

Pretrial Procedural Reform and Jack Friedenthal

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What makes an influential procedure scholar? Acute powers of analysis, the ability to see the broader implications of procedural change, and the capacity to articulate clearly and concisely what is at stake are, of course, all critical qualities. But there is an additional contributing factor. It may best be described as someone who becomes intellectually intrigued with an area of procedure that ultimately evolves into one that is central to achieving our objectives of according fairness and justice through the adversary system. It is exactly that combination of skills and interest that mark Jack Friedenthal's scholarly contributions throughout his academic career.

When asked to write an essay reflecting on some aspect of Jack Friedenthal's contributions over his remarkable, fifty-year academic career, I, of course, first thought about the long-time and important influence he has had on legal education and on generations of law students through his co-authored, widely adopted casebook on civil procedure, which was first published in 1968.¹ But then I began to think about what procedural reforms had taken place during his academic career and how he, as a scholar, had contributed to them and, most importantly, had helped others understand them.

Throughout Jack Friedenthal's career, a primary area of civil procedure reform has been in the area of the pretrial phase of litigation. The attention paid to pretrial procedure reflects, in part, the reality that most cases settle. But it also reflects the increasing docket pressure on courts, which has led to considerable emphasis on providing the courts with the appropriate tools to manage their cases efficiently and fairly, and to curb abuses that appear to prevent that from happening. In some instances, these reforms have created a "sea change" in the way that certain pretrial procedures are applied; in others, procedural rules have been amended to meet new challenges or to make

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¹ Originally co-authored with Arthur Miller and Jack Cound, the casebook is currently in its tenth edition and has as additional authors, John Sexton and Helen Hershkoff. See JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, CIVIL PROCEDURE: CASES AND MATERIALS (10th ed. 2009).

available new tools to handle litigation that itself has changed dramatically since the rules were adopted in 1938. A brief review of some of the changes that have occurred reveals the massive scope of the reforms that have taken place in the pretrial process over the years and that are covered by the body of work that constitutes Jack Friedenthal's scholarship.²

One of the first major pretrial procedural changes to note is the amendment of the discovery rules in 1970. These amendments followed a comprehensive review of the operation of the discovery rules begun by the Advisory Committee on Civil Rules in 1963. As a result of that review, the entire discovery system was redesigned to try to allow it to operate extrajudicially—directly between the parties without needing court orders to facilitate the exchange of information. The 1970 amendments came about as a result of several studies that determined that the prior discovery approach, which required court orders for all requests, was wasteful because most often those orders were granted.³ Thus, the idea was that the parties should come to court only when there was some disputed discovery request. This was a sea change to the way in which discovery had operated.

Unfortunately, in the years following the 1970 amendments, it became clear that the discovery phase of litigation was one of the most costly litigation elements. In addition, it frequently was identified as a (if not *the*) major cause of litigation delay. This then led to a series of amendments to the discovery rules to try to better calibrate the system and stem abuses.

In fact, the discovery rules have been amended nine times since 1970⁴ and there is yet another amendment being proposed in 2010.

² Federal pretrial procedure has not been the only area of Jack Friedenthal's scholarship, which also includes topics such as procedural issues in California state procedure and evidence. See, e.g., Jack H. Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1 (1970); Jack H. Friedenthal & W. Daniel Shieh, *The Value of an Initial Look at Counterintuitive Evidence Rules*, 50 ST. LOUIS U. L.J. 1039 (2006).

³ For a discussion of the empirical bases on which the amendments were made, see 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, *FEDERAL PRACTICE & PROCEDURE* § 2001 (2d ed. 1994).

⁴ Three of the discovery amendments were nonsubstantive and were part of broader changes being made to the civil rules generally. These were: (1) in 1987, as part of the amendment of all the rules to make them gender neutral; (2) in 2007, as part of the restyling of all the civil rules; and (3) in 2009, as part of a time-computation project to adopt a uniform system for time calculation in all the rules. On occasion, other amendments were directed to specific rules and specific questions posed by them. I am only discussing in text the broader changes that were designed to reflect general litigation concerns and practices, but the sheer number and compli-

This section of the federal rules thus has undergone a record number of changes in the past nearly forty years,⁵ indicating both the important role that discovery plays in litigation, as well as the difficulties encountered when trying to solve the problems discovery poses. For purposes of this Essay, in particular, it is worth noting five of the amendments that were made because they reveal the kind of major changes that occurred through the years.

In 1980, an amendment introduced the use of a discovery conference, confirming the power of the court to control discovery by directing the parties to appear before the judge to discuss it.⁶ In 1983, a series of amendments to Rule 26 attempted to discourage redundant and non-cost-effective discovery. These included placing a duty on the court to monitor the overuse of discovery⁷ and adding a signature requirement obligating lawyers to attest that their requests or responses are proper and not unreasonable, with the court being given sanctioning power if it finds a violation.⁸

In an effort to accelerate the exchange of basic information about a case, a new disclosure requirement was included in Rule 26(a) in 1993, although courts could opt out of this system by local rule. The imposition of a disclosure requirement reflected a new philosophy. Instead of the traditional discovery philosophy by which litigants attempt to discover evidence from their opponent and the party seeking evidence controls the process, litigants under this approach have an obligation to disclose all relevant information of which they are aware so that it is the evidence-possessor who has principal control over the process. The amended rule combined both traditional discovery with disclosure methods by requiring the exchange of certain evidence at the outset of the litigation, supplementing that initial disclosure by later traditional discovery.

In 2000, there were additional amendments to the disclosure provisions, making disclosure mandatory and removing the local rule opt-

cated nature of all these amendments were especially challenging for scholars, like Jack Friedenthal, whose writing included the functioning of the discovery process.

⁵ In contrast, it is interesting to note that the class-action rule, Rule 23, which also is recognized as having an extremely important impact on litigation, as well as being the source of many problems, has been amended only five times since its major revision in 1966, and three of those times were not addressing particular class-action issues, but as part of more general changes being made to the civil rules. See *supra* note 4. Substantive amendments were made only in 1998 and 2003.

⁶ FED. R. CIV. P. 26(f).

⁷ *Id.* 26(b)(2).

⁸ *Id.* 26(g). A signature requirement was also part of the changes made to the pleading rules to attempt to curb abuses there. See *infra* text accompanying notes 12–18.

out authority. The amendments also narrowed the scope of document disclosure to only those documents “in support of” the case, rather than merely “relevant” to the case. Indeed, the amendments generally narrowed the scope of discovery to authorize requests for information “relevant to any party’s claim or defense” and to require a court order for broader discovery related to the general subject matter of the action.⁹ Finally, the Rule 26(f) discovery conference became mandatory, rather than optional. The last amendments to note occurred in 2006, when the discovery rules were amended to insert references to the discovery of electronic information in recognition of the explosion of that form of information in the modern world and to make clear that it was covered in the rules.

In addition to, and sometimes in conjunction with, all of these changes to the discovery rules, numerous amendments have been made to Rule 16, which as originally adopted focused primarily on authorizing a pretrial conference. That rule was totally rewritten in 1983 to provide the courts guidance regarding pretrial management and scheduling in order to better move cases along. These changes effected a shift into a new era of serious judicial management, rather than allowing the parties to control the pacing of the litigation. As additional areas have emerged that should properly be addressed in the pretrial stage and as a means of further encouraging judicial management of the discovery process, Rule 16 also has been amended several times to clarify the court’s authority to do so.

Illustrative of the scope of these changes, the rule now contains detailed directions on scheduling, a concept not found in the original rule. These require, in most instances, that the court issue a scheduling order covering a wide array of items.¹⁰ Additionally, in the Rule 16 provisions concerning the matters to be considered at a pretrial conference, the subjects now listed number sixteen,¹¹ rather than the six items that were found in the original 1938 rule. All of this, again, simply suggests both the importance of this phase of the litigation and the considerable changes that have occurred as the rulemakers have struggled with how to improve it.

Rule amendments to encourage better or more careful investigation before filing a claim or defense also were made during this same period. These took the form of amending Rule 11, which since its adoption in 1938 has contained a requirement that all pleadings must

⁹ FED. R. CIV. P. 26(b)(1).

¹⁰ *Id.* 16(b).

¹¹ *Id.* 16(c)(2).

be signed by the attorney filing them. The purpose of the requirement is to ensure truthfulness in pleading as well as to deter frivolous claims and defenses. In 1983, it was recognized that this requirement effectively was unenforceable under the standard of the existing rule,¹² and the sanctioning power—to strike or dismiss a defective pleading—was so draconian that it seldom was utilized.¹³ Thus, significant revisions were made to clarify that the signer must not only have read the pleading and be acting in good faith but also must certify that the pleading was being filed only after a reasonable inquiry into the facts and law suggested that the pleading was well-grounded. The amendment also expanded the array of available sanctions and made sanctions mandatory upon finding a violation.

After only ten years' experience under this version of the rule, problems surfaced resulting in another set of substantial amendments in 1993. These amendments changed the standard again as to what is being certified by the attorney's signature;¹⁴ provided a safe-harbor for pleaders, by requiring a party seeking sanctions for the rule's violation to notify the alleged offender who then has twenty-one days during which the challenged pleading can be withdrawn or amended without risk of penalty;¹⁵ and clarified that the purpose of sanctions under the rule is to deter improper conduct, not to compensate the opponent.¹⁶

The preceding description of these changes to Rule 11 is far from comprehensive¹⁷ since my purpose here is not to create a detailed history of rule changes. Rather, the key point to be made is to recognize some of the major shifts in practice that have taken place in this important element of pretrial procedure. And controversy continues as to whether the approach taken in the 1993 rule, which somewhat relaxed the stringent requirements of its 1983 predecessor, is appropriately calibrated to avoid chilling innovative claims and defenses and to decrease satellite litigation over sanctions, while at the same time de-

¹² The original rule provided that the attorney's signature certified that the attorney had read the pleading, believed there were good grounds to support it, and had not interposed the pleading to delay the case. FED. R. CIV. P. 11 (1938) (amended 1983).

¹³ For a history of Rule 11 prior to 1983, see 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331 (3d ed. 2004).

¹⁴ FED. R. CIV. P. 11(b).

¹⁵ *Id.* 11(c)(2).

¹⁶ *Id.* 11(c)(4).

¹⁷ For a more detailed description of what the amendment included, see the Advisory Committee Note to the 1993 amendment to Federal Rule 11. FED. R. CIV. P. 11 advisory committee's note.

terring frivolous litigation and encouraging adequate pretrial preparation.¹⁸

Important changes in pretrial litigation procedure have not been limited to rule amendments. They also came about during these same decades as a result of the adoption by the Supreme Court of newly articulated standards governing both the granting of summary judgment and the pleading of a sufficient claim for relief.

In a trilogy of summary judgment opinions in 1986, the Supreme Court rearticulated the burden placed on the parties for purposes of determining whether there is a genuine issue of material fact that should prevent the granting of summary judgment.¹⁹ In doing so, the Court lessened the initial burden on the moving party by allowing the movant either to affirmatively negate the opponent's claim by introducing evidence or, without introducing any evidence, to demonstrate that the nonmoving party is unable to prove an essential element of the claim.²⁰ It also heightened the burden placed on the party opposing summary judgment, requiring the nonmovant to produce evidence sufficient to withstand a directed verdict motion under the evidentiary standard applicable at trial, even if that is higher than the typical preponderance-of-the-evidence standard.²¹ And when competing evidentiary inferences are presented, the Court ruled that summary judgment can be granted if one of the inferences is more plausible than the other; summary judgment can be denied only if the court is confronted by two equally plausible inferences.²² The combination of these three rulings clearly indicated the Supreme Court's interest in making it easier to obtain summary judgment.

Even more recently, the Court, in 2007, abandoned the approach commonly used by lower courts in evaluating what is sufficient to withstand a pleading dismissal under Rule 12(b)(6). That approach had been taken from language in the Supreme Court's 1957 decision in *Conley v. Gibson*,²³ stating that a claim should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of

¹⁸ For a discussion of the criticisms of both the 1983 and 1993 amendments, see 5A WRIGHT & MILLER, *supra* note 13, at § 1322.

¹⁹ See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

²⁰ *Celotex*, 477 U.S. at 325 ("[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.").

²¹ *Anderson*, 477 U.S. at 256–57.

²² *Matsushita*, 475 U.S. at 596–97.

²³ *Conley v. Gibson*, 355 U.S. 41 (1957).

facts in support of his claim which would entitle him to relief.”²⁴ The Court in *Bell Atlantic Corp. v. Twombly* characterized that phrase, which had been invoked by thousands of lower-court opinions through the years, as “best forgotten as an incomplete, negative gloss on an accepted pleading standard.”²⁵ It then went on to rule that the appropriate standard to be applied was whether the pleader has set out “enough facts to state a claim to relief that is plausible on its face.”²⁶ Thus, a new “plausibility” standard was adopted with a clear need for the claimant to assert facts to state a claim for relief in order to meet that standard, in contrast to merely giving generalized notice to the opposing party of the claim involved.²⁷

It is against this brief summary of developments in federal pre-trial procedure during the last several decades that I want to evaluate Jack Friedenthal’s scholarly contributions. The first thing worth noting is that he demonstrated his interest in and ability to help think seriously about the pretrial litigation phase in one of his very first articles, which appeared in 1962 and which focused on expert discovery.²⁸ With that early start, Jack Friedenthal identified the pretrial phase of civil litigation as a special area of his expertise. His many scholarly contributions over his fifty year academic career have placed him in the center of grappling with the numerous major changes just sketched. Not only has he suggested solutions to procedural problems confronted by the courts, but he has been a master at explaining some of the nuances and implications of various rule changes and the Supreme Court’s development of new procedural standards.

While a scan of his bibliography will reveal numerous entries covering the pretrial areas just described,²⁹ in particular I would note that

²⁴ *Id.* at 45.

²⁵ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007).

²⁶ *Id.* at 1974.

²⁷ *Twombly* itself was an antitrust case and several lower courts initially indicated that its heightened pleading standards might apply only in the complex business litigation setting. In 2009, however, in a suit alleging various constitutional rights violations, the Court affirmed that the *Twombly* standard applies to all civil actions, not solely antitrust cases. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

²⁸ Jack H. Friedenthal, *Discovery and Use of an Adverse Party’s Expert Information*, 14 *STAN. L. REV.* 445 (1962).

²⁹ See, e.g., Jack H. Friedenthal, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 *HOFSTRA L. REV.* 91 (2002); Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 *J.L. & POL’Y* 67 (2000); Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 *NOTRE DAME L. REV.* 770 (1988); Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 *CAL. L. REV.* 806 (1981); Jack H. Friedenthal, Herbert v. Lando: *A Note on Discovery*, 31 *STAN. L. REV.* 1059 (1979).

as a co-author for our *Hornbook on Civil Procedure*, which is now in its fourth edition,³⁰ Jack is the author who contributes the chapters on Pleading, Discovery, The Pretrial Conference, and Adjudication Without Trial (which includes, of course, summary judgment).³¹ Thus, he has had the laboring oar over the years at explaining the myriad large and small changes just briefly described, their implications, and the history and concerns that surround them. In the last twenty years when pretrial procedural reform has seemed almost constant, it is amazing that he has had time to do anything else!

In my view, although the body of Jack Friedenthal's scholarship is worthy of praise, his work on our *Hornbook*, alone, would entitle him to high accolades. It represents an incredible contribution to generations of students and lawyers.³² The reasons why it is such a significant contribution are because he has a superb ability to keep on top of an amazing amount of detail³³ and to present it clearly, always with an understanding of the broader context in which procedural change has taken place. Whether it is taking abstract, theoretically complicated concepts (like shifting burdens of proof on summary judgment³⁴) and stating them clearly and concisely, or walking through detailed rule requirements and describing them in a way that creates an understanding of the "bigger picture" and the objectives involved, thereby making them make sense,³⁵ Jack Friedenthal is a master. I am honored to be one of his co-authors because it has allowed me to work closely with a truly first-rate lawyer and scholar. He is a legal gem who well deserves this law review celebration of his career.

I close noting that his work is not yet over and we need to continue to receive his wise insights! First, there are pending 2010

³⁰ JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, *CIVIL PROCEDURE: HORNBOOK SERIES* (4th ed. 2005) [hereinafter "HORNBOOK"].

³¹ *Id.* at chs. 5–6, 8–9. He also is responsible for the chapter on the Trial Process, including the explanation of the Rules of Evidence, which is another of his fields of expertise. *Id.* at ch. 10.

³² The analytical ability and clarity of exposition that mark his HORNBOOK contributions are ones that also necessarily would come to the forefront in the classroom, so I can only envy the thousands of students who have had the opportunity to have him as their procedure teacher over the past fifty years.

³³ Not only are the changes in federal procedure that are briefly described in this Essay included in the *Hornbook*, but state procedure is covered as well. Thus, it is necessary for him to track which states follow the federal lead in these complicated areas and to explain other approaches that the states may be taking.

³⁴ HORNBOOK, *supra* note 30, at § 9.3. In fact, my earlier description of the Supreme Court's 1986 rulings in summary judgment, *see supra* text accompanying notes 19–22, is largely drawn from his concise statement of the impact of those cases in that section.

³⁵ *See, e.g.*, HORNBOOK, *supra* note 30, at § 5.11 (discussing the Rule 11 standards and amendments).

amendments proposing changes to the handling of expert witnesses.³⁶ (Perhaps, if we are lucky, these may encourage him to return to his first civil procedure article topic with the wisdom provided by almost fifty years' experience.) But, more generally, serious consideration is being given in the United States Judicial Conference committees as to whether we should totally rethink the current approach taken by the civil rules to litigation. A 2010 invitational conference is being organized by the Civil Rules Advisory Committee at the behest of the Standing Committee on Practice and Procedure of the U.S. Judicial Conference to begin thinking about the fundamental litigation problems of today, how well the current rules address them, and whether substantial change is needed. Areas to be explored at the conference include pleading, the discovery process, and dispositive motions. Thus, with possible significant changes in pretrial procedure under discussion again, it is clear that the thoughtful insights of Jack Friedenthal will be needed to help yet another generation of rulemakers and reformers. So, despite earning a well-deserved respite after fifty years of toiling in the civil procedure vineyards, I am afraid Jack Friedenthal's work is not yet done as a whole new series of reforms will need dissecting.

³⁶ See FED. R. CIV. P. 26(b)(4) (Preliminary Draft of proposed amendments, August 2008). After the comment period ended, the Advisory Committee on Civil Rules revised that proposal in small ways. The proposal was then approved by the Committee on Practice and Procedure of the U.S. Judicial Conference and, in September 2009, it was submitted to the Conference, which has recommended it to the Supreme Court for adoption in 2010.