trial while as few as 16 per cent of plaintiffs and 11 per cent of defendants who did *not* discover were surprised at trial. From this data and consistent data obtained from the mailed questionnaire Professor

28. *Id.* at 4.
29. *Id.* at 87.
30. *Id.* at 71.
31. *Id.* at 89.
32. *Id.* at 105-109.

Glaser concludes that discovery is "associated with more surprise."[33]

The contention is curiously misleading. It is—if one may say so—self-evident that one cannot be surprised at trial to hear again the very fact one has learned in discovery. Professor Glaser concedes as much.[34] Nor can discovery be the *cause* of surprise as to issues which cannot be (because of legal privilege or the like) or are not (because of poor preparation by counsel) inquired into. The most that can be reasonably concluded, therefore, from Professor Glaser's data is that better prepared cases (*e.g.*, cases in which counsel have discovered) are more likely to retain some element of surprise than less well prepared cases. This may stem from the fact that more diligent counsel on one side of a case tend to stimulate counsel on the other. Witnesses, once deposed, may find their imagination stirred by the trial date and may thus "surprise" by testifying differently at trial than in depositions. More probable still is that lawyers who do not take the trouble to take discovery may not recognize surprise when it looms before them. However one analyzes the problem, therefore, it seems an overstatement to suggest that discovery itself is responsible for more surprise.[35]

Similarly questionable is the basis for Professor Glaser's conclusion that discovery aids defendants more than plaintiffs.[36] Evidence cited for this proposition includes comparisons of the amounts plaintiffs initially expected to receive on their claims with the amount actually received; the amounts defendants expected to pay on claims with the amounts actually paid; and the amount of discovery taken. As plaintiffs spend more time on discovery, Professor Glaser maintains, the gap between what they hoped to receive and do receive increases. As defendants spend more time, they gain a little but—unlike plaintiffs—do not lose. "Discovery," the book concludes, "therefore appears more advantageous to defendants."[37]

Again, the argument claims too much on the basis of the data presented. It is one thing to say that defendants gain more from discovery because, in the nature of things, they generally know less about cases than the parties claiming against them. Professor Glaser's conclusions, however, ignore the possibility that the plaintiffs' bar may have a tendency towards generally inflated expectations. Moreover, defendants

33. *Id.* at 105.
34. *Id.* at 107.
35. In fairness it should be noted that Professor Glaser goes no farther than to conclude that discovery "is" (at 105) or "might be" (at 106) *"associated"* with more surprise. If this does not contain the implicit suggestion that discovery causes surprise, it is difficult to grasp what one is intended to conclude.
36. GLASER 90-91.
37. *Id.* at 91.

—holding the money plaintiffs seek to capture—may simply be in a position to be more realistic about the outcome of a case. In either event, discovery would not be the cause of defendants being closer to their original guesses as to amounts than plaintiffs. Defendants' counsel may instead be better guessers.

Despite its flaws, *Pretrial Discovery* is a splendid addition to the limited library of works dealing with how lawyers actually spend their days. In detailing for the first time a good deal of the actual functioning of federal discovery and in successfully applying the techniques of social research the book has usefully served us all.

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