A Roadmap for Reform --- A Dissent

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INTRODUCTION

What do I think about the rules in the "Roadmap for Reform" proposed by the Institute for the Advancement of the American Legal System and the and the American College of Trial Lawyers Task Force on Discovery and Civil Justice? Not much. The proposed rules are unnecessary, extreme and divisive. I think only a couple of the proposed rules are even relevant, the best of which is setting a firm trial date as soon as possible. That's my personal opinion, but I'll get to that later.

I am a 15 year Fellow in the College with 45 years of trial experience, representing plaintiffs in state and federal courts across the nation in products liability, aviation, medical-malpractice, class actions, and commercial litigation. On January 22, 2010, I attended (as an observer) a meeting of the Texas Supreme Court Advisory Committee where "A Roadmap to Reform" was presented to the committee by the Executive Director of the IAALS and by a Fellow of the College who served on the Task Force. In a 3 1/2 hour meeting, only the first five proposed rules were discussed. On March 4, 2010, I attended a 1 and ½ hour panel discussion concerning the "Roadmap" at the ACTL Spring Meeting in Palm Desert, California. It is from this perspective that I file this dissent to "A Roadmap for Reform."

OVERVIEW

So, what's this all about? The proposed rules are based on the assumption that the vanishing jury trial is the result of the cost of litigation and concludes that the primary problem is the cost of discovery. I do not find anything in the ACTL survey which was the basis for the "Roadmap" that supports this conclusion. Furthermore, neither the Final Report of the Task Force nor the notes accompanying the proposed rules identify any factual data establishing a need for the drastic changes. Yet, the "Message" introducing these proposed rules declares that "The results of that survey voiced a compelling mandate." I disagree.

The ACTL survey did not develop factual data supporting any of the 12 proposed rules. The survey identified nothing more than the feelings and perceptions of those surveyed by asking if we "Strongly Agree," "Agree," "Disagree," Strongly Disagree," or had "No Opinion" about a statement. More importantly, the survey instructed us that in answering the survey "to focus on whether the system is serving your clients' interest." I primarily represent plaintiffs and my clients' "interests" are going to be different from a manufacturer's interest or an insurance company's interests. If we followed the ACTL Survey instructions, the tabulated results simply reflect what we feel "serves" our plaintiff or defendant client's interest. The numerical superiority of defense attorneys in the College may well skew the results of any

survey. The more important point is that the survey was not conducted as a referendum on these specific proposed rule changes. The Fellows in the College have not been asked to endorse or reject the proposed rules in the "Roadmap".

The premise that litigation delay and costs are the principal cause of diminished jury trials is at best a questionable premise. Certainly delay may increase costs but that connection does not compel the assumption that this is the cause of the reduction in trials or that the proposed rules would restore trial prominence. There is factual evidence that establishes the vanishing jury trial is multi-faceted.

Legislation enacted in the past 35 years and the media blitz attacking lawyers and lawsuits has reduced the number of claims that can even be made the subject of a lawsuit. For example, the attack began in 1977 in Texas with the passage of the Medical Liability Insurance Improvement Act. In succeeding years restrictive legislation across the nation has taken many forms. Under the false guises of "lawsuit abuse," "insurance crisis," "frivolous lawsuits," and 'judicial reform," legislation has imposed damage caps in medical malpractice cases that severely limit the number of malpractice claims that can feasibly be filed. Securities disputes and shareholder actions must now be arbitrated. Statutes of repose protect manufacturers of defective products. The majority of real estate and other commercial contracts now have mandatory arbitration provisions. Home builders are protected from litigation by statutory commissions for construction disputes. Attorney fees have been stripped from workers compensation cases. This legislation has not only restricted the type of cases that can be filed, it has also increased the costs to litigants. Consider for a moment how expert report requirements and other procedural hurdles have increased the plaintiffs' cost to pursue even the most egregious medical malpractice cases. The reduction in trials in Texas has followed in lock-step the media blitz attacking lawsuits and the enactment of special interest legislation. From 1986 to 2008 there has been a 60% reduction in trials in Texas. For causes of action that haven't been "reformed" out of the court system, there are <u>no</u> facts available that establish that the cost of discovery is the reason cases are being resolved without a trial. In addition to the impact of special interest legislation, we cannot deny that over the past 20 years we have all become willing participants in a pretrial dance called "mediation." There are estimates that "alternative dispute resolution" (arbitration and mediation) dispose of 80 percent of all civil disputes. What was a cottage industry 20 years ago has grown into a nationwide society of mediators that not only divert cases away from trials but now divert appeals away from a final opinion in many states. The result: no trial, no judgment, no appeal, no opinion, no legal precedent. Is mediation the chosen remedy because of the cost of discovery or is it chosen because litigants want to retain more control over the outcome of the case?

I also believe the "Road map For Reform" has proposed rules that do not address the cause for delays or the costs of litigation. In the summer 2007 issue of THE BULLETIN, an ACTL publication, a Past President of the College, E. Osborne Ayscue, Jr., a member of the IAALS Board of Advisors and the Institutes liaison to the "Road map" project, , wrote a comprehensive "Opinion" essay entitled, "Before We Jump on our Horse and Ride Off in all Directions." He addressed the many questions raised by a thoughtful consideration of what has caused the vanishing jury trial and observed:

> "And should we also be looking at what happens in those jurisdictions that do provide timely civil trials? Should we be asking whether the procedural rules are really an impediment to trial if a case is given a reasonably prompt, firm trial date before a judge the parties know can - and will - try the case if it is not settled? There is anecdotal data that tends to support the conclusion that they are not. In those courts, Parkinson's Law in the form of unnecessary discovery to fill up the time from filing to trial has no opportunity to take hold."

Doesn't this hit the nail on the head? Doesn't a firm, enforced trial date with a strong judge who can, and will, try the lawsuit remove the need for any drastic rule changes? This author also identified a culprit we lawyers do not like to discuss.

> "And should we not examine the role of lawyers in the picture? Untrammeled discovery and the billable hour, where the lawyer controls how much he or she does and how long it takes to do it, are a toxic mix. Are we doing enough to sensitize lawyers to the ethical dilemma this creates? Have we created a generation of highly educated, expensive searchers of documents and briefers of motions who live off the present system and will never see a jury?"

It goes without saying that attorneys working on a contingent fee have no interest in delay or increasing the costs of litigation.

The survey conducted of the 1,494 ACTL Fellows clearly establishes that we support an early trial date, we appreciate a firm judge and a single judge assigned to a specific case is a luxury. Remember, 75% of the Fellows surveyed disagreed with the assertion that "the civil justice system is broken" and only 36% agreed that "the rules must be reviewed in their entirety and rewritten to address the needs of today's litigants." I do not believe this should be construed as 35% of the Fellows agreeing to the radical proposed rules the College is being portrayed as endorsing. The Fellows did not vote on these proposed rules.

The Honorable Royal Furgeson, United States District Judge, Western District of Texas, has written a comprehensive essay entitled, "CIVIL JURY TRIALS R.I.P.? Can it actually happen in America?" 40 St. Mary's Law Journal 795 (2009). Judge Furgeson examines and comments on the myriad of myths and assumptions given for the decline in civil jury trials based on his forty years in the civil court system. He doesn't suggest radical rewriting of the rules in favor of any participant. Rather, he urges “Our goal should be to seek a proper balance for the work of the civil jury in order to enhance its viability. At the very least, we should be guided in this effort by Aristotle's Golden Mean - avoid the extremes and find the middle path." (at page 888)

I find the proposed rules to be unnecessary, unbalanced, radical and divisive. It is important that anyone reading these proposals understand that they are published as a vehicle to start a dialogue, not as rules to be adopted.

THE PROPOSED RULES

I'll preface these comments by saying that I believe all of the problems these proposals seek to address would be eliminated with a strong judge and a lawyer who follows the College's Code of Pretrial and Trial Conduct.

RULE ONE: Scope

This rule requires that "the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issues" and is aimed at limiting discovery by reversing the discovery "default;" that is, eliminating discovery unless a party can justify the requested discovery.

CONSIDERATIONS:

- What is proportionate requires a balancing of all the interests involved. What seems proportionate to a corporate defendant may not seem proportionate to a plaintiff's attorney paying for expenses out of his own pocket.
- Will proportionate be measured by settlement negotiations, demands, or simply

what the judge thinks is appropriate?

- Do similar cases come into the equation?
- Doesn't this increase complexity, cost and fees because the party seeking a "proportionality assessment" may have to obtain a hearing before the discovery is allowed?
- Doesn't reversing the discovery default double the plaintiff's burden of proof?
- Why impose a higher burden of proof on discovery than "reasonably calculated to lead to admissible evidence"?

MY THOUGHTS:

One offered justification for Rule One was that, "small to mid-sized cases that should be filed are not filed" because of costs. A Houston district judge challenged this statement when she reported at the Texas Supreme Court Advisory Committee presentation that her docket was full and 90% of her cases had a value of under $100,000.

Inherent in the showing of 'proportionality' is the determination that the plaintiff has a meritorious case

. At first glance, this rule is a legitimate attempt to screen out "frivolous" cases early. But changing the discovery rules for all cases is a blunt instrument to obtain results already available under existing rules and seems patently unfair to meritorious claims. Under this proposal, requested discovery could be relevant but a court could decide it is too expensive to be pursued.

Texas has addressed proportionality in Rule 192.4, Tex. R. Civ. P. and by having Discovery Control Plans for cases involving $50,000 and under (Level I), by Rule (Level 2) and by Court Order (Level 3). More importantly, good lawyers practice an unwritten form of proportionality on a daily basis. Judges can, and should, stop attempted abuses of the existing discovery rules, and changes are unnecessary.

<u>RULE TWO:</u> Fact Based Pleadings

This rule eliminates notice pleading and substitutes pleadings that identify "all material facts that are known ... that support that claim or affirmative defense and each remedy sought" and facts that are "essential to the claim or defense and without which it could not be supported".

CONSIDERATIONS:

- What is or isn't "essential to the claim" depends on who you ask.
- Will this increase the length of complaints and answers?
- What provision is made for facts learned after the complaint is filed? Motions to amend?
- Doesn't the provision suggesting that parties should make use of the pre-complaint discovery "to compile the facts," actually increase costs?

- What if there is no time to investigate a case due to statute of limitation issues?
- In cases where a defendant has already investigated a potential claim, the liability facts are already in the defendant's possession and a plaintiff's knowledge of liability facts may be sketchy at best.
- How could a "pilot study" be done? Agreement of parties to re-plead?
- What rules will apply on appeal?

MY THOUGHTS:

If the issue is "costs," why are we talking about "pleadings"? Do the proposed rules envision that all unchallenged pleadings will be accepted as true?

How does this provide a mechanism for cost savings? Will the trial judge include a narrative of uncontested or established facts in the jury charge? Will no evidence of the uncontested facts be put on during the trial? How is the jury supposed to know the context for the evidence that is contested?

If all material facts have to be specifically pled, and then all those facts later have to be supported with admissible evidence at trial, then the costs of trials have not been decreased.

If the issue is that lawyers fail to limit discovery to the critical issues in the case, Judge Higginbotham suggests a solution. Require lawyers to file a proposed court's charge early in the case to help focus untrained lawyers on the discovery needed to prove their case.

Cooperation between lawyers will eliminate the vast majority of discovery disputes. As stated in the Preamble to the College's Code of Pretrial and Trial Conduct, "In pretrial proceedings, a trial lawyer owes opposing counsel duties of courtesy, candor, and cooperation in scheduling, serving papers, communicating in writing and in speech, conducting discovery, designating expert witnesses, and in seeking to resolve cases without litigation."

When opposing counsel will not cooperate, Judges can be called on to intervene; several Federal Judges in Texas have found that telephone calls asking for court guidance are a useful tool.

The Texas Rules of Procedure are designed to "obtain a just, fair, equitable and impartial adjudication of the rights of litigants. The Federal Rules are to be construed 'to secure the just, speedy, and inexpensive determination of every action and proceeding." That should be our charter as well. A few mega cases like *Bell Atlantic Corp. v. Twombly,* 127 S. CT. 1955 (2007) should not be the basis for rewriting the rules of procedure.

RULE THREE: Pre-complaint Discovery

This rule allows pre-complaint discovery "by a proposed plaintiff" under very restricted requirement. Significantly, it requires a court to hold a hearing to determine if pre-complaint discovery should be allowed with issues of allocation of costs of the discovery, attorney fees, scope, probable cause and others. Ostensibly the purpose is to obtain facts necessary to comply with the "fact base" pleading requirements of Rule Two.

Note that the "default" provisions of Rule One apply.

CONSIDERATIONS:

- Increases costs by requiring another hearing?
- Subject to abuse?
- Would additional parties brought in after the pre-complaint discovery be bound by the discovery?
- Would identical cases in other jurisdictions be used to deny or allow requested discovery?
- Automatically assigned to a specific judge that hears the motion for discovery?
- Will this lead to judge shopping?

MY THOUGHTS:

Why is this rule being touted as "something for the plaintiff?" Nothing could be further from the truth. This rule would increase the costs to all parties and increase the work of the courts. All of the costs of filing suit are included if the plaintiff has to file a motion for pre complaint discovery and the defendant has to respond. The court must schedule a hearing with all the attendant preparation time and costs. This Rule appears to be an artificial rebuttal to the arguments against adopting Rule Two, "fact based" pleading. The need for extensive pre complaint discovery shows the impracticality of 'fact based' pleading. It is inherently more time-consuming and wasteful.

This rule requires that a single judge be assigned for all pretrial and trial.

CONSIDERATIONS:

- Central dockets would have to be eliminated.
- Federal Court practice has shown this to be effective.

MY THOUGHTS:

One judge clearly works best for the litigants but there are also important reasons why central dockets work in some state court judicial districts.

RULE FIVE:

Initial Disclosures

This rule apparently would require plaintiffs to make initial disclosures of documents that may be used to "support that party's claim" before defendants are required to answer and disclose of items that "support any defense," and places strict limitations on the evidentiary use of documents not disclosed.

CONSIDERATIONS:

- Limited to documents that "support that parties claim", i.e. no requirement to produce

documents "relevant to any party's claim or defense" as in Fed. R. Civ. P. Rule 26 (b).

- Isn't this a purely pro-defendant proposal?
- What about impeachment documents/facts?
- What happens to consulting only experts?
- No provision for privileged documents?
- What does "reasonably available" mean? In possession?

MY THOUGHTS:

Everyone likes as much information as soon as possible. But, this rule is completely one-sided in favor of defendants.

Here, defendants are under no duty to voluntarily disclose documents that may result in establishing an element of a plaintiff's case. Defendants are only required to produce documents that support their defenses. Moreover, if a defendant sees the plaintiff has not disclosed those documents in their possession that validates the plaintiff's claim, they are home free. Plaintiffs will never know these documents existed because defendants don't have to disclose the documents, there will be no discovery to find the documents and defendants aren't going to offer them into evidence at trial. One member of the Task Force has stated, albeit in a mock debate with his partner, that he doesn't believe rules should "force lawyers to become advocates for their adversaries, by forcing the production of materials that are harmful to your own case." Ok, but do you impose a rule that is designed to prevent a party from discovering evidence that supports his case? This is clearly the design of this proposed rule.

In conjunction with Rule Six, this proposed rule allows defendants to hide documents and file a motion to dismiss that may have been defeated had "relevant" documents been disclosed and or discovery been conducted to uncover the documents.

RULE SIX: Motion to Dismiss/Stay of Discovery

This rule would, upon motion, allow a stay on discovery on jurisdictional *and* merit issues and eliminate defendants' requirements for disclosure until after a motion to dismiss or motion for summary judgment is heard. The Final Report of the Task Force stated:

> "Courts should consider staying discovery in appropriate cases until after a motion to dismiss is decided. Discovery should be a mechanism by which a party discovers evidence to support or defeat a valid claim or defense. *It should not be used for the purpose of enabling a party to see whether or not a valid claim exists.* "(italics mine.)

CONSIDERA TIONS:

- Plaintiff doesn't get the benefit of defendant's disclosure.

- Adds cost by requiring another hearing.
- Jurisdictional issues often require discovery to establish "minimum contacts" before jurisdiction over the defendant can be established.
- Merit information is often in the control of the defendant and cannot be obtained in an admissible form without disclosure and/or depositions.

MY THOUGHTS:

The italicized phrase may be a supportable defensive philosophy but as a principal to govern discovery, it has absolutely no merit. There are thousands of cases where discovery establishes that "a valid claim exits." Consider the case where there was a dispute over the validity of a deed and discovery established the pre-printed deed form was published 16 years *after* the date of the notarized signature appearing on the face of the deed. Consider the case where discovery established that the anesthesiologist was in the doctor's lounge during the entire surgery. Or the case where discovery established that the "economic loss of retooling" the Ford Pinto was considered an appropriate trade off for human lives. I could go on forever but I think this makes the point that it is often discovery that "enables a party to validate whether or not a valid claim exists."

The rule uses the term "legal sufficiency of the claims." Is this intended to be distinguished from “factual sufficiency'? If so, doesn't Fed. Rule 12(b)(6) already allow for early dismissal of claims that are not recognized by existing law? Under state rules, motions for summary judgment based on legal sufficiency failure to state a claim recognized by Texas law - can be set for hearing right out of the gate. There is no need for discovery before hearing a purely legal matter in a traditional motion for summary judgment.

The irony is that a rule limiting discovery ostensibly to protect jury trials from vanishing will do exactly the opposite. A rule staying discovery before the defendant's motion to dismiss or motion for summary judgment is heard will certainly eliminate costs in some cases because the entire case will be eliminated. . But for those cases that survive this new procedural hurdle, the costs will have been increased, not decreased. Is that what we want?

As long as “legal sufficiency” is limited to purely legal issues such as statutes of limitations or unrecognized causes of action, then the rule accomplishes nothing new. Special Appearance practice does a better job of handling jurisdictional challenges than the proposed rule. Traditional summary judgments already dispose of purely legal issues, "as a matter of law." To the extent this new rule provides any new mechanisms beyond the existing rules, it is counterproductive, at least if the goals are to save the vanishing jury trial and reduce expense for litigants.

<u>RULE SEVEN:</u> Preservation of Electronically Stored Information

This rule requires parties to meet "promptly after litigation is commenced" and agree on e-discovery or the Court will enter an order governing preservation of e-information.

CONSIDERATIONS:

- Litigation is "commenced" when suit is filed. Does this require a meeting before defendant answers? Before defendant files a motion to dismiss? Before plaintiff moves for discovery?
- If there is no agreement, doesn't this require another hearing?
- Isn't this a duplication of proposed rule 8.l.b.?
- If the defendant doesn't even have to file disclosures at this point, why would a defendant consider identifying e-information in its files?

MY THOUGHTS:

The proposed rules show that there is no "flow" to case management in the proposals. Rather the proposals are a series of suggestions that don't consider whether the defendant has filed disclosures, moved for dismissal or filed an answer on the merits. When read in conjunction with proposed rule 8, this rule is superfluous.

RULE EIGHT: Initial Pretrial Conference.

This proposed rule requires an initial pretrial conference "as soon as practical" after appearance "of all parties" and direct specific consideration of listed elements "a" through "o."

The provisions of proposed rule 8.2 require a pretrial order to be entered addressing the issues of "proportionality" (the court is "not bound by" the assessments of the parties) which is not to be modified except for "good cause".

CONSIDERATIONS:

- Most federal courts already use such pretrial orders to effectively manage cases.
- Most courts' pretrial orders are date-specific and leave the details to the lawyers to work out. This gives the flexibility required for any given case and puts the burden on the adversaries to agree on the details.
- As written, this proposed rule is tedious and pretrial conferences, unnecessary when lawyers can agree, would last longer and consume more of the court’s time.
- Many of the specifics listed under this proposed rule would not be known at this early date.
- To the extent that the concern is abuse of e-discovery, the Honorable Royal Furgeson, United States District Judge, Northern District of Texas, has an excellent suggestion for streamlining e-discovery disputes: appoint an e-discovery master to assist the parties.

MY THOUGHTS:

I enjoy Federal Court practice because the case is always moving toward resolution. Entry of a date-specific pretrial order is automatic and moves the case toward the trial date. The burden should be on the attorneys to work out the details of discovery, not on the judge to dictate those details. The majority, if not all cases, do not need to be micro-managed by the court.

This proposed rule eliminates the flexibility required to properly manage discovery by requiring the court to issue limitations on scope, witnesses, type of discovery, numerical limitations, experts, time, costs, all "as soon as practicable after appearance of all parties." This proposed rule assumes that the discovery allowed will not lead to the discovery of additional relevant information. This is borne out in the proposed rules desire to reverse the "default" so that no discovery is allowed unless ordered by the court. Do you ask for another hearing to ask for additional discovery when new facts are developed in the first deposition?

RULE NINE: Additional Pretrial Conferences/Setting the Trial Date

This rule allows for additional conferences to modify the pretrial order and orders that the "trial date must not be changed absent extraordinary circumstances."

CONSIDERATIONS:

- All courts entertain motions to modify previous orders of the court.
- Firm trial dates have historically been set by the attorneys in state courts and by the judge in Federal Courts.
- Flexibility to move trial dates reduces a parties certainty of disposition but allows attorneys and parties a measure of control over their calendar.
- Unanticipated events may become "extraordinary circumstances."

MY THOUGHTS:

I am not aware of any studies or real data that would support the need for this rule. While I have seen lawyers engage in purely dilatory tactics by requesting a change in trial dates, I have yet to see a federal judge give in to such tactics. There are certainly times, however, when continuances are justified.
One of the hallmarks of the College is our courtesy and collegiality toward our colleagues. Judges should not have their hands tied by a standard such as “extraordinary circumstances” that would prevent them from running their court with similar courtesy and collegiality.

RULES TEN, ELEVEN AND TWELVE.

These rules are the teeth of the proposed efforts to eliminate or severely restrict discovery, eliminate depositions of experts and impose sanctions for failure to comply with the proposals.

CONSIDERATIONS:

- These proposed rules reverse the "default" on discovery and limit all discovery except for "good cause" and a showing of "proportionality".

- When taken in conjunction with proposed rules Five and Six, these proposals allow a defendant an opportunity to get out of a case without allowing the plaintiff to conduct discovery of any type.
- Just what is the objective of our system of justice?

MY THOUGHTS:

There is much to criticize about the proposed limitations on expert testimony. The consequences of testimony by report and limiting each side to one expert per issue have not been thought through. Attorneys who cross-examine expert witnesses at trial know the value of taking an expert's measure in a deposition. Books have been written on this subject.

The College's Code of Pretrial and Trial Conduct address all of the concerns that these proposals seek to codify. Take a moment to read our Standards for Pretrial Conduct, and especially Section 5, Discovery Practice. What more needs to be said?

CONCLUSION

My thoughts are clearly a dissent and may not be a proper dialogue on the "Proposed Rules." I do not believe that the problems the justice system faces lie in the Rules of Civil Procedure. The rules can always be tweaked to stay healthy. I believe that the problem the civil justice system faces lies in the caliber of attorneys practicing in the courtrooms of America. The existing rules are sufficient to deal with stupidity and overzealous behavior when it occurs. I suggest that the College's Code of Pretrial and Trial Conduct be placed squarely before the next generation of practicing attorneys. If the College could get every law school to require or allow a seminar covering every aspect of the Codes, the next generation of lawyers would have an understanding that "Lawyers who engage in trial work have a specific responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation." Legal Ethics courses in law schools do not cover these responsibilities.

Let me end by stating that a recipient of the College's Sandra Day O'Connor Jurist Award, the Honorable Sam Sparks, United States District Judge, Western District of Texas, Austin Division, requires attorneys seeking judicial intervention in discovery disputes to read the Code of Pretrial and Trial Conduct of the American College of Trial Lawyers and sign a certificate of compliance. The problems these proposed rules try to address do not exist in that court. In Judge Spark's words, "I don't have any discovery problems with competent lawyers."

For the reasons stated, I dissent.