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ADVISORY COMMITTEE
ON
CIVIL RULES

Agenda Item III-A
Gleneden Beach, Oregon
April 19-20, 1999

AGENDA
Advisory Committee on Civil Rules
April 19-20, 1999

I. Opening Remarks of Chairman

- A. Report of the January 1999 Standing Committee meeting
- B. Legislative Report

II. Approval of Minutes of November 12-13, 1999 meeting

III. Consideration of Comments and Statements on Proposed Amendments Published for Comment

- A. Discovery (Separate Book)
  - 1. Reporter's Discussion Paper
  - 2. Summary of Comments
- B. Rules 4 and 12
- C. Admiralty Rules

IV. Consideration of New Proposed Amendments

- A. Electronic Service: Rules 5, 6, and 77
- B. Rule 81(c)
- C. Rule 51: Jury Instructions Requests Before Trial and More

V. Report of Agenda Subcommittee on Pending Matters

VI. Corporate Disclosure Statements

VII. Designation of Time and Place of Next Meeting

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Tab
11-A-1

MEMORANDUM

To: Advisory Committee on Civil Rules
From: Rick Marcus, Special Reporter
Date: April 5, 1999
Re: Discovery issues for April, 1999, meeting

This memorandum identifies and explains the issues the Discovery Subcommittee is bringing forward to the full Committee for its consideration.

By now the full Committee has received a great deal of information through the hearings and public comment process about the proposed amendments. A summary of those comments has been prepared and circulated to the full Committee, and an effort will be made herein to call your attention to the pertinent pages of the summary addressing the various matters discussed in this memorandum. The Discovery Subcommittee has twice discussed these issues since the hearing process began. First, on the day before the final hearing in Chicago it had a meeting to assess a variety of issues against the background of the comments and testimony received to date. Second, on March 22 it had a telephone conference call to identify issues to bring to the full Committee and to formulate specific proposals for the full Committee. This memorandum attempts to present the results of this consideration of the remaining issues. The Subcommittee was not unanimous on all issues presently before the full Committee, and members may address their particular views during the meeting. A few minor points are included even though they have not been reviewed by the Subcommittee.[1]

For purposes of reference, the topics are listed in order of the rules involved. This does not imply that the discussion should proceed in this order. Where it seemed helpful, surrounding material has been quoted to show where suggested additions fit in. For purposes of introduction, the topics

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[1] They were reviewed with the Chair of the Subcommittee.

covered are as follows:

(1) Rule 5(d)
  (a) "Must not" v. "need not" -- p. 4
  (b) Retention of discovery materials -- p. 9
(2) Rule 26(a)(1)
  (a) Articulation of the standard for the narrowed initial disclosure obligation -- p. 11
  (b) Note material regarding "high end" exclusion -- p. 22
  (c) Revision of (a)(1)(E) "low end" exclusions -- p. 26
(3) Rule 26(b)(1)
  (a) Deletion of "subject matter" from definition of scope of attorney-managed discovery -- p. 32
  (b) Changing "information" to "matter" in the new rule provision regarding expansion to "subject matter" on court order -- p. 33
  (c) Dealing with "background" information in the Note -- p. 34
  (d) Meaning of "relevant" in change to current last sentence -- p. 37
  (e) Relation between cost-bearing and good cause expansion explained in Note -- p. 38
(4) Rule 26(b)(2)
  (a) Location of cost-bearing provision -- p. 41
  (b) Addressing concerns of districts that use differentiated case management -- p. 45
  (c) Note material on party agreement regarding numerical and duration limitations on discovery -- p. 47
(5) Rule 26(d)
  (a) Specifying circumstances in which early discovery might be authorized despite moratorium in the Note -- p. 48
(6) Rule 26(f)
  (a) Allowing expedited management to move faster than the rule prescribes by authorizing local rules -- p. 49
(7) Rule 30(d)

(1) Rule 5(d)

(a) "Must not" v. "need not"

Last year the Advisory Committee recommended that Rule 5(d) be amended to say that parties "need not" file discovery and disclosure materials (except Rule 26(a)(3) disclosures). The Standing Committee changed the verb to "must." The Subcommittee has concluded that the Advisory Committee proposal was a better compromise of competing considerations. This was not, however, a unanimous view of the Subcommittee. Because the Advisory Committee's views were displayed in the published materials, and because this seems a modest change, there should be no need for republication if the verb is changed back to "need."

The "need not" formulation was designed to leave it to the parties to decide whether to file such materials, neither forbidding filing nor requiring it. Note that the proposed amendment overrides local provisions, which were the original stimulus for this proposed change: "The rule supersedes and invalidates local rules that forbid, permit, or require filing of these materials before they are used in the action." Aug. 1998 Preliminary Draft of Proposed Amendments pamphlet (hereinafter Aug. 1998 pamphlet) at 26; see also id. at 27 ("Although this amendment is based on widespread experience with local rules, and confirms the results directed by these local rules, it is designed to supersede and invalidate local rules."). Probably either the published version or the Advisory Committee's version would dislodge some local rule provisions. We have not tried to ascertain for certain which would dislodge more, although a quick look suggests that more districts have rules forbidding than merely excusing filing.

Besides corresponding to current local rule practice, it seems from the Minutes of the Standing Committee meeting (Tab 1-A

of the agenda materials for the Charleston meeting at p. 25) that worries about unnecessary filing of discovery materials, and the resulting burden on space in clerk's offices, prompted substitution of "must not" (although the Standing Committee action was taken without a lot of discussion of these questions). These reasons appear, on balance, not to be compelling. Keep in mind that the current national rule says that all discovery and disclosure documents (except the documents produced pursuant to Rule 34) must be filed unless there is a contrary order in the case. So in districts that follow the national rule either version would result in a reduction of filings. True, the Judicial Conference Local Rules Project found ten years ago that about two-thirds of the districts have some sort of provision limiting or forbidding filing of discovery materials. But some of those districts also have provisions allowing nonparties to seek an order from the court requiring filing or directing the clerk's office to entertain requests by nonparties for access to such materials. See comments of Magistrate Judge David Piester (98-CV-124) and Public Citizen Litigation Group (98-CV-181).[2] (For the summary of the pertinent commentary, see pp. 4-7 of the comment summary.) On balance, it seems that the number of instances in which parties will want to file materials although not required to do so is relatively modest, and therefore that the return to the original language proposed by the Advisory Committee will not produce significant additional burdens for clerk's offices in districts that flatly forbid filing now, while relieving clerk's offices in districts that still direct filing.

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[2] A quick review of some other districts' practices turned up three that seem to have such provisions. See D. Del. Local Rule 5.4(e) (allowing "application by a non-party" for filing of discovery materials); N.D. Ill. Gen. Rule 18B(1) (saying that the court may order filing "on application by a non-party"); E.D. Pa. Local Rule 26.1(e) (allowing "application of a nonparty," and also providing that "[t]he parties may provide for such filing by stipulation").

Balanced against this minimal potential burden is the considerable, if occasional, interest in filing of some discovery materials. As noted by the same two comments mentioned above, the amendment of Rule 5(d) twenty years ago (into its current form) caused considerable debate (including expressions of concern from some in Congress) about access. Since then there has been quite a lot of debate about such topics, and some legislative activity, often touching on issues of "public safety." Some of those debates affected the Committee's treatment over the past few years of possible revisions to Rule 26(c), which the Committee voted to drop last March. The point is that some latitude for filing has a value in partly addressing these concerns without much cost. Indeed, the Public Citizen Litigation Group (a frequent litigant in support of access to discovery materials) urges that the Advisory Committee's version be used instead of the version published by the Standing Committee. Thus, the Advisory Committee's version should deflect some possible criticism about public access, particularly since it is designed to replace local rules that absolutely forbid filing in quite a few places. It is worth noting that there is no way to know when or whether further opposition to the "must not" formulation might emerge; the Rule 26(c) experience shows that vigorous opposition of this sort can erupt at the eleventh hour.

In addition, changing back to the Advisory Committee's version seems likely to avoid other problems. As noted, two comments propose that there be provisions for either the court or the clerk to have to respond to nonparty requests for access to unfiled materials, and some districts now allow nonparty applications for court orders directing filing. That is a task we do not propose to impose on the courts. Except for forbidding filing, the published proposal does not limit what a party does with materials obtained through discovery (if no protective order is in place), and the change back to "need not" only means that a

party who wants to file such materials can do that as well as disseminating them in another manner. There are some legitimate reasons for a party to desire to file discovery materials -- where the materials are likely to be of legitimate interest to parties involved in other litigation, for example -- and the desire to file will not disappear just because the rule says that materials can be filed only when "used in the proceeding." At least some litigants may invent some such "use" as a method of justifying filing. In the alternative, such litigants may (as the rule allows) make a motion to allow filing. Either way, there would be more motions for the court to resolve, even without the sort of nonparty application authority included in some local rules. That sort of nonparty activity would create some added burden for the courts that might be abated by switching to "need not."

If this change back is made, it would be desirable to re-insert in the Committee Note the material included in our proposal to the Standing Committee last year (after the first full paragraph on p. 27 of the Aug. 1998 pamphlet) (with one proposed change):

> When the rule was amended in 1980, there was concern about access to discovery materials. The widespread adoption of local rules -- <u>often</u> ~~sometimes~~ forbidding, not just excusing, filing -- raises doubts about the ongoing importance of filing as a means of access to discovery materials. Unlike some local rules, Rule 5(d) permits any party to file discovery materials if it so chooses (subject to the provisions of any applicable protective order), thus potentially facilitating access. In addition, the court may order filing.

In sum, the actual difference in frequency of filing should "must not" be retained instead of "need not" is unpredictable,

and the "must not" formulation may generate more pressure on courts due to motions or other actions contrived to justify filing, and might fuel efforts by nonparties to be heard in requesting materials. The Advisory Committee proposal responds in a measured way to the occasional situation in which filing serves a purpose by providing the litigants the option of doing so, while deleting the national requirement that all discovery materials be filed. It is probably true that no proposal will satisfy all constituencies, but "need not" seems a better choice.

(b) Retention of discovery materials

As noted below, there is a proposal for an amendment to Rule 30(f) that will retain the requirement that depositions be preserved by counsel. That being true, the concern about retention of other materials formerly filed -- interrogatories, requests for admissions and Rule 34 requests, along with the responses to these discovery items -- seems best addressed in the Note rather than adding language to Rule 5(d). The Subcommittee suggests that this be accomplished by inserting the following on p. 28 of the Aug. 1998 pamphlet:

> Recognizing the costs imposed on parties and courts by required filing of discovery materials that are never used in an action, Rule 5(d) was amended in 1980 to authorize court orders that excuse filing. Since then, many districts have adopted local rules that excuse or forbid filing. In 1989 the Judicial Conference Local Rules Project concluded that these local rules were inconsistent with Rule 5(d), but urged the Advisory Committee to consider amending the rule. Local Rules Project at 92 (1989). The Judicial Conference of the Ninth Circuit gave the Committee similar advice in 1997. The reality of nonfiling reflected in these local rules has even been assumed in drafting the national rules. In 1993, Rule 30(f)(1) was amended to direct that the officer presiding at a deposition file it with the court or send it to the attorney who arranged for the transcript or recording. The Committee Note explained that this alternative to filing was designed for "courts which direct that depositions not be automatically filed."
>
> Rule 30(f)(1) directs that the attorney who arranged for the transcript or recording of a deposition "protect it against loss, destruction, tampering, or deterioration." It is expected that other discovery and disclosure materials

during the course of the litigation.

formerly filed will be ~~similarly~~ retained by prudent counsel. Documents and other materials made available for inspection under Rule 34 were not formerly filed; it is assumed that the care previously used in preserving such materials will continue. Should these materials be used in the proceeding -- either in connection with a motion or at trial -- Fed. R. Evid. 1003 provides that photocopies ordinarily would be admissible in place of originals.

Although this amendment is based on widespread experience with local rules, and confirms the results directed by these local rules, it is designed to supersede and invalidate local rules. There is no apparent reason to have different filing rules in different districts. Even if districts vary in present capacities to store filed materials that are not used in an action, there is little reason to continue expending court resources for this purpose. These costs and burdens would likely grow as parties make increased use of audio- and videotaped depositions. Equipment to facilitate review and reproduction of such discovery materials may prove costly to acquire, maintain, and operate.

2. Rule 26(a)(1)

(a) Articulation of the standard for the narrowed initial disclosure obligation

All were agreed last March that, in order to make the initial disclosure rule nationally binding, it was necessary to narrow its application to "helpful" material. By a vote of 7-4, the Advisory Committee decided then to propose "supporting its claims or defenses, unless solely for impeachment" as the way of putting that. The minority favored "may use to support its claims or defense, unless solely for impeachment," and the alternative language was included in Paul Niemeyer's memorandum introducing the proposed changes. See Aug. 1998 pamphlet at 8. Accordingly, the Advisory Committee could recommend changing to the minority version without republication. There has been a limited amount of commentary about the choice. During the March 22 conference call, it would be hard to say that a consensus emerged except that the issue should be examined and decided by the full Committee.

One of the Reporters favors the minority proposal, and the other favors the current proposal. For the background of the full Committee, those views are set forth below:

Ed Cooper favors the minority position. He has provided the following explanation for his position:

> This Note addresses the alternative that would reword the formula for disclosure under proposed Rule 26(a)(1)(A) and (B) to focus on material that may be used at trial:
>
> **(A)** the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party

may use to support~~ing~~ its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

Problems With "Supporting" Information

This formulation seeks to avoid three problems that arise from the unadorned reference to "supporting" information. Perhaps the simpler problem is that an obligation to disclose all supporting information requires a complete canvass of all available information; although the reduced scope of disclosure removes the "heartburn" obligation to reveal adverse information that the other parties may fail to reach by discovery, it would not reduce the burden of inquiry. This problem runs parallel to a second: there may be great volumes of supporting information that ranges in character from unimportant down to trivial. Disclosure of all this information is less useful than disclosure restricted to the significant supporting information. The third problem is perhaps the most important. Many witnesses, and many documents, harbor information that is favorable and also information that is unfavorable. There is good reason to require disclosure if the disclosing party means to use them at trial. But the disclosing party may not mean to use them, particularly when the favorable information is unimportant and the unfavorable information is important. Disclosure in that setting restores the "heartburn" that the proposal is meant to

alleviate.

The proposed Committee Note is written in terms that may seem to address the problem of information that is both favorable and unfavorable. At p. 50, it says: "A party is no longer obligated to disclose witnesses or documents that would harm its position." This statement suggests that the proposed rule language does not quite mean what it seems to say – the disclosing party can decide whether the information is, on balance, favorable, and regulate disclosure accordingly. If nothing else, this Note language should be reconsidered. If it does mean that the disclosing party can withhold supporting information when the support is outweighed by adverse implications, the statement should be made explicit.

Advantages of "May Use" Formulation

All of these problems are alleviated by requiring disclosure only of information that may be used at trial. This practice is at times called "laydown" discovery (an image that seems to conceive of litigation as a poker game rather than a sporting event). A party need not expand the inquiries it will naturally make in preparing its own case, need not disclose mountains of trivial information, and need not worry about the balance between favorable and unfavorable implications. The disclosure nonetheless will accomplish real good. Each party is freed from the need to undertake defensive discovery aimed at protecting against surprise by the other party at trial. In many cases, particularly those in which each party is confident that it knows its own case, this disclosure may accomplish the most important part of pretrial exchanges.

There is another benefit of "may use at trial"

disclosure. The initial disclosure requirement is, in one way, mislabeled. Rule 26(e)(1) makes it a continuing obligation. An obligation to disclose all supporting information requires regular and complicated review of accumulating information. An obligation to supplement disclosure of information that may be used at trial is much easier to honor.

A focus on information that may be used at trial also ties directly to enforcement by excluding undisclosed evidence at trial. It seems fair to expect a party to remember and implement the continuing duty to make disclosure as to information that may be used at trial. A broader obligation to disclose supporting information may not seem any different in this respect – the only meaningful enforcement will come when evidence is offered by a party who failed to disclose the witness or document. But it may be difficult for litigators to pay sufficient attention to the more diffuse obligation – to suggest that we can expect them to remember the obligation as to supporting information that will be used at trial, even if not as to other supporting information, is to suggest that the disclosure obligation should be written in these more realistic terms.

Arguments For Proposal as Published

The arguments in favor of the published proposal deserve attention. One is that "may use at trial" disclosure "is too likely to result in no disclosure at all by defendants. This sort of formulation is more meaningful much closer to trial (and something like it does appear in Rule 26(a)(3)." Three responses may be offered. (1) Just as there are many cases with no discovery problems, so there are likely to be many cases with no disclosure problems – the parties know at the beginning what the dispute is about,

they disclose the expected things, and pretrial preparation proceeds efficiently and without incident. (2) The lack of up-front initial disclosure, when that happens, is not troubling. Self-serving initial disclosure is not likely to narrow the scope of discovery in any event. Disclosures will be made as preparation progresses, and must be made on pain of exclusion at trial. (3) There is little reason to be concerned that sequential disclosure under the pressure of the Rule 26(e)(1) duty to supplement will, in some cases, merely mimic the pretrial disclosures required by Rule 26(a)(3). The proposed disclosure system is intended as a place-holder and an occasion for the Rule 26(f) conference, as much as it is intended to be an important means of pretrial exchange in the cases that are likely to involve discovery problems.

A second argument is really a range of considerations prompted by the strong opposition to the "may use" formulation expressed at the June, 1998 Standing Committee meeting by Patrick McCartan. He did not articulate the reasons for his opposition, but it did provoke some thought. Given the Rule 26(a)(3) obligation to make pretrial disclosure of witnesses and exhibits, the first reaction is that surely there is little harm in requiring earlier disclosure in a way that does not bind the disclosing party. But the counter-reaction is that insight into "work product" may be provided by changes between the initial disclosure and the pretrial disclosure (or other pretrial identification of trial witnesses and exhibits). The decision not to use a witness earlier identified as "may use," for example, could prompt an adversary to investigate reasons for the change in ways that could prove damaging to the disclosing party. There is no dispositive response to this argument, but there is room for skepticism.

A third set of arguments may support either formulation, depending on uncertain predictions about pleading behavior. Although many different arguments have been made about the effects of the proposed changes in Rule 26(b)(1), both of the generally predicted effects seem likely to occur. Some pleaders will add very specific claims to support discovery whose focus cannot be thwarted by self-serving interpretation of discovery requests based on the diffuse nature of the "claim." Others will add very general claims that seem to support very broad "claim-relevant" discovery. Canny pleaders will do both. To the extent that pleading is made more precise, it will be easier for a party to know and to disclose the information that supports its claims or defenses in response to the positions of its adversary. A defendant who knows just what the claim is, for example, can predict much better what information will support its defense. To the extent that pleading is made more general, on the other hand, it may be that the realm of information that supports the opposing party's position is broadened accordingly. At this point, it may be better to focus on "may use" information to avoid an over-broad obligation to search for, and describe, information that no one wants.

Comment & Testimony

The direct public comments and testimony shed little light on this question. The "may use" formulation was supported by H. Thomas Wells on the ground that it is similar to the local disclosure rule that works in his practice in Alabama. The ABA Litigation Section opposed the "may use" formulation, but the testimony in Chicago showed that they had not thought about the advantages or disadvantages of either formulation.

More general comments provide some indirect support for the "may use" formulation. Linda Willett, 98-CV-038, laments disappearance of the "disputed facts alleged with particularity" formula because the new language "could trigger for the defendant a burdensome obligation to disclose *any and all* information supporting defendant's general position that the challenged product is not defective." The New York State Bar Association Commercial & Federal Litigation Section, 98-CV-012, makes the same point in broader terms: If "defense" means – as it surely does – denial of the plaintiff's allegations, the new rule will require disclosure broader than the present rule requires because the particular pleading requirement has been dropped. In the process of revealing information that supports anticipated defenses, the defendant still may be revealing claim theories that the plaintiff has not thought of. James Hiller, San Francisco transcript 87-97, observed – as did one or two others – that an interrogatory asking for the identity of all witnesses who have knowledge supporting his positions would be objectionable as unnecessarily broad. William C. Hopkins, 98CV165, notes that it is not always possible to determine what is helpful and what is harmful. The Federal Bar Council's Committee on Second Circuit Courts, 98CV178, noted that a disclosing party will have to sift through all available information, and decide whether it is "supporting" information.

Conclusion

Choosing the better approach to "laydown" disclosure requires reflection on the deliberations that led to the basic decision to narrow the scope of disclosure. No attempt has been made to judge whether the present disclosure requirement is desirable; it is, indeed, too early to attempt a judgment. Instead, it has been concluded

that national uniformity must be restored without delay. Disclosure is to be scaled back in order to make uniformity palatable. In this setting, there is much to be said for adopting a disclosure system that will generate few problems of interpretation and application. Every party should know what information it may use at trial, recognizing that this knowledge is likely to evolve on a continuing basis throughout the pretrial process. Disclosure of this information, initially and by supplementation, is readily accomplished. It will be far more onerous to search out all "supporting" information, including information that would not be sought independently or in response to discovery requests. Greater opportunities for collateral dispute will arise from failure to disclose information that is harmful, but also helpful and therefore "supporting." Significant benefits flow from "may use" disclosure; the possible added benefits from "supporting" information disclosure are more than outweighed by the probable complications and burdens.

Rick Marcus responds: I favor the current proposal. As usual, Ed has been very thorough and fair. Nevertheless, I am not persuaded, and believe that the majority was right last March. Turning first to Ed's conclusion, I agree that the Committee adopted this "middle ground" proposal (between eliminating initial disclosure altogether and applying the current rule nationwide) partly as a method to reinstall national uniformity with a provision that would not excite such vigorous opposition as the current rule. At least as a job of selling the change -- not an insignificant issue in the current climate -- I think that argues in favor of sticking with the current proposal. Many who question disclosure say they accept this version as a compromise. Most pointedly, the ABA Section of Litigation has embraced it and argued against the "may use" alternative. This is a signal change in position, since in 1993 the entire ABA formally opposed the current rule and, I believe, lobbied

Congress to strike it from the package of rule amendments. Whether or not the ABA has thought the subject through as well as it might this time around, that shift in position merits some weight on the road to restoring national uniformity. To switch to a different version now -- even one mentioned in the pamphlet -- could dislodge some of the consensus in large segments of the bar from which we have heard about the wisdom of this change. None of the opponents of removing the opt-out provisions, or of narrowing the scope of disclosure, has spoken in favor of the "may use" formulation. In the most immediate of terms, changing to "may use" would garner no support we know of, and might endanger some important support we do know about.

Of course, I do not endorse the current proposal mainly because it has proven salable. I think it has proven salable because it is a good proposal, and superior to the "may use" alternative. To a considerable extent, I find it superior because of some of the features Ed sees as drawbacks. Thus, he notes that responding parties will still have to shoulder a heavy burden of inquiry under the majority version. In addition, a party seemingly will have to disclose some witnesses and documents that are partly harmful, even though the party might ultimately decide not to use them as evidence because of their ambivalent character. He suggests that a sentence in the Note at p. 50 of the Aug. 1998 pamphlet may be misleading about this. I see these objections as reasons to stick with the current proposal because it calls for more disclosure than the "may use" formulation. Some on the defense side have realized this, and noted that the proposal actually may call for more disclosure from defendants than the current national rule in some respects. This may cause some heartburn, but it is not the kind we sought to remove. To the extent we need to clarify the Note to make that clear, I suggest that can easily and honestly be done:

A party is no longer obligated to <u>search out and</u> disclose

witnesses and documents simply because they ~~that~~ would harm its position.

To go beyond that change and talk about "partly" supporting witnesses and documents in the Note, suggesting that disclosure of them is optional, would invite far too much disclosure avoidance by parties who claim that certain things seemed partly harmful and were therefore not disclosed.

The basic problem with the "may use" formulation is that it will result in too little disclosure, probably none by defendants in many cases. Plaintiffs may be prompted to disclose to avoid a summary judgment motion, but many defendants will say they don't know yet what they may use. Many defense lawyers have already told us that they favor "sequenced" disclosure -- making the plaintiff go first. Under the "may use" formulation, they will seemingly have a justification for adopting something like that unilaterally, by saying that they can't decide what to disclose until they see and reflect on the plaintiff's disclosures. Indeed, as Ed's comments about the inquiry burden under the current proposal suggest, the defendant may feel it need not even begin to inquire about materials to disclose (except to the extent that Rule 11 requires it to do so to draft its answer) until it gets the plaintiff's disclosures. All of this means to me that the better rule is the current proposal. The risk of confronting "mountains of trivial information" through disclosure seems minor to me in contrast. We direct the parties to confer about disclosure before it is due, and problems such as that can be handled at the conference. Although we have scaled back initial disclosure to make it mandatory nationally, we have not entirely abandoned it. Indeed, many lambaste us for retreating from the full force of the current rule.

To switch to "may use" essentially abandons initial disclosure and substitutes in invitation to begin the pretrial

disclosures required by (a)(3) sooner. As Ed notes, the prospect that the other side will look carefully at the names listed early but not as trial approaches will occur to the parties. Therefore, the likely incentive will be to hold off until you're sure about what and whom you will use, because you can't ever entirely take it back. Although narrowed, the majority proposal for initial disclosure still offers a much better hope of jump-starting the litigation than the "may use" formulation.

Finally, Ed notes correctly that we should adopt a disclosure system that will generate few problems. There is no reason to expect problems with the current proposal. Indeed, we have heard from one witness who has lived for 15 years under a similar rule that there has been no problem distinguishing supporting information from other information for purposes of disclosure. (See testimony of Brian Spector of Miami, Baltimore trans. at 79) More generally, a striking feature of the RAND and FJC reports is that, despite being vigorously predicted, the satellite litigation problem has not emerged. Disclosure looks fearsome to those who know it not, but it is acceptable to those who have lived with it. As Bob Campbell of the American College of Trial Lawyers told the Committee in San Francisco, the D.Mass. initially opted out but ended up embracing a strong form of disclosure. (See S.F. trans. at 128.) The majority proposal is better because it is stronger than the "may use" alternative, and there is no reason to expect that significant problems will follow its adoption that could be avoided by switching to the minority position.

Needless to say, if the "may use in support" formulation is substituted for the language in the current rule proposal, some modifications will need to be made in the Note to reflect that difference in rule language.

(b) Note material regarding "high end" exclusion

Many commentators urge that the Note provide more information about when a court might excuse disclosure, and inferentially when a party might legitimately object to disclosure. See, e.g., comments of Gennaro A. Filice, III (98-CV-071), and testimony of G. Edward Pickell (S.F.), Stephen Valen (S.F.), Thomas Allman (S.F.), Laurence Janssen (Chi.), Douglas S. Grandstaff (Chi.), and John Scriven (Chi.). The Public Citizen Litigation Group (98-CV-181), on the other hand, asserts that the opportunity to object is too open-ended, and urges that the burden be on the objector to justify any such objection. (For the summaries of the pertinent comments and testimony, see pp. 65-68 of the comment summary.)

The proper way to explain the ability to object has been a difficulty for some time, and a bit of background is in order. The focal point is the first full paragraph of Note material on p. 53 of the Aug. 1998 pamphlet. Probably the place for inserting more commentary would be before "Ordinarily" in the seventh line from the bottom of that paragraph, and the remainder of that paragraph at present could be broken out as a different paragraph.

When the Discovery Subcommittee met in San Francisco on April 24, 1998, it had before it a proposal that more details be provided at this point in the Note.[3] The conclusion of the

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[3] That proposal was as follows:

> Although no attempt has been made to specify the exact circumstances that would justify a decision that disclosure should not occur, it is contemplated that these would include (1) likely disposition of the case with regard to the objecting party on a preliminary motion attacking the court's jurisdiction or on a similar ground, or (2) extraordinary volume of discovery or material likely to be involved that would make initial disclosure ineffective or

Subcommittee then was that providing such specifics might cause more problems than it would solve, and there was also at least one voice for making the Note shorter rather than longer. Accordingly none were added.

In his electronically circulated materials for the Chicago dinner conference on Jan. 28, Ed Cooper tried to develop possible note material as well.[4]

Frankly, detailing the grounds (as suggested in the footnotes above) becomes challenging and may indicate that the game is not worth the candle. Keep in mind that the rule already says that the parties can agree to forgo or limit disclosures, and that if they don't any objector can present the matter to the court. The Note already says that this not a ground for

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unfair, or (3) other [extraordinary] [unusual] circumstances making initial disclosure ineffective or unfair.

There was also some suggestion that a strong motion to dismiss for failure to state a claim or on other grounds (absence of parties necessary under Rule 19?) might warrant an objection.

[4] Ed's Jan. 25 draft was as follows:

> A variety of circumstances may make initial disclosures inappropriate. In complex litigation, there often will be such full discovery that initial disclosures are redundant. Parties who practice under the 1993 disclosure rule regularly report that initial disclosures are not made for this reason. The prospect of sweeping discovery may arise from the complexity of the fact information relevant to the subject of dispute, the stakes of the litigation, actual or impending consolidation for multidistrict litigation, class-action allegations, or other sources. Initial disclosures also may be inappropriate before the court has ruled on a motion to dismiss for lack of jurisdiction or for failure to state a claim. In other circumstances, a motion for summary judgment may justify limiting initial disclosures to specified issues or bypassing disclosure in favor of discovery. Yet another reason may be that there is no prospect of discovery, and no reason to add unnecessary disclosure burdens. Still other reasons also will appear for bypassing initial disclosure.

unilateral opting out, and also that at least the damages information and insurance information (C and D of Rule 26(a)(1)) may often be warranted even if the witnesses and documents provisions (A and B) are wisely left out. Maybe saying more will only cause trouble.

Nevertheless, the Subcommitte brings forward proposed Note material containing a consolidation of points that inclines toward brevity and generality (to appear on p. 53 of the Aug. 1998 pamphlet):

> The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be "inappropriate in the circumstances of the action." Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures, if any, should be made.
>
> When presented with an objection, the court is expected to calibrate disclosure with a view to the needs of the particular case. In some complex litigation, the likely volume of formal discovery may make disclosures redundant. In some cases the possibility of consolidation with other cases or multidistrict treatment of the case may make it appropriate that disclosure be handled in a parallel manner in all the cases. Similarly, if discovery is to be staged disclosure should often be handled in a coordinated fashion. In some instances, disclosure might appropriately be

deferred until a potentially dispositive threshold motion is resolved.

Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others – such as the damages and insurance information called for by subparagraphs (a)(1)(C) and (D) – may continue to be appropriate.

(c) Revision of (a)(1)(E) "low end" exclusions

The Subcommittee did not discuss the "low end" exclusions from disclosure during its conference call. Ed Cooper has provided the following discussion of the issues raised by these provisions, on which the Aug. 1998 pamphlet invited input regarding whether the right types of actions have been selected and whether the selections have been described in the right way:

Note on 26(a)(1)(E) "Low-End" Exclusions

The comments and testimony bearing on the proposed Rule 26(a)(1)(E) "low-end exclusions" from disclosure are summarized at pp. 60-64 of the summary of comments. The comments suggest three ranges of issues: modification of a proposed exemption, rejection of a proposed exemption, and addition of new exemptions.

Modify Exclusions

(i) an action for review on an administrative record: The Public Citizen Litigation Group, 98CV181, calls for clarification because the issue whether there is an "administrative record" may be in dispute. The Department of Justice, 98CV266, suggests that the exemption may be ambiguous. In an enforcement action under CERCLA, for example, the defendant may question the government's remedy proposal – this will require that the administrative record be consulted. The Department suggests that the exemption be amended to refer to "proceedings for review on an administrative record."

The Committee Note already states that the descriptions of the exclusions are generic, and are to be administered with flexibility. This statement, at p. 51 of the pamphlet, could be expanded by adding a new sentence: "The exclusion of an action for review on an administrative record, for example, is intended

to reach a proceeding that is framed as an 'appeal' based solely on an administrative record. The exclusion should not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record."

Agree to add

(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision: EDNY Comm. on Civil Litigation, 98CV056, would modify this exclusion to require the government to make disclosure, but not the plaintiff. The Attorney General of Oregon, 98CV146, would expand to non-prisoner pro se actions; to require disclosure and Rule 26(f) conferences in pro se actions is too much. Timothy W. Terrell, 98CV211, would make two changes: the exclusion should be expanded to reach actions based on events while the plaintiff was a prisoner, even if the plaintiff was released before suing; and disclosure should not be required even if the prisoner has counsel.

The Committee discussed expanding this exclusion to reach all pro se plaintiff actions, and decided not to go so far with the initial list of exclusions. The proposal as published seems a reasonable compromise for a first rule.

(v) an action by the United States to recover benefit payments: The Department of Justice would blend this into the student-loan provision, as discussed next. The National Association of Consumer Advocates would delete this exclusion, citing the same reasons as it urges to delete the student-loan exclusion.

(vi) an action by the United States to collect on a student loan guaranteed by the United States: The Department of Justice suggests that this exclusion be expanded to reach all loans, "such as those involving Small Business Administration or Federal Emergency Management Agency loans." 98CV266. The Public Citizen Litigation Group, 98CV181, would delete the exclusion — these

actions should be treated in the same way as any other action on a promissory note. The National Association of Consumer Advocates, 98CV120, opposes this exclusion and also the exclusion for government benefit overpayments: initial disclosures are often important in student-loan and benefit cases because the government has all the records, and the records often are a mess; "[T]he government is holding all the cards, and it may be bluffing."

Expansion to include all government loans does not seem warranted. The pleas to delete the exclusion seem better taken, but may not be fully persuasive. Student-loan actions often result in default judgments. Benefit-overpayment cases are likely to meet the same fate. If the purpose of the exclusions is to avoid disclosure in cases that are not likely to have formal discovery, the exclusions may make sense. But the objections raise an interesting thought. Disclosure might be useful in these cases because there is not likely to be discovery. Disclosure will force the government to prepare more carefully, establishing a clear documentary foundation for its claims. It is to be hoped that the government is not often so confused as to be suing for the wrong amount. But if there is a reasonable risk of a significant number of government mistakes, disclosure could serve a real purpose, even though not the purpose initially contemplated. This question deserves some thought.

The Department of Justice also would combine this exclusion with the benefit-recovery exclusion: "an action by the United States to recover benefit and [or] loan payments." If exclusion (vi) is limited to guaranteed student loans, the drafting benefits would be slight.

(viii) an action to enforce an arbitration award: The Chicago Chapter of the Federal Bar Assn., 98CV156, suggests that some flexibility should be provided, in terms like this: "(viii)

unless the court orders disclosure, an action to enforce an arbitration award." C. Torrence Armstrong, Baltimore transcript 106-116, would not exempt actions to enforce arbitration awards.

With disclosure limited to supporting information, it remains difficult to suppose that disclosure will be of much help in these cases. Discovery should be sufficient for the cases that justify a search for information outside the arbitration record.

Bankruptcy: The original list included two exclusions related to bankruptcy: "(i) a proceeding withdrawn under Title 28, U.S.C. § 157(d) from reference to a bankruptcy judge; (ii) a bankruptcy appeal." The Bankruptcy Rules Advisory Committee made it clear that these exclusions would create endless confusion for the provisions of the Bankruptcy Rules that incorporate the Civil Rules, and the proposed exclusions were deleted with the ready consent of the Civil Rules Committee. Now Judge Louise De Carl Adler, writing for the Conference of Chief Bankruptcy Judges of the 9th Circuit, 98CV208, renews a number of questions that go to the relationship between bankruptcy proceedings and the disclosure provisions of the Civil Rules. These questions should be addressed to the Bankruptcy Rules Committee and its Reporter.

Strike Proposed Exclusions

The proposals to modify the exclusions for government actions to recover benefits overpayments or student loans include suggestions to delete these exclusions. See above.

Additional Exclusions

A significant number of proposals have been made to add to the list of exclusions. The suggested categories are listed below. It is not recommended that any them be added to Rule 26(a)(1)(E) as published for comment. Addition of new categories

likely would require republication. And it seems better to develop some experience with the present set of exclusions before casting about for additional exclusions.

The proposed additional exclusions include:

bankruptcy proceedings, including appeals and adversary proceedings (See above)

Bivens actions

civil fine or penalty proceedings

condemnation proceedings

default proceedings

deportation proceedings

facial constitutional challenges to statutes

foreclosure proceedings

forfeiture of property

Freedom of Information Act proceedings

interpleader proceedings (at least statutory interpleader)

judgment registration proceedings

Labor Management Relations Act proceedings

letters rogatory

mandamus proceedings

multidistrict § 1407 proceedings, including any proceeding that awaits a transfer decision by the Panel

perpetuation of testimony proceedings

postjudgment remedy proceedings

Social Security disability appeals

subpoena-quashing proceedings

Truth-in-Lending-Act proceedings not brought as class actions

any case exempted by court order

any case exempted by local rule – some districts may have significant numbers of cases in a category so rare in other districts as not to warrant a national-rule exclusion

(3) Rule 26(b)(1)

(a) Deletion of "subject matter" from definition of scope of attorney-managed discovery

In some respects the Committee's discovery project was prompted by the American College of Trial Lawyers' proposal to reconsider limits on the scope of discovery that were first proposed by the ABA Section of Litigation twenty years ago. Probably no change in a civil rule has received as much consideration for as long as this one. The published proposal restricts discovery much less than the original ABA proposal or the version urged by the American College, but it still received the support of the ABA Section of Litigation. The proposal limits lawyer-managed discovery to matters relevant to the claims or defenses of the parties, but enables the parties to seek discovery relevant to the subject matter of the action on a showing of good cause.[5]

Although a great deal of commentary has been directed toward this proposal during the hearing process, it does not seem that any striking new points have been made about it. (For the pertinent comments and testimony, see the comment summary at pp. 71-113.) As might be expected with a proposal that has been around for such a long time, the arguments made during the public comment period look a great deal like the ones made before the Committee's decision to propose this change. The Subcommittee is not suggesting any change to the basic proposal (as opposed to additional Note material discussed below), although it is no longer unanimous in support of the published proposal.

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[5] As noted under the next heading below, the wording of the authority to expand to the subject matter limit appears to need a slight modification to achieve parallelism with the former provisions of the first sentence of Rule 26(b)(1) under the proposed amendment.

(b) Changing "information" to "matter" in the new rule provision regarding expansion to "subject matter" on court order

This proposal addresses a possible oversight in prior drafting. Specifically, at line 122 on p. 41 of the Aug. 1998 pamphlet, we find that under our proposed amendment the scope of discovery extends (using the words of the current rule) to "any matter, not privileged, that is relevant to the claim or defense . . . ." But at lines 130-32 on p. 42, we find that the authority to expand is phrased slightly differently: "For good cause shown, the court may order discovery of any information relevant to the subject matter involved in the action." Lest there be a debate about whether "matter" in line 122 is different from "information" in line 131, the latter could be changed as follows:

> For good cause shown, the court may order discovery of any matter ~~information~~ relevant to the subject matter involved in the action.

It is true that "information" appears right afterwards (in line 133), but parallelism with that (later added) provision seems less important than with line 122, for we say we are shifting to the court the authority to go just as far as the parties could go under the current formulation, which uses "matter." The recurrence of "matter" in such close proximity under this proposed change is a bit ungainly, but no more so than under the current provision of Rule 26(b)(1) (see lines 122-23).

(c) Dealing with "background" information in the Note

Much commentary questioned the impact of the change on discovery issues that are familiar. For example, in employment discrimination and other types of cases, there may be a ground for discovery of organizational arrangements to determine who has authority to make certain decisions at issue in the case. Similarly, the organization of a party's files is a proper subject for discovery in order to determine what documents to ask for under Rule 34. A recurrent problem that also touches on this area is the question whether discovery of similar incidents is proper. Yet another was raised by a question during the Boston Conference that was picked up by some objectors -- the perjury conviction of a proposed witness. Such impeachment materials present a recurrent discovery problem (see 8 Fed. Prac. & Pro. § 2115), but the change in Rule 26(b)(1) hardly seems focused on them. As has been noted on occasion in the hearings, it is hard to generalize about these sorts of things because so much depends on what is involved in the individual case.

It is also somewhat hard to make confident predictions about the impact of the proposed change on these sorts of discovery. Certainly if the breadth of the current "subject matter" provision causes judges simply to refuse to listen to any relevance arguments about discovery, as some witnesses have asserted, the proposed change may be important if judges start giving serious thought to relevance due to the change. But judges who focus on relevance should have plenty of latitude to rule that these sorts of things are properly discoverable where justified in the case. Nevertheless, legitimate concerns have been raised about the impact of the changes. (E.g., Leubsdorf, 98-CV-008) My understanding is that the Committee does not intend to create obstacles to proper discovery in relation to these recurrent problems, and that in general the new formulation is designed to allow parties to seek such discovery.

Trying to explain all this presents some challenges. Nevertheless, to get the ball rolling, the Subcommittee offers[6] the following initial draft Note material to be added on p. 56 of the Aug. 1998 pamphlet:

> The Committee intends to focus the parties and the court on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.
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> ~~However, t~~The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to

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[6] Some Subcommittee members raised concerns about some of the provisions of this additional Note material. In particular, one felt that the "other incident" discussion was too tentative in authorizing this sort of discovery, and another was uneasy about raising that subject at all. After further consideration of these questions, the above draft has not been changed because it seems that greater specificity would cause more problems.

develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

(d) Meaning of "relevant" in change to current last sentence

We have also been presented with questions about the revision of the present last sentence. (For the summaries of the comments on this topic, see pp. 114-15 of the comment summary.) Hopefully the following addition at the end of the run-over paragraph on p. 57 of the Aug. 1998 pamphlet should deal with these concerns:

> The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, "relevant" means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.

(e) Relation between cost-bearing and good cause expansion explained in Note

There has been much commentary about the relationship between cost-bearing and good cause expansion. Some on the defense side seem to think that expansion leads automatically to cost-bearing, and some on the plaintiff side fear that it does. The Subcommittee believes that there is no such automatic link, and that the way to deal with the problem is to address the question in the Note on p. 57 of the Aug. 1998 pamphlet. Unfortunately, articulating the relationship between the two provisions has proven somewhat difficult, and several variations are therefore included here.[7] As a starting point, the following could be added:

> Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has

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[7] The specific proposal below has been revised since the Subcommittee's telephone conference. The proposal discussed by the Subcommittee did not include the added sentence at the end of the first paragraph of indented material, and the second paragraph read as follows:

> Rule [26(b)(2)] [[34(b)] now provides explicitly that a court may condition discovery that exceeds the limitations of subdivisions (b)(2)(i), (ii), or (iii) on payment of part or all of the reasonable expenses incurred by the responding party. Should the court expand discovery beyond matters relevant to the claims or defenses on a showing of good cause, that conclusion would normally indicate that the proposed discovery is consistent with the limitations of subdivision (b)(2). Nonetheless, as is true of discovery relevant to the claims or defenses, such broader discovery is subject to the limitations of subdivision (b)(2), and it could happen that some such proposed discovery might exceed the limitations of subdivision (b)(2) and therefore be subject to a cost-bearing order.

Could be denied OR

been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See* 8 Federal Practice & Procedure § 2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf.* Crawford-El v. Britton, 118 S. Ct. 1584 (1998) (quoting Rule 26(b)(2)(iii) and stating that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly"). The limitations of subdivision (b)(2) might be particularly pertinent to requests to expand discovery beyond matters relevant to the claims or defenses, and a party opposing such expansion could invoke its limitations.

Rule [26(b)(2)] [[34(b)][8] now provides explicitly that a court may condition discovery that exceeds the limitations of subdivisions (b)(2)(i), (ii), or (iii) on payment of part or all of the reasonable expenses incurred by the responding party. This provision is conceptually independent of the provision in subdivision (b)(1) that allows the court to expand the scope of discovery to matters relevant to the subject matter involved in the action, but administration of the two provisions may often overlap. Should the court authorize specific inquiries beyond matters relevant to the claims or defenses on a showing of good cause despite objections based on subdivision (b)(2), that conclusion would normally indicate that the proposed discovery is consistent with the limitations of subdivision (b)(2), and that cost-bearing is not appropriate. Nonetheless, as is true of discovery relevant to the claims or defenses, such broader discovery is subject to the limitations of

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[8] Another topic for discussion is whether to move the cost-bearing provision into Rule 26(b)(2) rather than leaving it in Rule 34(b).

subdivision (b)(2). If the court's expansion of discovery does not direct specific inquiries, but instead finds good cause for a more general inquiry into the subject matter of the action, it need not imply that every relevant inquiry has been endorsed, no matter how expensive, disproportionate, or probably fruitless. Accordingly, it could happen that some such proposed discovery might exceed the limitations of subdivision (b)(2) and therefore be subject to a cost-bearing order.[9]

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[9] Ed Cooper has proposed alternative language for the material above at lines 1237-57:

> A finding of good cause to expand the scope of discovery under subdivision (b)(1) ordinarily will resolve the same issues as would be raised — and may well have been raised — by an explicit argument to limit the scope of discovery under subdivision (b)(2). It is possible that the two determinations may be combined in an order that allows the proposed discovery on condition that the party seeking discovery bear part or all of the reasonable expenses of responding. If the (b)(1) order resolves those issues, or if the (b)(1) order explicitly defines the nature of the expanded discovery, a subsequent (b)(2) motion to prohibit the discovery or to impose cost-bearing terms should be entertained only on showing circumstances that could not have reasonably been anticipated at the time of the (b)(1) motion. If the (b)(1) order simply authorizes general areas of inquiry, on the other hand, the actual course of discovery under the order may well justify a request for (b)(2) relief. In any event, it is clear that a party cannot automatically expand the scope of discovery by agreeing to pay the reasonable expenses of responding. The limits on the scope of discovery adopted in subdivision (b)(1), and the additional limits embodied in subdivision (b)(2), reflect the need to protect privacy and the difficulty of ensuring compensation for all of the human costs imposed by inappropriate discovery.

(4) Rule 26(b)(2)

(a) Location of cost-bearing provision

The question whether cost-bearing should be in Rule 26(b)(2) or Rule 34 has been raised several times. The arguments on that question, and the alternative provision, are included in the Aug. 1998 pamphlet at 14-15. There has been some commentary about this question. Those opposed in principle to any cost bearing (e.g., ATLA, 98-CV-183; Trial Lawyers for Public Justice, 98-CV-201) argue that limiting it to Rule 34 is better than including it in Rule 26. Others (e.g., the ABA Section of Litigation, 98-CV-050; Public Citizen Litigation Group, 98-CV-181) say that it should be in Rule 26(b)(2) (sometimes even though generally opposed to the idea of cost-bearing). (For the pertinent summaries, see pp. 166-68 of the comment summary.) Many said that document discovery was where the problems arise, and that the provision should therefore be in Rule 34.

The Subcommittee voted 3-2 to move cost-bearing to Rule 26(b)(2) during the April 24, 1998, meeting in San Francisco. The opposing view then was that it would "sink without a trace" in Rule 26(b)(2), and that Rule 34 was where it was most needed. It was decided thereafter not to poll the full Committee then about the change, but because both were published there would be no need to re-publish if the full Committee wanted to move it to Rule 26(b)(2). During the March 22 telephone conference, a majority of the Subcommittee favored locating the provision in Rule 26(b)(2) rather than Rule 34(b).

If cost-bearing remains in Rule 34, we will need to address possible modification of that proposal to clarify ambiguities about when cost-bearing is allowed (discussed below in materials on Rule 34). If cost-bearing is moved to Rule 26(b)(2), there may be reason to include some cross-reference in Rule 34, and

possibilities are explored below in the materials on Rule 34.

Should this change be made, we would also need to cover it in Note material. The Committee provided such Note material in the Appendix it sent to the Standing Committee last year. This would be added at p. 57 of the Aug. 1998 pamphlet as follows:[10]

> Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them.
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> The amended rule also makes explicit the authority that the Committee believes already exists under subdivision (b)(2) to condition marginal discovery on cost-bearing -- to offer a party that has sought discovery beyond the limitations of subdivision (b)(2)(i), (ii), or (iii) the alternative of bearing part or all of the cost of that peripheral discovery rather than to forbid it altogether. The authority to order cost-bearing might most often be employed in connection with limitation (iii), but it could be used as well for proposed discovery exceeding limitation

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[10] Note that the next two headings propose additional Note material. That additional note material is not included here.

(i) or (ii). It is not expected that this cost-bearing provision would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might only occur in certain types of cases. The limits of (i), (ii), and (iii) can be violated even in "ordinary" litigation. It may be that discovery requests exceeding the limitations of subdivision (b)(2) occur most frequently in connection with document requests under Rule 34, cf. Rule 45(c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena),[11] but the limitations also apply to discovery by other means.

In any situation in which discovery requests are challenged as exceeding the limitations of subdivision (b)(2), the court may fashion an appropriate order including cost-bearing. Where appropriate it could, for example, order that some discovery requests be fully satisfied because they are not disproportionate, direct that certain requests not be answered at all, and condition responses to other requests on payment by the party seeking the discovery of part or all of the costs of complying with the request. In determining whether to order cost-bearing, the court

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[11] There is a proposal for a change to Rule 34(b) to refer to the limitations of Rule 26(b)(2) later in this memorandum. If that is adopted, it might be desirable to mention it here. One way of doing so would be to change the above Note material as follows:

> It may be that discovery requests exceeding the limitations of subdivision (b)(2) occur most frequently in connection with document requests under Rule 34, cf. Rule 45(c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena), and Rule 34(b) now calls attention to the provisions of Rule 26(b)(2) for that reason. B~~b~~ut the limitations also apply to discovery by other means.

should ensure that only reasonable costs are included, and (as suggested by limitation (iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

The court may enter such a cost-bearing order in connection with a Rule 37(a) motion by the party seeking discovery, or on a Rule 26(c) motion by the party opposing discovery. The responding party may raise the limits of Rule 26(b)(2) in its objection to the discovery request or in a Rule 26(c) motion. [As noted above,[12] the objection may also be raised in response to a request under subdivision (b)(1) that the court authorize discovery beyond matters relevant to the claims or defenses.] Alternatively, as under Rule 26(b)(2), the court may act on its own initiative.

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[12] This refers to the proposed discussion of the relation between expansion of discovery under (b)(1) and cost-bearing under the immediately previous heading.

(b) Addressing concerns of districts that use differentiated case management

Two comments raised a concern not discussed when the current proposals were made -- the impact of deleting the authority for local rules from Rule 26(b)(2) on districts that do differential case management. See comments of Hon. Richard Enslen (98-CV-170) and Hon. Russell Eliason (98-CV-249). I have talked to both judges and reviewed their local procedures. The basic problem in both districts is that their local rules or comparable orders provide blueprints for different tracks that include specifics about such things as the duration of discovery, the number of interrogatories, and the number of depositions. On their face, then, these local rules seem to go beyond the authority allowed after the amendment, which takes away authority to deviate from the national rules by local rule.

Based on my conversations with the judges, I believe that, at least in their districts, the conflict is really illusory. In the M.D.N.C. (Judge Eliason) there are three tracks and the choice which to use (or what mix-and-match provisions to make) is made at the Rule 16(b) conference. Similarly in the W.D. Mich. (Judge Enslen) there are five tracks and the parties are to indicate which is appropriate before the Rule 16(b) scheduling order, at which the court selects one. In each instance, then, the local rules or comparable orders really serve an informational function, alerting the bar to what the judges will have in mind when they make a case-specific order in the Rule 16(b) process.

Under these circumstances, the Subcommittee proposes adding the following further Note material about subdivision (b)(2) on p. 57 of the Aug. 1998 pamphlet:

Subdivision (b)(2). Rules 30, 31, and 33 establish

presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them.

by case-specific order

This change is not intended to interfere with differentiated case management in districts that use this technique as part of their Rule 16 process. The Committee has been informed that some districts devise "tracks" ~~including specified limits~~ on discovery events -- sometimes described in detail in local rules or comparable orders -- and that judges in these districts assign cases to such tracks pursuant to Rule 16(b). Because such assignments involve a case-specific order, and the rule explicitly provides that such an order may vary the limitations provided in these rules, this amendment should not affect the validity of such practices. Indeed, because subdivision (f) is amended to require in all districts that the parties confer and provide reports including a discovery plan to the court in advance of the Rule 16(b) order, these amendments may supplement the efforts of courts that employ differentiated case management.

(c) Note material on party agreement regarding numerical and duration limitations on discovery

The E.D.N.Y. Committee on Civil Litigation (98-CV-077) objects that the proposed amendment to Rule 26(b)(2) makes no provision for limitations on interrogatories by party agreement. This topic has not been discussed by the Subcommittee. Although the rule itself provides only for modification by court order, the Note does day that "[t]he limits can be modified by court order or agreement in an individual action." Aug. 1998 pamphlet at 57. This point could be emphasized by adding to the Note as follows[13]:

> Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action. Possible modification of the limitations might wisely be considered by the parties in devising a discovery plan during their subdivision (f) conference (see Official Form 35, item 3) or by agreement pursuant to Rule 29, and could be addressed by the court under Rule 16(b). Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them.

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[13] Note that a change in the Note regarding Rule 26(b)(2) to accomplish another result was suggested under the immediately previous heading.

(5) Rule 26(d)

(a) Specifying circumstances in which early discovery might be authorized despite moratorium in the Note

More than one commentator has noted that there are some recurrent circumstances that would often warrant early discovery, but that the rule says nothing about those possibilities. See, e.g., Public Citizen Litigation Group (98-CV-181); testimony of Hon. Owen Panner (S.F. trans, pp. 79-80). This issue was not raised during the Subcommittee's March 22 conference call, but the following could be inserted in the Note at the end of the carry-over paragraph on p. 58 of the Aug. 1998 pamphlet, as follows:

> Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case. Such early discovery may be appropriate where needed to resolve early motions, such as a request for a preliminary injunction or a challenge to the court's jurisdiction.

Alternative sequence for addition to Rule 26(f)

This memo contains the alternative to lines 1580-85 of the agenda materials to switch the order of the provisions regarding submission of a report by the parties about their Rule 26(f) conference:

> and (ii) require that the written report outlining the discovery plan be filed less than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(6) Rule 26(f)

(a) Allowing expedited management to move faster than the rule prescribes by authorizing local rules

Both in the Baltimore hearing (see testimony of Torrence Armstrong, Balt. trans pp. 106-17) and in a number of comments from judges of the E.D. Va., we have been informed that the proposed amendments might slow the progress of the docket in that court. David Levi and I have talked to a district judge and a magistrate judge from that district, and determined that the problem is with the change to Rule 26(f) because it requires that 21 days elapse between the conference of the parties and entry of the scheduling order, and requires that the parties file a discovery plan. The E.D. Va. reportedly moves too fast for this; on the filing of an answer or a motion by a defendant, the clerk's office sets a Rule 16(b) conference in two weeks, so the parties don't have enough time to do these things 21 days before the conference. The judges there believe that adhering to the new schedule would delay them three to five weeks. We think that Rule 26(f) need not do so.

Accordingly, the Subcommittee proposes[14] that this problem could be solved by adding the following to the rule at the end of line 211 on p. 47 of the Aug. 1998 pamphlet:

> The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference ~~and being present or represented at the meeting~~, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14~~10~~ days after the conference ~~meeting~~ a written

[14] Some subcommittee members initially expressed some misgivings about this rule change.

report outlining the plan. A court may by local rule or order require that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties under this subdivision occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) excuse the parties from submitting a written report outlining the discovery plan, permitting the parties instead to report orally on their discovery plan at the Rule 16(b) conference, or require that the written report be filed less than 14 days after the conference.[15]

Then the following could be added to the Note just before Rule 30 on p. 59 of the Aug. 1998 pamphlet:

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the Rule 16 scheduling conference, and the time for the report is changed to no more than 14 days after the Rule 26(f) conference. This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order.

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that

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[15] The last clause was added after the March 22 telephone conference to address the possibility that a district would prefer to require that the written report be submitted more quickly rather than dispensing with it altogether.

certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct. The final sentence of subdivision (f) responds to the risk that early pretrial management in some districts might be slowed by insisting that a Rule 16(b) scheduling conference be deferred until 21 days after the conference of the parties. It is also possible that the requirement that a written discovery plan be filed in advance could impede prompt issuance of a Rule 16(b) scheduling order in such a district. Accordingly, the rule permits districts that act with such alacrity to adopt a local rule shortening the period between the conference and the Rule 16(b) scheduling order. In addition, a court that shortens the period may also, by local rule, excuse the filing of a written discovery plan, providing that the parties do confer and report orally to the court before entry of the Rule 16(b) order, or shorten the time for filing the discovery plan from the 14 days allowed under the subdivision (f). Unless a court shortens the period between the conference and the Rule 16(b) order by local rule, it should not adopt a local rule altering subdivision (f)'s requirement that a written report be filed.

(7) Rule 30(d)

(a) Deleting the deponent veto

The comments on this topic appear at pp. 144-46 of the comment summary. On March 22, the Subcommittee voted unanimously to recommend that the deponent veto be deleted. This can be easily done by changing the proposed rule amendment at lines 11-13 on p. 60 of the Aug. 1998 pamphlet as follows:

> (2) Unless otherwise authorized by the court or stipulated by the parties ~~and the deponent~~, a deposition is limited to one day of seven hours.

If adopted, this will also involve minor changes in the Note. The sentence on pp. 62-63 of the Aug. 1998 pamphlet ("Because this provision is designed partly to protect the deponent, an agreement by the parties to exceed the limitation is not sufficient unless the deponent also agrees.") should be deleted. In addition, "and the witness" should be taken out of the first line of the first full paragraph on p. 63.

(b) Computation of the limitation

Several comments, including the ABA Section of Litigation (98-CV-050) and the Rules Committee of the Federal Magistrate Judges' Association (98-CV-268) say that the rule is unclear about whether there can be breaks for lunch and other matters, and how the limitation is to take account of those. For the summaries generally relating to comments and testimony about the deposition duration limitation (relevant to the next heading also), see pp. 125-43 of the comment summary. Certainly the Committee did not intend to suggest that everyone had to sit in a deposition room for seven hours straight. In the same vein, we can deal with the Rule 30(b)(6) problem that has been called to our attention by many commentators and witnesses.[16]

Some suggest writing the rule differently to address these concerns, but probably Note material can do the job. After discussion on March 22, the Subcommittee suggests that the following can be added to the Note on pp. 62-63 of the Aug. 1998 pamphlet:

> Paragraph (2) imposes a presumptive durational limitation of one day of seven hours for any deposition. The Committee has been informed that overlong depositions

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[16] When the ten-witness limitation was adopted in 1993, the Committee Note said that "[a] deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify." The durational question seems to call for different treatment; surely if a corporation designated ten people to testify it would not make sense to say that they all had to be done in seven hours, 42 minutes each on the average. As between saying they all are one deposition and saying that each is one, the latter appears preferable with regard to the durational limitation since the interrogating lawyer can't know while questioning the first witness how long it will take for the third one. We want to encourage planning and prompt questioning, but need to provide circumstances under which that planning can work.

can result in undue costs and delays in some circumstances. This limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition. For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition. The presumptive duration may be extended, or otherwise altered, by agreement. ~~Because this provision is designed partly to protect the deponent, an agreement by the parties to exceed the limitation is not sufficient unless the deponent also agrees.~~[17] Absent such an agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.

Note that this does not say anything about excluding colloquy between counsel, or computing the duration differently if the witness takes a long time to answer questions. Trying to be specific about those things is likely to cause more problems than it will solve.

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[17] This is deleted on the expectation that the deponent veto will be removed, as suggested above.

(c) Note material on grounds for extending the limit

We have received a lot of comments about reasons for extending the deposition beyond the presumptive limit. (See generally pp. 125-43 of the comment summary.) Some have urged that some of these topics be included in the rule itself, but that seems rather hard-edged for things of this sort. Referring to these considerations in the Note seems worthwhile. After discussion on March 22, the Subcommittee concluded that Note material would be desirable. This could be provided as follows on pp. 62-63 of the Aug. 1998 pamphlet:

> Paragraph (2) imposes a presumptive durational limitation of one day of seven hours for any deposition. The Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances. The presumptive duration may be extended, or otherwise altered, by agreement. ~~Because this provision is designed partly to protect the deponent, an agreement by the parties to exceed the limitation is not sufficient unless the deponent also agrees.~~ Absent such an agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.[18]
>
> For example, Parties considering extending the time for a deposition -- and courts asked to order an extension -- might consider a variety of factors. Should the witness not be expected to testify at trial, so that the deposition transcript would be used at trial pursuant to Rule 32, that might warrant additional time. If the witness needs an interpreter, that

[18] Note that a proposal for a change to this paragraph to deal with a different issue is made under the immediately previous heading, and that it is assumed that the deponent veto will be removed, as discussed above.

may prolong the examination. If the examination will cover events occurring over a long period of time, that may justify allowing additional time. In cases in which the witness will be questioned about numerous or lengthy documents, it is often desirable for the interrogating party to send copies of the documents to the witness sufficiently in advance of the deposition so that the witness can become familiar with them. Should the witness nevertheless not read the documents in advance, thereby prolonging the deposition, a court could consider that a reason for extending the time limit. If the examination reveals that documents have been requested but not produced, that may justify further examination once production has occurred. In multi-party cases, the need for each party to examine the witness may warrant additional time, although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest. Similarly, should the lawyer for the witness want to examine the witness, that ought ordinarily to be accommodated. Finally, with regard to expert witnesses, there may more often be a need for additional time -- even after the submission of the report required by Rule 26(a)(2) -- for full exploration of the theories upon which the witness relies. When a challenge is expected to the admissibility of that testimony, see Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), there may be a particular reason for ensuring sufficient time to develop a full record. Where possible, these factors should be explored during the Rule 26(f) conference of the parties, with provisions for them included in the discovery plan. At the Rule 16(b) scheduling conference, they can be addressed by the court.

It is expected that in most instances the parties and the witness will make reasonable accommodations to avoid the

need for resort to the court. The limitation is phrased in terms of a single day on the assumption that ordinarily a single day would be preferable to a deposition extending over multiple days; if alternative arrangements would better suit the parties and the witness, they may agree to them. It is also assumed that there will be reasonable breaks during the day. Preoccupation with timing is to be avoided.

(d) Note material regarding nonparty "right" to instruct witness not to answer

The Magistrate Judges Association (98-CV-268) objects that the change from "party" to "person" in Rule 30(d) is undesirable because it legitimates instructions not to answer by nonparties. In one sense this seems correct, in that the rule does say "[a] person ~~party~~ may instruct a deponent," so this seems to broaden the realm of people the rules say can make such an instruction. But that reading really disregards the rest of the sentence, which says "only when necessary to preserve a privilege, . . ." So the sentence is really putting limitations on instructions, not authorizing them. This question was not raised with the Subcommittee on March 22, but could easily be addressed in the Note. The following could be added to the Note material appearing on p. 62 of the Aug. 1998 pamphlet:

> The current rule places limitations on instructions that a witness not answer only when the instruction is made by a "party." Similar limitations should apply with regard to anyone who might purport to instruct a witness not to answer a question. Accordingly, the rule is amended to apply the limitation to instructions by any person. The amendment is not intended to confer authority on nonparties to instruct witnesses to refuse to answer deposition questions. But in some instances -- such as a nonparty witness represented by counsel -- there may legitimately be such instructions, and in other instances nonparties might purport to instruct witnesses not to answer. The amendment makes it clear that, whatever the legitimacy of giving such instructions, the nonparty is subject to the same limitations as parties.

(e) Amendment of Rule 30(f)(1) to conform to change in Rule 5(d)

When the question of retention of discovery materials that were not filed came up at the Standing Committee meeting last June, that called attention to the need to modify Rule 30(f)(1) to take account of the change proposed to Rule 5(d) because Rule 30(f)(1) now directs the court reporter to file the deposition or deliver it to the lawyer who took the deposition. This could be changed as follows:

> (1) The officer shall certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly ~~file it with the court in which the action is pending or~~ send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which

event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

This could be accompanied by Note material as follows before Rule 34 on p. 64 of the Aug. 1998 pamphlet:

Subdivision (f)(1): This subdivision is amended because Rule 5(d) has been amended to direct that discovery materials, including depositions, ordinarily should not be filed. The rule already has provisions directing that the lawyer who arranged for the transcription preserve the deposition. Rule 5(d) provides that, once the deposition is used in the proceeding, the attorney shall file it with the court. [Until that time, the attorney may, but need not, file it with the court.[19]]

or recording

[19] This sentence seems appropriate if the "need not" formulation is used in Rule 5(d).

(8) Rule 34(b)

(a) Clarifying that cost-bearing is only authorized if proposed discovery exceeds the limitations of Rule 26(b)(2)

One of the reasons for moving the cost-bearing provision to Rule 26(b)(2) is that it is easier to draft there. But if that is not done, and the published proposal goes through, we will have Rule 26(b)(2) saying that the court shall limit discovery when the limitations are exceeded, and Rule 34(b) saying that as to document discovery the court may instead allow the discovery subject to cost-bearing (or, presumably, allow the discovery but not subject to cost-bearing). There seems nothing to do to remove that dissonance if the provision stays in Rule 34(b).

A different, though related, drafting problem does deserve some attention if the provision stays in Rule 34(b), and it was raised by Judge Tashima at the Standing Committee meeting last June. The problem is that the rule language proposed for Rule 34(b) may not say what we want. It says that cost-bearing is allowed "if appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii)." The Note tries to say that cost-bearing is only allowed when the discovery exceeds those limitations, but a court might not so interpret it. Indeed, given that Rule 26(b)(2) already says that the discovery should be limited if it actually exceeds the Rule 26(b)(2) limitations, the "appropriate to implement" language might be interpreted to invite cost-bearing orders in other situations. That would give each provision meaning. Rule 26(b)(2) might be read to cut off discovery beyond the limits absolutely, while Rule 34(b) might be read to go beyond that and authorize cost-bearing when discovery gets into a "danger zone" short of that limit.

The Subcommittee suggests that this problem can be solved by

making the following revision in the rule language we proposed to be added (lines 23-28, pp. 65-66) of the Aug. 1998 pamphlet:

> On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall -- if it determines that proposed discovery exceeds ~~appropriate to implement~~ the limitations of Rule 26(b)(2)(i), (ii), or (iii) -- limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party.

(b) Cross-reference to cost-bearing in Rule 34(b) if cost-bearing provision is moved to Rule 26(b)(2)

Should the cost-bearing provision be moved to Rule 26(b)(2), as discussed above, it may still be important to acknowledge the existence of cost-bearing authority in Rule 34, given the frequent comments that it is particularly important in connection with document discovery. At least one member of the Subcommittee believes that this should be done. It might be done by addition of a rule provision in Rule 34 that calls attention to the newly explicit cost-bearing features of Rule 26(b)(2), or with a Note to Rule 34 alerting lawyers to those provisions. Proposals for both options are included. Neither option is without problems.

The rule provision route could take the following form in Rule 34(b):

> **(b) Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).
>
> The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be

specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. Such an order, or an order under Rule 26(c), [is subject to] [~~shall implement~~] the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

This proposal is worded in two ways. One is consistent with the language proposed to be added to Rule 26(b)(1) (Aug. 1998 pamphlet at 42, lines 136-38). The other ("shall implement") builds on the original proposal we made for Rule 34(b) and seems more directed to the exact situation presented by a motion. It does not seem to have the difficulties mentioned under the immediately previous heading should the cost-bearing provision be retained in Rule 34(b), since it does not purport to confer any authority beyond that contained in Rule 26(b)(2). Although adding a cross-reference may seem an odd reason for amending a rule, it is worth noting that the present reference to Rule 37(a) in Rule 34(b) is itself little more than a cross-reference, so that sort of thing is sometimes done when useful to call attention to provisions elsewhere.

Neither version of the proposed rule language specifically mentions "cost-bearing." That seems more readily dealt with in the Note. For that, one might say something like the following:

Subdivision (b). The amendment calls attention to the provisions of Rule 26(b)(2)(i), (ii), and (iii). In 1998,

the Committee published a proposal to amend Rule 34(b) to include explicit authority for the court to require the party seeking discovery to pay part or all of the cost of responding if the discovery sought exceeded the limitations of Rule 26(b)(2)(i), (ii), or (iii). See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, 181 F.R.D. 19, 64-68 (1998). The provision was included in Rule 34(b) because the Committee had heard that problems of disproportionate discovery were more prominent in connection with document discovery. After public comment and further deliberation, the Committee decided that the cost-bearing provision more appropriately should be included in Rule 26(b)(2), and it has been added there. Because cost-bearing concerns often arise in connection with discovery pursuant to Rule 34, however, a change to Rule 34(b) appeared warranted to call attention to the availability of that device in connection with motions to compel Rule 34 discovery and Rule 26(c) protective orders in connection with document discovery.

Alternatively, since the basic objective is to alert lawyers to the provisions of Rule 26(b)(2) rather than provide additional authority to courts (the usual reason for a rule provision), Note material would seem sufficient. Thus, the following could serve as a stand-alone Note without any rule change if that were allowed. The problem with that approach is that it has been the custom that a Note should not be changed unless there is a corresponding rule amendment. In large measure, that custom seems to have developed in situations in which parties sought to undo judicial interpretations of the rule by changing the Note. In this instance, the purpose of the Note would be to call attention to a new insertion in another rule, so perhaps that is different. If a stand-alone Note were allowable, it might look something like this:

Subdivision (b). In 1998, the Committee published a proposal to amend Rule 34(b) to include explicit authority for the court to require the party seeking discovery to pay part or all of the cost of responding if the discovery sought exceeded the limitations of Rule 26(b)(2)(i), (ii), or (iii). The provision was included in Rule 34(b) because the Committee had heard that problems of disproportionate discovery were more prominent in connection with document discovery. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, 181 F.R.D. 19, 64-68 (1998). After public comment and further deliberation, the Committee decided that the cost-bearing provision more appropriately should be included in Rule 26(b)(2), and it has been added there. Because that new provision may be of particular importance in connection with Rule 34 discovery, this Note is included to recognize the change in Rule 26(b)(2).

(9) Rule 37(c)(1)

(a) Correcting a misuse of language in the proposal

This is our most popular proposed amendment. It seems that nobody opposes it. (See comment summary at pp. 169-70.) But it was drafted too simply because the language of the current rule refers only to failure "to disclose information" while the addition talks about amending discovery responses. Instead of the provision now found at lines 4-6 on p. 69 of the Aug. 1998 pamphlet, the following would correct the problem:

> (1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), shall not, unless . . . .

This is a nonsubstantive change, and should not occasion any change in the Note. The Subcommittee supports this change.

(10) Miscellaneous clarifications in Note material

Besides the above matters of some substantive significance, a number of clarification matters have come up and appear to the Reporters to warrant clarification in the Note material. They are reproduced below not in the expectation that any Committee members should have concerns about these changes, but to allow any who do have concerns to relay them to me. It is not expected that there will be any discussion during the April meeting of these clarification matters. Each is presented below with a reference to the place in the Aug. 1998 pamphlet where the material can be found and (hopefully) enough surrounding material to explain the change.

pp. 27-28 of Aug. 1998 pamphlet:

> Although this amendment is based on widespread experience with local rules, and confirms the results directed by these local rules, it is designed to supersede and invalidate local rules. There is no apparent reason to have different filing rules in different districts. Even if districts vary in present capacities to store filed materials that are not used in an action, there is little reason to continue expending court resources for this purpose. These costs and burdens ~~would~~ will likely ~~grow~~ change as parties make increased use of audio- and videotaped depositions. Equipment to facilitate review and reproduction of such discovery materials may prove costly to acquire, maintain, and operate.
>
> The amended rule provides that discovery materials and disclosures under Rule 26(a)(1) and (a)(2) must not be filed until they are "used in the proceeding." This phrase is meant to refer to proceedings in court. The filing requirement is not triggered by ~~Accordingly,~~ "use" of

discovery materials such as documents in other discovery activities, such as depositions~~, would not trigger the filing requirement~~. In connection with proceedings in court, however, the rule is to be interpreted broadly; any use of discovery materials in court in connection with a motion, a pretrial conference under Rule 16, or otherwise, should be interpreted as use in the proceeding.

Once discovery or disclosure materials are used in the proceeding, the filing requirements of Rule 5(d) ~~should~~ apply ~~to them~~. But because the filing requirement applies only with regard to materials that are used, only those parts of voluminous materials that are actually used need be filed. Any party would be free to file other pertinent portions of materials that are so used. *See* Fed. R. Evid. 106; *cf.* Rule 32(a)(4). If the parties are unduly sparing in their submissions, the court may order further filings. By local rule, a court could provide appropriate direction regarding the filing of discovery materials, such as depositions, that are used in proceedings.

pp. 49-51 of the Aug. 1998 pamphlet:

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal "standing" orders of an individual judge or court that purport to create exemptions from – or limit or expand – the disclosure provided under the national rule. *See* Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can

stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information ~~as a feature of its management of~~ in managing the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that support the claims or defenses of the disclosing party. A party is no longer obligated to disclose witnesses or documents that would harm its position. The scope of the revised disclosure obligation connects directly to the exclusion sanction of Rule 37(c)(1), for ~~it requires disclosure of~~ the obligation is to disclose the sort of material that would be subject to exclusion. Because the disclosure obligation is limited to supporting material, it is no longer tied to particularized allegations in the complaint. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement.

The disclosure obligation applies to "claims and defenses," and therefore requires a defendant to disclose information supporting its denials of the allegations or claim of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials "warranted on the evidence," and disclosure should include the identity of any witness or document that supports such denials.

Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. ~~This~~ Impeachment information is similarly excluded from the initial disclosure requirement.

pp. 52-53 of the Aug. 1998 pamphlet:

The time for initial disclosure is extended to 14 days after the subdivision (f) conference unless the court orders otherwise. This change is integrated with corresponding changes requiring that the subdivision (f) conference be held 21 days before the Rule 16(b) scheduling conference or scheduling order, and that the report on the subdivision (f) conference be submitted to the court 14 days after the meeting. These changes provide a more orderly opportunity for the parties to review the disclosures, and for the court to consider the report. In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is ~~therefore~~ encouraged ~~in appropriate cases~~.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be "inappropriate in the circumstances of the action." Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures~~,~~ = if any~~,~~ = should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others – such as the damages and insurance information called for by subparagraphs (a)(1)(C) and (D) – may continue to be appropriate.

pp. 54-56 of the Aug. 1998 pamphlet:

Subdivision (b)(1). In 1978, the Committee published for comment a proposed amendment, suggested by the Section of Litigation of the American Bar Association, to refine the scope of discovery by deleting the "subject matter" language. This proposal was withdrawn, and since then the Committee has ~~since then~~ made other changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the "subject matter" language. Nearly one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. Discovery and Disclosure Practice, *supra,* at 44-45 (1997). The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the "subject matter" involved in the action.

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject matter involved in the action on a good-cause showing. The amendment is designed to involve the court more actively in regulating the breadth of ~~discovery in cases involving~~ sweeping or contentious discovery. The Committee has been

informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. *See* Discovery and Disclosure Practice, supra, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

pp. 62-63 of the Aug. 1998 pamphlet:

Paragraph (2) imposes a presumptive durational limitation of one day of seven hours for any deposition. The Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances. The presumptive duration may be extended, or otherwise altered, by agreement. Because this provision is designed partly to protect the deponent, an agreement by the parties to exceed the limitation is not sufficient unless the deponent also agrees. Absent ~~such an~~ agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.

pp. 66-68 of the Aug. 1998 pamphlet:

Subdivision (b). The amendment makes explicit the court's authority to condition ~~document production~~ Rule 34

discovery on payment by the party seeking discovery of part or all of the reasonable costs of responding ~~that document production~~ if the request exceeds the limitations of Rule 26(b)(2)(i), (ii), or (iii). This authority was implicit in the 1983 adoption of Rule 26(b)(2), which states that in implementing its limitations the court may act on its own initiative or pursuant to a motion under Rule 26(c). The court continues to have such authority with regard to all discovery devices. If the court concludes that a proposed deposition, interrogatory, or request for admission exceeds the limitations of Rule 26(b)(2)(i), (ii), or (iii), it may, under authority of that rule and Rule 26(c), deny discovery or allow it only if the party seeking it pays part or all of the reasonable costs.

This authority to condition discovery on cost-bearing is made explicit with regard to ~~document~~ Rule 34 discovery because the Committee has been informed that in some cases document discovery poses particularly significant problems of disproportionate cost. *Cf.* Rule 45(c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena). The Federal Judicial Center's 1997 survey of lawyers found that "[o]f all the discovery devices we examined, document production stands out as the most problem-laden." T. Willging, J. Shapard, D. Steinstra & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change, at 36 (1997). These problems were "far more likely to be reported by attorneys whose cases involved high stakes, but even in low-to-medium stakes cases . . . 36% of the attorneys reported problems with document production." *Id.* at 35. Yet it appears that the limitations of Rule 26(b)(2) have not been much implemented by courts, even in connection with document discovery. *See* 8 Federal Practice & Procedure § 2008.1 at 121.

Accordingly, it appears worthwhile to make the authority for a cost-bearing order explicit in regard to document discovery.

Cost-bearing might most often be employed in connection with limitation (b)(2)(iii), but it could be used as well for proposed discovery exceeding limitation (i) or (ii). It is not expected that this cost-bearing provision would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might occur only in certain types of cases; even in "ordinary" litigation it is possible that a given document request would be disproportionate or otherwise unwarranted.

The court may employ this authority if doing so would be "appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii)." In any situation in which a document request exceeds these limitations, the court may fashion an appropriate order including cost-bearing. When appropriate it could, for example, order that some requests be fully satisfied because they are not disproportionate, excuse compliance with certain requests altogether, and condition production in response to other requests on payment by the party seeking the discovery of part or all of the costs of complying with the request. In making the determination whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by Rule 26(b)(2)(iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding ~~to the discovery~~.

The court may enter ~~such~~ a cost-bearing order in connection with a Rule 37(a) motion by the party seeking

discovery, or on a Rule 26(c) motion by the party opposing discovery. The responding party may raise the limits of Rule 26(b)(2) in its objection to the document request or in a Rule 26(c) motion. Alternatively, as under Rule 26(b)(2), the court may act on its own initiative, either in a Rule 16(b) scheduling conference or order or otherwise.

p. 70 of the Aug. 1998 pamphlet:

The amendment explicitly adds failure to comply with Rule 26(e)(2) as a ground for sanctions under Rule 37(c)(1), including exclusion of withheld materials. The rule provides that this sanction power only applies when the failure to supplement was "without substantial justification.~~,~~" Even if the failure was not substantially justified, ~~and~~ a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless.

III-A2

SUMMARY OF PUBLIC COMMENTS
PRELIMINARY DRAFT OF PROPOSED AMENDMENTS
CIVIL RULES REGARDING DISCOVERY
1998-99

This memorandum attempts to collect and summarize the various comments received regarding the proposed discovery rule amendments contained in the Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence published in August, 1998. In part because these are summaries, there will inevitably be some omissions of points made. Because several made similar points, there will also be some repetition. As noted below, this recapitulation attempts to pigeon-hole the comments in relation to specific rules. In doing so, it may obscure the overall thrust of some in favor of or against the package as a whole. Some effort will be made at the end to capture these overall reactions of some who commented.

At the outset, it is important to emphasize that this commentary reflects enormous effort and attention from wide sectors of the bench and bar. Beginning with the Advisory Committee's conferences and related events in 1997, this effort has proved of great value to the process of rule amendment.

The following summary reflects some editorial judgment. It separates written comments from testimony at the hearings held by the Advisory Committee. As to testimony, it attempts to note points made in written testimony as well as those provided orally (which sometimes dealt with different topics). Every effort has been made to ensure accuracy, but there have undoubtedly been mistakes in the process.

For the ease of the reader, the following is the intended arrangement of the comments, organized in the sequence of the rules affected:

1. Rule 5(d)

   (a) General desirability of abolishing filing requirement

   (b) Requiring retention of unfiled discovery materials

2. Rule 26(a)(1)

(a) National uniformity

(b) Narrowing the disclosure obligation to supporting material

(c) Articulation of the standard for narrowing the obligation

(d) Handling and listing of "low end" excluded categories

(e) Handling of "high end" cases

(f) Added parties

3. Rule 26(b)(1)

(a) Deletion of "subject matter" language describing the scope of discovery

(b) Authorization for expansion to "subject matter" limit on showing of good cause to court

(c) Revision of last sentence of current Rule 26(b)(1) to state that only "relevant" material is discoverable

(d) Explicit invocation of Rule 26(b)(2) in Rule 26(b)(1)

4. Rule 26(b)(2)

5. Rule 26(d)

6. Rule 26(f)

7. Rule 30(d)

(a) Deposition duration

(b) Deponent veto

(c) Other deposition changes (Rules 30(d)(1) and (3))

8. Rule 34(b)

   (a) General desirability

   (b) Placement of provision

9. Rule 37(c)

10. Comments not limited to specific proposed changes

   (a) General observations about package

   (b) Additional suggested amendments

1. Rule 5(d)

(a) General desirability of abolishing filing requirement

Comments

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Supports the change. This completes the cycle rationalizing and validating the local practices and should be fully supported. It will not only reduce costs and expenses for the clerk's office, but also reduce filing and copy expenses of the parties.

Michelle A. Gammer, 98-CV-102: (on behalf of Federal Bar Assoc. of W.D. Wash.) The proposed change is unclear on the use of materials that are used in the case. Suggests that the change be further modified to read that "the following discovery requests and responses must not be filed until and to the extent that they are used in the proceeding . . ."

Hon. Howard D. McKibben (D. Nev.), 98-CV-109: (On behalf of D. Nev.) Supports the proposal. This district previously implemented this procedure and found it successful.

Hon. Prentice H. Marshall (N.D. Ill.), 98-CV-117: Supports the change.

Hon. David L. Piester (D. Neb.), 98-CV-124: Questions decision to require filing of Rule 26(a)(3) disclosures. These disclosures are repeated in the final pretrial order. If there is no objection, there is no need for either the pretrial conference judge or, if different, the trial judge, to see the disclosures twice. Also notes that the 1980 amendments to Rule 5(d) met with opposition from certain senators on the ground that the court's business is the public's business, particularly in products liability cases. Although that argument did not prevail in the Senate, it may be good to address it. His district has a local rule the provides:

> Upon request of a member of the public made to the Clerk's office, non-filed documents shall be made available by the parties for inspection, subject to the power of the court to enter protective orders under the Federal Rules of Civil

Procedure and other applicable provisions of law.

Even if there were no requests from the public, the inclusion of such a provision would serve a valuable purpose in keeping the court from being used as a tool for secrecy. In addition, the phrase "used in the proceeding" should be clarified the show that it means "needed for trial or resolution of a motion or on order of the court." Otherwise, there will be all sorts of "uses" cropping up and there will be unnecessary filings.

Chicago Council of Lawyers Federal Courts Committee, 98-CV-152: The purely stylistic change from "shall" to "must" causes confusion because both appear in various places in the rules. The two words mean the same thing, and either one or the other should be used.

National Assoc. of Railroad Trial Counsel, 98-CV-155: Supports the change.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Endorses the change.

Federal Practice Section, Conn. Bar Assoc., 98-CV-157: Endorsed. This is consistent with the local rules of the D. Conn.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports amendment for the salutary purpose of easing the administrative burden put on the court in handling large volumes of paper.

Public Citizen Litigation Group, 98-CV-181: Opposes the amendment. It would reverse the policy decision made by the rule drafters in 1978-80 when they rejected a similar amendment and decided that the determination whether to file discovery material should be made on a case-by-case basis. The courts have recognized that Rule 5(d) establishes a substantive policy that gives the public a presumptive right of access to discovery materials unless good cause is shown to justify confidentiality. Even though the national rule's mandate has been eroded by widespread adoption of local rules that discovery materials not be filed, many of these local rules recognize the public interest in access to discovery materials by including provisions stating that nonparties may request that discovery materials be filed based on a minimal showing. The proposed rule goes too far in reversing the presumption of access. If it is adopted, it should

be modified in four ways: (1) Class actions under Rule 23 and shareholder derivative actions under Rule 23.1 should be excluded, as should actions involving hazards to public health; (2) The phrase "must not be filed" should be replaced with the phrase "need not be filed" that the Advisory Committee originally suggested; (3) The rule should say that the court may order that discovery materials be filed with the court because of the interest of nonparties or the public in the litigation. The following sentence could be added:

> Any party or nonparty that believes that discovery materials should be filed may request that the court order that discovery materials be filed with the court. In response to such a request, or on its own motion, the court shall order that such materials be filed to the extent that filing serves the interests of nonparties or the general public.

(4) Rule 16(c) should be amended to add filing of discovery materials to the list of issues to be discussed at pretrial scheduling conferences.

Philadelphia Bar Assoc., 98-CV-193: Supports the change, which makes practices on filing national and uniform. The amendment reconciles the courts' generally limited storage space with their need to be informed of certain key information.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the change with regard to initial disclosures. Filing full disclosures is an efficient method of informing the trial court about the basic facts and structure of the case.

F.B.I., 98-CV-214: Supports the change because it will eliminate inconsistencies provided by local rules.

National Assoc. of Independent Insurers, 98-CV-227: Supports the change. It should assist the parties, on both sides, in their control of expenses.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: The Section agrees with the proposed rule change. However, it suggests that the Committee make clear that this house-keeping change is not intended to change the principle in the current Federal Rules that discovery materials

should be available to the public when the public interest in access outweighs any countervailing privacy or other interest.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: Supports this change. The amendment is a progression of changes that have occurred since 1990 with a recognition of the costs imposed on parties as well as the court by the required filing of discovery materials that are never used in the action.

(b) Requiring retention of unfiled discovery materials

Testimony

Baltimore Hearing

Brian F. Spector, prepared stmt. and Tr. 64-80: Now that the national rules will not direct routine filing of discovery, there should be provision for the retention of the originals of discovery documents by counsel for possible future use in the case. Accordingly, the following could be added to amended Rule 5(d): "The attorney responsible for service of the discovery request shall retain, and become custodian of, the original discovery request and the response. The original of a deposition upon oral examination shall be retained by the attorney who arranged for the transcript or recording. All discovery materials shall be stored under conditions that will protect against loss, destruction, tampering, or deterioration." In addition, because filing is no longer allowed, Rule 30(f)(1) should be changed to remove the language now in that rule permitting the court reporter either to "file [the deposition] with the court in which the action is pending or" send it to the attorney who arranged for the transcript or recording.

2. Rule 26(a)(1)

(a) National uniformity

Comments

Prof. Edward W. Cavanaugh, 98-CV-002: "I support the elimination of local options on discovery rules and strongly support the concept that the Federal Rules should be national rules with a minimum of local variation."

Hon. Avern Cohn (E.D. Mich.), 98-CV-005: Opposes eliminating opt outs. "The Eastern District of Michigan opted out of Rule 26(a). We are getting along just fine as far as I know." It is easy to determine local procedures, and clients who are baffled by differences between districts "are generally represented by bad lawyers who fail to explain the complexities of a case to their clients." Baffled clients are not a reason to write national rules.

James F. Brockman, 98-CV-009: Because initial disclosure creates more of a burden than a benefit, courts should retain the ability to opt out.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: The Section agrees with the goal of reestablishing uniformity. In the majority of cases there is no need for disclosure. It is particularly ineffective in the very type of cases that create discovery problems--contentious, complex cases. "Because the mandatory initial disclosure regime is such a radical departure from our traditional adversary system, the burden of demonstrating why it should be adopted uniformly should rest with the Advisory Committee. The Advisory Committee has not met this burden, and the objective of establishing uniformity is itself an insufficient justification."

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "There is an absolute need for uniformity. Trial lawyers and their clients should be able to go into any federal trial court and know what the rules are and not have to waste their money doing 'fifty state surveys' of things as simple as discovery rules."

John R. Dent, 98-CV-036: In the C.D. Cal, general orders are sometimes used to promulgate procedural rules of general applicability. These are a serious trap for the unwary and a source of frustration for the bar. By allowing opting out "by order," the amended rule may be read to authorize such district-wide action by general order. In the Federal Rules of Appellate Procedure, this problem is solved by referring to an "order in a particular case." See Fed. R. App. P. 5(c). There is a risk that a district court might interpret the failure to use the same term in the Civil Rules as inviting (or at least allowing) such use of general orders. This would be undesirable.

Assoc. of the Bar of the City of N.Y., 98-CV-039: Supports uniformity. The opt-out rules might have produced useful results if districts had only chosen from a limited few alternatives when fashioning their rules. This did not happen, however, and the wide disparities in practice that have resulted have had a harmful impact on the judicial system. Balkanization of the legal profession is undesirable, and also favors local practitioners over national practitioners. There are no differences between districts that justify different rules on discovery.

James A. Grutz, 98-CV-040: The W.D. Wash. opted out of the initial disclosure requirement and this has worked well. The disclosure requirement would be wasteful in many cases.

ABA Section of Litigation, 98-CV-050: The variety of discovery rules among the federal judicial districts as a result of the 1993 amendments has been troublesome for practitioners and is inconsistent with the philosophy of a single, uniform federal judicial system. The discovery rules should be the same in all federal courts, subject to Rule 83's provisions for local rules. Therefore, supports the proposed change in mandatory disclosure primarily because it establishes national uniformity. Although some in the Section still oppose mandatory disclosure, they view lack of uniformity among the districts to be even more undesirable. The Antitrust Section supports the amendment because it establishes uniformity, even though it opposes mandatory disclosure.

Charles F. Preuss, 98-CV-060: The elimination of local power to opt out is sound. Uniformity of discovery procedures in all

federal jurisdictions will produce efficiencies and reduce confusion. In the mass tort area, this will be particularly helpful in easing the present burden of having to respond to disparate local disclosure requirements for cases in which the same contentions are made.

Gennaro A. Filice, III, 98-CV-071: Joins with others in strongly supporting greater uniformity procedures in all federal jurisdictions. Uniformity is needed in today's legal environment, where not only the parties, but also counsel, appear in various districts around the country.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Favors elimination of the opt-out provisions regarding disclosure. Variations in practice from district to district spawned by a proliferation of local rules have produced uncertainty and confusion, but have not generated any significant efficiencies within the federal system.

Kelby D. Fletcher, 98-CV-078: Opposes deletion of opt-out. In W.D. Wash. the CJRA Committee concluded that disclosure would not be helpful. Those who practice in this court would oppose this amendment.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: There is no substantial policy reason for different discovery rules in different districts. The time has come for experimentation under the 1993 amendments to end. Therefore strongly recommends elimination of the opt-out provisions.

Frank Stainback, 98-CV-093: Uniformity in the federal system is a must.

Michele A. Gammer, 98-CV-102: (on behalf of Federal Bar Assoc. of W.D. Wash.) Opposes making disclosure mandatory nationwide. Her district opted out across the board. Having reviewed the materials published in connection with the current package of proposed amendments, the W.D. Wash. FBA leadership respectfully disagrees with the mandatory approach proposed by the Advisory Committee. The opt-out approach has been valuable and successful in this district. The district's use of differential case-management techniques has allowed individual judges to implement various approaches that have allowed continuing improvement in judicial administration. Making all districts use a disclosure

provision that has engendered broad opposition raises substantial doubts. This district has manifestly benefitted from the latitude for innovation afforded by the opt-out provisions. Permitting districts to serve as laboratories for experimentation is desirable.

Hon. Lacy H. Thornburg (M.D.N.C.), 98-CV-108: Seriously objects to making the requirements of Rule 26 mandatory. Rule 26(a) disclosure would tend to slow the judicial process.

Hon. Howard D. McKibben (D. Nev.), 98-CV-109: (On behalf of D. Nev.) Expresses concern about the proposed elimination of the ability to modify the requirements of disclosure by local rule.

Hon. Frederic N. Smalkin (D. Md.), 98-CV-110: Strenuously opposes making disclosure mandatory. "[T]he entire tenor of the Advisory Committee's report on this amendment reminds one of a parent's rebuke of a wayward child. It is insulting to the district courts and was put forth in support of a change that has no justification except to serve the end of uniformity in and for itself."

Hon. Richard L. Williams (E.D. Va.), 98-CV-111: Opposes eliminating opt out authority. In 18 years on the federal bench, has never seen a disclosure problem.

Hon. William W. Caldwell (M.D. Pa.), 98-CV-112: Strongly opposed to requiring mandatory initial disclosure in all cases. "[D]istrict courts should be accorded the discretion and flexibility that exists under the present rule." The variations adopted in some districts are important.

Hon. Robert H. Whaley (E.D. Wash.), 98-CV-113: Disclosure has worked very well in the E.D. Wash., and has helped avoid many discovery problems. "As a practitioner in the federal courts of this district prior to coming on the bench, I worked under the rule and found it very beneficial."

Hon. Richard L. Voorhees (W.D.N.C.), 98-CV-114: Opposes mandatory initial disclosure. District courts should at least be able to opt out, as his district has done successfully.

Hon. Milton I. Shadur (N.D. Ill.), 98-CV-115: Believes that opt

out power should remain. His district opted out, and has operated with great success. It would be unfortunate to impose a dramatically different rule from the current national one on the strength of what appear to be a minority of inadequately supported personal preferences. "Although I (and the large majority of the judges on our District Court) have strong views on the subject . . . . I would not push for a repeal of the Rule 26(a)(1) provision to override their beliefs. It seems to me that the rulemakers ought to have equal respect for the views of those of us who differ with them."

Hon. David A. Katz (N.D. Ohio), 98-CV-116: Just reviewed letter from Judge Owen Panner. N.D. Ohio has opted in, and in at least 90% of his cases he orders initial disclosure. "To deprive the individual judge of discretion to order or not to order initial disclosure in selected cases is to deprive the individual closest to the case of the right to determine whether initial disclosures are warranted."

Hon. Prentice H. Marshall (N.D. Ill.), 98-CV-117: Particularly pleased to see elimination of opt out by local rule, although he predicts that there will still be significant numbers of individual judges ordering opt outs.

National Assoc. of Consumer Advocates, 98-CV-120: "The current proposal to eliminate local opting out of Rule 26(a)(1) disclosures is an excellent one that will foster both efficiency and uniformity."

Hon. H. Franklin Waters (W.D. Ark), 98-CV-123: Agrees with Judge Panner that individual courts should have some discretion in determining what is best for their particular court. "I recognize this as just the latest attempt to make us all alike, in my strongly held view very unwisely. . . . Fayetteville, Harrison, Fort Smith, Hot Springs, Texarkana and El Dorado, Arkansas, just aren't like Detroit, Chicago, Philadelphia, Pittsburgh, Boston, New York City, etc., etc., etc." This district has been near the head of the list in terms of efficiency by minimizing red tape; what we now have works well for us.

Hon. David L. Piester (D. Neb.), 98-CV-124: "In small districts such as Nebraska, we often feel that the rules are crafted to the

exclusive needs of the large, metropolitan districts, and I suppose these may be met with similar comments, but on the whole, I personally favor them. I laud the objectives of specificity and national uniformity in these respects, in spite of the inevitable cries of micro-management. I think the bar, particularly those lawyers who practice in several districts, will, too. Local rule peculiarities allow for lawyers to be 'home towned' too much, particularly in areas such as Nebraska, where the 'national firms' don't practice much."

Hon. Jackson L. Kiser (W.D. Va.), 98-CV-125: Opposes making disclosure mandatory nationally. In his district, the overwhelming response was that disclosure would add another layer of controversy. His first preference would be to eliminate disclosure nationwide. His second preference is to make the disclosure requirement optional.

Hon. Andrew W. Bogue (D.S.D), 98-CV-126: Asked by Owen Panner to advise Committee of his feelings. "Succinctly put, I detest the initial disclosure provided by Rule 26 and I believe that it has adversely affected our cases here in South Dakota." He does not believe that there is any present consensus supporting imposition of a national standard.

Hon. G. Thomas Eisele (E.D. Ark.), 98-CV-127: Strongly endorses views of Judge Waters (comment no. 123) and of Judge Panner. In his district they have operated successfully by opting out, and he believes that the Committee's proposal will have serious negative effects on the efficient disposition of civil cases.

Hon. Shelby Highsmith (S.D. Fla.), 98-CV-128: His district opted out, and he believes that the present system, allowing local discretion in configuring discovery parameters, is preferable. "Indeed, at a time when the federal government is promoting decentralization, this change from local option to a national. standard in the federal courts appears to be an anachronism."

Hon. Jack T. Camp (N.D. Ga.), 98-CV-129: He is the Chairman of the local rules committee in his court. It adopted a rule that requires broader disclosure than proposed Rule 26(a)(1). This local provision has been in effect for almost five years and has worked very well, resulting in little additional litigation. "The benefit from putting the burden upon the litigants to

disclose relevant information has far outweighed any of the criticisms of the mandatory disclosures." He sees no reason to adopt a "one size fits all" approach, however. The present rule allows each court to craft a procedure suited to the practice and customs of its bar, and thus allows creativity and experimentation.

Hon. Charles B. Kornmann (D.S.D.), 98-CV-130: Although his district has required initial disclosures, he is opposed to a national rule so requiring. His district may later decide the experiment was a mistake. "Judicial districts do not need solutions imposed from Washington. Judges in the field know best what works in their District. Lawyers simply do not practice in rural areas (where they almost always know personally the opposing lawyer) the way lawyers practice in metropolitan areas."

Hon. Susan Webber Wright (E. and W. D. Ark.), 98-CV-131: At their regularly scheduled meeting, the judges and magistrate judges in attendance unanimously endorse the views of their colleagues H. Franklin Waters (comment no. 123) and G. Thomas Eisele (comment no. 127).

Hon. Gilberto Gierbolini (D.P.R.), 98-CV-132: Opposes the proposal. It fails to take into consideration the idiosyncracies of each local bar and court docket. It also strips district courts of the flexibility needed to handle the discovery process.

Hon. John Feikens (E.D. Mich.), 98-CV-133: Writes in response to memorandum sent by Judge Panner. "The proposed amendment, providing for mandatory initial disclosure, simply makes no sense."

Hon. James P. Jones (W.D. Va.), 98-CV-134: Initial disclosure is not helpful in most cases. Although uniformity is an important object in the federal rules, so is a set of rules that have wide acceptance among lawyers and judges. Mandatory initial disclosure would not have that acceptance.

Norman C. Hile, 98-CV-135: (On behalf of Judicial Advisory Committee, E.D. Cal.) This district opted out in 1993. But given the narrowing of the disclosure requirement, the committee does not have the concerns that it had in 1993. Indeed, the disclosure requirement seems to be essentially the same as, if

not more limited than, what might be compelled pursuant to an initial set of interrogatories.

Hon. Sol Blatt, Jr. (D.S.C.), 98-CV-137: Joins with Judge Panner in opposing elimination of opt-outs, and believes that the majority of district judges in the district also oppose the change.

Hon. Barefoot Sanders (N.D. Tex.), 98-CV-138: Opposes mandatory use of disclosure. He was one of the judges who tried to use the rule when it first appeared, but found that it was creating disputes where none previously existed. "While national uniformity may be theoretically desirable (to assist a relatively small number of attorneys with a 'national' practice), most lawsuits -- at least in this district, and I think we are representative -- are filed and tried by attorneys of the local bar."

Hon. Bruce M. Van Sickle (D.N.D.), 98-CV-139: Opposes national requirement of disclosure. Routine small cases come up where disclosure is simply meaningless. To require it could make litigation too expensive to maintain. "Please get the bureaucracy out of the way and let us hear the cases."

Deborah A. Elvins, 98-CV-141: (on behalf of Civil Justice Reform Act Advisory Group of W.D. Wash.) This group joins in comments of the Trustees of the Federal Bar Association of W.D. Wash. (comment no. 102) Working with lawyers in this community, the judges in the W.D. Wash. have implemented local rules and standing orders to encourage earlier resolution of cases and efficient cost-effective discovery. Strict adherence to the goal of national uniformity may sacrifice gains made in this and other districts without a corresponding benefit or real consensus on what the national rules should be.

Robert G. Doumar (E.D. Va.), 98-CV-142: These proposals, if imposed on this district, will cause further delays. Several years ago, civil cases in the district were handled within a five-month period from filing to trial. Now it is at a seven-month period, and if the changes that are proposed are adopted, he guesses that this will rise to nine months. "Clearly, an initial conference and preparation of a discovery plan is merely another layer placed on litigation." As layers are added to

litigation, middle America is prevented from using the federal courts.

Board of Judges of S.D.N.Y., 98-CV-143: Removing the ability to opt out will result in "an exponential increase in discovery disputes requiring judicial intervention." This district draws a disproportionate share of complex and contentious cases, and these are precisely the kinds of cases in which mandatory disclosure will only increase delay and expense in litigation. Even if disclosure did proceed smoothly in those cases, it would do nothing to advance them because there would undoubtedly be at least as much formal discovery. But experience teaches that disclosure will not proceed smoothly, and instead will require repeated efforts by the court to advance the cases. Parties will not stipulate to suspend in these contentious cases, but will zealously press for whatever advantage they can garner. The express availability of fee-shifting under Rule 37(a)(1) will provide parties in these cases with a litigation incentive they cannot refuse.

J. Frederick Motz (D. Md.), 98-CV-144: At a recent bench meeting, the judges of the court discussed the question and decided unanimously that they agree with the views previously expressed by Judge Smalkin (comment no. 110). After reading the correspondence between Judge Panner and Judges Levi, Rosenthal and Doty, the judges of this district adhere to their previous views in a an addendum. They see a risk of losing the virtue of adaptation to local legal culture that local deviation permits. "Its success should not be sacrificed in pursuit of the illusory goal of national uniformity sought by a small segment of the bar who characterize themselves as 'national practitioners.' In the long run there will be far greater respect and adherence to the Federal Rules if they tolerate a reasonable degree of diversity intheir application among those of us laboring in the field."

Hon. Sarah Evans Barker (S.D. Ind.), 98-CV-145: Opt-out authority should be retained. This district opted out of Rule 26(a)(1). There is no need for disclosure in this district, in which the traditional method of adversarial discovery has done well. Although the goal of uniformity may appear laudable, in practice there are significant variations of type, number, and complexity of cases in districts. "We respectfully submit that we are best situated to assess practice and procedure in our

district."

Hardy Myers, 98-CV-146: (Attorney General of Oregon) The local rules of the District of Oregon provide effective regulation of the discovery process, and opt out of Rule 26(a)(1). This is especially suited to the efficient resolution of the large number of cases handled by the Oregon Department of Justice, which are decided on motions before initiation of discovery.

Stephen J. Fearon, 98-CV-148: Opposes end to opting out. It is too soon to require mandatory disclosure nationwide, and districts that want it can use it under the current system.

Hon. Albert V. Bryan (E.D. Va.), 98-CV-150: Opposes a nationwide requirement. If there is an outcry from the bar about lack of uniformity, he hasn't heard it. Nor has he seen any case in which disclosure would have permitted the case to have been resolved in a more inexpensive and efficient way. In most cases, it just adds to the volume of paperwork and expense of litigation.

Hon. Harry Lee Hudspeth (W.D. Tex.), 98-CV-151: Opposes mandatory initial disclosure. The CJRA plan adopted in his district has worked well, and it is far superior to the concept of initial disclosure embodied in the proposed amendments. "Our District would be much better off continuing to operate under our Plan rather than under your Rule."

Chicago Council of Lawyers Federal Courts Committee, 98-CV-152: Favors elimination of local option to opt out of the rules in order to foster national uniformity in federal practice.

Seventh Circuit Bar Association, 98-CV-154: "[W]e agree that it is time to bring uniformity to the initial disclosure provisions mandated by Rule 26(a)(1). At present, district courts within our Circuit have a 'striking array of local regimes,' which make discovery practice both within courts in the same district as well as in nearby districts unduly complicated and confusing. We support the need for uniformity in the initial disclosure process."

National Assoc. of Railroad Trial Counsel, 98-CV-155: Believes that the opt-out language should remain. Reports from members

that practice in opt-out districts indicate that the old system of discovery works well in those districts. Leaving the opt-out option available would allow the Committee to monitor the two systems to determine which is the better procedure.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Opposes the change. Although there is a minority view within the Chicago Chapter that opting out should not be available to a court by rule, a majority of the Chapter believes that courts should be free to enact rules waiving compliance with Rule 26(a)(1).

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports changes to achieve uniformity.

Hon. Terence P. Kemp (S.D. Ohio), 98-CV-161: This district opted out, and there has been no adverse result. The Local Rules Advisory Committee has recommended that the district continue to opt out. Local courts are many times in the best position to judge what procedures work best in their particular district.

Richard C. Miller, 98-CV-162: "I whole heartedly agree with the proposal to standardize Rule 26. As you well know, the proliferation of both the amount and type of local rules make it practically impossible for an attorney handling a case outside his normal jurisdiction to avoid some procedural mistake during the course of litigation."

Philip A. Lacovara, 98-CV-163: This change will go a substantial way toward reducing the balkanization of federal practice that has evolved in recent years. There is still a risk that individual judges will institute their own regimes via "standing" or "chambers" orders. In large, multi-judge districts, these rival the Federal Rules themselves in length and present practitioners with a dizzying array of idiosyncratic demands.

Hon. J. Garvan Murtha (D. Vt.), 98-CV-164: Opposes eliminating the opt-out, evidently on behalf of the judges of the district. After consulting with its advisory committee, the court found there was strong sentiment for continuing to encourage the spirit of cooperation without additional discovery rules that would result in added expense. "We are a small, rural district, and most of the attorneys who practice in our courts know each other and exchange information in a cooperative and prompt manner."

Oregon Trial Lawyers Ass'n, 98-CV-166: Opposes the elimination of the opt out provision and endorses the position of the Local Rules Advisory Committee in favor of retaining the opt-out.

Hon. Jerome B. Friedman (E.D. Va.), 98-CV-168: There is no reason efficient courts should be penalized with this change in the rules. Leave the opt-out provision in the rules.

Hon. Henry Coke Morgan, Jr. (E.D. Va), 98-CV-169: Objects to elimination of opt-out provision. "[I]t seems apparent that there is a movement to eliminate the local rules entirely. It is clearly the objective of large multi-state law firms to create a single set of national rules. This proposed change is a step in the direction of ceding the control of the court's docket from the judge to the attorneys." Each district has different problems and should be given the latitude of opting out of Rule 26 "and similar discovery rules."

Hon. Richard A. Enslen (W.D. Mich.), 98-CV-170: Writes to relay the unanimous opposition of the judges in his district to the abolition of the opt-out. The proposed amendment would interfere with this district's differentiated case management practices. The practices were developed when the district was a demonstration district under the CJRA, and obviously Congress intended that the rulesmakers pay attention to the demonstration districts in fashioning future approaches to case management. But the proposed amendments don't show any effort to do so, and instead would impede this court's practices. A principal rationale for uniformity is concern for practitioners who appear in more than one district. We consider this concern to be exaggerated. The 1995 amendment to Rule 83 requires that local rules be numbered in a consistent way, so the outsider can find pertinent provisions without difficulty.

Hon. Claude M. Hilton (E.D. Va.), 98-CV-171: Writes to express the views of the judges and bar of the E.D. Va. None of the judges favors a change that would eliminate the opt-out provisions.

Prof. Ettie Ward, 98-CV-172: Fully supports the changes which reduce the opportunity for nonuniformity in the federal rules. With the sunset of the CJRA, there is no longer a need to defer to local variations. Moreover, the fact that some districts

opted out of provisions that did not permit that local variation shows there is a need for action. This change would return to the original vision of the Federal Rules.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) The proposals will reduce confusion arising out of varying local court practices.

Gary M. Berne, 98-CV-175: The empirical data gathered by the FJC do not support the Advisory Committee's statement that adopting a uniform national rule has "widespread support." Although that was the second most desired change, even the most desired change received the support of only 18% of respondents.

Hon. Robert E. Payne (E.D. Va.), 98-CV-176: Abolishing the opt-out provision would strip Rule 26(a)(1) of the only legitimacy which it enjoys because the opt-out is the only reason it was approved by the Supreme Court and Congress. Given these circumstances, it is a "fundamental distortion of the record to argue . . . that the initial disclosure provision is imbued with the mantle of uniformity which attends the promulgation of most federal rules." Moreover, the empirical data do not support the proposal to eliminate the opt-out provision, because a study based on the responses of only 1,000 lawyers "is a statistically insignificant basis upon which to reach any valid conclusions because it represents such an insignificant fraction of the lawyers in practice in federal court." The FJC study is also defective because it asks about "concerns" about disclosure without defining "concern." A significant impetus for abolition of the opt-out provisions is the desire of large law firms to avoid the need to learn, and to conform with, local disclosure rules. Certainly, it is not asking too much of lawyers who desire to practice in different courts to learn and obey the rules of those courts. If litigants don't understand why the rules are different in different places, "[i]t is the responsibility of lawyers to explain that relatively simple proposition to their clients and, if that task is not performed successfully, it is the fault of the lawyers, not of any provisions of the rules of procedure."

Hon. Leonie M. Brinkema (E.D. Va.), 98-CV-177: Opposes the change because it would slow the district's civil docket. The local bar was so concerned about this prospect that it sent a

representative to testify at one of the Committee's hearings. Slowing down the E.D. Va. docket runs counter to the Congressional goals of reducing delay and expense. This "one size fits all" view is a serious mistake. Our federal judicial system is strengthened by the ability of individual districts to experiment with new ways of conducting business.

Federal Bar Council's Committee on Second Circuit Courts, 98-CV-178: The proposed elimination of the opt-out ignores the fact that different courts need different rules for their respective cases.

Greg Jones, 98-CV-179: Opposes elimination of opt-out power. W.D. Ark. has opted out. Mandatory disclosure originated in the seedbed of discovery abuse, and the lawyers who practice there now want to export their remedial steps to areas of the country that have no such culture. The concern about familiarity with varying local practices seems a silly ground for removing the ability to opt out. The concern that clients are bewildered is farcical. He has never met a client who would oppose economizing on discovery costs.

Public Citizen Litigation Group, 98-CV-181: Although we generally support uniformity in the discovery rules, Rule 26(a)(1) is still relatively new and there has not been sufficient experience with it to evaluate whether requiring initial disclosures is preferable to permitting the use of traditional discovery devices from the outset of litigation. Therefore oppose making it mandatory at this time. Requiring all districts to implement the same disclosure scheme will make it more difficult to evaluate whether requiring initial disclosures is beneficial because there will be no opportunity to compare the experience of districts that have one version with those that have another. The 1993 amendments reflected a deliberate decision to permit this sort of experimentation, and that should not be reversed until there is more evidence about whether it reduces the cost. Regarding requests for admissions, however, the Group opposes continuing the authority to adopt local rules limiting these matters. They are underutilized and are not readily susceptible to abuse. Moreover, if national uniformity is a goal these should be treated the same in all districts.

Michigan Protection & Advocacy Service, Inc., 98-CV-184:

Supports deleting the opt out provisions, insuring uniform application of Rule 26(a)(1) throughout the country.

Federal Practice Committee, Oregon State Bar, 98-CV-185: Endorses the opposition of the Local Rules Advisory Committee to abrogating the opt-out provisions (attached).

New Hampshire Trial Lawyers Assoc., 98-CV-186: D.N.H. opted out, and that decision was well founded and supported. Disclosure has not been an unqualified success, and the original criticisms remain valid. Opposes the change.

Ohio Academy of Trial Lawyers, 98-CV-189: Opposes the change. Most lawyers do not like disclosure.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: "The current rule seems to be working well. The fact that a large number of districts have opted out of the mandatory disclosure requirement is evidence that in many districts such a requirement is not necessary and may in fact be counterproductive."

Philadelphia Bar Assoc., 98-CV-193: Supports uniformity. The differences among the districts have made a national practice difficult. In their astonishing proliferation and variety, these local differences have become dangerous traps for the innocently uninformed or, at least, an unnecessarily cumbersome burden for multi-district practitioners.

Washington Legal Foundation, 98-CV-200: Agrees that it is crucial to eliminate the balkanization of discovery rules that has developed since the 1993 amendments. Presently, litigators who practice in more than one district are largely confused regarding the disclosure requirements imposed on them in any given case. This confusion has led to considerably less disclosure than would have occurred under any reasonable, uniform system. It is less important what particular disclosure requirement is ultimately adopted than that the requirement apply nationally.

Trial Lawyers for Public Justice, 98-CV-201: Currently there is inordinate procedural diversity on disclosure in the district courts. The sheer diversity of procedures has sadly balkanized the federal system. In some parts of the country, parties take

the responsibility to disclose seriously, but in others they do not.

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: Removing the opt out provision and applying disclosure nationwide is a step forward.

Hon. Stanwood R. Duval, Jr. (E.D. La.), 98-Cv-206: Districts should retain the right to opt out. Disclosure is superfluous since interrogatories and requests for production will be propounded anyway.

Hon. Marvin E. Aspen (N.D. Ill.), 98-CV-207: Opposes removal of opt-put authority. This district's experience without disclosure has been a happy one, for attorneys can ask for initial disclosure if they want it, and the court can so order. More generally, the court is not anxious to provide contentious litigants with another area to dispute. Discovery presently works well in the district, which has the shortest average case disposition time of any major metropolitan district.

Hon. T.S. Ellis, III (E.D. Va.), 98-CV-209: Strenuously objects to removal of opt-out authority. His service on the Standing Committee made him aware that rule changes are carefully and thoroughly considered. But there is absolutely no showing that elimination of the opt out provision will yield benefits. "I continues to be puzzled by the mindless advocacy of national uniformity in all rule-making details and minutiae. Insistence on blanket uniformity ignores the positive aspects and characteristics of local legal cultures, which surely exist." In an addendum Judge Ellis concurs in the views of Judge Payne (comment no. 176) and of Judge Panner.

Hon. Lawrence P. Zatkoff (E.D. Mich.), 98-CV-212: On behalf of all the judges of the district, opposes mandatory initial disclosure without the ability of the district to opt out. This district opted out, and believes the change would be both unwarranted and unnecessary. If mandatory disclosure is imposed, it may undermine discovery cooperation and lead to many more discovery disputes.

Federal Courts and Practice Committee of the Ohio State Bar Assoc., 98-CV-213: Uniformity for its own sake is a hollow

principle, and the reasons for eliminating opt out authority are not persuasive. Although the two districts in Ohio took different approaches, the bar has not suffered from this lack of uniformity. After all, Ohio has 88 different counties with their own local courts, and their practices vary. The suggestion that clients can be bewildered by conflicting obligations in different districts is farfetched.

F.B.I., 98-CV-214: Opposes the change because it will have a negative impact on cases affecting the FBI and its employees, the majority of which are dismissed on the basis of procedural motions before discovery.

Exec. Comm., Federal Bar Assoc., W.D. Mich., 98-CV-215: Opposes elimination of opt out. These proposed rules would negate a case management program in this district that has worked well for litigants.

Michigan Trial Lawyers Assoc., 98-CV-217: Supports the change toward greater uniformity in discovery rules.

Comm. on the Fed. Cts., N.Y. County Lawyers' Assoc., 98-CV-218: Opposes elimination of opt-out. The S.D.N.Y. judges concern has been borne out by anecdotal experience by Committee members with automatic disclosure in other districts. But the Committee does support threshold disclosure of "witness lists and damages computations."

Fed. Practice Comm., U.S. Dist. Ct., N.D. Iowa, 98-CV-219: The overwhelming majority of attorneys practicing in the federal courts in this state oppose the proposal to eliminate the opt-out provision. The discovery process presently works as it should in this state's district courts.

Helen C. Adams, 98-CV-220: Concurs in comments of Federal Practice Comm. for N.D. Iowa (comment no. 219). "We subscribe to the adage that 'if its not broken, don't fix it.' Litigation in our federal courts has proceeded smoothly without the mandatory disclosure requirement."

Hon. Stephen M. McNamee (D. Az.), 98-CV-221: Supports making initial disclosures mandatory. He actively manages a large civil docket and enforces the current rule. He has not found that it

is onerous or misplaced. He has found that there is little gamesmanship and few disputes because the rule is clear. Moreover, it forces the parties to look at the case realistically.

Hon. James L. Graham (S.D. Ohio), 98-CV-222: Strongly feels that mandatory initial disclosure complicates the discovery process and breeds unnecessary discovery disputes. Therefore opposes eliminating opt out rights.

Michael E. Kunz, Clerk of Court, E.D. Pa., 98-CV-224: Believes that the best course of action is adoption of nationwide rules of discovery that no court or judicial officer can opt out of. In his court, the court as a whole opted out, but four individual judges opted back in. Discussion at Advisory Group meetings leads him to the position that uniformity is necessary in order for counsel to act with total confidence in litigating in the federal courts.

National Assoc. of Independent Insurers, 98-CV-227: Supports the change. The general elimination of local rules standardizes the federal court system, which provides consistency to the parties litigating there.

Jon Comstok, 98-CV-228: Supports the change. The proliferation of local rules and individual judges' "standing orders" has contributed greatly to the cost of litigation.

Edward D. Robertson, 98-CV-230: "Executive Branch bureaucrats have long tried to write one-size-fits-all rules without success in most cases; the federal judiciary ought to learn from that experience and allow district judges to manage the cases as needed."

Martha K. Wivell, 98-CV-236: Supports the recommendation for uniformity.

Hon. James C. Cacheris (E.D. Va.), 98-CV-245: Joins other judges in opposing the requirement for disclosure without opt-out provision. This district has operated efficiently without disclosure, and it is difficult to have a "one size fits all" rule. Local conditions ought be be permitted to control.

Hon. Gerald Bruce Lee (E.D. Va): Opposes elimination of the opt-out provision because it would result in negative consequences in his district. Districts that have successful delay reduction programs should be allowed to opt out.

Hon. Rebecca Beach Smith (E.D. Va.): Joins her colleagues in strongly opposing elimination of the opt-out authority. These proposals would only delay the docket in her district.

Standing Comm. on U.S. Courts of State Bar of Mich., 98-CV-250: At a regularly scheduled meeting of the committee, members present voted unanimously to oppose elimination of the power to opt out of disclosure. Disclosure would add to the litigation burden and result in motion practice.

Jeffrey J. Greenbaum, 98-CV-251: (attaching article he wrote for the New Jersey Lawyer) The elimination of the opt out power is a welcome change.

Hon. Ernest C. Torres (D.R.I.), 98-CV-252: On behalf of all the judges of the court, expresses opinion that the proposed requirement of mandatory disclosure would be undesirable. It results in needless disclosure of information that may not be of interest to the parties. It also creates another layer of contentious litigation.

Hon. Jerry Buchmeyer (N.D. Tex.), 98-CV-259: Opposes the amendment. In his district disclosure has not worked. Agrees with Judge Barefoot Sanders (comment no. 138).

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l Corp.) Navistar supports uniformity of discovery procedures in all federal jurisdictions. Otherwise the committee's efforts to curb discovery abuse could be too easily thwarted.

Hon. Raymond A. Jackson (E.D. Va.), 98-CV-263: Opposes elimination of the opt-out provision and agrees with Judge Owen Panner and other judges of his own district. Elimination of the opt-out provision will undermine the effective managment of dockets in districts such as E.D. Va., where the courts have adopted reasonable discovery procedures to decrease case processing time.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports the amendment in terms of a nationally uniform approach to the mandatory implementation of Rule 26.

Testimony

Baltimore Hearing

Gregory Arneson, Tr. 30-45: (Representing New York State Bar Assoc. Commercial and Federal Litigation Section) Opposes expanding application of disclosure. The problem cases are the high stakes, complex commercial litigations, and in those cases disclosure does not work. Not sure that the opportunity to stipulate out or object will solve the problem. (Tr. 41-44)

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense Counsel) Although he appreciates the need for uniformity, he would have preferred a rule abolishing disclosure altogether. In the Maryland state courts, the question whether to adopt disclosure like the current proposal was debated a few years ago, and there was unanimity among defense and plaintiffs' counsel that it should not be adopted. So he would prefer a uniform rule of no discovery. (Tr. 53-54)

C. Torrence Armstrong, prepared stmt. and Tr. 106-17: The three chapters of the Federal Bar Assoc. of Norfolk/Newport News, Richmond, and Norther Virginia uniformly oppose the proposal to eliminate the opt-out feature of Rule 26(a)(1) and the parallel features in Rules 26(b)(2) and 26(d) and (f). These changes will have a negative impact on the operation of the E.D. Va., which has "the most effective docket management system in the United States." The district's local rules and scheduling orders do not permit delay, and the proposed changes would add delay. Disclosures would not go forward until two weeks after a conference, and perhaps also a hearing on objections. Therefore a case could remain in suspense for an extended period. In the E.D. Va. this does not happen, and judges frame their scheduling orders in accord with what will work best. Formalistic rules of the sort proposed are needed only to address the concerns caused by irresponsible lawyers or courts that do not manage their dockets efficiently. Most of the other changes proposed are probably salutary, but they seem to be essentially the same as

already followed in the practice of the E.D. Va. Indeed, the sort of disclosure required under the proposed amendment corresponds to the sort of things that discovery covers now in the district. The aggregate effect would add one to two months to the district's ordinary progress in a case. But there has been no formal study of the effectiveness of the Rocket Docket, which was not included as a pilot district under the CJRA. The whole thing depends on the credibility of the system, and these changes would impinge on it. You can't develop a rule that makes judges accessible, but they are in the E.D. Va.

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: Endorses national uniformity and favors eliminating the opt-out authorizations from Rule 26(a)(1) and Rule 26(b)(2). But he senses that opposition to mandatory automatic disclosure remains firm and deeply rooted. Thus, although the proposed amendment limiting disclosure to supporting material is a positive step, it may be time to jettison the disclosure concept altogether. Fundamentally, the bar has not accepted the idea captured in the 1993 disclosure provisions. It has great theoretical appeal, but does not work in the adversarial system. The shift to disclosure only of supporting material is a step in the right direction. But the episode has been very painful for the bar, and it might well be better to scrap the idea altogether. Even in the E.D.N.Y, which started out with the 1991 version, disclosure was down-sized and didn't work the way they wanted it to work.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Strongly supports the effort to achieve greater uniformity in discovery procedures in all federal jurisdictions. Removing the opt-out authorizations can reduce confusion now resulting from diverse local standards, and reduce the burden imposed on counsel.

San Francisco Hearing

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) Lack of uniformity is a trap for the unwary, and is expensive. LCJ supports restoring uniformity to the federal judicial system.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell strongly supports national uniformity of discovery rules as proposed with respect to Rules 26(a)(1),

(b)(2) and (d). The current patchwork of varying rules leads to confusion, disparate results in similar cases, and potential traps, even for the vigilant. Such uniformity is desirable so long as the initial disclosure requirement is modified as proposed in the amendments. He is in the position of being both a lawyer and a client, in that he works in house. The problem is not just what lawyers have to face from district to district, but also that the parties themselves face these traps of trying to deal with broad differences among districts. This has proved quite difficult to handle.

H. Thomas Wells, prepared stmt. and Tr. 47-60: Supports uniformity. The experiment with local rules regarding basic discovery and disclosure has been difficult to deal with for the practicing bar. Even in a state such as Alabama, there are three different federal districts, and three different local rules regarding discovery and/or disclosure. Multiplied by the myriad options among the districts nationwide, this shows that the ideal of one set of procedural rules for all federal courts has been dealt a serious setback. This effect runs counter to the promise of Rule 1 that the rules be construed and administered to achieve the just, speedy, and inexpensive determination of every action.

Charles F. Preuss, Tr. 60-67: This is a marvelous proposal to save time, expense and money for everybody. In the mass tort area, it is very frustrating to have to get everything straight in every district. It really streamlines litigation if lawyers can know that they are dealing with the same set of rules in all districts.

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: Opposes making disclosure mandatory nationwide. The rules should not be changed for all cases based upon problems in exceptional cases. His district (D. Ore.) opted out of disclosure and has found this decision wise. Requiring adherence to the schedule prescribed in Rules 26(a)(1), 26(d) and 26(f) will delay litigation in his court and make it more costly. The proposals to require national uniformity are not based upon sufficient study. If the Committee can come up with a good rule, district judges will support it even if it isn't exactly what they might prefer for themselves. Right now, only about 50% of the courts have tried disclosure, and 83% of lawyers surveyed said that they didn't think that it saved money. As a result, district judges

are not satisfied that disclosure is the right answer. What lawyers want is access to judges, not disclosure. Rule 16 conferences should be earlier. We try to do that in Oregon, and we don't have any problem in our district. This disclosure requirement will delay things. Getting lawyers together, even on telephone conferences, will take added time. If one side objects to disclosure, there will be additional delay to resolve that dispute. There are no standards to tell the judge how to resolve objections to disclosure. Meanwhile, discovery is stopped, even if there is an urgent matter like a motion for a preliminary injunction. Even though there are as many reliefs as can be included, there's nothing to get the parties into court until there is a Rule 26(f) conference. At the conference, lawyers will have great difficulty determining what to disclose due to notice pleading. Determining what is impeachment evidence, for example, may be quite difficult. Anyone who makes a mistake and omits something from disclosure faces the risk of serious sanctions later in the case. In his district, they try to get the initial scheduling order in place as soon as possible, and he is concerned about delaying that process. The idea is for the judge to set up a telephone conference with the lawyers as soon as there is a response to the complaint by the defendant. Under the proposal, it won't be possible to get uniformity because there will be differences among judges about when to sustain objections to disclosure. In trying to get uniformity, we are rushing to judgment.

James Hiller, Tr. 87-97: (President of Oregon Chapter of Federal Bar Assoc.) Wants to emphasize how things are handled in his district. When a case is filed, they get an initial scheduling order that says discovery is to be completed in 120 days. Under the disclosure requirement, it would probably be 120 days before they even had their conference. Often the 120 days for discovery has to be extended, but there is a firm push right from the start to get to it and move the case. He can almost always get a motion scheduled in seven days. If he has a problem in the middle of a deposition, he can usually get an answer in about seven minutes. There is a local rule that encourages lawyers to make telephonic contact with the court about problems in depositions, and it has worked quite well. They have had pretrial disclosures like Rule 26(a)(3) for years and years. Most cases get to trial within 12 months. When the automatic disclosure system arrived in 1993, almost everyone thought it was

a bad idea. All the lawyers in Oregon could envision was another layer of discovery. Everyone would stipulate around the rule now proposed. He would object to an interrogatory asking him for all the witnesses that support his denials on the ground that it is overbroad. He sees no uniformity issue regarding traps for the unwary because his district is saying you don't have to do something, not that you do. The solution is to insist on two choices, no disclosure at all or the national rule regarding disclosure, and then there wouldn't be any problem of traps for the unwary.

Prof. Lisa Kloppenberg, Tr. 97-99: She has a lot of sympathy for seeking uniformity, but with discovery that doesn't seem such a big issue given that there are not discovery problems in most cases. The concern is delay and expense. We need better studies comparing districts that are doing disclosure with those that are not.

Mark A. Chavez, prepared stmt. and Tr. 108-17: Supports the efforts to create national uniformity by eliminating the ability of individual district courts to opt out of the mandatory disclosure requirements by local rule.

Robert Campbell, Tr. 117-30: (Chair, Federal Civil Rules Comm., Amer. Coll. of Tr. Lawyers) It is important that we have a national rule on discovery, not a rule of confederate states. The legal tender is one that should be understood by everybody so we don't engage in forum shopping or other games like that. Moreover, disclosure seems to be gaining currency in many places. In D. Mass., for example, after the district decided to opt out it developed its own rule that is even broader. (Tr. 127-28) We have reached a place where there has been sufficient experimentation.

Anthony L. Rafel, Tr. 130-40: (President of Fed. Bar Assoc. for W.D. Wash., and appearing on its behalf) Opposes elimination of local option. His district opted out, and has found that current practices work very well there. It has had an experience much like that in the D. Ore. The judges use differential case management to make things efficient. There is early alternative dispute resolution. There is already active case management, and no significant problems of cost or delay to be addressed in this district. The E.D. Wash. did not opt out, but there have not

been problems of confusion among lawyers in Washington as a result. To insist on uniform local rules will force individual judicial preferences underground, not end them. In that way, it will make it harder to find out what rules will be enforced in the court where you are appearing. The disclosure rule is highly controversial at the moment, and there is not sufficient empirical data to justify enforcing it where it is opposed.

Weldon S. Wood, Tr. 140-46: Uniform application of the rules across the country is essential. Lawyers should know what is required of them regardless of venue. When the rules are in harmony nationwide, it is possible to develop a nationwide body of precedent interpreting these uniform rules.

Gregory C. Reed, Tr. 146-55: Having national uniformity is very important. Otherwise people will forum shop for a court with discovery rules they like.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. counsel of Houston Indus., Inc.) Supports eliminating opt out authority. HII manages its litigation out of its Houston offices, so uniform national discovery rules will be beneficial.

Thomas Y. Allman, prepared stmt. and Tr. 162-74: (General Counsel, BASF Corp.) Strongly supports national uniformity. Heard statements of others about disclosure slowing cases down. He found that surprising since it seems to him to speed cases up. He has been particularly pleased with what he has seen in Dallas. (Tr. 172)

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: His preference would be to eliminate disclosure altogether, but imposing national uniformity and limiting disclosure to information supporting the claims and defenses is likely to eliminate the most troublesome aspects of disclosure, given the safety valves of stipulation and objection.

Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: Thinks that with regard to disclosure, there must be at least 50 variations. She had a handy pocket guide to the opt-in and opt-out districts for her nomadic practice. The goal of uniformity that is embedded in the

produced it won't be produced.

Daniel Fermeiler, Tr. 188-93): He has found that the activism in managing cases in the N.D. Ill. has been effective in dealing with discovery problems. Nevertheless, for a practicing lawyer, uniformity has its benefits. If one appears in jurisdictions that one does not ordinarily appear in, uniformity gives some refuge on knowing how to practice. Uniformity also alleviates forum shopping, or at least the perception of forum shopping.

Linda A. Willett, prepared stmt. and Tr. 217-26: (Assoc. Gen. Counsel, Bristol-Myers Squibb Co.) Favors uniformity. Nowhere has the proliferation of local rules had a more pronounced impact, or a more negative one, than in mass tort litigation. The vast number of filings in different jurisdictions with different discovery rules translate into exorbitant and uncontrollable discovery costs. Squibb has to retain local counsel in every jurisdiction because of local differences. "The crazy-quilt of local rules and standing orders greatly increases discovery costs by confronting litigants with a Hobson's choice: either pay national counsel to spend significant time navigating the rules peculiar to each district, or hire local counsel in every venue in which an action is filed."

Chris Langone, Tr. 251-259: (appearing on behalf of Nat. Assoc. of Consumer Advocates) NACA strongly supports eliminating the local opt-out.

Kevin E. Condron, Tr. 259-67: National uniformity should reduce costs to corporate litigants, particularly in conjunction with the narrowed disclosure rule.

Rex K. Linder, prepared stmt.: Reestablishing national uniformity of discovery rules is welcome. It lessens the burden imposed on counsel to vary disclosure practices depending upon local rule. This will reduce confusion and acknowledges the recognition that lawyers are increasingly involved with litigation in multiple districts.

(b) Narrowing the disclosure obligation to supporting material

Comments

Alfred W. Cortese, 98-CV-001: (These comments--which reappear in regard to other topics--were submitted on behalf of the Chemical Manufacturers Assoc., the Defense Research Institute, the Federation of Insurance and Corporate Counsel, the International Assoc. of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers and the Product Liability Advisory Council. This listing will not be repeated each time this comment is cited.) These groups' strong preference would be the elimination of prediscovery disclosure altogether and replacement with a sequenced core discovery process. They agree that, at a minimum, disclosure should be required only of material that will support a party's own position, and that the proposed change eliminates the dilemma that confronts counsel under the current rule.

Edward D. Cavanaugh, 98-CV-002: This change is to be commended. Mandatory automatic disclosure makes sense in the abstract, but has encountered too much resistance in practice to be effective. The amendment "may salvage whatever is worth keeping" in disclosure.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: The change does not solve the problem. "In order to determine which documents support its position, a party will likely have to review the same documents that it would review if it were producing documents 'relevant to disputed facts alleged with particularity.'" This review has to be performed when the case is in its infancy, and will likely lead to overproduction. Moreover, if "defense" means denial of plaintiff's allegations, disclosure under the proposed rule could be even broader than under the current version, which is limited to disputed facts alleged with particularity. This effort still resembles doing the job of opposing counsel. The Section is also opposed to Rule 26(a)(1)(C) (to which no amendment is proposed) because it is too difficult to make the required computations early in complex litigation. Finally, it also opposes production of insurance agreements as prescribed by present Rule 26(a)(1)(D). As was formerly the case, this should await a discovery request.

Maryland Defense Counsel, Inc., 98-CV-018: Would have strongly preferred a national rule abolishing disclosure. In Maryland, both the plaintiffs' and defendants' bar opposed disclosure. Admits that the revised rule is in some respects better than the current rule, but fears the removal of the particularity requirement. Strongly urges the committee to reinject into the rule or the Note the concept that a defendant's capacity to make disclosure is in direct proportion to the specificity of plaintiff's allegations.

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "There is absolutely no need or logic in the attempt to force disclosure of anything that might be relevant to not just a party's claims or defenses, but the other side's claims."

Linda A. Willett, 98-CV-038: (Assoc. Gen. Counsel, Bristol-Myers Squibb Co.) Favors sequenced disclosure in which plaintiff would have to provide defendant with disclosure before defendant would have to provide anything. Concerned that current change could actually expand the disclosure requirements on defendants in some instances, and that elimination of particularity requirement would worsen the situation for a defendant. Therefore favors a phased disclosure process, but does not see that the current proposals implement that approach.

Assoc. of the Bar of the City of N.Y., 98-CV-039: Supports the narrowing of disclosure. The present rule jeopardizes the attorney-client relationship because it requires the lawyer to reveal what is discovered about the client regardless of whether it is good or bad. The narrowed language would avoid this problem.

James A. Grutz, 98-CV-040: "[T]he whole idea of 'discovery' is destroyed with this proposal, and harmful information can be hidden."

Thomas J. Conlin, 98-CV-041: The change would gut the benefit of the disclosure rule. If there is to be mandatory disclosure, it should not be so lopsided in favor of producing party.

Scott B. Elkind, 98-CV-042: The change will lead to abuse. The process of litigation should not be a game of "hide and seek,"

where documents are submerged and produced only upon special request. The current version of disclosure should be given full effect, backed by sanctions.

John Borman, 98-CV-043: "[T]his rule change is ludicrous, because the proposed narrowing of the rule runs counter to the entire purpose of the mandatory disclosure rule, and will make it even less productive, informative, and useful than it already is." It will free defendants from a significant portion of their mandatory disclosure obligations.

Donald A. Shapiro, 98-CV-044: Mandatory disclosure should require disclosure of all relevant information. How otherwise is the opponent to obtain information? Moreover, the change would make the responding party the arbiter of what constitutes discoverable material. Mandatory disclosure should remain as it is.

Michael J. Miller, 98-CV-047: The change would be harmful to any individual seeking redress from the federal courts. The entire purpose of discovery is to require full disclosure.

ABA Section of Litigation, 98-CV-050: Views the proposal to be a substantial improvement over the 1993 version because it eliminates the need to disclose information supporting an adversary's claims or defenses without an appropriate discovery request. This was a major objection to the 1993 version.

Ellen Hammill Ellison, 98-CV-054: Opposes the change. In some cases it would cripple the plaintiff's ability to discover vital evidence usually withheld until court orders force production.

Richard J. Thomas, 98-CV-057: (On behalf of Minn. Defense Lawyers Ass'n): Strongly supports narrowing the scope of disclosure. The current rules create an unsolvable conflict of interest for counsel who are required to disclose adverse information.

Laurence F. Janssen, 98-CV-058: This amendment is good as far as it goes, but he questions whether disclosure really narrows issues or saves time and money. Phased discovery is more efficient and less costly.

Charles F. Preuss, 98-CV-060: This change will eliminate one of the most fundamental objections to the present rule and should be adopted. A party should not be required to make the adversary's case or to speculate as to the meaning of the adversary's pleading. He urges the Committee to go beyond the present recommendation to consider a sequenced discovery process.

Lawyers' Club of San Francisco, 98-CV-61: Opposes the change. This revision would constitute a step backward. There does not appear to be any strong justification to alter the existing disclosure obligation. Allowing parties to withhold damaging information from the initial disclosure would impede early resolution of litigation and increase the burdens and costs of discovery.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Opposes narrowing the disclosure rule. Disclosure has worked well in this district, and can work well in others. Judges in this district were strongly of the view that the current version of disclosure has had a positive effect. Lawyers had a more mixed view. The district's rule tracked the language in the 1991 Advisory Committee proposal, and was broader than the one adopted nationally in 1993.

Michael S. Allred, 98-CV-081: Opposes the change. "The idea that in an initial disclosure a defendant is not required to disclose information which he deems to be harmful to his position is grotesque."

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Supports the revision of the scope of disclosure as a good balance between competing arguments in favor of the broadest disclosure provisions and against disclosure altogether.

Frank Stainback, 98-CV-093: Limiting the scope of disclosure is a welcome change. The present rule requires counsel to practice his or her adversary's case, a concept that runs counter to our system of jurisprudence.

Michele A. Gammer, 98-CV-102: (on behalf of Federal Bar Assoc. of W.D. Wash.) The amendment replaces terms that are well understood in practice and the case law--"relevant to disputed facts"--with a potentially problematic new term that is not

easily susceptible to interpretation. The new standard will require judicial construction and clarification, and will place undue emphasis on the pleadings, which can be drafted in an expansive or restrictive manner to suit a party's interests.

Hon. Howard D. McKibben (D. Nev.), 98-CV-109: (On behalf of D. Nev.) Supports the change, which would avoid the concerns of the bar.

Hon. Prentice H. Marshall (N.D. Ill.), 98-CV-117: Pleased to see the narrowing of the disclosure obligation.

National Assoc. of Consumer Advocates, 98-CV-120: Opposes the change. The experience of NACA members with the current rule is that it is virtually impossible to obtain inculpatory information without a discovery fight. Accordingly, concerns about misbehavior by defendants prompt fights about disclosure. In these cases, the cost of formal discovery for information helpful to plaintiffs may be too great, so retaining the disclosure requirement as to that information is important. Limiting the obligation to supporting information makes it unimportant since a party always has an incentive to disclose its supporting information. But even there the proposal has a gap for impeachment information, and that exception should be deleted. The fact that impeachment information is exempted from pretrial disclosures under Rule 26(a)(3) is inapposite, because that is limited to what the party intends to use at trial. No similar reason exists for cloaking otherwise-discoverable impeachment information as exempt from disclosure.

Hon. David L. Piester (D. Neb.), 98-CV-124: Expresses concern about the exemption of "impeachment" materials from disclosure. He has found that lawyers will try to excuse their failure to disclose on the argument that the information is to be used in the rebuttal case. In his district, the court adopted a definition to deal with the problem: "'Impeachment' shall mean only (1) to attack or support the credibility of a witness or (2) to attack or support the validity of or the weight to be given to the contents of a document or other thing used solely to attack or support the credibility of a witness. It does not include evidence which merely contradicts other evidence."

Prof. Beth Thornburg, 98-CV-136: (enclosing copy of her article

196 and is not separately summarized) This is one of the all-time bad ideas in American jurisprudence. Very little discovery is needed to support a party's position. What is always needed through discovery is information that is damaging to your opponent's position.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes narrowing the disclosure obligation, noting that in 1993 the numerical limitations on certain discovery activities were tied to the introduction of disclosure and that curtailing disclosure calls for lifting those limitations. But those limitations are now to be imposed nationally at the same time that disclosure is narrowed. Views the new standard as narrower because it looks to claims and defenses rather than factual disputes at issue in the case. In civil rights cases, the new form of disclosure would yield little information from defendants. The current rule works well where it has been implemented, and there is no basis for shrinking from national application of the current rule nationwide. The change overtly benefits the party who understands the litigation better, who will be the defendant in most civil rights cases.

Arizona Trial Lawyers Assoc., 98-CV-199: This change would significantly hamper discovery by the party who does not control the documents. In product liability and bad faith cases, most information is controlled by the defendant; in discrimination cases and other types of personal injury cases, most of the harmful information is controlled by the plaintiffs. In Arizona state court harmful information must be produced, and this has proved effective. The narrowing of disclosure will encourage litigation about additional discovery.

Washington Legal Foundation, 98-CV-200: The change adopts the proper level of disclosure. Under the present rule, litigants adopt wildly different interpretations regarding what needs to be disclosed, which has resulted in unfairness to parties who have been conscientious in following disclosure.

Trial Lawyers for Public Justice, 98-CV-201: This will eviscerate the usefulness of disclosure. TLPJ supports disclosure, but all too often the rule produces little real disclosure. If the proposed amendment is adopted, responding parties could easily provide next to no meaningful information.

Moreover, the change "is arguably an endorsement of the stonewalling ethos."

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: Narrowing the scope of disclosure makes sense. This more relaxed rule, plus half a decade of good experience with required disclosures in districts such as D. Minn., will prompt a move toward similar disclosure in state courts.

Sharon J. Arkin, 98-CV-204: This essentially renders the initial disclosure meaningless. In the context of insurance bad faith law, for example, the "supportive" documentation will consist of the insurer's self-serving letters to the insured and "expert" reports or letters which support the insurer's denial. Those documents are generally received by the insured from the insurer before litigation is filed. At a minimum, the insured needs the entire claim file, the underwriting file, the claims manual and, in some cases, the underwriting manuals. Since that information is often withheld in response to basic discovery requests, it is not reasonable to believe that the complete universe of those documents will be voluntarily disclosed at the initial disclosure. If they are not, the disclosure is pointless.

Nicholas Wittner, 98-CV-205: (on behalf of Nissan North America) This will not streamline discovery and will likely spawn ancillary sanctions motions and needless expense. The committee has unhooked the automatic disclosure requirement from the mooring of "facts alleged with particularity in the pleadings."

Montana Trial Lawyers Assoc., 98-CV-216: Opposes the change. The initial disclosure requirement reduces the time, effort, and expense involved in conducting discovery. The amendment will do nothing to reduce the overall cost of discovery. It will have the opposite effect, for discovery will be necessary for information that is now disclosed.

Michigan Trial Lawyers Assoc., 98-CV-217: Opposes the change. It would undermine the utility of the mandatory disclosure rule and send a harmful signal.

Stuart A. Ollanik, 98-CV-226: Opposes the change. The results of disclosure have been positive, as they were in states that

tried this approach before 1993. But those who opposed the 1993 amendments are back, with no supporting data, and with the same arguments previously rejected not only in 1993, but in 1937 as well.

National Assoc. of Independent Insurers, 98-CV-227: Favors the change. It will eliminate needless inquiry to information that has no bearing on the claims or defenses.

Jon B. Comstok, 98-CV-228: Strongly supports the change. The 1993 rule always seemed contrary to the premise of our adversary system. Asking a party to simply produce "supporting" material is not offensive, whereas the current rule is offensive. Thinks an unanticipated upside is that attorneys will work harder at full compliance, whereas his experience in over ten jurisdictions is that most attorneys in commercial litigation simply see the current rule as a paper hoop they have to jump through.

Edward D. Robertson, 98-CV-230: This is short-sighted in view of the narrowing of discovery. He finds the changes nearly comical, for it is clear to those who regularly join battle with big industry that it is nearly impossible to get defendants to reveal harmful information even with well-focused discovery.

Martha K. Wivell, 98-CV-236: This change would defeat the concept of mandatory disclosure.

Jeffrey P. Foote, 98-CV-237: "I see no legitimate purpose in limiting the initial disclosure to those documents that support the parties' claims or defenses. That is not meaningful discovery at all."

Matthew B. Weber, 98-CV-238: Eliminating initial disclosures except for that material which supports the disclosing party's position simply allows a party to hide damaging materials until the other side specifically asks for them.

Anthony Z. Roisman, 98-CV-240: There is no reason, except preventing disclosure of the true facts, for failing to require that all relevant information be produced. "Imagine how much less time and expense would have had to be expended in discovery had the tobacco companies been subject to and had they complied with the current Rule 26(a)(1)(B) when they were first sued for

damages by a smoker."

Norman E. Harned, 98-CV-241: The change is beneficial and should be adopted.

Eastman Chem. Corp., 98-CV-244: Supports the proposal. This is necessary to bring some rationality to the initial disclosure concept.

NAACP Legal Defense Fund, 98-CV-248: Opposes narrowing the disclosure duty. In the tactical context of litigation today, this will encourage defense counsel to read the plaintiff's claims as narrowly as possible, and to furnish information about its defenses as narrowly as possible also. The broader disclosure required by the current rule does not require a party to do its adversary's work. Rather, disclosure moves away from the concept of litigation as a sporting contest and levels the playing field for both sides.

Hon. Russell A. Eliason (M.D.N.C.), 98-CV-249: Worries about exempting material that casts doubt on a claim or defense and exempting impeaching material. Some evidence, after all, both supports and undercuts claims and defenses, but the rule makes no provision for that. (Note that when contacted by the Special Reporter about a different matter, Magistrate Judge Eliason brought up the revision of Rule 26(a)(1) and, after discussing it, related that his misgivings were satisfied on the basis that it was not a limitation on the right to do formal discovery but only an initial disclosure obligation.)

Jeffrey J. Greenbaum, 98-CV-251: (attaching article he wrote for the New Jersey Lawyer) The proposal wisely eliminates the controversial requirement of punishing a client for hiring a diligent attorney who ferrets out material helpful to his adversary without even a request for such information by the adverse party.

Warren F. Fitzgerald, 98-CV-254: Narrowing the scope of discovery will encourage parties to make selective determinations about what the regard to support their respective claims and defenses. This will result in less fairness in the application of initial disclosure.

Anthony Tarricone, 98-CV-255: This change will make it easier for parties and their counsel to decide unilaterally that documents and data are not discoverable, and opposing parties will consequently never see the relevant evidence.

Annette Gonthier Kiely, 98-CV-256: Opposes the change. It will provide a further shield for defendants to legitimately withhold and fail to identify witnesses and evidence which are most relevant and germane to the claims brought by the plaintiff. The current requirement of disclosure regarding disputed facts alleged with particularity is the core of the disclosure rule. Narrowing the disclosure requirement will guarantee that there must be more costly, protracted discovery.

David Dwork, 98-CV-257: Opposes the change. It will have the undesirable effect of limiting the ability to obtain valudable documentes and data that may be critical and are often in the opposing party's exclusive control

William P. Lightfoot, 98-CV-260: Opposes the proposal. Supporting information will come out sooner or later anyway. This proposal is at best unnecessary, and at worst encourages the attitude that it is all right to hide harmful information.

New Mexico Trial Lawyers Ass'n, 98-CV-261: If mandatory disclosures are to proivde the benefit of streamlining the discovery process, disclosure of harmful material must be retained.

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l Corp.) The change may improve disclosure, but Navistar doubts that the idea is useful. Navistar strongly urges that sequenced core and expert discovery be substituted.

U.S. Dep't of Justice, 98-CV-266: If initial disclosure is retained, the Department supports the proposed change for the reasons offered by the Advisory Committee. But it thinks that disclosure has often resulted in unnecessary, duplicative disclosure, especially when there are dispositive motions on jurisdictional, constitutional or statutory grounds that do not require disclosure to resolve. The Department would support a presumption that there be no disclosure until a specific period, such as 30 days, after an answer is filed. Certainly 14 days

after the Rule 26(f) conference is too soon in some complex cases.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: The Section believes that the proposed standard might present complications. Whether a particular document or witness generally helps or hurts a party's case may not be clear at the outset. Whether the witness or document has information relevant to a disputed fact pled with particularity is a more objective standard. In addition, the proposed standard would broaden the scope of disclosure in some circumstances. The change would not narrow the scope of formal discovery, moreover.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee is concerned that the standard is different in Rule 26(a)(1) and (b)(1). Suggests that both should say that the scope is "relevant to the claims or defenses plead by any party." The Committee opposes excluding impeachment material from the scope of disclosure. Those members of the Committee who have experience with disclosure are concerned about limiting disclosure to supporting information because that might rob the requirement of its ability to reduce discovery disputes later on. The reason for opposing the impeachment exclusion is that impeachment material is subject to discovery, and is highly effective in bringing cases to an early settlement.

Testimony

Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) DRI's strong preference would have been to eliminate initial disclosure and replace it with sequential disclosures, but it agrees with limiting such disclosure to supporting documents. This should reduce costs while not sacrificing the attorney-client privilege or work product protection.

Allen D. Black, prepared stmt. and Tr. 18-30: Thinks that the current proposal is fine (Tr. 21).

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense

Counsel) Concerned about the abolition of the particularity requirement. Offers example of accident involving an RV driven by "a couple from the Orient" who had never been in this country before, and who set the vehicle on automatic cruise control to have tea, resulting in an accident. If the complaint contains none of this information, and only alleges that the vehicle was unreasonably defective, should defendant have to provide disclosure even of "supporting information?" (Tr. 56-58)

Brian F. Spector, prepared stmt. and Tr. 64-80: Finds that a witness list without some detail about the subjects of the witness's knowledge not to be sufficiently helpful, particularly in an era with numerical limits on depositions and interrogatories. It would be good to require that the substance of the knowledge be included, not just the subjects. (Tr. 76-77) His district has had mandatory disclosure of supporting information for 15 years, and there has not been a problem distinguishing supporting information from other information for purposes of this local rule. (Tr. 79)

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Supports the change as a first step. At a minimum, disclosure should be required only of materials that support the disclosing party's case. But the changes should go further and require sequenced disclosure. Setting forth the supporting materials at the outset sets a bull's eye for the case that can help focus later efforts.

San Francisco Hearing

Maxwell Blecher, Tr. 5-14: Endorses the change to disclosure, which brings those requirements into accord with actual practice. That is constructive. (Tr. 5)

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) Supports the change. The current "relevant to disputed facts alleged with particularity" standard is too vague. It also requires a defense attorney who knows the weaknesses of the defense case better than anyone else to disclose information supporting those weaknesses. He does not think that sticking to the old standard for witness disclosure would be desirable, because that would still require a very great effort to identify witnesses in order to find if some have information that helps the other side. There might be some need

to interview widely under the current proposal to determine who has supporting information, but at least the incentives line up. He desperately will want to make sure that every good document and favorable witness is identified because otherwise there may be trouble later on for his client. But he probably will get an interrogatory asking for the identity of all persons with information about a particular subject, but usually that is limited to "most knowledgeable" people, so it is more manageable. (Tr. 21-23)

Diane R. Crowley, prepared stmt. and Tr. 36-47: The change will have a desirable effect in limiting the information subject to disclosure. In a trademark case handled by her firm, the breadth of the current requirement resulted in a very long list of people with knowledge of relevant information, and her firm felt obliged therefore to notice the depositions of these people. Had she been sending an interrogatory, she would only have asked for the "most knowledgeable persons" and would not have received such a long list. (Tr. 30-31) The result of the overlong list was beneficial in her case because the judge ordered that all the listed individuals be produced for deposition in San Francisco, but the case illustrates that the current requirement is too broad. But she has not found that her pleading has changed due to the adoption of disclosure; she is not trying to expand the allegations or specificity of them.

G. Edward Pickle, prepared stmt and Tr. 47-60: (Gen. counsel, Shell Oil Co.) Limiting disclosures to supporting materials is a substantial advance in the right direction, though this can still prove difficult in complex cases. In those cases, it is difficult to anticipate the issues at the initial stage of litigation.

H. Thomas Wells, prepared stmt. and Tr. 74-87: The proposal is an improvement on the current provisions in Rule 26(a)(1). The current rule infringes counsel's obligation of zealous representation. The limitation to supporting information overcomes this major criticism of the current rule. It might be desirable to make the disclosure provision broader with regard to witnesses than documents. Often that is requested in an interrogatory anyway, so doing this might complement the limit on the number of interrogatories. (Tr. 51-53)

Charles F. Preuss, Tr. 60-67: Narrowing the scope of disclosures is good. It avoids the dilemma of risking prejudice to your client's case in disclosure.

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: Favors narrowing of disclosure; if we have to have disclosure, let's put it that way. (Tr. 80)

Larry R. Veselka, Tr. 99-108: The current rule works well. You don't get everything, but everyone learns more than would be the case under disclosure limited to supporting information. The current rule allows people to start quicker.

Mark A. Chavez, prepared stmt. and Tr. 108-17: Opposes the change. The existing obligation to disclose harmful information serves useful purposes and should not be eliminated.

Robert Campbell, Tr. 117-30: (Chair, Federal Civil Rules Comm., Amer. Coll. of Tr. Lawyers) Clearly favors the change in disclosure.

Gregory C. Reed, Tr. 146-55: Supports the change. this prevents parties from being required to go to work to do the other side's preparation. It also prevents the production of huge amounts of material that are not relevant. For example, in a case on which he worked recently the initial production of documents involved more than 40,000 pages of material, but maybe 100 have been referred to in the depositions that have followed. This was a huge waste of time for his client in gathering together all these documents, and a waste for the other parties in going through them. Usually he has produced rather than identifying the disclosed documents, because identifying would be an additional effort and would lead to a request to produce. The narrowing of disclosure should have the side effect of focusing the formal discovery that follows. With regard to plaintiff's disclosure, that will help the defendant and the court determine what the plaintiff's real claims are. But it would be helpful if the Note were clearer on the dividing line between claims and defenses and subject matter. Presently judges often seem loath to get involved in the specifics of these problems, and it would be desirable if these changes could prompt more of that activity. A prime area of dispute in products liability cases is the breadth of discovery involving products plaintiff claims are similar.

Even if the changes can't put into words the difference in result, the disclosure provisions may permit a more focused approach to it. Sometimes the court will need to be involved to determine whether the similarity is sufficient to justify the discovery.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. counsel of Houston Indus., Inc.) HII generally supports this change, although it does believe that disclosure should be eliminated in its entirety. It notes that this change is identical to new Texas Rule 194.2(c), which goes on to state that "the responding party need not marshal all evidence that may be offered at trial." HII believes it would be desirable to add that a defendant can only respond to allegations by the plaintiff which are stated with particularity.

Thomas Y. Allman, prepared stmt. and Tr. 162-74: (Gen counsel, BASF Corp.) Supports uniform national requirements limited to supporting information. The Dallas federal courts employ a similar rule now, and disclosure there has clearly facilitated the process of identifying witnesses and documents and helped reduce costs. Applauds idea of coupling disclosure to claims and defenses asserted, as opposed to broad subject matter. Initial disclosures can move the case along and get the parties to a place where they can discuss settlement. He was struck by the statements of opponents of disclosure, for he believes that the probably don't speak from his point of view as a client, for he wants cost-effective litigation.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: Concerned about elimination of the particularity requirement. Perhaps the Committee Note should specifically acknowledge that in cases where claims are not particularized, a defendant cannot provide meaningful initial information relating to its denials or defenses if it does not know what the claims are. Sequenced disclosure would be a better way.

Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: Opposed to narrowing the disclosure requirement, particularly if the moratorium in Rule 26(d) is retained. The problems in convening a Rule 26(f) conference have delayed cases on which she has worked. The bar's

familiarity with the 1993 changes is still limited, and narrowing them would be counterproductive.

Daniel F. Gallagher, Tr. 39-47: The disclosure in the 1993 rule was far too broad, and the current proposal is far preferable. A party should not be required to flesh out the other side's case. He also applauds taking out the particularized pleading provision, which is inconsistent with the general federal approach to pleading.

Andrew Kopon, Jr., prepared stmt. and Tr. 94-98: If Chicago is required to adopt disclosure, he thinks the proposed rule is better than the 1993 version now in the federal rules. It is better to have parties respond to direct requests for information than to require them to search around for material that hurts their position. If this jump-starts the litigation and causes the parties to come together, that is desirable.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: In the C.D. Ill., where he practices, the current disclosure rule has been enforced. It has produced problems for defendants, and even persistent counsel have difficulties getting clients to assemble the information that is called for. He believes the narrowing disclosure as the Advisory Committee has proposed is a really good idea. Having the broader obligation now in the rule does not cause plaintiffs to forgo discovery; they still want just as much as they would without any disclosure.

Gary D. McCalllister, prepared stmt. and Tr. 109-13: Narrowing disclosure will narrow and inhibit the development of the case. The need to disclose this material triggers the plaintiff's ability to get the documents. In Chicago, however (compared to Kansas), he has not seen much disclosure. To require only supporting information will certainly result in limiting the ability of litigants to obtain proof. The obligation to disclose unfavorable information at the outset makes it more likely that this material will see the light of day.

Laurence Janssen, prepared stmt. and Tr. 154-60: Supports the change.

Clinton Krislov, prepared stmt. and Tr. 171-77: Opposes narrowing disclosure. You need a rule that forces defendants to

produce the harmful material too, or it won't come out. Defendants will fight everything so this has to be the rule. All relevant documents should be subject to mandatory disclosure.

Linda A. Willett, prepared stmt. and Tr. 217-26: (Assoc. Gen. Counsel, Bristol-Myers Squibb Co.) Favors retaining the pleading with particularity provision in the amended disclosure rule. Focusing disclosure on defenses is a salutary change, often claims are stated at a high level of generality and, without a particularity limitation, responding parties will be at a disadvantage.

Michael E. Oldham, prepared stmt. and Tr. 235-45: From defendant's perspective, if the particularity requirement is eliminated the disclosure requirement for denials is difficult to accept.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Although Caterpillar would have preferred that disclosure be eliminated altogether, the proposed amendment saves a defendant from having to guess, at its peril, the nature and substance of a plaintiff's inarticulately pled claim. The Note should say, however, that the defendant's obligation to provide disclosure is limited to cases in which the claim is pled with particularity.

Kevin E. Condron, Tr. 259-67: Supports the change because it should help reduce the cost of litigation.

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) This compromise is a way to reestablish national uniformity. It relieves attorneys of conflicts they may experience under the 1993 version of the rule.

(c) Articulation of the standard for narrowing the obligation

Comments

ABA Section of Litigation, 98-CV-050: Favors the majority's language, which makes clear that the disclosing party must disclose all of the information that it believes supports its position, rather than what appears to be a more permissive standard of information a party "may use" to support its position.

Testimony

San Francisco Hearing

H. Thomas Wells, prepared stmt. and Tr. 47-60: The minority proposal for wording of the narrowed obligation under Rule 26(a)(1) is remarkably like the local rule in the Northern District of Alabama, which was drafted by that district's CJRA Advisory Committee (chaired by Wells). Experience in that district has revealed few, if any, problems with this formulation. He would therefore support the minority position on the drafting of this provision.

Chicago Hearing

Lorna Schofield, Tr. 193-202: (speaking for ABA Section of Litigation) The ABA supports the majority version -- "supporting claims and defenses" -- for three reasons. First, "supporting" seems to be a more inclusive term. It makes sense to use a more inclusive term if you want to achieve efficiencies through disclosure. Second, "may be used to support" is subjective. That may encourage gamesmanship. Finally, the minority view might raise questions of admissibility, and that should not be pertinent to initial disclosure. This could lead to disclosure with regard of large amounts of information in some cases, but that is desirable in the eyes of the Section of Litigation.

Michael E. Oldham, prepared stmt. and Tr. 235-45: For him, the "may use" formulation would be preferable because the particularity requirement has been removed and he wouldn't know

exactly how to respond for defendant in some cases that are pled very generally. But his problem might well be solved in the Rule 26(f) conference, where there will be a chance to discuss the specific assertions of the plaintiff before disclosure is required.

(d) Handling and listing of "low end" excluded categories

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports excluding low end cases.

E.D.N.Y. Comm. on Civil Lit, 98-CV-056: Endorses low end exclusions, but proposes that the Government be required to provide disclosure in pro se prisoner cases rather than exempted.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: This is a sensible exemption.

Hon. Howard D. McKibben (D. Nev.), 98-CV-109: (On behalf of D. Nev.) Expresses concern that additional categories the district has exempted are not included. Examples include Freedom of Information Act suits, deportation actions, forfeiture actions and condemnation actions. They urge that the court retain discretion to augment the list by local rule.

National Assoc. of Consumer Advocates, 98-CV-120: Opposes exemption of actions by the United States to recover benefits and to recover student loan payments. NACA members often represent consumer debtors, and have found that initial disclosures are important in those cases. Many of these cases involve debtors appearing without counsel, so it is essential that the U.S. provide these pro se defendants discovery related to its claim. In student loan cases, the information is often in the exclusive possession of the U.S. Department of Education, and often in significant disarray. "[T]he government is holding all the cards, but it may be bluffing." Unless the goal of the rules is to give the government an unfair advantage, these exemptions should be eliminated.

Hon. David L. Piester (D. Neb.), 98-CV-124: Suggests adding the following categories of actions to the exempt list: Actions to enforce a civil fine or penalty, or the forfeiture of property; bankruptcy appeals; proceedings to enforce postjudgment civil remedies; proceedings under the Freedom of Information Act; and proceedings to compel testimony or production of documents relative to perpetuation of testimony for use in any court. He

also notes that the practice in his district has been to include prisoner civil rights cases in the disclosure requirements, and that this has not caused problems. On this point, however, he accedes in the interest of national uniformity. He asks, however, whether such a case is later returned to the disclosure fold if counsel is appointed.

Hardy Myers, 98-CV-146: (Attorney General of Oregon) Under this proposed rule, Assistant Attorneys General would be required to confer and begin discovery in many cases now exempt from such requirements, such as non-prisoner pro se actions, which is not now true in this opt-out district. This would considerably and unnecessarily increase litigation expense. (It seems that these are often decided on motion before initiation of discovery.)

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: These exemptions make sense and are recommended. However, not every action to enforce an arbitration award would be appropriate for an exemption, and some flexibility (e.g., by starting the provision "Except as a court may otherwise order . . .") would be desirable.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Supports the exclusion of certain categories of cases like those listed.

Public Citizen Litigation Group, 98-CV-181: Thinks that three aspects of the proposed exclusions should be reconsidered. (1) The exemption for actions for review of an administrative record should be clarified because the issue of whether there is an administrative record that provides a basis for review is often in dispute. (2) The exemption for an action to collect on a student loan should be deleted. These actions involve the same issues as any other action on a promissory note. (3) The rule should allow local rules providing exemptions for other categories of actions, because such cases may be prevalent in a certain district, but not sufficiently prevalent nationwide to justify a nationwide exemption.

Philadelphia Bar Assoc., 98-CV-193: The exempted categories seem inappropriate for mandatory initial disclosures and, for that reason, are properly excluded.

Chicago Hearing

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Fully supports the exemption of these eight categories.

(e) Handling of "high end" cases

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports excluding high end cases.

Maryland Defense Counsel, Inc., 98-CV-018: Urges that the Note more forcefully convey the point that as a general rule in complex cases initial disclosure should be waived in favor of developing a thoughtfully tailored discovery plan.

ABA Section of Litigation, 98-CV-050: The proposal provides flexibility to exempt appropriate cases, such as highly complex cases involving voluminous discovery, and it ensures court supervision of discovery in cases that are likely to pose discovery problems and that are unsuited to mandatory disclosure.

Charles F. Preuss, 98-CV-060: The "high end" proposal should be adopted. The ability to obtain early judicial intervention in the more complex cases where initial disclosure is inappropriate should ensure that the initial disclosures, if any, fit the case.

Gennaro A. Filice, III, 98-CV-071: The automatic disclosure requirement would be useful in factually straightforward litigation. However, in complex toxic tort or environmental litigation, early definition of the issues is key to streamlining discovery and reducing attendant costs and burdens. For this reason, it is critical that the parties are able to petition the court at the initial disclosure stage to seek relief from this requirement. But the Committee Note should emphasize in more detail than at present that complex cases should be presumed inappropriate for initial disclosure, and that a court-managed discovery order ought to be implemented.

Federal Practice Section, Conn. Bar Assoc., 98-CV-157: Endorses the opportunity to object.

Public Citizen Litigation Group, 98-CV-181: Opposes the provision. It would allow litigants to interpose objections in ordinary litigation, and thereby to delay disclosure without imposing any burden to justify the objection, for the rule does not specify any standard for objecting. This may provide a tool

for litigants routinely to frustrate mandatory disclosure. If the opportunity is retained, it should specify that the burden is on the objector to justify the objection and explain the court's approach as follows:

> In ruling on the objection, the court may determine that all or part of the initial disclosures need not be made if the objecting party or parties demonstrates that such disclosures would be burdensome and would not facilitate discovery or resolution of the merits. If the objection is rejected in whole or in part, the court shall set the time for making disclosures.

Philadelphia Bar Assoc., 98-CV-193: Supports the party-objection procedure as an essential component of these reforms. This procedure best balances the responding party's desire to avoid unnecessary burdens and the federal courts' desire for non opt-out uniformity.

Jon B. Comstok, 98-CV-228: Strongly supports the change. The parties need to have a recognized mechanism by which they can assert that disclosure is not appropriate in the particular existing circumstances. He proposes adding that: "Any objection shall be promptly resolved by the court."

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee opposes this change. It would support an amendment putting the burden on the objecting party to seek an order exempting it from disclosure before the meet and confer process. It would be counterproductive for the conference to be convened with someone anticipating making an objection to disclosure. The better practice would be to require that to be resolved before the conference.

Testimony

San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) The proposal to allow discretionary exemption from disclosure is crucial to fairness and due process in complex cases. Shell strongly urges that the Committee Note stress that exemption is the preferred course in such cases.

Charles F. Preuss, Tr. 60-67: Likes the flexibility of the rule provision that allows either a stipulation to dispense with disclosure, or an objection that brings the matter to the court if there is no agreement on this subject.

Stephen Valen, Tr. 67-74: In more complex cases, the disclosure requirement does not usually work. There should be a presumption or recommendation in the Note that gives the courts and the parties guidance on how to handle those cases. In those cases there should be more active judicial involvement in managing the cases. In some cases, what needs to be done is for discovery to be phased, with some issues addressed and possibly resolved early in the case. Perhaps an objection that the court considered justified would be a signal that more active management of discovery should be considered early on. He wants some expansion of the Note regarding the kinds of cases in which disclosure should be excused.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) The opportunity to object to disclosure appears to offer some relief in complex cases. HII supports it, and encourages the Committee to emphasize in the Note that this is one of the purposes of the opportunity to object.

Thomas Y. Allman, prepared stmt. and Tr. 162-74: (Gen counsel, BASF Corp.) Initial disclosure in massive document cases is problematic, but the provision for automatic deferral should allow those issues to be worked out on a case-by-case basis. Suggests that the listed exemptions from initial disclosure include class actions where the J.P.M.L. may transfer cases for consolidated pretrial proceedings. The idea is to arrange for a single uniform event of disclosure rather than multiple and "competing" disclosure occasions.

Chicago Hearing

Laurence Janssen, prepared stmt. and Tr. 154-60: Believes that the Note should say that complex cases should usually be exempted, and that phased discovery is preferable for those.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Urges the Committee to use its Note to stress that initial disclosures may not be appropriate

for large and/or complex cases. In such cases, discovery plans are preferable.

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) The ability to object is crucial to making disclosure work. Urges that the Note be strengthened to forcefully emphasize that disclosure in high-end cases is often a wasteful exercise that should be waived. In addition, the Note could suggest other ways in which the judge can become profitably engaged in such cases. For example, discovery in purported class actions can be limited initially to class certification issues. Similarly, in cases where there are serious jurisdictional problems activity should focus on those questions.

(f) Added parties

Comments

Thomas J. Conlin, 98-CV-041: Favors disclosure requirement applicable to later added parties in the same way as to original parties.

Chicago Council of Lawyers Federal Courts Committee, 98-CV-152: The treatment of later-added parties omits an important feature because it contains no provision for disclosure by the original parties to the newly-added party. Probably this should be at the same time as the disclosure required by added parties.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Thinks that the new party should be given more time since the case would generally have been pending for a period of time and the original named parties would have received more than 30 days for their disclosures.

Trial Lawyers for Public Justice, 98-CV-201: TLPJ supports the addition of language requiring added parties to make disclosure.

U.S. Dep't of Justice, 98-CV-266: The Department is concerned that 30 days is not enough time for a late-added party. Ths rule would have the effect of requiring dislcosure by the United States before its answer is due. Also, any late-added party might find that disclosures are due before a ruling is had on any jurisdictional or similar challenges it might have to the complaint.

Testimony

Baltimore Hearing

Kevin M. Murphy, Tr. 80-89: Concerned about requiring disclosure by newly-added parties within 30 days. In his experience in a case in the E.D. Va., where added parties came in after discovery had been under way, it would have been very hard for them to make disclosure in 30 days. These were corporate defendants, and they had to search down their former employees to gather information. A longer time would be better.

San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell has some concern about the timing of disclosure regarding newly-added parties. Thirty days is likely to be insufficient in a case of any complexity or magnitude. Shell urges that 60 days be allowed for such parties to analyze the case and marshall responsive materials.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) HII believes that 30 days is not enough time for newly added parties to respond.

Chicago Hearing

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Fully supports the requirement that late-added parties provide disclosure.

3. Rule 26(b)(1)

(a) Deletion of "subject matter" language describing the scope of discovery

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Agrees with deletion of "subject matter" language.

Edward D. Cavanaugh, 98-CV-002: Opposes the change. This change will generate disputes. The courts have a well-understood, consistent, and reasonably predictable construction of the scope of discovery under the present rule, and the amendment "would throw this sixty years' experience out the window."

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: Favors the change, which it proposed to the Advisory Committee in 1989. It finds that there is a significant distinction between relevancy to the issues raised by claims and defenses and relevancy to the subject matter of the action. It disputes the statement in the Committee Note that the dividing line between material relevant to the claims and defenses and that relevant to the subject matter of the action cannot be defined with precision. Although the Note does indicate that judicial involvement is desired, little further guidance is given. Reviewing current practice at some length (see pp. 11-16) it concludes that further specifics could be provided and that some caselaw shows that there is a substantial distinction between the two formulations. At least, the courts that grant broad discovery tend to use the "subject matter" language more often, while the ones that restrict discovery tend to emphasize relevance to the claims and defenses. When Mississippi deleted the "subject matter" provision from its rule, it did so to favor limitations, rather than expansions, of discovery. The New York standard also seems similar to the proposed amendment rather than to the current federal rule. The Section does note that the revised standard may have an impact on pleading and finds it surprising that the Committee Note says nothing about this potential effect. "[T]here certainly will be a strong incentive to put more detail in the complaint."

Maryland Defense Counsel, Inc., 98-CV-018: Supports the

amendment as "at least a directionally correct step" towards reducing unnecessarily burdensome and costly pursuit of information.

Prof. Peter Lushing, 98-CV-020: "Suppose I were the Devil and wanted to increase procedure litigation unnecessarily. I would propose a distinction for discovery purposes between 'claim or defense' and the 'subject matter of the action.' Since nobody would know what I was talking about, I would create endless fodder for commentators, lawyers, courts, and professors."

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) Supports the change. It provides not only a bright line standard, but also some common sense to the discovery process.

Assoc. of the Bar of the City of N.Y., 98-CV-039: Opposes the change. There likely will be no distinction in practice between the old standard and the new standard. If the goal is to "send a message" to the bar, there are better ways than using such imprecise language. Increased judicial intervention in cases of discovery abuse, not a rule-based effort to narrow discovery, is the proper vehicle.

James A. Grutz, 98-CV-040: Opposes the change. "Parties should still be allowed to discover any matter relevant or likely to lead to relevant information concerning the lawsuit."

Thomas J. Coffin, 98-CV-041: Opposes changes that narrow the exchange of information. The biggest problem with discovery is withholding of information. There is nothing wrong with the subject matter scope.

M. Robert Blanchard, 98-CV-048: This change will unfairly limit the scope of discovery. There will be more objections from civil defendants. Plaintiffs will have to decide whether to plead a number of issues for which discovery will be required to provide a basis, risking Rule 11 sanctions, or simply resign themselves to never getting to the bottom of meritorious claims.

ABA Section of Litigation, 98-CV-050: The Litigation Section and the Antitrust Section support this proposal because, in the ordinary case, it prohibits use of discovery to develop new

claims and defenses and restricts discovery to the basic issues.

Richard L. Duncan, 98-CV-053: Opposes the change. This will increase the amount of procedural jousting by attorneys who are paid by the hour.

Laurence F. Janssen, 98-CV-058: Strongly supports the proposed revision.

Charles F. Preuss, 98-CV-060: Supports the change. Given the "subject matter" language of the present rule, even courts that have the stomach for supervising discovery have difficulty restricting discovery to the confines of the actual claims being asserted. Without reasonable limits on the scope of discovery, there is little likelihood that meaningful discovery reform can be achieved.

Lawyers' Club of San Francisco, 98-CV-061: Opposes the change. It would interfere with the ability of parties to fully investigate and develop their claims. At the inception of litigation, plaintiffs frequently lack specific and detailed information about the activities of a defendant. In view of the constraints of Rule 11, they would be unable to allege matters they were unsure about. But the change would preclude their pursuing discovery either. Given the breadth of res judicata, this foreclosure of investigation to the scope of the subject matter of the litigation puts parties in an unfair bind.

Jay H. Tressler, 98-CV-076: Approves of the change. The subject matter scope becomes burdensome unless policed by the court under a good cause standard. Moreover, plaintiffs' lawyers try to use defendant's failure to produce some document they already have as a method to turn cases into fights over discovery compliance.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Opposes the change. It is a well-intentioned invitation to judges to involve themselves early in the discovery process. But insufficient reasons exist for making such a significant change, and it could adversely affect the procedural system as a whole. The present standard has been in place for 60 years, and has produced a well-defined, predictable, and workable standard that is relied on by lawyers and judges alike. Because discovery abuse is limited to a few cases, changing this is an overreaction. Making the change will

produce satellite litigation, and it is likely to undermine notice pleading. That, in turn, may in some instances immunize parties in exclusive control of evidence. In a similar vein, the amendment would create perverse incentives for plaintiffs to plead broadly.

Michael S. Allred, 98-CV-081: Opposes the change. It is important that the scope of discovery remain wide.

Amer. Coll. of Trial Lawyers, 98-CV-090: The College's federal courts committee proposed this change, and the College's Board of Regents endorsed it. By letter dated Nov. 30, 1998 (98-CV-122), the president of the College informed the Advisory Committee that it supports the proposed amendment.

Frank Stainback, 98-CV-093: Believes that the limitations on attorney managed discovery and requirement for a showing of good cause before embarking on discovery related to the "subject matter" will be positive changes.

Steven H. Howard, 98-CV-095: Opposes the change. it will limit a party's rights to conduct full and open discovery and allow parties to hide the ball.

Michele A. Gammer, 98-CV-102: (on behalf of Federal Bar Assoc. of W.D. Wash.) This change is unnecessary and counterproductive. The existing rules permit the court to regulate the scope of discovery, and case law confirms that power.

National Assoc. of Consumer Advocates, 98-CV-120: Opposes the change. It will cause defendants to resist legitimate discovery. Under the current rules, defendants often resist discovery that is in fact relevant to claims and defenses because they do not wish to provide the plaintiff with any means by which to prove the claims asserted. They should not be encouraged to provide even less information. Usually in their cases, the plaintiff has virtually no information and all the information is in the possession of the defendant. Narrowing discovery will prompt defendants to hide information. It will also foster litigation about the meaning of the changes. Indeed, "it is probable that plaintiffs, aware that defendants may be hiding something, will seek more discovery than would otherwise be requested, in an effort to turn over the right stones."

Prof. Beth Thornburg, 98-CV-136: (enclosing copy of her article Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals, 52 SMU L. Rev. 229 (1999), which contains observations about the proposals) Although the change looks minor on its face, it is likely that, together with the other proposed changes, it will send a strong message to district judges that the rulemakers want judges to exercise their discretion to restrict discovery. Products liability defendants will now have an added reason to read requests narrowly.

Walt Auvil, 98-CV-140: Opposes the change. Narrowing the scope of discovery is a backward step.

Chicago Council of Lawyers Federal Courts Committee, 98-CV-152: Opposes the change. There will be satellite litigation over a hair-splitting difference, and the change is at tension with Rule 8's pleading provisions. Unsettling the standard now used for scope will reward mulishness and raise transaction costs in connection with discovery.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Opposes the change. There is no need for this revision.

Federal Practice Section, Conn. Bar Assoc., 98-CV-157: Opposes the change. It is inconsistent with the notion of notice pleading that lies at the heart of the Federal Rules because parties may feel they must expand their pleadings to justify broad discovery.

Penn. Trial Lawyers Ass'n, 98-CV-159: Opposes the change. The line between matters relevant to the claim of a party and those relevant to the subject matter is too fine, and motion practice will greatly increase as lawyers seek broader information.

Richard C. Miller, 98-CV-162: Opposes the change. It will permit parties to base their response on their own subjective interpretation of the other side's pleadings, This will create loopholes, and another step in the pleading process, because the defense will argue it cannot begin to respond to discovery until plaintiff's pleadings are made more definite.

Philip A. Lacovara, 98-CV-163: Supports the change. Only in a rare case does it make sense to impose on the parties the burden

and expense of discovery to the amorphous "subject matter" limit.

William C. Hopkins, 98-CV-165: Opposes the change. The amendment dramatically narrows the scope of discovery. It is the most grave threat to plaintiff's lawyers because with broad discovery they can always try to force the production of information through standard interrogatory and document production practice.

Mary Beth Clune, 98-CV-165: This change will only lead to more objections by defense attorneys, and will require plaintiff's counsel to get more court intervention in order to obtain discovery.

Prof. Ettie Ward, 98-CV-172: The current scope is not overly broad, and it ought not be changed. The "subject matter" standard has been tested over time, and is generally understood by the bench and bar.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Strongly supports the change. The development of a drug can take 15 years and result in creation of hundreds of thousands of pages of documents. Many of these relate to indications of adverse events unrelated to plaintiff's claim. these documents are then fodder for discovery battles. This results in an enormous expenditure of time and money on matters that do not further the litigation.

Nebraska Assoc. of Trial Attorneys, 98-CV-174: Opposes this dramatic revision of the scope of discovery. Under notice pleading, the real defenses do not appear until the discovery is completed and the parties are in a pretrial conference. The plaintiff begins with little information and must divine the real direction in which the defense will go. Subject-matter discovery is familiar and well understood by the bench and bar.

Gary M. Berne, 98-CV-175: This change is not supported by the FJC survey, which showed only 31% in favor of narrowing the scope of discovery. Therefore, 69% did not believe this change would generally reduce expenses without harming the quality of results.

Federal Bar Council's Committee on Second Circuit Courts, 98-CV-178: The proposed amendment reflects a salutary intent to focus

on the specific claims and defenses, and probably should have been adopted years ago. But in 1999, with several decades of experience under the current version, the Committee does not believe the change is justified. The difference between the current formulation and the amended one is not necessarily clear. A very narrow reading of "claims or defenses" could exclude matters that probably should be discoverable, such as certain background information on facts and witnesses. Disputes about the meaning of the changed language will lead to unproductive motion practice. The change could also prompt parties to assert broader claims and defenses as well.

Trial Lawyers Association of Metropolitan Washington, D.C., 98-CV-180: Opposes the change. The main problem with discovery is evasion and gamesmanship. Cost is not a primary problem. This change will encourage more gamesmanship, for one of the few weapons plaintiffs have left is the broad definition of discovery in Rule 26(b)(1). Evasion occurs nevertheless. "The only preventative measure against such evasion is a definition of discoverable information that is so broad that it is not subject to disagreement between the parties."

Public Citizen Litigation Group, 98-CV-181: Opposes the change. It would create new problems by requiring parties to obtain court approval to obtain discovery that is not abusive and is important, such as information to test an opponent's claim that certain conversations or documents are privileged. It is not targeted at cases where discovery abuse is prevalent. The courts have already held that discovery is not permitted simply to develop new claims, so the change is not needed to accomplish that objective. The new standard is not more objective or clear than the current one, and the parties will have a higher incentive to litigate discovery disputes.

Association of Trial Lawyers of America, 98-CV-183: Opposes the change. It would work a de facto abolition of notice pleading, and lead to highly fact-specific pleadings. It would provide an opening for improper resistance and evasion of discovery. For example, in auto crashworthiness cases, it is typical for plaintiffs to request discovery regarding other similar incidents, but defendants have engaged in de facto narrowing of discovery. Under the current proposal plaintiffs would receive data only related to accidents involving the plaintiff's

particular model and year of automobile in virtually identical incidents under identical road conditions. For an example of this problem, consider Baine v. General Motors Co., 141 F.R.D. 328 (M.D. Ala. 1991), in which Judge John Carroll refused to allow defendant to do this sort of thing. If the rule were changed, the plaintiff might never be able to overcome such tactics.

New Hampshire Trial Lawyers Assoc., 98-CV-186: Does not believe the proposed change clarifies or improves the operation of the rule. Encourages the Committee not to base rule changes that affect the whole of federal practice on the problems of a small category of cases.

James B. Ragan, 98-CV-188: Opposes the change. Lawyers cannot foresee the future when they draft initial pleadings. A lawsuit changes over time, and discovery should not be limited to the original pleadings.

Ohio Academy of Trial Lawyers, 98-CV-189: Opposed. This would inhibit the plaintiff from developing other causes of action and prevent a defendant from developing a counterclaim. It would also increase the involvement of the court in discovery.

Michael W. Day, 98-CV-191: This change would increase the burden on individual litigants and cause them to abandon litigation that would otherwise vindicate important individual rights.

Philadelphia Bar Assoc., 98-CV-193: Opposes the change. The amendment could make discovery even more contentious, and the Committee Note does not make it clear how the new standard should be applied. Litigants will craft pleadings in a way that permits the broadest attorney-managed discovery, and the amendment would complicate and delay, rather than facilitate, discovery.

James C. Sturdevant, 98-CV-194: The amendment would interfere with the ability of parties to investigate fully and develop their claims. Plaintiffs frequently lack specific and detailed information about the activities of the defendant when they file suit. Under Rule 11, they cannot assert claims unless they are sure about them, and this change would prevent them from pursuing discovery about claims they couldn't allege in their complaints.

Maryland Trial Lawyers Assoc., 98-CV-195: This would preclude developing new claims or defenses through discovery, and will promote more motions practice. Under Rule 11, a party cannot file a claim without a basis, and the proposed changes would prevent the parties from developing the information needed to file the claim.

James B. McIver, 98-CV-196: (98-CV-203 is exactly the same as no. 196 and is not separately summarized) Although this does not rise to the level of foolishness of the proposal regarding Rule 26(a)1), it is not a good idea. It reflects the understandable frustration of judges with those few parties who abuse the rules, but is not the correct solution. The current standard has been with us for many years and has, generally, worked well.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: This change is not supported by empirical research. Constricting discovery will have an impact on substantive rights. Experience has shown that shifting from attorney-controlled to court-controlled discovery has worked to the detriment of a just resolution in cases such as civil rights cases in which one party has significantly less access to the relevant facts than the other parties. It is improper for the discovery rules to curtail discovery of unpled theories, because the defendant does not advertise the specifics of its wrongdoing.

Trial Lawyers for Public Justice, 98-CV-201: Opposes the change. It will encourage stonewalling, and prevent many parties with valid claims from receiving justice. Discovery will be tied to the specific allegations set out in the complaint or answer, and therefore one can obtain access to information only after one has enough information to write a complaint. But presently many individuals initiate a lawsuit with limited access to information, or have details only about one of many potential claims. This proposal will lead to motions battles about the proper interpretation of the pleadings, and encourage a renewed emphasis on formality and gameplaying.

Sharon J. Arkin, 98-CV-204: This will impose unreasonable burdens on consumers in their actions against corporate entities. Corporate defendants are extraordinarily resistant to providing clearly-appropriate discovery.

Hon. Stanwood R. Duval, Jr. (E.D. La.), 98-Cv-206: Parties will spend more time trying to understand the fine distinction between "issues clearly raised by the language of the pleadings" and the "subject matter" of the case. This will cause more problems than it will solve.

Faith Seidenberg, 98-CV-210: Opposes the change. Even under the present rules, it is extremely hard for an individual plaintiff to pry loose from a large corporation any material that it thinks might aid the plaintiff. Under the change, stonewalling will be greatly enhanced.

Federal Courts and Practice Committee of the Ohio State Bar Assoc., 98-CV-213: The Committee urges that action be deferred pending significant further study on the possibly far-reaching change, which would radically alter a key provision of the Civil Rules. This change will engender interpretive litigation in federal court and skew the balance in favor of defendants. Many types of cases in federal court require broad discovery, and the amendment would totally distort the pretrial discovery system and eliminate a key feature of it.

F.B.I., 98-CV-214: Supports the change because it would favor the FBI. In the majority of cases brought against it, the FBI would seek little if any affirmative discovery from its opponent. In contrast, the FBI is very often the recipient of overly broad and unnecessarily intrusive discovery requests which go far beyond the issues which should be dispositive of the case.

Montana Trial Lawyers Assoc., 98-CV-216: Opposes the change. It will increase cost and delay. The present structure of the rules provides an effective means by which discovery disputes can be presented to the court.

Michigan Trial Lawyers Assoc., 98-CV-217: Opposes the proposal. It will increase discovery abuse by encouraging stonewalling. Many plaintiffs will be prevented from obtaining relief. If the scope of discovery is tied to specific statements in the pleadings this will lead to a series of motion battles which in turn will encourage a renewed emphasis on formality and game playing.

Comm. on the Fed. Cts., N.Y. County Lawyers' Assoc., 98-CV-218:

Opposes the change. The current standard has been thoroughly reviewed and defined by the courts for decades, and is thus a predictable standard.

George Chandler, 98-CV-223: Narrowing the scope of discovery would greatly increase the cost burden on individual litigants and inevitably lead some to abandon litigation that would otherwise be pursued.

Stuart A. Ollanik, 98-CV-226: This proposal would abandon the mainstay of the discovery rules. It is hard to specify what information that is discoverable currently without special leave of court will fall outside the new limits. This is because it would abandon a well-understood and long-applied standard and replace it with a new, vague one. This will result in untold litigation, and years of uncertainty regarding obligations. We will be giving up 60 years of jurisprudence that make it clear that all parties are entitled to access to the relevant evidence.

Jon Comstok, 98-CV-228: Very much endorses the change, which he considers to be dramatic. In almost instance in which he has encountered overbroad discovery, the trial judge has refused to be involved because the current rules foster a spirit of "anything goes." Judges seem to believe their authority to control discovery has been usurped by the broad current wording of the rules.

Tony Laizure, 98-CV-229: This change simply will not work. It will result in standard responses from defendants who will simply claim that the material requested is not relevant. This will drastically increase discovery disputes. It will also put the judge in the position of making the relevance determinations prematurely.

Edward D. Robertson, Jr., 98-CV-230: The proposed rules place the cart before the horse, requiring the plaintiff to plead his or her case as though fully informed at a time when full information is not available.

Karl Protil, 98-CV-231: Opposes the change. What does "relevant" mean? The fact of the matter is that the victim is often poor and has no records. The defendant has all the records and no incentive to provide them. Write rules to assist in the

search for the truth.

Martha K. Wivell, 98-CV-236: Opposes the change. The most widespread problem in discovery is stonewalling. Narrowing the scope will encourage this behavior. There is not sufficient evidence that discovery imposes excessive costs to justify narrowing its scope. This will also encourage litigation about the scope of discovery, and undermine notice pleading.

Jeffrey P. Foote, 98-CV-237: Opposes the change. This would effectively eliminate notice pleading. "By narrowing the scope of discovery, the plaintiff is effectively precluded from learning information that would be helpful to his or her case." Automobile manufacturers, for example, regularly refuse to provide information about other incidents unless the circumstance is practically identical.

Anthony Z. Roisman, 98-CV-240: This change will open Pandora's box of litigation problems by displacing a familiar standard. It seeks to draw an impossible line between material relevant to the subject matter in the litigation and that relevant to the claims and defenses. There is no evidence that this will solve any serious problems, although it surely will create some. The real problem with discovery is failure to produce what is required under the rules, not over-discovery by plaintiffs.

Norman E. Harned, 98-CV-241: The change is not advisable. Parties will simply make pleadings far more specific and detailed. In addition, the narrowing may allow parties to prevent disclosure of evidence adverse to the producing party's position.

Darrell W. Aherin, 98-CV-243: Opposes the change. This will increase the burden on individual plaintiffs because a bifurcated system will lead to additional costs.

Eastman Chem. Corp., 98-CV-244: Supports this "pivotal" change narrowing the appropriate discovery. Coupled with Rule 11, this change will appropriately focus the activities of the litigation on the actual dispute between the parties.

NAACP Legal Defense Fund, 98-CV-248: Like the narrowing of disclosure, this change is undesirable. Defense counsel will

take a very narrow approach to plaintiff's claims and try to confine discovery accordingly. Inevitably there will be meritorious claims and defenses that are not aired. At the same time, there will be considerable litigation about the new terminology and its meaning. This will lead to the type of hairsplitting that the Federal Rules were intended to prevent.

Jeffrey J. Greenbaum, 98-CV-251: (attaching article he wrote for the New Jersey Lawyer) The change is useful, coupled with the protection to permit broader discovery if the court determines it to be proper.

R. Gary Stephens, 98-CV-253: Narrowing the scope of discovery works only for the benefit of the defendant.

Warren F. Fitzgerald, 98-CV-254: This change will impede the free flow of information in most civil actions.

Anthony Tarricone, 98-CV-255: This change will make it easier for parties and their counsel to decide unilaterally that documents and data are not discoverable, and opposing parties will consequently never see the relevant evidence.

Annette Gonthier Kiely, 98-CV-256: Opposes the change. It will provide a further shield for defendants to legitimately withhold and fail to identify witnesses and evidence which are most relevant and germane to the claims brought by the plaintiff.

David Dwork, 98-CV-257: Opposes the change. It will have the undesirable effect of limiting the ability to obtian valudable documents and data that may be critical and are often in the opposing party's exclusive control.

William P. Lightfoot, 98-CV-260: Opposes the change. The main problem with discovery is that parties resort to evasive tactics to withhold information. "The only preventive measure against such evasion is a definition of discoverable information that is so broad that it is not subject to disagreement between the parties."

New Mexico Trial Lawyers Ass'n, 98-CV-261: Opposes the change. It is counter to the entire concept of notice pleading and encourages unnecessarily detailed pleadings. The current scope

limitation sufficiently curtails unjustified inquiries. The change would foment discovery disputes where they don't happen now.

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l, Inc.) Supports the change because there are rarely any reasoned limitations on discovery. This has had a negative effect on Navistar's business.

U.S. Dep't of Justice, 98-CV-266: The Department does not support birfucating discovery between attorney-managed and court-managed discovery. The Committee's proposal is, at best, an indirect method for encouraging judicial involvement with discovery, and such a broad and systematic change is not warranted by extant evaluations of how discovery is now working. Making this change is likely to lead to unintended consequences and disputes about the meaning of the change. It seems that the problems that occupy the Committee exist in particular types of cases -- large, complex, contentious, and high-stakes litigation -- and a solution should focus on those types of cases. A discrete problem calls for a targeted response. The distinction created by the proposal is, at best, ambiguous, and it would provide a recalcitrant party with ammunition for obstructing access to relevant information. The experience with Rule 11 should offer a warning about the possibility of additional litigation from such a change. The Department offers several examples of types of situations in which the change might lead to problems. (See pp. 7-8) There is often a serious imbalance of information regarding access to relevant facts at the pleading stage, and this change would worsen that problem and might be iconsistent with notice pleading. To limit discovery to claims pled could make discovery a game of pleading skill.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: Does not support the change. The change is not justified by the empirical information available. Although it might force judges to become more involved with discovery, it is hard to believe that it will do so with judges who don't want to become involved. But the effect is likely to be increased litigation about the meaning and application of the new standard and to make it harder to settle cases.

Thomas E. Willging (Federal Judicial Center), 98-CV-269: Writes

to clarify data presented by FJC survey and to caution against inferring more than the data will support. He notes that several commentators opposing this change to the handling of discovery scope referred to tables in the FJC report and drew conclusions or even added "data" concerning numbers or proportions of respondents who assertedly did not believe that proposed change would decrease the expenses of discovery. In particular, some assert that the FJC survey shows 69% of respondents to believe that narrowing the scope of discovery would not decrease the cost of discovery, and that only 12% of respondents believe that narrowing the scope of discovery would reduce the costs of discovery. Given those contentions, Willging clarifies what the survey results actually show: (1) Readers should not assume that failure to endorse a proposal means disagreement with it. Thus, the 69% who did not predict favorable consequences for narrowing the scope of discovery might have selected other choices had they been included on the questionnaire, such as that they disagreed with the proposal as a matter of principle, that they don't know, that they didn't want to say, or that they had no opinion on the matter. (2) Regarding the assertion that only 12% believed that reducing the scope of discovery would reduce expenses, he notes that this use of the data fails to take account of whether the expenses in the given case were reported to be high, about right, or low. If that is taken into account, one finds that 24% of the attorneys who said that the expenses were high in the case believed that reducing the scope of discovery would reduce expense, 12% of those who said that expenses were about right thought the change would have this effect, and 7% of the attorneys who said discovery expenses were low thought narrowing the scope would have this effect.

Testimony

Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) DRI would have preferred an overall narrowing of discovery scope, but views proposed change as a significant step in the right direction. He is unable, however, to provide an example of a case in which the change in the rule would make a difference in discoverable information.

Allen D. Black, prepared stmt. and Tr. 18-30: Opposes the change as a "serious mistake." A prime problem with discovery is that lawyers contrive beyond any proper bounds to avoid giving words their plain English meaning. This change will encourage undesirable activity of this sort, and send a powerful message to both lawyers and clients, encouraging them to interpret their discovery obligations even more narrowly than they do now. The change is supported only by the anecdotal grousing of a relatively small group of lawyers who tend to handle very large cases. Certainly the Committee would not want to establish the principle that a powerful segment of the bar can secure changes to the Rules simply through perseverance. This change will cause substantial increased litigation over discovery disputes. It will also put pressure on lawyers to assert thin or borderline frivolous claims or defenses. Asked to offer an example of a case in which the difference would matter, he suggests a contract case where the plaintiff feels that there has been fraud. Under the current rules plaintiff would file a breach of contract suit and take discovery about the possibility of fraud. Under the amended rule, one is pushing the plaintiff's lawyer into treading close to the Rule 11 line to file a fraud claim as a predicate for discovery. There will be a monumental message to the profession that discovery should be cut back. At present, there is already a culture that it is o.k. to read requests as narrowly as one can, and requesting parties therefore write their requests as broadly as they can. If the rule is narrowed, this will become more of a problem. (Tr. 24-26)

Gregory Arneson, Tr. 30-45: (Representing New York State Bar Assoc. Commercial and Federal Litigation Section) Favors narrowing scope of discovery. His organization has urged narrowing the scope since 1989. It is made up of both defense and plaintiffs' lawyers, usually those involved in complicated commercial litigation. It believes that the proposed amendment will change the standard. As an example of a case in which the standard would make a difference, he offers an antitrust case involving a certain market, and the question is whether plaintiff can have discovery about defendants' behavior in other markets. This is similar to the question in an employment discrimination case whether defendant has engaged in discriminatory conduct at other locations in addition to the one where plaintiff worked. Then under the new standard it would be up to the plaintiff to demonstrate some reason why information about other locations

would have a bearing on the case before the court. (Tr. 34-36) It is true that it will take some time to get used to the new standard. Although there is a tension with Rule 11, the place to deal with that is at the Rule 16(b) conference and establish clear parameters for discovery in the case. There will probably be a little more Rule 11 litigation as a result of this change.

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense Counsel) The two-tiered approach, shifting the line for attorney-managed discovery, is the correct direction for change. Frankly, would have preferred to close off discovery to the subject matter limitation altogether. Offers examples from a state court of cases in which the change would make a difference. In one asbestos case, plaintiff asked defendant to produce all documents about the operation of the company from 1920 to the time of the suit, including all organizational charts, minutes of meetings, etc. Whether or not the change in language on its own strength alters the result in such cases, it is important to send a message that it is no longer appropriate to adopt an anything goes philosophy. Even if this philosophy does not exist in federal courts, there are state courts that seem to have embraced it. But the domino effect of the federal rules on practice in state court means that this change can alter that behavior.

Kevin M. Murphy, Tr. 80-89: In his experience, the currently-broad provisions regarding the scope of discovery have led to abuses and some scorched earth discovery tactics. Often judges restrain abuses, but sometimes they do not. This has happened in state court and federal court. It is only human nature for one side to want to discover everything that is allowed. In this environment, the shift to "claims and defenses" does make a significant improvement in giving at least some guideposts to both counsel and judges. Counsel will moderate their behavior somewhat. As an example, offers a case in a state court in which he represented a defendant in a suit that resulted from a contractor hitting a gas line, thereby causing a substantial explosion. One of the defendants decided to extend its exploratory discovery to whether the gas line had been mismarked in the first place, even though no witness had indicated this was so. This defendant dragged everyone else through six or seven depositions devoted to this question, and there was no way to put a stop to this. But had there been a mismarking, that would have been relevant to the claims and defenses in the case, so it is

not clear that the wording of the scope rule would bear heavily on this problem. Eventually, this defendant was sanctioned for pursuing this fruitless line of inquiry, but this happened only after a tremendous amount of expense had been incurred.

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Opposes the proposal. The empirical evidence does not show that over-discovery is a serious problem, but there is a problem with discovery resistance. If the goal is to send a signal, the signal should address the problem that the empirical evidence shows is real. But only a relatively small number of respondents in the FJC survey said that requests for excessive documents had occurred, and that proportion corresponds to the figures in the 1960s study done for the Advisory Committee before the 1970 amendments to the discovery rules. But the signal will be that judges should be skeptical about discovery requests being too broad, and people won't get the material that is relevant to their claims and defenses. The "claim or defense" focus puts too much emphasis on the pleadings. It will also produce Rule 11 litigation. Some plaintiffs will have valid claims but not evidence sufficient to plead them.

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: Opposes the change. It would throw out 60 years of experience under the current scope provision, and invite costly satellite litigation. Even through discovery abuse does exist, it is not pervasive, and this "solution" is disproportionate to the problem. Judges will be inundated with applications to extend discovery to the subject matter limit. The courts already have the power to limit discovery in a case, and this change won't add anything of substantial value. But the change will likely undermine notice pleading because parties would be forced to plead claims or defenses they would otherwise not include in order to provide a basis for discovery. There will also be a tendency to push the limits of Rule 11, and motions to dismiss for failure to state a claim will also likely proliferate. The change will also produce undesirable distributional effects where evidence is in the exclusive possession of a defendant. Actually, the subject matter standard is great, and very important to furthering the Federal Rules' attitude toward specificity of pleadings. This change will destabilize this settled area.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Supports the change. There has been "scope creep" in federal courts under the current standard. Limiting discovery to material relevant to claims and defenses is clearly preferable to discovery relevant to the "subject matter" of the case. The "subject matter" definition, combined with the "leading to discovery of admissible evidence" criterion, has left no real limitation on the scope of discovery, and this has contributed to the scope creep that has occurred. Over the past 25 years, we have come to a situation in which there is effectively open discovery without regard to cost of anything a party asks for. He offers examples from his own experience. In one, the case involved an injury in which there was a rear-seat shoulder harness. The claim was that there should have been a three-point harness in the back seat rather than a two-point belt. On behalf of defendant, he produced documents about the rear-seat seat belt. The plaintiff took the position that the subject matter of the case was seat belts, and that discovery should include anything about seat belts in defendant's files, including cars manufactured in the 1920s and 1930's. In addition, the defendant manufactured airplanes, and plaintiff sought discovery about airplane seat belts even though those are of a completely different design. The court rejected the argument about airplane seat belts, but did require production going back to the 1920's on car seat belts. The cost of doing that production was $342,000. Under the proposed standard, he is convinced that he would have gotten a different result, because the argument that prevailed was that the subject matter of the case was seat belts. The real problem is not the abstract question whether a certain set of words seems to be more confining, but that the evolutionary impact of litigation is that with the current rules there is no effective restraint for the judge to invoke. Coupled with the narrowed disclosure required under the Committee's proposed amendments, this change will allow the judge to focus on what the case is really about and get a handle on the proper scope of party-controlled discovery.

San Francisco Hearing

Maxwell M. Blecher, prepared stmt. and Tr. 5-14: Opposes the change. It will encourage defendants to resist discovery that is now recognized as routine. In antitrust cases, discovery is the lifeblood on which plaintiffs rely. The change will therefore

undercut the private antitrust remedy. It will also encourage more expansive pleading. In real life, defendants can always justify the most expansive discovery, relying on causation and scope of damages. That justifies inquiry into almost every aspect of the plaintiff's business, and this would be true under the new formulation as well as under current law. But the message to judges is to restrict plaintiffs' discovery. Even if the plaintiff is found entitled to broader discovery on a good cause showing, the back-up suggestion is that the plaintiff should pay for it, which will discourage the process of litigating. As an example, consider an antitrust case about monopolizing oranges in which plaintiff wants to ask about grapefruits; that would probably be found not to relate to the claims or defenses. But it would relate to the subject matter of how defendant conducts its business. There will be disputes about scope in every case, where now these disputes are very rare. Plaintiff will routinely be arguing for expansion to the subject matter limit. There will also be more pleading disputes, as defendants focus on what is actually already in the complaint and plaintiffs seek to expand them. Right now there is little dispute, and the only things taking up the court's time are disputes about privilege. This will expand the areas for dispute. There is a slight judicial tilt in favor of defendants today, but given the subject matter language in the rule this is not too problematical. This change will encourage judges to become too restrictive. But plaintiffs don't want to pose expansive discovery requests in antitrust cases. They prefer to go with the rifle rather than the shotgun. Spending time and money on discovery is wasteful from the plaintiff's perspective. (Tr. 10-14)

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) Supports the change. The reason there are few disputes about scope of discovery today is that, in effect, there are no limits under the current rule. The current situation is an invitation to the broadest of discovery. In tobacco litigation, for example, there are already warehouses full of documents that have been produced, but plaintiffs' lawyers want more without ever having looked at those already produced. The current proposals will work wonders in terms of changing the method of doing litigation. The rich plaintiffs' lawyers are getting richer, and they can afford huge amounts of discovery. Because they can spend whatever it takes, the absence

of limits in the rules has become quite difficult to endure. He does not accept the idea that the change in the scope will prompt plaintiffs to write broader complaints, because in his experience there could not be broader complaints than there are currently.

Diane R. Crowley, prepared stmt. and Tr. 23-36: The change is precisely what is needed by most parties most of the time. In California, the state-court discovery rule was drawn in the same broad way as the current federal rule, and every California lawyer can relate tales of litigants who have simply given up due to excessive discovery and settled because they could not afford to continue the discovery battle.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) The present scope of permissible discovery is an invitation to overbreadth and abuse. The proposed amendment is sorely needed. In particular, it is important to curtail massive, unjustifiable fishing expeditions in complex cases. Shell regards this change as one of the most significant and needed amendments. He has not seen many plaintiff attorneys who use rifle-shot discovery. Instead, in almost every case the cost of discovery is far too high, and for material that has little prospect of being useful in the case. In many jurisdictions, the judges will regulate discovery in a sensible way, but there are other jurisdictions in which that does not happen. There needs to be an appreciation that, with a company like his, asking for all information on a given subject is a huge request that is bound to produce a lot of entirely irrelevant material. This problem comes up in almost every significant case, and there is a tremendous amount of lawyer and judge time involved in addressing these issues under the current rules. Under the committee's proposal, that should not occur. As Mr. Blecher said, under the current rules, costs are very rarely shifted, so the supposed limits on disproportionate discovery don't do anything in most cases. Usually the subject matter provision trumps all before it. He views this as a change in philosophy, and hopes that Rule 11 will keep plaintiffs from fraudulently trying to plead their way around it. This change in philosophy is needed even if the judge is involved early on (although that is certainly desirable) since under the subject matter approach the judge's involvement won't solve the problem since the problem is in the rule.

H. Thomas Wells, prepared stmt. and Tr. 47-60: The change is an

improvement on the current rule, which has, in practice, encouraged fishing expeditions virtually without limits. This is a tremendous improvement in terms of the philosophy of the rules and in terms of the message that the Committee is sending. The actual determination in a given case will depend on the circumstances presented. In a police brutality case, for example, the court will have to have that in mind in determining whether something is relevant to the claims or defenses. The change in the rule should not have a harmful impact on such cases. (Tr. 54-55) Right now, the practicing bar sees fishing expeditions as routine and, in fact, expected. The need to show good cause to justify going to the subject matter limit will give pause to some of the fishermen. They will feel uneasy about going into court and trying to articulate why they need this. Right now, even with a good burden argument, he finds that it is very hard to fight a motion to compel because of the subject matter language. The proposed change shifts the playing field a good bit, but right now it is tilted too far in favor of broad discovery.

Charles F. Preuss, Tr. 60-67: Changing to claims and defenses is good in terms of the initial disclosure and attorney-managed discovery. The subject matter limitation, in operation, has meant that everything has to be produced, and it has prevented him from persuading judges to focus on the claims actually being made by his adversaries. This would not mean as a blanket rule that in products liability cases there could never be discovery about other incidents without a court order. Rather, the point is to focus on the actual defect raised by the plaintiff. He doesn't think this will change pleadings all that much. At the initial scheduling conference, this new focus will enable the judge to ask the plaintiffs' lawyers what they are really getting at in the case and thereby focus the case. To date, he has had little success with getting even federal judges to control the scope of discovery.

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: Satisfied that the change to scope of discovery will help psychologically, if for no other reason.

Larry R. Veselka, Tr. 99-108: Some litigants will use the change in scope as an excuse or stimulus to stonewall. Then access to court will really be a problem. The shift to showing good cause

to go to the subject matter limit is a shift of burden of justification from the opponent to the proponent of discovery.

Mark A. Chavez, prepared stmt. and Tr. 108-17: Opposes the change. The current standard does not cause any problems that warrant an amendment. This will lead to an "everything but the kitchen sink" pleading approach. This is not happening now with ordinary cases even though it is probably happening in big cases. This change will make the huge complaint more common. That will lead to fights over pleadings. The fact that it is difficult to offer examples in which the change makes a difference does not mean it makes no difference, but underscores the fact that we don't know what difference it will make. It will lead to litigation about what the new standard is. Nobody can tell for sure right now what the effect of these amendments will be. The courts now have sufficient authority to limit discovery. There are individual differences in how much judges are involved. Judges who are not now involved will not welcome fights about discovery that result from these changes.

Robert Campbell, Tr. 117-30: (Chair, Federal Civil Rules Comm., Amer. Coll. of Tr. Lawyers) This is only the second time the College itself has taken a stand on a proposed amendment to a federal rule. The first time was the change to Rule 11 from mandatory sanctions to discretionary ones. The College submitted a report to the Advisory Committee in support of the narrowing of the scope of discovery. That report was carefully worked up by a number of prominent lawyers from around the nation. The report shows that the courts have interpreted the term "subject matter" differently from "claims and defenses." It also offered examples based on real-life cases. The current reality under the current rule is that there are really no limits. The new standard will permit production of all documents having any importance. The College believes that the time has come to make this change.

Anthony L. Rafel, Tr. 130-40: (President of Fed. Bar Assoc. for W.D. Wash., and appearing on its behalf) Opposes the change. It will alter pleading practices, and encourage people to plead more broadly. It will create a new layer of objections and motions. It will increase expense rather than reduce it. There are better ways to encourage judges to get involved in discovery.

Weldon S. Wood, Tr. 140-46: Supports limiting lawyer-managed

discovery to material relevant to the claims and defenses. If the lawyers can't agree, the court gets involved.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) Supports the proposal. This is a welcome and much needed reining in of the unfettered discovery of the past, with its many and manifest abuses.

Thomas Y. Allman, prepared stmt. and Tr. 162-74: (Gen counsel, BASF Corp.) Strongly favors changing to narrow the scope of discovery without court involvement. BASF frequently sees attempts in personal injury cases to argue that the "subject matter" test legitimizes open-ended access to every fact about all chemical products, not just the particular substance that the plaintiff seeks to place at issue in the litigation. In addition, it frequently faces attempts by terminated employees to coerce settlements by seeking compensation or disciplinary records of former colleagues or others for the sole purpose of developing information that may be embarrassing or useful for other purposes. This revision would be a clear change in direction that will assist in rebutting widespread opinion outside the United States that our system of justice is too unrestrained.

Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: This is her central concern about the current proposals. In an ideal world the focus on claims and defenses ought not to cause any problem. In the real world, however, this change will place an emphasis on the hypertechnical interpretation of pleadings, which are already a good deal longer than one might expect if they are supposed to be short and plain. There has been a "balanced tension" between Rule 8 and Rule 26, but this change might break it. Until now, there has been a reduction of pleadings motions, and more and more defendants are filing answers. But that could change under this proposal because it will put a premium on knocking out allegations at the pleading stage. This sends a signal to litigators that the way to preclude discovery is to hammer away at the complaint.

Paul L. Price, Tr. 16-25: (on behalf of Federation of Insurance and Corporate Counsel) The scope has to be narrowed. Plaintiff's lawyers continue to develop new strategies to search

warehouses, computers, etc. in order to develop documentation over years and years. Massive corporate sweeps are justified under the current rules. If the focus is narrower, that will improve the discovery process. Trials will become faster and simpler. The current standard is too vague. As an example, his firm had a case involving one machine. The discovery request was for documents about a lot of other types of machines, but magistrate said that the subject matter of the case was machines and the discovery had to be provided. None of the documents about other machines ever got used at trial.

Daniel F. Gallagher, Tr. 25-39: He does not see any incentive for a defense lawyer to file a Rule 12(b)(6) motion because the discovery standard has been changed. Similarly, he does not see a bare-bones complaint enabling a defendant to avoid discovery because it is bare-bones.

David E. Romine, prepared stmt. and Tr. 36-46: Opposes the change. It is not supported by the empirical information gathered for the Advisory Committee. There has not been a "disciplined inquiry" that supports this change. It will increase the expense of discovery in several ways. It will increase motion practice in all types of cases. It will lead to different standards of discovery in different judicial districts, undermining uniformity. It will force the judge to make trial relevance determinations at an early stage. Routine cases in which there are no problems now will mushroom into discovery disputes across a variety of topics. It will prevent inquiry into the witness's background at a deposition, which is now a customary and necessary thing. There are already adequate rules for dealing with problems in discovery that this will not solve. He suggests that there be a comparison between districts operating under different relevance rules to see what effect they have. This could be the "disciplined study" he says is needed.

James J. Johnson, Tr. 47-63: (Gen. Counsel, Procter & Gamble) The heart of the problem is that there are no objective standards as to scope, and as a result judges naturally are less inclined to address the issue in the first place. Procter finds itself on both the plaintiff and defendant sides of litigation, so he isn't talking just as a defendant. Moreover, he agrees that corporate parties can be among the biggest problems in relation to discovery. Finally, Procter is involved in litigation in many

countries, and he has learned the value of having discovery, which is much fairer than not having it. But with document discovery in the U.S. you have one of those rare processes in which virtually all of the benefits are received by the requesting party, and virtually all the costs are borne by the other side. As a result, there are no economic checks that would naturally lead to reasonable controls. He analyzed the costs of document discovery for Procter and found that of some $30 million in litigation costs per year Procter spends 8% on the ministerial part of document production (copying, stamping and optically scanning the documents turned over to the other side). This is roughly the same for cases in which Procter is the plaintiff or defendant. This doesn't include attorneys' fees. Each of the documents has to be reviewed by a lawyer or paralegal. With those included, document discovery comes to cost about 48% of Procter's litigation budget -- an average of $14 million per year. The costs of in-house attorneys are not included, so the actual costs are higher. Some part of this is due to the lax standard of relevance. For example, in a case involving a baby who was scratched by a piece of glass embedded in a diaper, Procter could determine from the box exactly when and where that diaper was manufactured. Even though this should have focused the case on that time and place, plaintiff asked for far-reaching discovery. Since the subject matter of the case was diapers and the manufacturing of them, plaintiff demanded all documents related to any complaints about diapers or to the entire diaper manufacturing process. This took 200 internal man-hours to produce. In that case, Procter settled rather than go through the discovery, and did not try to get relief from the court because it was told there was not chance of getting relief.

Jeffrey J. Jackson, prepared stmt. and Tr. 63-73: (V.P.-Counsel, State Farm Mut. Auto. Ins.) State Farm has been seeing increased discovery costs since he joined it two years ago, largely due to bad faith litigation. He is not aware of any connection between these increases and discovery rule provisions. The source of the problem in part is the subject matter scope of discovery. In each case, plaintiffs say that the subject matter of the case is insurance, so almost anything State Farm has might relate to that. Primarily the problems are in state court cases. In general State Farm has a better shot of convincing a federal court to limit overbroad discovery. He believes not only that motions to limit discovery would not be granted, but that making

them would be used against State Farm as evidence that it is stonewalling. The state courts look to the federal courts for guidance on rules, so changing the federal rule will probably have an effect on state court activity also. In bad faith cases, the question whether State Farm's practices in other locations would be relevant can't be answered universally but should be examined in light of the issues in the case. (Tr. 68-69) Some state courts have the claim and defense standard, but they don't do a better job than the federal courts, which operate under the subject matter standard.

Robert T. Biskup, prepared stmt. and Tr. 73-84: (Ford Motor Co.) Document discovery imposes huge costs on companies like Ford, and the scope of discovery is one reason why this is so. Ford handles almost all its document discovery in-house, and he therefore offers a unique insight into what that really means. So far as he can tell, the stated scope of discovery is virtually the same in all states as in the federal courts. In federal court there is a better chance of up-front involvement of the judge. The amorphous subject matter standard is being used a lot for tactical advantage. For example, in a 1996 case a teenager drove his car into a ditch on the way home from a bar. The driver claimed that he lost control of the car because the two air bags deployed spontaneously. The state court ordered discovery on all reports of defective air bags ever received by Ford without any temporal limitation or limitation as to type of vehicle. The suit was for $9,000, and Ford settled rather than incur the cost of discovery. This is an example of the use of scope for tactical purposes. There are more examples. The problem is not limited to complex cases, and it has given birth to a roll-the-dice mentality on the part of plaintiffs' counsel. Ford regularly finds itself in the same boat, and in part because judges feel handcuffed by the current rules. That's why the change that has been proposed is needed.

Kevin J. Conway, prepared stmt. and Tr. 84-93: Opposes the change, which will benefit people with documents. Personal injury plaintiffs often can offer no more than a bare-bones outline of a negligence case. Discovery to the "subject matter" allows the plaintiff to discover what defendants knew about the products involved. Without that scope of discovery, plaintiffs' access to proof of defendants' knowledge will be limited. As discovery proceeds, prior injuries resulting from the same

product are often revealed, allowing the plaintiff to amend his cause of action to include improper design, failure to warn, etc. Without broad discovery, the plaintiff, the court and the jury may never know how the product became unsafe. Changing this rule will encourage stonewalling. Plaintiffs will no longer risk short and plain complaints for fear of sacrificing full discovery. In the Illinois state courts, owing to strict pleading requirements, plaintiffs who would file an eight to fifteen page complaint in federal court will file one of 200 to 300 pages. This change is not supported by the empirical data, and there is no reason to shift the burden of justifying discovery to the proponent. We already have court supervision without a change in the rule, because the judges often impose limitations. Lawyers already work these things out, including expense, without a change in the rules. The truth is that product liability defendants know what the plaintiffs are really looking for, and they are trying to avoid having to turn that harmful information over. From the perspective of plaintiff's lawyer, there is no desire to inspect useless documents, so they will try to be reasonable about what they insist on seeing. In one case involving a Johns Manville plant in Waukeegan, Ill., defendant lied about documents showing that it was guilty of medical fraud.

Andrew Kopon, Jr., prepared stmt. and Tr. 94-98: Supports the change. This should help reduce costs in discovery, which presently is too broad and often imposes an inappropriate burden on the defendant. This is especially true in employment discrimination litigation. For an example of overbroad discovery, he offers a product liability case involving a coffee maker in which there was a problem with the thermostat. But the discovery was not limited to thermostat problems; it included all complaints about the coffee maker. Defendant was unable to get the judge to limit the discovery to problems with the thermostat.

Peter J. Ausili, Tr. 105-09: (Member, E.D.N.Y. Civ. Lit. Comm.) The committee opposes the amendment. The current standard is well understood in the district.

Gary D. McCalllister, prepared stmt. and Tr. 109-13: Opposes the change. In most cases discovery is working well, so change is not needed. It will impede discovery by plaintiffs in products liability litigation. The burden should remain on the opponent

to discovery to justify stopping it, rather than on the proponent, who would have to justify doing it.

David C. Wise, Tr. 113-19: Disagrees with the change. This will put plaintiff at a horrible disadvantage because plaintiff goes into some of these cases a little bit blind. As a result, plaintiff can't set forth all the claims at the outset. Right now there is little problem disputing the scope of discovery, but this change will produce disputes. This will open the opportunity for defendants to avoid having to turn over documents. Plaintiffs find things in discovery that lead in new directions. The Committee Note seems to be directed at discouraging amendment of pleadings to add new claims.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Opposes the change. Already defendants stonewall at first and then dump lots of stuff at the end. This will make things worse. To get anything one has to go to court, and judges give half a loaf. This will mean the loaf is smaller. The reality nowadays is not what one might guess from looking at the wording of Rule 26(b)(1); there really is a narrower approach in the courts already. If the claims and defenses standard is adopted, there will be a whole category of documents that plaintiffs aren't going to see.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) These changes have been justified by exaggerated tales of woe. The problems don't warrant across-the-board changes of this extent. There is, moreover, a longstanding practice of stonewalling by defendants. These changes will assist that activity. In addition, there will be a de facto move away from notice pleading. To some extent the concern may be a perception because people haven't practiced under the new proposed formulation. The perception is that this will be much narrower than the current standard. It would be helpful if the comments made it clear that this was not to be a substantial narrowing. There will be more litigation about scope of discovery with this narrowing. He doubts that the ability to extend to the subject matter limit on good cause will make up for this, and is concerned that there is a natural tendency to try to limit discovery, which may come into play at that point.

John H. Beisner, prepared stmt. and Tr. 147-54: Favors the

change. It should get judges more involved in discovery issues. The idea behind the current regime was that discovery would narrow issues, but that didn't happen. It has become the great procrastinator's provision, for it allows parties to put off having to decide what the case is really about. In the E.D. Va., for example, the court's insistence on moving the case forces the lawyers to define the issues. There will be more motions, but that is not necessarily a bad thing because the focus of them will be different. Right now we don't have a meaningful limitation on discovery, but with this change there will actually be something for the judge to do on such a motion. Although courts do say they don't authorize fishing expeditions, the reality is that they will consider burden as bearing on which ones to authorize. A scope limitation wouldn't have to turn on burden, because it would set some limits that go to the content of the discovery rather than the effort involved in providing it. Actually, judges are a lot better equipped to address scope than burden, because that is a legal rather than an economic concept. These changes should not have that much effect on pleading practice, for people plead what they can already. Complaints may be more specific, but that is not necessarily bad. He sees no connection between the changes and abuses like stonewalling.

Laurence Janssen, prepared stmt. and Tr. 154-60: Favors the change. The current scope allows plaintiffs to increase the cost of defense as a tactic. There is a mind set that everything should be produced through discovery if somebody wants it. At least with this change there will be a framework for addressing the real need for proposed discovery.

Jonathan W. Cuneo, prepared stmt. and Tr. 160-65: Urges that a decision on this be deferred. The anecdotes from defense lawyers about costs of discovery could be matched by anecdotes from plaintiff lawyers about improper discovery resistance. The task of searching for information is undergoing a transformation due to computers, and it does not make sense to alter the scope of discovery due to search burdens that are likely to disappear soon. All this change would do is to substitute one set of ambiguities, which will need to be clarified by the courts, for the ambiguities of the current rule, which at least have received the attention of the courts for a long time. In antitrust cases, with which he is familiar, this change would prompt defendants to try to throttle potentially fruitful and valid lines of inquiry.

Sanford N. Berland, prepared stmt. and Tr. 165-71: Strongly supports the change. This is a positive step toward reining in uncontrolled discovery and the abuses that it causes. There will be a period of time during which the understanding of the new rule will have to take shape, and some additional motion practice. But some of this happens already in the context of motions for protective orders and the like. To the extent this might lead to differences between districts in interpretation of the scope of discovery, that should be no more than the differences among districts that exist at present under the current rule.

Pamela Menaker, Tr. 177-82: (Reading prepared statement of Robert A. Clifford, chair-elect of ABA Section of Litigation. Prepared stmt. of Clifford appears below) Opposes the narrowing of discovery. He is aware that the ABA Section of Litigation favors the change, but he is opposed in his individual capacity. He thinks that the scope of discovery is essential to fair disposition of cases. Defendants will take additional advantage of the discovery process. The Advisory Committee should focus on the abuses by defendants, not change the scope of discovery.

Thomas E. Rice, Tr. 183-88: The current standard is too subjective, and the claims and defenses standard would be more objective. Using it, judges will be able to make sensible decisions. Presently, in airplane liability litigation, no matter what the problem involved, plaintiffs will want to inquire into any problems of any type related to the aircraft in question. You end up with a mini trial on every prior accident, and you have to produce thousands of documents and witnesses from everywhere involved in those other accidents. But none of these are ever used at trial, because for use at trial you have to have similarity of accident. Discovery disputes become the animating force behind settlements, and sometimes the focus of the case becomes discovery instead of the event that originally prompted the suit.

Daniel Fermeiler, Tr. 188-93): Favors the proposed change. It will be workable. The claims and defenses standard can set boundaries for experienced litigators and the trial bench. It should not add anything to what we now deal with under Rule 9(b), where one must plead with specificity.

Lorna Schofield, Tr. 193-202: (speaking for ABA Section of Litigation) She expects that it will continue to be hard for judges to say no to discovery under the revised standard. In some ways, it's easy for a judge to say yes to discovery because in a sense there's no harm done, and you are not keeping anything from anyone. Under the new rules, judges are not suddenly going to embrace denying important discovery to litigants. She cannot agree with Robert Clifford (see above) on these issues.

Peter Brandt, Tr. 208-11: (representing Ill. Assoc. of Defense Trial Counsel) He has seen instances of overdiscovery by plaintiffs. The court would not restrict discovery in advance or impose costs later. The proposed amendment at least gives courts some guidance about the type of situation in which plaintiff's counsel wants all every item of information about a type of product.

Lloyd H. Milliken, prepared stmt. and Tr. 211-17: (president-elect of Defense Res. Inst.) Offers example of jeep rollover case in which plaintiff noticed depositions of 24 people across the country who had been involved in other rollover accidents, and the court refused to limit that. Had the new rule been in place, he believes the judge would have taken a different tack. The alleged defects in the other cases were different. The change will prompt court involvement, and that of itself will be a good thing.

Linda A. Willett, prepared stmt. and Tr. 211-17: (Assoc. Gen. Counsel, Bristol-Myers Squibb Co.) Under the broad current language, litigants use discovery as a vehicle to explore additional claims and as a way to investigate unknown but potentially available theories of liability. The Committee Note should make it clearer that parties have no entitlement to discovery to develop claims or defenses not already identified in their pleadings.

Michael J. Freed, prepared stmt. and Tr. 226-35: This change will result in a change from notice pleading, which would not be a positive development. Plaintiffs' lawyers will provide particularity where they do not now in order to provide a basis for broad discovery. But there will still be disputes on whether given discovery efforts come within the claims and defenses. The changed rule will deter compromise regarding discovery and lead

to more disputes coming before the court.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Caterpillar strongly supports the narrowing of the scope of discovery presumptively available. Personal injury claimants frequently use the "subject matter" test to seek unrestricted access to information regarding each and every piece of machinery that Caterpillar manufacturers, rather than focusing on the piece of machinery at issue in the case. This amendment deters this discovery run amok. This is needed now, for in the last ten years the amount of discovery has grown even as the number of cases has shrunk. It has proved hard to get a judge to pay attention to these issues, and when they do they usually seem to think that since Caterpillar is a big company there's no reason to be concerned about the burden of what they order.

Chris Langone, Tr. 251-259: (appearing on behalf of Nat. Assoc. of Consumer Advocates) NACA believes that the proposal will increase the cost of discovery on behalf of consumers because it will encourage parties to raise more improper objections to discovery requests. Right now, defendants resist discovery that is clearly appropriate, and this change will embolden them. These cases are document driven, so defendants have a strong incentive to resist producing documents because that will leave plaintiffs without anything on which to base their claims. For example, in a Truth in Lending Act case, he found an odometer violation. But with the narrowed discovery he might not be able to do discovery that would reveal that violation because his original claim was for violation of the Truth in Lending Act. Both Rule 15(a) and rules of claim preclusion argue for permitting the broadest discovery of other claims in the initial litigation. In any event, the defendant will still have to review all the documents to weed out the ones that are not about this claim, so it doesn't really save the defendant any money. It only means that the plaintiff won't get those inculpatory documents because they supposedly go beyond the narrowed scope of discovery.

Robert A. Clifford, prepared stmt.: Opposes narrowing discovery. This will interfere with the benefits of notice pleading. The present scope of discovery contributes to the early settlement of cases, while the narrowed scope will mean that a great many

consumers and victims with strong claims will be denied justice. The fundamental fact is that in many cases plaintiffs lack information, while defendants have information and do not want to give it up. This leads to stonewalling, which is endemic. Even when they are ordered to produce relevant documents, defendants produce some scant documents in an attempt to feign good faith. If the Committee is really concerned about problems with discovery, stonewalling is where its attention should focus.

Thomas Demetrio, prepared stmt.: Narrowing the scope will cause an unending volume of litigation about the allegations of the parties' pleadings and the interplay of those allegations with the individual discovery requests. Judicial rulings on these issues will take time, but will not produce a body of law that will provide guidance for other cases.

(b) Authorization for expansion to "subject matter" limit on showing of good cause

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) This will undermine the limitation of discovery to material relevant to claims and defenses.

Prof. Edward D. Cavanaugh, 98-CV-002: The amendments will generate costly satellite litigation by prompting motions for discovery available as a matter of right under the current rule. The courts will be involved in discovery disputes more often.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: Opposes this authorization. It notes that there is no definition of "good cause," and that the good cause requirement provided in Rule 34 with regard to document discovery until 1970 was deleted in that year as uncertain and erratic in application. The Section found no precedent for the two-tier standard proposed by the Advisory Committee. This is likely to promote satellite litigation, particularly since there is no guidance about what constitutes good cause. The claims and defenses test, standing alone, should provide sufficient flexibility. As a bottom line matter, "on balance, we believe that the amendment, if enacted, can have an important salutary effect on the parties' and the courts' approach to discovery problems."

Maryland Defense Counsel, Inc., 98-CV-018: Expresses concern that trial judges numbed by years of tolerance of scorched earth discovery requests will fail to actively manage discovery under the proposed amendments, so that the intended benefits will not occur. Therefore urges that the Note stress that any discovery beyond attorney-managed discovery be treated as suspect.

Prof. Peter Lushing, 98-CV-020: Suggests that removal of the "subject matter" language is what the Devil would do (see above). "But I would not stop there. I would permit discovery of the 'subject matter' upon motion. Now, assuming anybody understood the above distinction, I would assure endless litigation as lawyers who bill by the hour found yet another way of running up fees."

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "The trial court can always look at discovery requests under a good cause standard. The parties can be protected by the trial court if they can establish good cause for reasonable discovery requests."

Assoc. of the Bar of the City of N.Y., 98-CV-039: The two-tiered structure has problems. It creates a distinction so fine as to lack practical value. The current rule uses both criteria, but suggests that the latter is a different way of saying the former. The leave of court option invites increased discovery motion practice. The Committee opposes any kind of leave-of-court process for determining the scope of discovery.

ABA Section of Litigation, 98-CV-050: Supports the proposal. It strikes a good balance by giving the court flexibility to permit broader discovery when warranted in an individual case. The proposal also encourages the court to supervises cases involving extensive discovery.

Laurence F. Janssen, 98-CV-058: Urges that the Note emphasize that any party's request to expand the scope be carefully examined and that there be a presumption against expansion.

Charles F. Preuss, 98-CV-060: Elimination of the "subject matter" standard entirely would facilitate more consistency and predictability in the discovery process. If the expansion is to be retained, more guidance, perhaps in the Committee Note, should be given on what constitutes good cause.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: "We anticipate that judges will be inundated with applications to extend discovery to the 'subject matter' of the action, and that these applications will be routinely granted. Judges would indeed be involved in discovery disputes, but not in a way that would expedite litigation but rather in a way that would be tedious, time-consuming, and inefficient."

Amer. Coll. of Trial Lawyers, 98-CV-090: While supporting the deletion of the subject matter requirement, the College believes that an order authorizing discovery to that limit should "be permitted only in a very unusual case." "Unless the 'subject matter' exception is left to the rare or unusual case, the

proposed amendment could be meaningless." (The foregoing is in a Nov. 30, 1998, letter from E. Osborne Ayscue, Jr., President of the College, to the Committee, 98-CV-122.)

Michele A. Gammer, 98-CV-102: (on behalf of Federal Bar Assoc. of W.D. Wash.) The amendment will create a new category of "standard" discovery motions--motions to expand discovery for good cause. Judges do not wish to become more actively involved in managing the discovery conducted in complex cases, and an increase in discovery motions will cause further delay while parties await decision by busy federal judges.

Prof. Beth Thornburg, 98-CV-136: (enclosing copy of her article Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals, 52 SMU L. Rev. 229 (1999), which contains observations about the proposals) "What, exactly, is good cause to go beyond whatever its 'claims and defenses' are? These decisions are likely to be highly discretionary and extremely case-specific. . . . This non-standard layers uncertainty on top of uncertainty and is begging to be repeatedly litigated."

Board of Judges of S.D.N.Y., 98-CV-143: In complex or contentious cases, one or the other party will, without exception, seek to demonstrate "good cause" for the broader scope of discovery. This will lead to further delay and expense, particularly if the expansion is authorized.

William C. Hopkins, 98-CV-165: From the plaintiffs' perspective, the expansion possibility is a crumb. To expect the judges to get involved is unrealistic, and the provision to expand to the subject matter limit is illusory.

Prof. Ettie Ward, 98-CV-172: The proposed two-tier system is likely to generate a great deal of satellite litigation, and there are also likely to be undesirable effects on pleadings designed to justify broader discovery.

Nebraska Assoc. of Trial Attorneys, 98-CV-174: The good cause expansion is bound to place further stress on the judicial system,and will lead to more discovery arguments.

Association of Trial Lawyers of America, 98-CV-183: This will generate satellite litigation. ATLA doubts that the distinct

courts can realistically handle the resulting disputes.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: This will lead to more discovery disputes and motions over the question whether the trial judge should or should not "broaden" discovery in a particular case.

Michael W. Day, 98-CV-191: This will lead to satellite litigation and increase the cost for litigants.

James C. Sturdevant, 98-CV-194: "The availability of judicial relief from the reduced discovery of the proposed amendments offers scant benefit to most practitioners. The delays and costs involved in pursuing any discovery motion will serve as an effective deterrent to seeking more expansive discovery."

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: The expansion possibility is a Catch-22 because it won't be of any use to parties who lack the information necessary to justify expansion.

Trial Lawyers for Public Justice, 98-CV-201: This will not solve the problems caused by narrowing the scope of discovery. It is already very hard to get judges to hear discovery motions, and if courts heed the Committee Note they are very unlikely to grant expanded discovery. It will be hard for requesting parties to establish specific good cause to get discovery, because they need discovery to do that.

Michigan Trial Lawyers Assoc., 98-CV-217: Takes little solace in this opportunity. It will be hard for requesting parties to get information through this procedure because it will be difficult to come forward with evidence to establish good cause to get discovery of materials which could not be specifically identified in advance.

Donald Specter, 98-CV-235: The good cause requirement is tantamount to a prohibition on discovery since it will be nearly impossible to establish good cause. A litigant cannot establish good cause to demand information if the litigant does not know the information exists.

NAACP Legal Defense Fund, 98-CV-248: There will be considerable

collateral litigation about expanding discovery.

R. Gary Stephens, 98-CV-253: The bifurcated system of court-managed discovery serves only to increase the cost of litigation, thereby denying the right of trial by jury to the citizens of the United States.

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l Corp.) Navistar is concerned this this will too easily present a back door route to returning discovery to the monstrosity that the proposed changes are designed to eradicate.

Testimony

Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) DRI would favor greater specificity in the Committee Note concerning the good cause showing necessary to obtain information that is not relevant to the claims or defenses. It would prefer to limit discovery to claims and defenses without any authority to expand on court order, and it hopes that the courts will exercise a lot of discretion in expanding.

Gregory Arneson, Tr. 30-45: (Representing New York State Bar Assoc. Commercial and Federal Litigation Section) Opposes the expansion possibility. Having two levels in the rule is just going to confuse things, particularly since the Committee Note makes it unclear where the line is between the two of them. If there were only one standard, then everyone would have to run with that. Moreover, the good cause standard was rejected in Rule 34 back in 1970. (Tr. 37-38)

Kevin M. Murphy, Tr. 80-89: He does not see a boom in discovery litigation due to the existence of expansion to the subject matter limit on court order. From his experience, counsel are reluctant to go before the judge on a discovery dispute, unless it is really significant. In general, people will moderate their behavior. (Tr. 86-87)

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) The good cause expansion possibility helps offset the

negative consequences of narrowing the scope of discovery, but it is a fairly modest change in the original proposal to narrow discovery. It is very difficult for courts to hold hearings on discovery issues in a timely way. Moreover, this is a Catch-22 solution, since a party can't make the needed showing without access to the materials in question. Case law on protective orders, which also turn on "good cause," shows that substantial amount of specificity must be shown. As a consequence, this escape valve is going to have very small practical effect in real litigation.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Concerned that the overall discovery obligation remains vague so long as the court may order discovery to the "subject matter" limit, even though that is judicially supervised. At the very least, the Committee Note should acknowledge precisely what is necessary before the discovering party is permitted to "dig deeper."

San Francisco Hearing

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) The concept of restricting "subject matter" discovery until good cause is shown is valuable.

Diane R. Crowley, prepared stmt. and Tr. 23-36: Appreciates the value of giving the court power to expand discovery, but is worried that in some places discretion is used too often to do so.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell is concerned that the amendment of the scope of discovery might be undermined by the allowance of broader discovery on court order for good cause shown. If this option is retained, the Committee Note should stress that any request outside the scope of attorney-managed discovery should be examined with the closest scrutiny, and be permitted only on a particularized showing of necessity or palpable bad faith of the responding party. Absent such caveats, the history of free-roaming, overly burdensome and irrelevant discovery will be very difficult to overcome. Frankly, Shell has difficulty conceiving what would justify application of the exception absent bad faith.

H. Thomas Wells, prepared stmt. and Tr. 47-60: The requirement that a litigant seek a court order on good cause should at least give pause to the discovery "fishermen," and hopefully reasonably restrict such requests.

Charles F. Preuss, Tr. 60-67: Thinks that the scheduling conference will focus on the question of scope of discovery, in response to question about whether the ability to expand to scope will prompt more discovery motions. So the parties should know almost from the start whether the judge will authorize that. In addition, the judge can indicate what good cause would be in the given case. Good cause is where this whole scheme is going to stand or fall. To the extent the Committee can help explain what that is, it will assist the judges and the lawyers operating under the new approach. Probably plaintiffs will come to the Rule 16 conference and say that they want to go to the subject matter limits, and the issue will be addressed then. (Tr. 65-67)

Robert Campbell, Tr. 117-30: (Chair, Federal Civil Rules Comm., Amer. Coll. of Tr. Lawyers) The College doesn't really like the proposed right to seek expansion to subject matter on a showing of good cause. It would prefer to see the second tier eliminated. At least it would hope that the exception does not become the rule. It does not, however, think that the court will have to hear good cause motions in every case. If lawyers are before the court, that is likely to be due to disputes about the attorney-managed scope. One example for proper expansion might be a case where a plaintiff has one kind of claim and wants to see if there is a basis for adding another type of claim.

Gregory C. Reed, Tr. 146-55: Does not expect that having the possibility of expanding scope for good cause will cause more disputes to be taken before the court. There will be occasions when there are disputes about whether proposed discovery is within the claims or defenses. (Tr. 153-54)

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) Views the addition of the ability to go to court to expand discovery as unfortunate. Urges the Committee to state clearly in the Note that this should be limited to situations clearly involving good cause, for otherwise this option may overwhelm the rule and the discovery abuses remain unaddressed.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: If the amended scope of discovery works as seems intended, it would be an ingenious compromise. However, perhaps there should be further explanation in the Note of the need to establish good cause for information related to the "subject matter" of the case. One way would be to use sequencing of discovery. He does not foresee, however, that there will be much more court involvement.

Chicago Hearing

Paul L. Price, Tr. 16-25: (on behalf of Federation of Insurance and Corporate Counsel) Supports the concept of the two-tier, good cause, approach. There are situations where the initial exchange requires additional supplementation. The good-cause standard should be used. Having to come to court with those disputes would be a good thing. One example would be the one in the Illinois courts -- the prima facie case. You can't pursue a punitive damage claim without making such a showing.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Sees the good cause burden as a serious impediment to plaintiffs. If they don't have access to the documents, they can't make the showing. How do you prove there's something good out there if you don't know what is out there? In everyday practice of law people don't do what the are supposed to do, so plaintiffs have to file Rule 37 motions.

Sanford N. Berland, prepared stmt. and Tr. 165-71: The Note should say that courts ought to look with skepticism on requests to expand the scope of discovery. If they do so, they should do so with regard to specific requests rather than as an abstract pronouncement. In the absence of these cautions, the salutary effects of the narrowing amendment may be lost.

Michael J. Freed, prepared stmt. and Tr. 226-35: This change will prompt increased discovery motion practice. Requiring judicial involvement will result in micro-management.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Urges that Note stress that broader discovery be used sparingly and in a staged fashion, so that this exception does not eat the rule.

Dean Barnhard, prepared stmt. and Tr. 267-76: Strongly urges that the Note say that discovery should be expanded only if that is justified by something far more palpable than idle curiosity or the desire to engage in a fishing expedition. The case that goes beyond the claims and defenses limit should be the exception, not the rule. In this regard, the cost-benefit considerations of Rule 26(b)(2) are entitled to considerable weight.

Robert A. Clifford, prepared stmt.: In practice, this expansion procedure would prove totally ineffective and it borders on the unreasonable. Federal judges have a great deal to do without ruling on motions to expand discovery. He doubts that most judges would see this provision as reducing court involvement. To the contrary, it could have the opposite impact.

Rex K. Linder, prepared stmt.: It would be helpful if there were more guidance in the Note on what types of situations would satisfy the good cause requirement to expand discovery.

(c) Revision of last sentence of current Rule 26(b)(1) to state that only "relevant" material is discoverable

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) They propose a different change to the last sentence: "The information sought need not be admissible at the trial if the information sought ~~appears reasonably calculated to lead to the discovery of admissible evidence~~ is relevant to the claim or defense of any party."

Prof. John Leubsdorf, 98-CV-008: Although finding the package generally to be a "desirable overhaul of Rule 26," he is concerned about this change as creating problems. The change seems to exclude discovery of information that, although not relevant and admissible at trial, nevertheless is needed to obtain important and admissible material. For example, in a complex case discovery may begin with a deposition of an opposing party's custodian of records. Similarly, a party might request the names of all persons working in a given department in order to notice their depositions later. Assuming the objective is not to preclude these sorts of discovery, the solution is to see the change in this sentence as invoking "relevant" as used previously in Rule 26(b)(1), but this is not made clear. If that is the goal, it is not clear why any change is needed, and if it is one could change the sentence to read: "Information within the scope of discovery, as set forth in the two previous sentences, need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

Jay H. Tressler, 98-CV-076: The amendment is warranted. Discovery should depend on whether there will be admissible evidence if it is allowed.

Philadelphia Bar Assoc., 98-CV-193: Supports the change. This change eliminates the current language that suggests that anything is a legitimate discovery object so long as it is reasonably calculated to lead to discovery of admissible evidence.

Testimony

San Francisco Hearing

H. Thomas Wells, prepared stmt. and Tr. 47-60: The clarification that Rule 26(b)(1)'s allowance of discovery "reasonably calculated to lead to the discovery of admissible evidence" is not a relevance test is an improvement on the current rule as interpreted, and is a reasonable restriction on the scope of attorney-managed discovery.

(d) Explicit invocation of Rule 26(b)(2) in Rule 26(b)(1)

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) They commend the addition of the reference to Rule 26(b)(2).

Charles F. Preuss, 98-CV-060: The addition of the final sentence invoking Rule 26(b)(2) is a useful reminder against the allowance of excessive discovery.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: The change does not mark any substantive change, but probably serves as a helpful reminder that the factors in 26(b)(2) should be brought into play more frequently.

Gary M. Berne, 98-CV-175: The proposed addition to Rule 26(b)(1) is redundant, unnecessary, and insulting. Courts already have sufficient powers, and all discovery is already subject to (b)(2).

Federal Bar Council's Committee on Second Circuit Courts, 98-CV-178: Supports the change. This is the only amendment that has been proposed that should be adopted. It will help clarify that the scope of permissible discovery depends on the factors delineated in Rule 26(b)(2). It would be helpful if the Committee Note stressed that this cross-reference modifies the scope of discovery otherwise available under Rule 26(b)(1) and requires courts to make case-by-case assessments to avoid discovery abuse and delay.

Testimony

Baltimore Hearing

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Strongly supports Committee's reemphasis on proportionality of discovery. Explicit invocation of this limitation is certainly needed to underscore those provisions, which are so often overlooked or misapplied.

4. Rule 26(b)(2)

[Note that comments regarding uniformity under Rule 26(a)(1) may relate to these provisions as well]

Comments

Marvin H. Kleinberg, 98-CV-010: Decries the erosion of use of requests for admissions, and feels that any authority to limit these by local rule should not be retained.

Assoc. of the Bar of the City of N.Y., 98-CV-039: Supports the elimination of opt-out provisions for numerical limitations on interrogatories and depositions.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Endorses the changes. The goals of Rule 1 are best served by national rules. Notes, however, that the proposed amendment makes no provision for limitations on interrogatories or depositions by the consent of the parties. Recommends that the parties should be permitted to limit the number of interrogatories or depositions and the length of depositions by consent. Further, recommends deleting authority for a district court to limit the number of requests for admissions by local rule.

Hon. Howard D. McKibben (D. Nev.), 98-CV-109: (On behalf of D. Nev.) Expresses concern with the elimination of the ability of the district to set the number of interrogatories or requests for admissions by local rule.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes "new" authority for local rules limiting the number of requests for admissions. Urges that all numerical limitations on discovery activities, whether in the national or local rules, be eliminated.

Hon. Russell A. Eliason (M.D.N.C.), 98-CV-249: The provision eliminating the power to set local limits on the number of depositions or interrogatories would eliminate his district's ability to use a differentiated case management plan by local rule. This plan provides a framework for the parties to facilitate agreement on a discovery plan.

U.S. Dep't of Justice, 98-CV-266: Opposes the "change" authorizing local rules to limit the number of requests for admissions.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: Questions the "change" to authorize local rules limiting the number of requests for admissions.

Testimony

Baltimore Hearing

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: A court in a particular case should be empowered to limit the number of interrogatories or depositions and the length of depositions. But the proposed rule makes no provision for these limitations by consent of the parties. The parties should be allowed to limit the number of interrogatories or depositions and the length of depositions.

San Francisco Hearing

Diane R. Crowley, prepared stmt. and Tr. 23-36: In areas like San Francisco, where attorneys routinely appear in several different district courts, limitations on local rules in order to increase uniformity will be most welcome.

5. Rule 26(d)

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Retention of the moratorium is welcome.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Concurs in the proposal, and agrees that authorization to lift the moratorium by local rule should be eliminated.

Hon. Howard D. McKibben (D. Nev.), 98-CV-109: (On behalf of D. Nev.) Strenuous objection to elimination of opt-out provisions. This causes a delay in the initiation of discovery and is unnecessary. Urges Committee to consider reinstating authority to provide by local rule that discovery can begin immediately.

Norman C. Hile, 98-CV-135: (On behalf of Judicial Advisory Committee, E.D. Cal.) The committee has concerns about the moratorium because it may create problems in cases in which immediate discovery is essential, such as cases in which a preliminary injunction is sought or a motion to dismiss for lack of personal jurisdiction is noticed.

Public Citizen Litigation Group, 98-CV-181: Supports the proposal, but believes that there are additional categories of discovery that should be exempt from the moratorium. In class actions, discovery should be allowed on the propriety of class certification. Similarly, a plaintiff seeking a preliminary injunction should be allowed to proceed with discovery. The rule might also say that courts may grant motions to commence discovery before the Rule 26(f) conference where that is in the interest of justice.

New Hampshire Trial Lawyers Assoc., 98-CV-186: Opposes removing the authority of districts to opt out. This is exactly the type of procedural matter that is appropriate to deal with at the local level.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the retention of the moratorium. It interferes with the jost, speedy, and efficient resolution of cases. Able counsel

can operate responsibly without the rule-based requirement that they confer before starting formal discovery. "We understand that the provision is based on the fact that there are some counsel on both sides with marginal abilities to represent their clients, and that guiding them through each step of the process will assist their clients. We submit, however, that the problmes of marginally-competent counsel should be addressed in another manner."

Jon B. Comstok, 98-CV-228: Concerned that objections to disclosure might be taken to mean that the moratorium is extended. Rather than leaving this unsettled, he would recommending the following: "Following such conference, any party may initiate discovery irrespective of whether the party has objected to initial disclosures as required by (a)(1)."

Hon. Russell A. Eliason (M.D.N.C.), 98-CV-249: Expresses concern that in cases exempted from the moratorium pursuant to (a)(1)(E) there may be abusive discovery in cases in which court approval should be required before discovery occurs.

U.S. Dep't of Justice, 98-CV-266: The Department suggests that the proposal be altered to provide that the moartorium applies even to cases exempted by (a)(1)(E) "unless the court orders otherwise." The Department believes that in cases in which disclosure is inappropriate other discovery would also be inappropriate unless a court so orders.

Testimony

San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell strongly endorses the retention of the prohibition against discovery until after the Rule 26(f) conference. This permits the court to have a more visible and necessary role in discovery sequencing and planning.

Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: If disclosures are restricted to helpful information, the moratorium should not be continued.

Already, the delay until the Rule 26(f) meeting for formal discovery is impeding activity by plaintiffs, who would otherwise be filing interrogatories to get discovery started. There seems to be something of a dance to put off the Rule 26(f) conference as long as possible. The idea of a discovery plan is a wonderful idea, but the reality is that this is not happening frequently or easily enough and the narrowing of disclosure will be a harmful development if the moratorium is retained.

Michael E. Oldham, prepared stmt. and Tr. 235-45: The decision to keep the moratorium on discovery until after the attorneys' conference is sound.

6. Rule 26(f)

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports amendment to require a conference instead of a meeting because it is not always possible for litigants to meet physically. Also supports changes in timing to meeting 21 days before the scheduling conference.

James F. Brockman, 98-CV-009: Supports amendment permitting conference to occur by telephone.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Supports elimination of requirement that parties hold face-to-face meetings. Also supports timing changes (moving meeting to 21 days before pretrial conference).

Amer. Coll. of Trial Lawyers, 98-CV-090: The proposed timing changes are rationally arranged and should be adopted.

Norman C. Hile, 98-CV-135: (On behalf of Judicial Advisory Committee, E.D. Cal.) The committee has concerns about the timing of the Rule 26(f) and Rule 16(b) conferences. For one thing, they could be used by a plaintiff to disadvantage defendants added to the litigation after it has commenced, and particularly after a discovery plan has been set. In this district, the district judges vary in when they do these things, and a later-added defendant might be disadvantaged in a case assigned to a judge who acts early as compared to a case assigned to a judge who does not act so promptly. The U.S. Attorney's Office, in particular, has found that it is difficult to get agencies to provide information by the time needed for those judges who act earlier in the litigation. The whole idea of adopting a discovery plan at the Rule 16(b) conference causes the committee concern. At this early stage of the litigation, the parties and the judge have very little appreciation of the issues and the evidence. Moreover, there could be problems in this district because most discovery matters are assigned to magistrate judges. If the discovery plan is entered by the district judge, the magistrate judges may feel that they cannot change anything.

National Assoc. of Railroad Trial Counsel, 98-CV-155: Opposes authorization for local rules that require face-to-face meetings. "We do not believe that an in-person meeting is necessarily required for preparation of a discovery report."

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Supports the change to require conference 21 days before the scheduling conference.

Federal Practice Section, Conn. Bar Assoc., 98-CV-157: Endorses minor amendments in rule to secure uniformity.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the change. Elimination of the face-to-face requirement, particularly in a large district, saves time and money.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Supports this change because it logically orders the planning and disclosure process. It also eliminates the requirement of a face to face meeting.

Philadelphia Bar Assoc., 98-CV-193: Supports the change. Applying the rule nationwide is commendable, and exempting the categories of cases excluded from disclosure is wise. It is appropriate to leave the question of requiring a face-to-face meeting to local option.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Supports the change allowing the parties to confer without the need for a personal meeting.

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: This change is long overdue, and probably describes what most attorneys actually do under the current rule.

Comm. on the Fed. Cts., N.Y. County Lawyers' Assoc., 98-CV-218: Supports the change to permit parties to "confer" rather than meet under Rule 26(f).

Jon B. Comstok, 98-CV-228: Insisting on face-to-face meetings has imposed an unnecessary expense. The proposed amendment amply handles situations where a local court may require personal conference. But he would suggest deleting the authorization for

a local rule so requiring in any and all cases. Judges should be required to do it on a case-specific basis.

Testimony

San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) The proposed amendments to Rule 26(f) create a more logical sequence of events and time schedule in developing a discovery and case management plan. The present "face to face" requirement is generally unnecessary, and has appropriately been dispensed with.

Chicago Hearing

Michael E. Oldham, prepared stmt. and Tr. 235-45: The decision to allow a "conference" in lieu of a "meting" is very well advised.

7. Rule 30(d)

(a) Deposition duration

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) These organizations were unable to reach a consensus on this amendment.

Thomas E. McCutchen, 98-CV-006: Seven hours may be too little time, and it may be difficult to obtain extensions or other relief. If a witness doesn't answer or gives evasive answers, one may learn little in one day.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: Opposes the one-day limit. This is unnecessary in the normal case, and unworkable in the complex case. The FJC survey says that there is no reliable evidence that such limits have achieved their intended effects, and it found more disputes about duration in those districts that have such limitations. In high-stakes complex litigation the limit would increase the gamesmanship that would occur. "Court reporters will routinely time restroom breaks and lunch recesses; will they also time colloquies, objections and pauses before answering?"

Maryland Defense Counsel, Inc., 98-CV-018: Supports the amendment, but would exclude expert witnesses. Since the party taking the deposition typically pays the expert's fee, that financial disincentive should serve as a sufficient curb on overlong depositions.

Assoc. of the Bar of the City of N.Y., 98-CV-039: Opposes the proposal. The change is unnecessary because the vast majority of cases do not have any depositions exceeding seven hours according to the FJC study. Moreover, seven hours is arbitrary.

Thomas J. Conlin, 98-CV-041: Opposes the change. "In my experience, over 90% of the depositions which last more than one day last that long for a good reason." There is sufficient protection already in the rules.

ABA Section of Litigation, 98-CV-050: Supports the proposal

because it establishes a uniform national practice, limits excessive discovery where appropriate, and encourages judicial supervision of cases where more extensive discovery is sought. Believes that seven hours is sufficient and often generous for a single deposition in the vast majority of cases. However, more time may be required for some witnesses in some cases, for example in highly complex cases involving issues spanning many years. The Antitrust Section, in particular, was concerned that seven hours often is not sufficient for depositions in antitrust cases and that, as a result, the proposal could result in significant additional motion practice. Suggests that language be added to the comment recognizing that the seven-hour rule may be inappropriate in complex litigation matters and encouraging courts to exempt those cases as permitted by the proposed rule. In addition, recommends that the Note be clarified to indicate that the seven-hour period does not include lunch or another substantial break.

Ellen Hammill Ellison, 98-CV-054: Opposes the change. It will cripple plaintiffs' ability to discover vital information in some cases.

Laurence F. Janssen, 98-CV-058: Recommends exempting expert witnesses. As the court's role as gatekeeper in cases involving expert opinion testimony has expanded, it is unrealistic to expect that necessary inquiry as to both scientific methodology and the substance of an expert's opinions can be accomplished within seven hours. This is especially true in mass tort cases. Nor should the agreement of an expert witness be necessary to effect a stipulation to extend.

Lawyers' Club of San Francisco, 98-CV-061: This change is unwise and arbitrary. It will impede the ability of parties to adequately conduct discovery and prepare their cases for trial. Attorneys should not be required to make a showing of good cause in order to conduct an examination in excess of the seven hour time limit.

Gennaro A. Filice, III, 98-CV-071: Although the rationale for limiting depositions is a sound one, in the vast majority of complex litigation there is a real need for longer examinations. Accordingly, the limitation should not apply automatically in complex cases. Rather, the need for, and scope of, limitations

on deposition testimony should be one of the subjects for consideration in the judicial supervision of the action. The scientific and technical issues in such complex litigation almost invariably call for more active management and discretion in permitting or limiting depositions. The better course is for the Note to reflect a preference for a case-by-case analysis of the matter and time limitations to be applied as the circumstances dictate.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Opposes the change. It is unnecessary, because the courts have sufficient power to enter such orders. The one-day limit is simply not practicable in complex cases, which are typically document-intensive and time-consuming even for the most skilled and cooperative counsel. Moreover, the amendment will create perverse incentives to be uncooperative.

Lee Applebaum, 98-CV-086: Urges that the rule should contain some guidance about how the ground rules of depositions should be handled under the time limitation. Attaches a copy of a forthcoming article urging counsel to prepare carefully to make effective use of time. Suggests that both sides should agree about whether breaks, objections or disputes that go to the judge count against the seven hours. "Ideally, professional counsel will work out a fair set of ground rules."

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Opposes the change. The time limit is arbitrary, and does not allow for the variable dictates of each case and each witness. It would also encourage gamesmanship. This is "an overly ambitious attempt at fine-tuning and tinkering with the discovery process."

Hon. Prentice H. Marshall (N.D. Ill.), 98-CV-117: Pleased to see the time limitation on length of depositions.

National Assoc. of Consumer Advocates, 98-CV-120: The change is positive; all parties can benefit from a limitation on the time for depositions. Time spent in depositions is the single greatest cost of virtually any civil lawsuit. But the rule should be clarified to say that no single party can exceed the time limit. Often both sides wish to depose the witness to obtain testimony for use at trial rather than call the person as a live witness at trial. With expert witnesses, judges often

encourage this treatment. Unless the rule says that, the party who noticed the deposition might monopolize the time. In addition, the rule should state that breaks are not included. Finally, the rule should explicitly state that the seven-hour limit applies to each witness designated by a corporation or other entity pursuant to Rule 30(b)(6). Modeled on recently-adopted Tex. R. Civ. P. 199, N.A.C.A. proposes that the final sentence be changed as follows:

> Unless otherwise authorized by the court or stipulated by the parties and the deponent, no side may examine or cross-examine an individual witness for more than one day of seven hours. Breaks taken during a deposition do not count against this limitation. For purposes of this limitation, each person designated under Rule 30(b)(6) is a separate individual witness.

Norman C. Hile, 98-CV-135: (On behalf of Judicial Advisory Committee, E.D. Cal.) Opposes the proposal. A one-day limitation for a significant witness is unrealistic, and it will lead to more game-playing in litigation. Stalling will occur. There are situations where further questioning is usual and needed. For example, if the witness discloses that previously-requested documents have not been produced, or reveals additional claims or new facts, more questioning will usually be needed. In such a case, the lawyer faces a Hobson's choice whether to continue questioning until the time limit arrives or immediately seek leave to question longer. Also, where there are multiple parties the party who noticed the deposition may use up all the time. Further problems will arise where an interpreter is needed. Presently the burden is on the party who wants a limitation to seek judicial relief, and it should remain there. Under the proposal, there will be more motions in court, particularly since the witness can veto additional time even if the lawyers agree to it. If there is to be a limit, it should take account of the type of case. One idea would be to vary the length in terms of the A.O. weighting scale for cases. Another was to require that the limit be set at the Rule 16(b) conference. If a "one size fits all" approach is used, the committee at least suggests that it be two days of 14 hours, at least for parties, experts, and cases in which multiple sides are represented.

Chicago Council of Lawyers Federal Courts Committee, 98-CV-152: There are ambiguities in the proposal. In cases involving multiple parties, does each party have seven hours? How does the rule work if the deponent is designated under Rule 30(b)(6)? Do the parties get only seven hours even if several people are designated? Perhaps these issues will have to be dealt with on a case-by-case basis, but the rule gives little guidance at present and it might do more.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Opposes the change in its present form. The goal of reducing deposition time may be admirable, but the blanket rule is arbitrary and workable (much as the Illinois state court rule is unworkable). The rule does not deal with the problem of the multi-party deposition, fails to advise how break time is to be handled, and fails to address numerous other subjects on which attorneys can dispute.

Federal Practice Section, Conn. Bar Ass'n, 98-CV-157: Opposed. Experience in the D. Conn. shows that such a limitation is not needed. In those relatively rare instances in which depositions have been unduly extended, the court has been available to provide relief.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the proposed amendment as written. The one-day deposition of seven hours in the great majority of cases is more than sufficient. In complex cases, the court can permit longer depositions if needed.

Libel Defense Resource Center, 98-CV-160: Strongly opposes the limit. It is unnecessary and overbroad. The length of a deposition is a function of a variety of factors that don't indicate abuse. Placing a limit will give the uncooperative witness an incentive to be difficult. Moreover, a time limit will foster trials by forcing counsel to curtail some lines of inquiry. In defamation cases, the limitation may harm First Amendment rights since those are protected by summary judgment motions that depend upon full inquiry during depositions.

Philip A. Lacovara, 98-CV-163: Supports the change. In 1992, he suggested adopting a limitation "in the eight to twelve hour range," but he is relatively comfortable with the Committee's proposal. But the rule might have the perverse effect of fostering filibustering. At least the rule should be changed to

deal with the right of the other parties (including the deponent's own counsel) to cross-examine, if they wish to do so. The rule should not imply that the deposing party has a right to seven hours of testimony and that nobody else has any right to examine. He would therefore support adding the following at line 17, p. 60 of the Committee's draft:

> The court . . . shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent, including examination by parties other than the deposing party, or if the deponent or another person . . . or other circumstance, impedes or delays the examination.

William C. Hopkins, 98-CV-165: Opposes any "presumptive" limitations on discovery. Due to the difficulty of getting the attention of a federal judge, this is too unworkable, and it targets plaintiffs.

Prof. Ettie Ward, 98-CV-172: Opposes the change. Seven hours is an arbitrary limit. Not all lengthy depositions are abusive, and the existence of a seven-hour "standard" might prompt some depositions to be longer than they would be without the rule.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Supports the limit.

Federal Bar Council's Committee on Second Circuit Courts, 98-CV-178: Opposes the limit. A one-size-fits-all approach is too rigid. Witnesses vary in speed and responsiveness.

Trial Lawyers Association of Metropolitan Washington, D.C., 98-CV-180: Supports this proposal. This support (compared to opposition to several other proposed changes) underscores the lack of interest in the plaintiff's bar in running up time and costs unnecessarily. Most plaintiff's lawyers rarely or never conduct a deposition of more than seven hours. Defense lawyers, on the other hand, frequently take multi-day depositions which could have been concluded far more efficiently and quickly.

Public Citizen Litigation Group, 98-CV-181: Does not support. Although seven hours is sufficient for most depositions, it will not be for a substantial minority of depositions. Imposing an arbitrary limit is likely to increase the need for judicial

intervention. If the rules are to establish a presumptive limit, submits that it would be better to adopt a limit on the total number of hours that may be taken by plaintiffs, defendants, or third-party defendants in the case. For example, each group could be allocated seventy hours of deposition time.

New Hampshire Trial Lawyers Assoc., 98-CV-186: Favors adoption of the limit. Very often depositions are too lengthy, and the proposed amendment incorporates substantial flexibility and opportunity to modify the limit by agreement or motion.

Ohio Academy of Trial Lawyers, 98-CV-189: Opposed. This change may make it difficult to obtain necessary information, and the limit could increase the burdens on the court.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: This simply invites increased discovery motions over whether the limits should be extended or not in a given case.

Philadelphia Bar Assoc., 98-CV-193: Takes no position. Many members welcomed the limit, but others believed that gamesmanship and motion practice would be more prevalent if the rule were adopted.

James C. Sturdevant, 98-CV-194: Limiting the time of each deposition to an arbitrary number of hours will further constrict available discovery and the ability of plaintiffs to prepare adequate for trial.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the limitation as a simplistic "one size fits all" measure. There is a substantial problem of abusively long depositions of plaintiffs, and therefore the Note should say that one day of seven hours should ordinarily be sufficient for a deposition of a laintiff or a person who is defending a claim in his or her personal capacity. Sometimes defendants use a long deposition to intimidate individual plaintiffs. But the situation is altogether different when the witness is testifying on behalf of a governmental agency, a coporation, a partnership or an unincorporated association. Then a long deposition may be required to pin down the various types of records kept by the organization.

Trial Lawyers for Public Justice, 98-CV-201: TLPJ supports this proposal. In its experience, this discovery tool has too often been abused under the current rule. Parties represented by counsel who are compensated on a billable hour basis, such as corporate defendants, often take unnecessarily lengthy depositions. Sometimes it is necessary for a deposition to take longer than seven hours, but the proposal recognizes that fact and provides protections to direct the court to extend the length of the deposition where additional time is needed.

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: Committee has mixed feelings, but an open mind, on the subject. It is curious to see how the new limit will work in practice.

Nicholas J. Wittner, 98-CV-205: (on behalf of Nissan North America) Supports the change. Lengthier depositions are all too often the product of less competent examiners or of lawyers whose real motive is to harass or otherwise coerce a settlement.

F.B.I., 98-CV-214: Supports the change. FBI employees and agents are often subject to depositions, and the change would make these less disruptive.

Michigan Trial Lawyers Assoc., 98-CV-217: Supports the change. Flexibility is provided under the rule for agreement of the parties, which, in all likelihood, would take place rather than resorting to the Court.

Comm. on Fed. Cts., N.Y. County Lawyers' Assoc., 98-CV-218: Opposes the change. It does not work in complex commercial litigation and would lead to a proliferation of motion practice. Deponents will be evasive and stonewall.

National Assoc. of Independent Insurers, 98-CV-227: Supports the change. It will eliminate unnecessary duplication of questions and force parties to utilize the time allocated for a deposition efficiently.

Jon B. Comstok, 98-CV-228: Thinks that this simple proposal will do more than any other to cut down on unnecessary costs of litigation. Parties and deponents are routinely abused by counsel that unreasonably delay and extend depositions requiring

multiple days for a single witness. He would have preferred a shorter limit of perhaps five hours.

Donald Specter, 98-CV-235: Although there is a benefit to shortening depositions, the means chosen appear arbitrary and don't reflect the realities of litigation. Deponents are often uncooperative and attorneys are obstructive. This will reward those tactics. At least expert witnesses should be excluded.

Eastman Chem. Corp., 98-CV-244: Strongly supports limitations on depositions, both in number and duration. The proposed rule is a step in the right direction. But it is concerned that key fact witnesses and many expert witnesses cannot be properly examined with the allotted time.

Jeffrey J. Greenbaum, 98-CV-251: (attaching article he wrote for the New Jersey Lawyer) Fears that plaintiffs who need to ferret out facts critical to their case from key witnesses may not have a full and fair opportunity to do so. Similarly, defendants may be unable to challenge the pat answers of a polished plaintiff.

Warren F. Fitzgerald, 98-CV-254: Limiting the length of depositions is a laudable goal, but the proposal is too general in its application. It would restrict some depositions too much while allowing others to be abusively long.

Anthony Tarricone, 98-CV-255: Agrees that most depositions can be completed within one seven-hour day, but opposes the proposed change as presently drafted. Some depositions cannot be completed reasonably in seven hours. Where that is due to the complexity of the case, it is unfair to place this burden on the party seeking discovery. Courts are already empowered to deal with abuses, and the current scheme is preferable.

Annette Gonthier Kiely, 98-CV-256: Opposes the change. It is based on a false presumption that there is widespread deposition abuse. The current rules provide sufficient remedies for abusive behavior in depositions. An arbitrary limitation on the length of depositions will result in aprties being precluded from propoerly developing evidence which is crucial to their cases.

David Dwork, 98-CV-257: Opposes the change. A two hour deposition may sometimes be abusive, and a two-day deposition

need not be. The current rules are adequate to deal with these problems.

William P. Lightfoot, 98-CV-260: Supports the change. Plaintiff lawyers don't have an interest in running up expenses. Defense lawyers, on the other hand, often take multi-day depositions that could have been conducted much more efficiently and quickly.

U.S. Dep't of Justice, 98-CV-266: The Department agrees that one day is an appropriate limit for many, if not most, depositions. It believes that the rule and the Note should make clear that this is a presumptive and not a mandatory limit. In many complex cases seven hours will not be sufficient. A mandatory rule might also be problematical in cases involving numerous documents controlled by the deponent. Similarly, in cases involving complicated scientific or industrial processes the limit could be inappropriate. Even a a generally appropriate presumptive limit may be inappropriate if aplied so rigidly that it is effectively mandatory. A party should be discouraged from insisting that its opponent incur the cost of a motion to extend the time needed for testimony. Given these concerns, the Department's support for the limit is subject to three important qualifications: (1) expert witnesses, witnesses designated under Rule 30(b)(6), and possibly party witnesses should be excluded in the rule itself; (2) the Note should state that grounds for extending the limit be liberally construed; and (3) the deponent should not be given a veto (covered below).

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports this change. It will require deposing counsel to be better prepared, more efficient, and will save on fees and costs to the parties. The Committee recommends that the Note articulate everyone's expectation that the seven hour limitation relateds to "real time," and does not include breaks or other time off the record.

Testimony

Baltimore Hearing

Robert E. Scott, prepared stmt. and Tr. 8-18: DRI is not opposed to time limits on a deposition, or to the one day, seven hour

rule. It recognizes that there could be issues in some cases in which that amount of time is not sufficient. In the run-of-the-mill case, seven hours should probably be sufficient.

Allen D. Black, prepared stmt. and Tr. 18-30: Thinks the current proposal is fine. (Tr. 21)

Brian F. Spector, prepared stmt. and Tr. 64-80: The time limitation is problematic because it is difficult, or perhaps impossible, to complete a deposition within seven hours in a variety of situations. These include (a) multiple parties with disparate interests, each represented by separate counsel, (b) instances in which the examining attorney consumes virtually the entire time, leaving little or not time for cross examination; (c) witnesses who require an interpreter; (d) a Rule 30(b)(6) deposition in which there are multiple designees, each of whom must be examined to establish competence to testify on the designated subjects. Moreover, it is not unusual to require multiple sessions with a deponent, particularly where examination reveals the existence of documents not yet produced, or where issues in discovery have been bifurcated (as with staging of class and merits discovery in a class action). Interrogatories might take up some of the slack, but the 25 interrogatories limitation gets in the way of that solution. There is also a potential problem with Rule 30(b)(6) designations since that could be treated as one witness or several. That problem can exist with regard to the ten-deposition limit and also with regard to the one-day limit. The current Advisory Committee Note says that this is one deposition for purposes of the ten-deposition limit. Should that be the same for the one-day limit? Amendments to Rule 16 calling more specifically for discussion of these matters at the initial scheduling conference would be helpful. Although there is nothing to keep the judge from addressing these matters now, it would help to impress on judges the need to take them seriously. Too often, judges simply say that they don't want to worry about these issues unless a dispute arises.

Kevin M. Murphy, Tr. 80-89: Although he doesn't have personal experience with deposition time limits, he would favor them. He thinks, however, that there needs to be guidance on exactly how this would work where there are several lawyers questioning and obviously the questioning will go on more than seven hours.

Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: The change is unwise. There may be reason to limit the length of depositions in certain types of litigation, particularly where the stakes are lower or the litigation is not complex. But an across-the-board limitation should not be adopted. The rule is unnecessary, for the courts already have ample power to limit deposition length. In complex cases, the one-day limit is not realistic. Particularly when a witness needs to review documents during the deposition, the seven hour limit will not work. Similarly, the limit won't work if the witness has poor language skills. The limit will also give the witness perverse incentives to be uncooperative or obdurate. The issue is best handled on a case-by-case basis.

San Francisco Hearing

Diane R. Crowley, prepared stmt. and Tr. 23-36: Cannot support the change. In far too many of the actions handled by her firm, depositions must of necessity be longer than seven hours because the cases are complex. This is especially true if there are a number of attorneys taking part in the questioning. Seeking a stipulation to continue beyond seven hours is absolutely unworkable in her experience, and will create a need for yet more court appearances. If there are twelve attorneys around the deposition table, each will want to question the witness and protect his client's interests. Even if the limit were raised to two days, there would still be problems. Leave out time limits. People don't stay there to run up their bills. They want to get out, but need to ask the questions to protect their clients' interests.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell suggests emphasizing in the Committee Note that motions to extend expert depositions, particularly in complex or multi-party cases, be viewed with favor by the court. So long as the Note makes explicitly clear that complex or large cases require tailored treatment, we believe the proffered amendments will function well and reduce cost and burden.

H. Thomas Wells, prepared stmt. and Tr. 47-60: The establishment of a national standard is useful. It is likely that the deposition length limit will generate the most controversy of the current proposals. Nevertheless, his personal experience in a wide variety of litigation is that it is the extraordinary case

in which more than seven hours of testimonial time (excluding breaks, counsel colloquy, and other extraneous matters) is necessary. He personally doubts that any serious difficulty will be encountered even in those cases, whether dealt with by stipulation or court order. Having a uniform standard nationwide will be desirable. But perhaps expert witnesses should be treated differently, for in a significant number of instances seven hours is not enough time for these people. This could be dealt with either in the rule or the commentary. This witness, after all, is being paid to sit there and answer questions, and usually it is the examining party who is paying for that time. But in his experience expert depositions are also too long. (Tr. 58-60)

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: He likes the seven hour rule, and thinks the Committee should stay with it. He urges resistance to the "California culture" and can't imagine going on for days and days in a deposition. A lawyer should have to explain when he wants to go beyond seven hours. In Oregon, they just don't have the kind of long depositions that occur in California. With experts, they don't allow the deposition until after the expert has given a detailed report, and that doesn't leave a lot of room for spending two or three days on qualifications and the like. He thinks that proposal is great. There should be exceptions on occasion,but you ought to ask the court to make them. (Tr. 85)

Larry R. Veselka, Tr. 99-108: This limit is fine. If you have a serious problem with seven hours, you can go to the court. (Tr. 107)

Mark A. Chavez, prepared stmt. and Tr. 108-17: Opposes the change. The limit is arbitrary, and is bound to engender numerous disputes over deposition tactics and the need for more extensive testimony in particular cases. If a limit must be imposed, would suggest no less than two seven-hour days. Here again this will generate fights the district courts won't want to hear, and they will say the parties should work it out, but they won't. The numerical limitations on depositions work right now, but this limit should not be added.

Robert Campbell, Tr. 117-30: (Chair, Federal Civil Rules Comm., Amer. Coll. of Tr. Lawyers) This is micromanagement. It will

promote gamesmanship. Usually a deposition should not be more than seven hours, but this rule should not be adopted. You can't measure justice with a stop watch.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) Notes that the presumptive limit is similar to recent amendments to Texas Rule 199, which allows a six hour limit per witness. HII has some concern that the limit may be far too restrictive, and he is a little concerned about the seven-hour rule proposed for the federal courts. It may be problematical if there is no provision guaranteeing each side a chance to question if it so desires. Also, in the case of experts seven hours might not be enough, although a good report is helpful to avoid a long deposition. The Texas rule allows six hours per side, and has a fairly elastic definition of side. Nonetheless, he is fairly confident that the seven-hour limit will generally work reasonably well.

Thomas Y. Allman, prepared stmt. and Tr. 162-74: (Gen counsel, BASF Corp.) Based on his own experience with endless depositions, he strongly favors the proposed change. Believes that the one-day or seven-hour limitation can work. He acknowledges, however, that in expressing these views he is in the minority among the outside lawyers hired by BASF. To some extent, the lawyers are at fault for long depositions. A lot of the explanation has to do with which lawyer you send to the deposition. If you send a second year associate who has never taken a deposition, you are going to have a 20-hour deposition. On the other hand, with an experienced lawyer who is organized, the proposed limit should work even with an important deposition. With experts, the key is having the report first, and that saves a lot of time, particularly on qualifications. (Tr. 167-68)

Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: As one who does complex litigation, she thinks she can live with the one-day deposition in most cases. She finds this change in the rules refreshing. Most depositions take longer than one day because counsel do not prepare and organize their questions. Many depositions do nothing more than waste the time of opposing counsel and harass witnesses. They should not be a free-form, indeterminate exercise in indulging counsel who are trying to figure what their

case is about. There is a duty to prepare cross examination before a deposition so that it can be completed in a reasonable time. Even experts need not take longer. It's a rare deposition that needs to take multiple days. She is sure that if you need more time for a particular deposition, you will get more time. Sending out the documents in advance can be very helpful. In some complex cases there is a pretrial order very early that requires the documents that are going to be used or may be used to be exchanged in advance so that the witness can become familiar with them. They are prelabeled. Very little time is wasted shuffling through the exhibits or identifying or reading them.

Paul L. Price, Tr. 16-25: (on behalf of Federation of Insurance and Corporate Counsel) Does not favor the limit. This is not because defense lawyers want to churn the billable hours. There are already solutions to the abuses. If the lawyers can agree to suspend the limit, that may be a good solution, but there are times when the lawyers cannot agree. Few actually follow the three-hour limitation in the Illinois state courts, but the fact there is a limit probably has some effect to the way lawyers approach the length of depositions. He does not disagree with sending a message to lawyers that there ought to be an end to a deposition at some point.

Daniel F. Gallagher, Tr. 39-47: Limiting the length of depositions is a good rule. It prevents abuses by lawyers of all stripes and saves clients time and money. Seven hours is also a considerable amount of time. Let's hope the seven-hour ceiling does not become a floor. In his experience, there is no problem in the state courts in Illinois, which have a three-hour rule, with multi-party cases. The lawyers agree on how to handle the situation, and it works. Usually from the defense side somebody takes the laboring oar in multi-party situations, and others don't try to reinvent the wheel by asking the same questions again.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: This is a good presumptive rule. The existence of the rule will probably shorten depositions significantly. In cases where more than seven hours is needed, the lawyers are going to agree because they need to continue to deal with each other.

Peter J. Ausili, Tr. 105-09: (Member, E.D.N.Y. Civ. Lit. Comm.) The committee does not support this proposal. The amendment is unnecessary given the court's existing power to limit depositions, and to sanction misconduct. Actually, there are few motions to limit depositions. The creation of a discovery plan for the case with the court is preferable.

Gary D. McCalllister, prepared stmt. and Tr. 109-13: Favors the limitation. It will cut across most of the cases. If there is a need to come back to the court for more time, that will be done. The three-hour rule in the state courts in Illinois does not work particularly well, and there are accommodations in most cases. He can finish experts in three to five hours in some cases, so he does not see a need to exclude them as a category.

David C. Wise, Tr. 113-19: The seven hour rule is a pretty good rule.

John M. Beal, prepared stmt. and Tr. 119-26: (Chair, Chi. Bar Assoc. Fed. Civ. Pro. Comm.) The Committee supports the seven-hour deposition limitation. Generally, among its members the defense bar opposed the proposal and the plaintiffs' lawyers favored it. But the Chicago Bar Assoc. Board of Managers voted to endorse this based on the experience in Illinois with the three-hour rule. They believe that rule is working well. He himself has had a number of employment cases where plaintiffs were deposed for three days and he thought it could be done in one. I would welcome this rule. They would like to see something assuring that all parties who want to examine will be able to do so if the deposition will be used in lieu of live testimony at trial. He can imagine that in contentious cases the lawyer who noticed the deposition may say "This is my deposition" and use up all the time. The current Illinois rule does not say anything about this, however.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: He has taken or defended about 300 depositions since the Illinois rule went into effect, and this has involved three that went over three hours. He supports the seven-hour proposal. This is not a problem. His cases are serious cases involving a lot of money. The seven-hour rule may be too long. There have been no problems with experts either. Where more time is needed, the lawyers work it out. Where there are multiple parties, they have to work it out.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) He is from Illinois, and agrees with everyone on the Illinois matter. ATLA did not take a position on that, however. His personal experience is that it has worked out with the three-hour rule. He guesses ATLA would be with him on limiting depositions.

Laurence Janssen, prepared stmt. and Tr. 154-60: Recommends exempting expert witnesses from the limit. In the toxic tort litigation he does, he can't cover all the things he needs to do with experts in seven hours. Even with a good report this is not enough time because there are some "regulars" in toxic tort litigation whose reports all sound the same. But he concedes that the rule addresses the problem with 95% of the depositions.

Daniel Fermeiler, Tr. 188-93): When the Illinois rule was adopted, he was president of the defense bar and spoke against the adoption of the rule. But now he has lived under it and can report that it has worked. For the most part, the state-court three-hour limit has worked. This has worked for party depositions, witness depositions, fact-based depositions. Expert witnesses in complex cases may present problems, but this can be handled in a carefully crafted case management order. In multi-party cases, they operate under the convention that the three-hour limit is a per-side limitation. Before the rule came in, there was a practice of witness-churning, in which multiple questions are asked about the same topic by different parties. This has been substantially reduced since the rule came into effect. In most multi-defendant cases defendants are able to work it out to allocate time knowing what the overall limit will be. Actually, nobody insists on ultimate termination times so long as the deposition is moving along.

Jack Riley, Tr. 202-08: (representing Illinois Assoc. of Defense Trial Counsel) The three-hour rule in the Illinois state courts has really not caused a problem for either side. Probably that's because there has been a sort of balance of terror, with each side afraid that if it imposes the limit the other side will too. What has happened primarily is that the parties have reached stipulations. Where it's reasonable for the deposition to exceed three hours, they have done so. Very rarely has there been occasion to file a motion. In 99% of cases it has been worked out informally. The goal of the Illinois rule was to prevent

unnecessarily long depositions, which are often caused by inexperienced lawyers getting their training in a deposition. I think that the rule has worked, and that the thrust of the change has been accepted by both sides. Even where there are multiple defendants, they agree on who will be the primary questioner. Frankly, many questions were repetitive before in multiple party situations. So it does force you to work with co-defendants. It has shortened the length of depositions even where they go beyond three hours because lawyers realize that this is "borrowed time." His experience is that the three-hour rule is overall, not per side, and it has forced defendants to make some decisions about who is the best questioner. Usually the plaintiff's lawyer has no questions in tort cases.

Linda A. Willett, prepared stmt. and Tr. 217-26: (Assoc. Gen. Counsel, Bristol-Myers Squibb Co.) Her company has experienced first-hand the effect of abusively lengthy depositions. In the breast implant litigation, an 80-year-old company witness was deposed for nine consecutive days while his ailing wife was left home alone. The proposal made by the Committee is sound in most cases. But there are categories of witnesses for whom the seven hour limit will not be sufficient. The example that springs most readily to mind is expert witnesses. A better compromise would be to limit depositions to two seven-hour days.

Michael E. Oldham, prepared stmt. and Tr. 235-45: Agrees wholeheartedly with the presumptive limit of one day of seven hours. In multi-defendant cases, usually there is one lead defense lawyer who asks 80% to 90% of the questions, and the others only ask follow-up questions. It's generally not a problem for depositions to be limited, and the rule allows for those odd situations where it does cause difficulty.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) This is a good proposal, but it could be improved. It should recognize explicitly that one day is usually not enough for an expert witness in a complex case.

Chris Langone, Tr. 251-259: (appearing on behalf of Nat. Assoc. of Consumer Advocates) NACA thinks the limit is a good idea, but suggests three clarifying amendments. First, the rules should say that no side may exceed the seven-hour limitation. Second, it should state that breaks are not included. Third, it should

explicitly say that the limit applies to each witness designated by a corporation under Rule 30(b)(6).

Kevin E. Condron, Tr. 259-67: He loves the idea of a seven hour deposition. Except in extremely technical cases, this should work.

Dean Barnhard, prepared stmt. and Tr. 267-76: Strongly urges the Committee to make an express exception to the rule for expert witnesses. Under Daubert, there is a need to create a full record for a pretrial hearing that could be compromised by the time limit. It is true that a district that has embraced Rule 26(a)(2) can shorten the deposition, but that is not true everywhere. His own experience is that there are often situations in which the minimum amount of time required for a deposition is considerably longer.

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) Concerned that the time limitation would be too short for experts in "toxic tort" cases. In those cases, the theories offered by plaintiffs' experts are often "creative," and probing them takes time.

(b) Deponent veto

Comments

ABA Section of Litigation, 98-CV-050: Notes the provision for a deponent veto. Urges the Committee to clarify in the rule or Note that when the deponent is an employee or other representative of an entity, rather than an individual deponent, the entity would be the appropriate party to stipulate to the extension.

Norman C. Hile, 98-CV-135: (on behalf of Judicial Advisory Committee, E.D. Ca.) Because the witness can veto additional time even if the lawyers agree to it, there will be additional motions in court.

Libel Defense Resource Center, 98-CV-160: Allowing the nonparty witness to veto an extension the lawyers find reasonable will breed problems. Most witnesses find depositions uncomfortable experiences, and counsel would be hamstrung by the requirement of obtaining the agreement of the witness.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the deponent veto. "Giving a witness the power to veto otherwise proper discovery is unprecedented, and too likely to result in mischief."

Eastman Chem. Corp., 98-CV-244: Although it supports the durational limitation, Eastman believes it is not wise to require the agreement of the deponent to lengthen the deposition by stipulation. Many witnesses, particularly nonparty witnesses, would likely refuse.

Annette Gonthier Kiely, 98-CV-256: Opposes the veto. Often it is the deponent's evasiveness that has prolonged the deposition, and such a person is unlikely to forfeit the protection this rule affords.

U.S. Dep't of Justice, 98-CV-266: Opposes the deponent veto. If that were adopted, deposition practice would increasingly require court involvement because the deponent could prevent the parties from agreeing to a reasonable period for examination. The deponent may quite naturally want to conclude the examination,

but that's not a reason to give him or her an absolute veto. The parties are in a better position to determine the needs of the litigation.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: Members were divided on the deponent veto. S
ome agree that nonparty deponents should have this right. Others believe it will inject yet another complication into the deposition process.

Testimony

Baltimore Hearing

Robert E. Scott, Jr., prepared stmt and Tr. 8-18: Concerned about requiring deponent agreement to extend deposition beyond the seven hours. In some situations, particularly with experts, seven hours is not sufficient. In those situations, having to ask the deponent's permission to continue could create problems.

San Francisco

Diane Crowley, Tr. 23-36: The idea of a stipulation will never work to extend the time if the deponent is involved in the picture. He is tired and wants to go home. Even if the lawyers will stipulate, the deponent won't.

Anthony L. Rafel, Tr. 130-40: (President of Fed. Bar Assoc. for W.D. Wash., and appearing on its behalf) Strongly opposes the deponent veto. Whether or not justice so requires, the witness is likely to oppose continuing.

Chicago Hearing

Daniel F. Gallagher, Tr. 39-47: Giving the witness the right to refuse to continue is letting the tail wag the dog. If you do that, you are going to have a real problem. That will also give lawyers who want to be difficult a perfect explanation -- I'd love to go along, but my client won't. Don't give people that out; make the lawyers the ones to agree to the extensions.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: Although having a presumptive limit on deposition length is a good idea, requiring the deponent to consent to exceed that limit is a bad idea. This will cause problems.

Gary D. McCalllister, prepared stmt. and Tr. 109-13: Although he favors the deposition limitation, he would be very concerned about the deponent veto. He would oppose that.

Jack Riley, Tr. 202-08: (representing Illinois Assoc. of Defense Trial Counsel) He has come to favor the limit on depositions from his experience in Illinois, but the deponent veto could raise problems. At least with nonparty witnesses there might be a justification, but not with a party or an expert. It would get a little unwieldy. Judges are fairly accommodating to nonparty witnesses if their seems to be overbearing behavior, so this deponent veto would not be needed for them.

Linda A. Willett, prepared stmt. and Tr. 217-26: (Assoc. Gen. Counsel, Bristol-Myers Squibb Co.) Opposes the requirement for the agreement of the witness to extend the deposition. Non-party witnesses often appear reluctantly, and requiring their agreement will add an unnecessary and counterproductive obstacle.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Making an extension by agreement depend on assent by the witness is likely to frustrate proper discovery and allow the witness to evade full questioning.

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) Recommends against requiring that the witness agree to extend the time for a deposition beyond the limit. This would be particularly undesirable with experts, for the fate of the parties' discovery efforts should not be in the hands of an expert with an agenda.

(c) Other deposition changes (Rules 30(d)(1) and (3))

Comments

National Assoc. of Railroad Trial Counsel, 98-CV-155: Supports the changes. They should help eliminate "speaking objections" and make clear that a witness can be instructed not to answer only to invoke a privilege.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the changes with one reservation. The rule should be clarified to permit instruction not to answer on the condition that a motion to support the objection is filed within a specified period of time, and that it may include legally sufficient reasons other than those set forth in Rule 30(d)(3).

F.B.I., 98-CV-214: Supports the changes. Eliminating excessive objections during depositions should narrow discovery abuses.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee is concerned that the changes empowers someone outside the scope of the litigation to instruct a witness not to answer. Also, current paragraph (3) says that a "party" can seek relief from an abusive deposition; it is not clear why this should not also be changed.

Testimony

San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) The effort of the Committee in Rules 30(d)(1) and (d)(3) to return civility and professionalism to deposition taking is very welcome. In addition to the grounds for instructing a witness not to answer a question, we suggest a fourth basis: "to present a motion for a protective order to cease or prevent deposition conduct by a party, deponent, or counsel intended to be abusive, harassing oppressive, embarrassing, unduly repetitive, or otherwise improper." Shell is concerned that the proposal, as currently drafted, removes the court from correcting conduct during the course of a deposition, short of a motion to terminate the deposition entirely.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) These changes are very similar to Texas Rule 199.5(d)-(h), which require depositions to be conducted as if in open court, and prohibit most private conferences between witness and attorney. The Texas rule goes on to provide that if a deposition is "being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling." HII suggests that the Note to Rule 30(d)(1) make clear that violations are cause for relief under Rule 30(d)(3).

8. Rule 34(b)

(a) General desirability

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports the addition of explicit cost-bearing provisions.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: This change is unnecessary and misleading. The authority to shift costs already exists under Rule 26(b)(2). Thus, there is no real change. The Section disagrees with the assertion that Rule 26(b)(2) has rarely been applied, citing four cases. The FJC Study found that document requests generated the largest number of discovery problems, but these were not generally in the overproduction area. Thus, if there were a change it would not address the problems identified. The FJC Survey does not show that the cost of document production is a problem; even in the high-stakes cases in which such costs are relatively high, they are commensurate with the stakes involved. Moreover, the proposed amendment is unclear on what costs may be shifted. If attorneys' fees, client overhead and the like are included, the proposal involves funding an adversary's case.

Maryland Defense Counsel, Inc., 98-CV-018: Supports the proposed amendment. Document production is not only the most expensive, but also the most institutionally disruptive aspect of discovery for the clients represented by this organization's lawyers. Suggests that the Note stress that an outright bar on proposed discovery often may be preferable to simply shifting its overtly quantifiable costs.

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "The burden of the cost of production of documents should be on the party initiating the request. That burden will make 'discovery initiators' think before making abusive document requests."

Assoc. of the Bar of the City of N.Y., 98-CV-039: Endorses the change, so long as either the rule itself or the Committee Note makes it clear that the power granted should be applied only in

the unusual or exceptional case. This is consistent with the general trend of making discovery more efficient. It would give the party requesting discovery an incentive to limit requests and lessen the financial burden on the producing party. But the provision should be used only in the unusual or exceptional case. Liberal application of the proposed rule would unfairly tilt the playing field in favor of litigants with larger financial resources.

James A. Grutz, 98-CV-040: Opposes the change. If costs become onerous, a litigant can request the court's aid. The provision is unnecessary.

Thomas J. Conlin, 98-CV-041: Opposes the change. If a document request is excessive, it should be limited in accordance with the current rules. The court already can protect parties against excessive expenses, and it should not be permitting or requiring a response to excessive requests even if the requesting party has to pay some of the cost.

John Borman, 98-CV-043: Opposes the change. It deters parties seeking discovery from being aggressive in pursuing information, and it will encourage responding parties to employ this new device to resist. It places the burden of proving that the benefit of the discovery sought outweighs its burden or expense on the party who does not even know what is in the material.

Michael J. Miller, 98-CV-047: This proposal will be used as a weapon by corporations who seek to prevent the discovery of relevant information under the guise of cost.

ABA Section of Litigation, 98-CV-050: Supports the proposal because it encourages courts to overcome their reluctance to apply existing limitations on excessive discovery, and it offers courts an alternative when they view a complete denial of excessive discovery as too harsh. The cost-bearing proposal will not deter legitimate discovery because, by definition, it applies only when a document demand exceeds the limitations of Rule 26. The court's power to shift these costs is already implicit in Rule 26(c). The Antitrust Section opposes this proposal because it believes that it could create a new standard for discovery that is dependent an a party's financial ability to pay for discovery as opposed to the current standard based on relevance,

etc. Because of this important concern, the Litigation Section suggests that the Note urge that the courts be particularly sensitive to this issue.

Richard L. Duncan, 98-CV-053: Opposes this proposal. It will create more litigation.

Charles F. Preuss, 98-CV-060: Supports this explicit authorization to impose part or all of the costs of document discovery that exceeds the limits of Rule 26(b)(2).

Lawyers' Club of San Francisco, 98-CV-061: The probable impact of the proposed amendment would be to increase the prevalence of cost-bearing orders. Doing so would increase financial disincentives for individuals to conduct litigation against corporate and institutional defendants. As such, it would impede and restrict discovery unnecessarily by individual claimants.

Jay H. Tressler, 98-CV-076: Applauds this proposal.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Opposes the proposal. The provision is unnecessary, because the courts already have the power to do this. At the same time, cost-bearing is not to be applied routinely. Given these two propositions, the Committee can't comprehend the benefit of the amendment. More generally, the Committee would favor a direct limitation on discovery as opposed to cost-shifting, which may favor deep-pocket litigants. It might even further use of discovery to harass.

Michael S. Allred, 98-CV-081: Opposes the change. This is biased in favor of not making discovery, but gives no remedy if discovery is unjustifiably refused.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Supports the change. Document production is where the most serious problems currently are found. It is appropriate that if a party wishes to pursue broad and unlimited forms of document production, it should pay the reasonable expenses that result.

National Assoc. of Consumer Advocates, 98-CV-120: Opposes the change. It will lead to additional delay, ancillary litigation, and increased costs. Objections by defendants that document production costs too much are full of sound and fury but not

based on valid concerns. Usually the parties can reach an equitable solution to the costs of document production. If that doesn't happen, the current rules provide adequate tools for the problem. Since this is a power the courts already have under Rule 26(c) and 26(b)(2), the change is not needed. It may cause judges to cast an especially jaundiced eye on requests for documents, above and beyond the limits that already exist. Because defendants have most of the documents in the cases handled by N.A.C.A. members, this change will have a disparate impact on plaintiffs.

National Assoc. of Railroad Trial Counsel, 98-CV-155: Supports the changes. They will assist the trial court in controlling discovery abuses in document production.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Endorses the change. Courts already have the power to do this, but there is no harm in saying so expressly.

Federal Practice Section, Conn. Bar Ass'n, 98-CV-157: Endorses the rule, understanding it to say that everything beyond the "claims and defenses" scope would be allowed only on payment of costs.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the amendment as written because it permits the court to reasonably limit discovery and gives the judge discretion to extend the limits on a good cause showing, providing that the cost is to be borne by the party seeking discovery.

Richard C. Miller, 98-CV-162: Opposes the change. It "strikes at the heart of our juridical system by eliminating access to justice." Defendants already have an incentive to draw things out and increase expense to defeat claims. This change will magnify that tendency.

William C. Hopkins, 98-CV-165: The cost shifting proposal means that plaintiffs will face a price tag on the first discovery request. This is not desirable.

Timothy W. Monsees, 98-CV-165: He is afraid this will extend to more than simple copying costs, which no one has a problem with paying. He envisions getting a bill for a couple of thousand

dollars for defendants to hire people to search their records. Why should a party have to pay for production of relevant material?

Mary Beth Clune, 98-CV-165: This change would be very unfair to plaintiffs. In employment cases, the defendant has all the documents, and such defendants often produce files of meaningless documents in an effort to bury the relevant documents. Requiring the plaintiff to finance the "reasonable expenses" of discovery will likely lead to abuse by defendants.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Supports the change. In pharmaceutical litigation, plaintiffs routinely seek discovery of all reported adverse events, clinical trials and other documents not relevant to the core issues in the case. It would be preferable if the discovery of these materials were not permitted. The company strongly opposes cost shifting with respect to depositions. The appropriate cost control measure there is to limit the duration of the deposition.

Gary M. Berne, 98-CV-175: The change is unnecessary, for courts already have the authority to take needed measures. The FJC report shows that the main problem is not overproduction, but failure to produce, which the amendments don't address.

Public Citizen Litigation Group, 98-CV-181: Does not support. The rule provision is not needed, and may lead to the incorrect negative inference that cost-bearing is only authorized in connection with document discovery.

Association of Trial Lawyers of America, 98-CV-183: Opposes the change. ATLA generally opposes proposals to institute cost-shifting measures as leading to abrogation of the American Rule that parties bear their own costs of litigation. Even if the proposal only makes explicit authority that was already in the rules, it appears a move in the wrong direction.

James B. Ragan, 98-CV-188: Concerned about the proposed change. It purports to shift the burden to the party seeking discovery in some instances. In fact, this should be a situation that never occurs. Rule 26(b)(2) directs the court to limit excessive discovery, so the circumstance identified in the proposed

amendment should not happen.

Ohio Academy of Trial Lawyers, 98-CV-189: Opposed. This is not needed, since the court already has the power under Rule 37 to impose this sanction.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: Although the Committee Note says that this cost-shifting should not be a routine matter, this will certainly result in additional motions to determine in any particular case whether or not the costs should be shifted to the requesting party.

Philadelphia Bar Assoc., 98-CV-193: Supports the amendment. Placing an explicit cost-bearing provision in Rule 34 might clarify and reinforce the judge's ability to condition discovery on payment of costs. This might encourage more negotiation and cooperation in cases where large document productions are involved.

James C. Sturdevant, 98-CV-194: The Committee does not say that this authority is only to be used in "extraordinary" cases or "massive discovery cases." There is a very real potential that it will be invoked in many cases to support cost-bearing, which would be undesirable. The courts already have adequate authority to deal with abuse.

Maryland Trial Lawyers Assoc., 98-CV-195: Urges rejection. Often the injured party is at an economic disadvantage to the opposing entity, which is usually insured. Coupled with the limitation of disclosure to supporting information, this change will work a harsh result. It is unnecessary and unduly restrictive.

James B. McIver, 98-CV-196: (98-CV-203 is exactly the same as no. 196 and is not separately summarized) This will have the effect of harming victims, consumers, and other plaintiffs.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the change. This will establish what some judges will view as a presumption that documents should only be produced on payment of the other party's costs of production. It would also establish a two-track system of justice based on wealth.

Trial Lawyers for Public Justice, 98-CV-201: Courts already have this power, and the proposal is therefore redundant. But the signal to judges is obviously that they should impose sanctions more frequently against parties who ask for too much information, and that they have not imposed such sanctions with sufficient regularity in the past. This will strengthen the hands of defendants and encourage stonewalling.

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: Supports the change.

Sharon J. Arkin, 98-CV-204: Opposes the change. The defense deliberately engages in dump truck tactics. If this change is adopted, the rules will impose on the consumer the obligation to pay for the costs of such productions, and they will be further victimized by corporate defendants.

Nicholas J. Wittner, 98-CV-205: (on behalf of Nissan North America) Supports the proposal. It will reduce needless discovery requests and related expense.

F.B.I., 98-CV-214: Supports the change.

Michigan Trial Lawyers Assoc., 98-CV-217: Opposes the proposal. Courts already have the power to impose this sanction. But making it explicit in the rules will send a signal to judges to impose sanctions more frequently. This will encourage responding parties to stonewall.

Stuart A. Ollanik, 98-CV-226: A general rule promoting cost-shifting is an invitation to evidence suppression. It will be in the responding party's best interests to exaggerate the cost of production, in order to make access to relevant information prohibitively expensive. It will be one more tool for hiding the facts.

Jon B. Comstok, 98-CV-228: This is an excellent idea. He realizes it is somewhat redundant because the authority already exists in Rule 26. But it is laudable to make modifications that will somehow get the judge to become more involved in discovery.

Edward D. Robertson, 98-CV-230: Opposes the proposal. It is a first, and ill-advised, step by the representatives of corporate

America toward the English system that requires losers to pay. Defendants are the primary violators of reasonable discovery and the chief advocates of discovery limitation. If the proposed rule is adopted defendants will file for costs to pay for their excessive responses to reasonable discovery requests.

Martha K. Wivell, 98-CV-236: The rule is unnecessary because there is already authority to do this. Nonetheless, defendants will seek to shift costs in almost every products liability case, for they always say the costs are too high. Then the proof of the benefit of discovery is placed on the party who does not even know what there is to be discovered.

Jeffrey P. Foote, 98-CV-237: Opposes the change. This will simply lead to further litigation.

Eastman Chem. Corp., 98-CV-244: Strongly favors the amendment. It notes, however, that a better course would be forbidding discovery altogether.

Anthony Tarricone, 98-CV-255: Opposes the change. There is no need to revise the rule in this manner.

New Mexico Trial Lawyers Ass'n, 98-CV-261: Finds the change troublesome. It appears to be an invitation to increased litigation about what constitutes an excessive request.

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l Corp.) The cost-bearing provision will hopefully encourage a litigant to think twice before requesting every conceivable document, no matter how attenuated its relevancy. Navistar has been an easy target for burdensome discovery about information remote in time from the events in suit.

U.S. Dep't of Justice, 98-CV-266: Because this proposal reinforces the proposed amendment to Rule 26(b)(1) limiting access to information relevant to the "subject matter of the litigation," it is subject to the same concerns the Department presented about that change. The Department would be less concerned about the proposed change to Rule 34 if the "subject matter" standard of current Rule 26(b)(1) were retained. Thus, if the current Rule 26(b)(1) is retained, and if the proposed amendment retains its reference to Rule 26(b)(2)(i)-(iii), the

Department supports this proposal.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: The Section agrees with this proposal. The Committee should make it clear, however, that the change is not intended to change the standard that judges should apply in deciding whether to condition discovery on payment of reasonable expenses.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports the amendment. It is apparent that the court already has this power, but the amendment makes the authority clear. Perhaps even more beneficial is the Committee Note, which provides considerable guidance to everyone as to when and how these costs may be assessed.

Thomas E. Willging (Fed. Jud. Ctr.), 98-CV-270: Based on a further review of the data collected in the FJC survey, prompted by concerns about the potential impact of cost-bearing on civil rights and employment discrimination litigation, this comment reports the results of the further examination of the FJC survey data. It includes tables providing the relevant data in more detail, and generally provides more detail than can easily be included in a summary of this sort. The study found "few meaningful differences between civil rights cases and non-civil rights cases" that might bear on the operation of proposed Rule 34(b). Discovery problems and expenses related to those problems differed little between the two groups of cases, and the percentage of document production expenses deemed unnecessary, and document production expenses as a proportion of stakes, were comparable in both sets of cases (civil rights and non-civil rights). The differences that were observed included that defendants in non-employment civil rights cases were more likely to attribute discovery problems to pursuit of discovery disproportionate to the needs of the case; civil rights cases had a modestly higher proportion of litigation expenses devoted to discovery; nonmonetary stakes were more likely to be of concern to clients in civil rights cases; and total litigation expenses were a higher proportion of stakes in civil rights cases (but stakes were considerably lower in such cases). Complex cases have higher expenses than non-complex cases, but for complex civil rights cases the dollar amounts of discovery expenses, especially for document production, were far lower than in

complex non-civil rights cases. Overall, the report offers the following observations: "First, because discovery and particularly document production expenses are relatively low in complex civil rights cases, defendants would have less room to argue that a judge should impose cost-bearing or cost-sharing remedies on the plaintiff. Second, our finding that total litigation expenses were a higher proportion of litigation stakes in civil rights cases may give defendants some basis for arguing that discovery requests are disproportionate to the stakes in the case and that cost-bearing or cost-sharing should be ordered. On the other hand, our finding that nonmonetary stakes are more likely to be of concern in civil rights cases may give plaintiffs a counterargument in some cases. Third, one might read our finding that defendants are more likely to attribute discovery problems to pursuit of disproportionate discovery as suggesting that defendants' attorneys will look for opportunities to act on that attribution by moving for cost-bearing remedies."

Testimony

Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) This is a positive step, giving litigants the opportunity to obtain items to which they are not entitled by right under Rule 26(b)(2) by paying the costs of production. This will not shift the costs of document discovery related to the core allegations of the case, but recognizes that the court should not allow expansive discover on tangential matters without consideration of reallocating the costs and burdens involved in ordering production.

Allen D. Black, prepared stmt. and Tr. 18-30: Opposes the change. This will favor well-heeled litigants, whether plaintiffs or defendants. It thus runs against the basic democratic underpinnings of the American judicial system. It will also add a new layer of litigation to a substantial number of cases--to determine who should pay what portion of the costs of document production. Yet the proposal provides no standards whatsoever to guide the court's decision about whether and how to shift these discovery costs. The invocation of Rule 26(b)(2) aggravates the problem because it contains no objective standard

and instead asks the court to make an impossible prediction concerning the potential value of the proposed discovery. Virtually every producing party will argue vehemently that the burdens and costs outweigh the possible benefit of the proposed discovery. Should the court take evidence on the likely cost of discovery to decide these disputes? Even if it could do that, how could it determine the "likely benefit" of proposed discovery? This will produce a whole new layer of litigation about who will pay and how much. (Tr. 25-26)

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense Counsel) Supports the change. The policy of proportionality has been overlooked, and this should re-awaken the parties to the existence of this limitation on discovery. Notes that document discovery is the only type of discovery that cannot have numerical limitations. Interrogatories and depositions do in the national rules, and requests for admissions can be limited by local rule, but not document requests.

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Opposes the proposal. The authority already exists without the change. The goal, then, is again to send a signal that the problem judges should address is over-discovery even though the evidence does not support that concern.

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: Opposes the change. Courts already have this power, and the Committee Note acknowledges that the power is not to be used routinely. He would favor a direct limitation on discovery as opposed to a cost-shifting limitation.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Supports the proposal. Believes that emphasis on the proportionality provisions is essential since they have been overlooked or misapplied in the past. Believes that the impecunious plaintiff argument is specious. In his entire career as a defendant's lawyer, he has never encountered a case in which a plaintiff in a personal injury case reimbursed counsel for costs in an unsuccessful case. The real issue is that this is an investment decision for counsel for plaintiffs, and this is not a violation of professional responsibility rules. This might be different in other sorts of cases -- employment discrimination, for example, with pro se plaintiffs. But in those cases the proposed change

allows the judge to take the ability of the plaintiff's side to bear the expense into account. His own experience, however, has been limited to cases involving plaintiffs with lawyers who took the case on a contingency fee basis.

San Francisco Hearing

Maxwell M. Blecher, prepared stmt. and Tr. 5-14: Together with the proposed change to Rule 26(b)(1), this is pernicious and gives a collective message that there should be less discovery to plaintiff at increased cost. The standards set forth in Rule 26(b)(2) are so vague that the court can't sensibly apply them. Moreover, if costs are shifted and the documents contain a "silver bullet" there should be another hearing to seek reimbursement. This is not worth it. The basic message is that even if plaintiff manages to persuade the judge to expand discovery to the subject matter scope, plaintiff must pay for the additional discovery to that point. He has nothing against making plaintiff pay if the specific discovery foray is unduly expensive. For example, if defendant usually has e-mail messages deleted upon receipt and plaintiff wants to require a hugely expensive effort to locate these deleted messages, there is nothing wrong with presenting plaintiff with the option of paying for that material. But that is different from institutionalizing the process of shifting costs every time plaintiff goes beyond a claim or defense. This is how he reads the current proposal. He feels that the judge could both find that there is good cause and that the plaintiff has to pay for the added discovery. In the real world, judges will be likely to link the two and think that as soon as plaintiff gets beyond claims and defenses it's pay as you go. At present, the limitations of Rule 26(b)(2) are only applied in the most exceptional cases, where a party does a hugh and marginal search, such as reconstructing electronic data. But the rule will encourage the same sort of thing in many cases. This will institutionalize a process that is already available today. It will up the stakes in antitrust litigation, which is already very expensive. (Tr. 7-10)

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) This change can work in tandem with the revision of Rule 26(b)(1), and the court could shift costs if it found good cause to allow discovery to the subject matter limit. But courts should be admonished not to assume that a

party is automatically entitled to discovery it will pay for. There are now plaintiffs' law firms which are as wealthy as small corporations, and their willingness to pay should not control whether irrelevant discovery is allowed. The rich plaintiffs' lawyers won't hesitate to put up the money for such discovery forays, so their willingness to pay should not be determinative. They will continue going after the same stuff whether or not they have to pay.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell emphatically endorses the proposed change. Document production abuses are at the core of most discovery problems, particularly in larger or more complex matters. Shell strongly urges that the rule or the Note state that "court-managed" discovery on a good cause showing under Rule 26(b)(1) presumptively be subject to cost shifting, absent a showing of bad faith on the part of the responding party.

H. Thomas Wells, prepared stmt. and Tr. 47-60: This change is more of a clarification of the existing rule's intent than a new rule change. The authority has always been present in the existing rule, and the problem is that it was rarely invoked in the manner originally intended. The proposed change adequately recognizes the original intent of the provisions.

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: In every speech he makes to young lawyers or bars, he talks about Rule 26(b)(2) and seldom gets anyone to bring such concerns to him. He likes this change to encourage attention to this. Notes that he had Shell in his court and did not hear from it on this score. (See testimony of G. Edward Pickle, above.)

Larry R. Veselka, Tr. 99-108: Does not see this change as a particular problem. That's the way to solve problems about costs. (Tr. 107-08)

Mark A. Chavez, prepared stmt. and Tr. 108-17: Opposes the change. It would encourage further resistance to discovery, result in extensive litigation over cost-bearing issues, and inhibit plaintiffs from adequately investigating their claims.

Weldon S. Wood, Tr. 140-46: Supports the change. Document production is where the problems are found. Most discovery is

reasonable. It is the exceptional case that causes the problems.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: Because of the enormous cost that litigants can impose on adversaries, it is essential that the rules recognize the power to require a party seeking non-essential, discretionary discovery to bear the cost of it. At the same time, there should be a limit on a party's ability to impose discovery on an adversary just because it is willing to pay the cost of the discovery.

Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: She fears that this change may lead to a repeat of the kind of collateral litigation that occurred under Rule 11, where every motion was accompanied with a motion for sanctions. The courts already have authority to shift costs in cases where it's truly necessary. She believes there is not a large volume of unnecessary discovery, so that this "solution" may be more of a problem than the problem it seeks to solve. She doesn't think that what we now know about discovery of electronic materials shows that some power like this is needed for that sort of discovery. The problem is that too often what's permissive becomes mandatory.

James J. Johnson, Tr. 47-63: (Gen. Counsel, Procter & Gamble) To date he has not found the existing cost-bearing possibilities helpful to Procter because when judges find out that it is a multi-billion dollar company they don't have any interest in shifting any of its substantial costs of document preparation. (For details on these, see supra section 3(a).) This is at the heart of the unevenness of cost between the discovering party and the producing party. This sort of activity takes place even when both sides are large entities with considerable documents to produce. (Tr. 57-58) He suggests that the Note to this rule suggest cost-bearing as an effective tool for discovery management.

Robert T. Biskup, prepared stmt. and Tr. 73-84: This is integrally linked with the proposed Rule 26 scope change because it calls for an ex ante determination about the proper allocation of costs. This would avoid the risk of a new brand of satellite litigation, as with Rule 11. If it works the way Ford thinks it should, the fee shifting issue would be before the court at the

time that the issue of expanding to the subject matter limit is also before the court.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: He agrees with the cost-bearing provision. Documentary discovery requests are among the most costly and time-consuming efforts for defendants. For peripheral materials, courts should have explicit authority to condition discovery on cost-bearing.

David C. Wise, Tr. 113-19: There is already a mechanism in place to deal with these problems when they arise. What this change would do would be to send a message to the defendants to make plaintiffs pay for their discovery. And plaintiffs simply can't pay. Companies like Ford aren't paying anything for their document production; they are simply passing the cost along to the consumer. If there were no link to expanding discovery beyond the claims and defenses, suggesting that if expansion occurs the plaintiff must pay, his opposition to the proposed amendment would be less vigorous.

John M. Beal, prepared stmt. and Tr. 119-26: (Chair, Chi. Bar Assoc. Fed. Civ. Pro. Comm.) The CBA has no objections to this amendment.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Opposes the change. This will result in motion practice and satellite litigation. The court already has sufficient authority to deal with problems.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) Opposes the change. This is another proposal to impose costs on individuals, and ATLA is opposed to that.

John H. Beisner, prepared stmt. and Tr. 147-54: Without doubt, this is a positive change. But the Note does not go far enough in stressing that there may be circumstances in which a court should say "no" to proposed discovery. The Note should stress that there should be no presumption that the court should authorize discovery that the propounding party wants, even if it will pay for it.

Jonathan W. Cuneo, prepared stmt. and Tr. 160-65: This change will disadvantage plaintiffs and could restrict the types of

cases lawyers in small firms like his could undertake. The existing rules provide adequate protections for defendants. There is no reason to provide more.

Lloyd H. Milliken, prepared stmt. and Tr. 211-17: (president-elect of Defense Res. Inst.) Favors the change. This will not be a sword to be held over the plaintiffs' heads or a shield for defendants. The Note is perfectly clear that this is to happen only in extreme cases, where the discovery is essentially tenuous.

Michael J. Freed, prepared stmt. and Tr. 226-35: The proposal will favor litigants, whether plaintiffs or defendants, that have significant financial resources, over other litigants. It will create a new layer of litigation in a significant number of cases. The reference to the standards in Rule 26(b)(2) really provides no guidance on when this authority should be used.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Although Caterpillar believes that use of Rule 26(b)(2) to bar excessive discovery altogether would be preferable, this change should give judges a tool to put a quick end to incrementally escalating discovery abuses. However, the Note's statement that the court should take account of the parties' relative resources is at odds with the goal of limiting unnecessary and irrelevant discovery. This comment suggests that a party with few resources is entitled to demand discovery beyond the limitations set by Rule 26 at no cost.

Kevin E. Condron, Tr. 259-67: This may be the most meritorious of the proposals. Document discovery is where the cost is, and it should be curtailed if there is no reason for it.

Robert A. Clifford, prepared stmt.: Opposes the change. The court already has powers to deal with abuse, and it is unnecessary to amend the rule in this way.

Thomas Demetrio, prepared stmt.: This is nothing more than a surreptitious attempt to push the cost of litigation so high that individual citizens will not be able to exercise their rights or seek redress for wrongdoing. "Business builds the 'cost' of legal defense into the 'cost of doing business.' That cost is passed on to the consumer. We already bear our share of the

burden of defense costs. By requiring individual litigants to bear the cost again, industry gets not only a free ride but a windfall."

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) This change is well worth making, but it is important to recognize that many plaintiffs will only be able to pay a fraction, if any,of the attendant financial costs in any event. Accordingly, the Note should stress that the primary goal should be for the judge to carefully scrutinize any discovery beyond the initial disclosure, and that the presumption should be toward barring that discovery.

(b) Placement of provision

Comments

ABA Section of Litigation, 98-CV-050: The Litigation Section favors including the cost-bearing proposal in Rule 26(b)(2) rather than Rule 34. This would avoid the negative implication that cost shifting is not available for all forms of discovery. It would also avoid an otherwise seeming inconsistency with Rule 26(b)(2), which merely permits courts to "limit" discovery, without mentioning the court's power to shift the cost of discovery.

Philip A. Lacovara, 98-CV-163: Supports the change, but would go further. He believes that the change should be in Rule 26 because document discovery is not the only place where problems exist that should be remedied by this method. Even though the Note says that inclusion in Rule 34 does not take away the power to make such an order in relation to other sorts of discovery, there is a significant risk that it will be so read. But he thinks it should be in Rule 26(b)(1), not Rule 26(b)(2), and that it should go hand in hand with decisions to expand to the "subject matter" limit. As the proposals presently read, it would not seem that a court could find good cause to expand, but then conclude that Rule 26(b)(2) is violated. He would therefore add the following to Rule 26(b)(1):

> If the court finds good cause for ordering discovery of information relevant to the subject matter of the action, the court may require the party seeking this discovery to pay part or all of the reasonable expenses incurred by the responding party.

This kind of provision would protect plaintiffs as well as defendants, for plaintiffs are often burdened by excessive depositions. Unless there is some further provision on recovery of these costs, it would seem that some of them might be taxable under 28 U.S.C. § 1920; in that sense, the discovering party's willingness to press forward is a measure of that party's confidence in the merits of its case as well as the value of the discovery.

Prof. Ettie Ward, 98-CV-172: For the reasons expressed in Judge

Niemeyer's transmittal memorandum, suggests that any reference to cost-bearing should be in Rule 26(b)(2) rather than Rule 34(b). That placement is more evenhanded, and it fits better as a drafting matter. Including it in Rule 34 appears to favor defendants and deep-pocket litigants. In addition, the standards for shifting costs are not as clear as they would be if the provision were in Rule 26(b)(2).

Public Citizen Litigation Group, 98-CV-181: Does not support. But if additional language is to be added, favors the alternative proposal to amend Rule 26(b)(2).

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee recommends that the cost-bearing provision be included in Rule 26(b)(2) rather than in Rule 34(b). This would make it explicit that the authority applies to all types of discovery, including depositions. Additionally, placement in Rule 26(b)(2) eliminates the possibility of a negative implicaton about the power of a court to enter a similar order with regard to other types of discovery, notwithtanding the Committee Note that tries to defuse that implication.

Testimony

Baltimore Hearing

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Moving the provision to Rule 26(b)(2) would not be desirable, because that would stress the same message. If that would make the message even broader, it would be worse.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: This provision should be in Rule 34 because that's the only type of discovery that creates the serious problem of disproportionate costs. Both sides do depositions, roughly in equal numbers, and so also with interrogatories. But in personal injury cases, one side has documents and the other does not. That's the way it is.

San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Placing the cost-shifting provision in Rule 34

rather than Rule 26 places the emphasis where it belongs.

H. Thomas Wells, prepared stmt. and Tr. 47-60: Regarding placement of the provision, in his experience a provision limited to document production would reach the most abusive and expensive discovery problems, and that the rule should be so limited.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: The placement of this provision in Rule 34 is correct, as opposed to Rule 26. The real need for the provision is in Rule 34.

Chicago Hearing

Robert T. Biskup, prepared stmt. and Tr. 73-84: Rule 34 is the right place for this sort of provision to be, rather than Rule 26. This would avoid the risk of a new brand of satellite litigation, as with Rule 11.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) Because ATLA is adamantly opposed to cost shifting, there was no discussion about whether it might be preferable to put such a provision in Rule 26(b)(2) rather than in Rule 34.

Lorna Schofield, Tr. 193-202: (speaking for ABA Section of Litigation) The Section of Litigation favors that the cost-bearing provision be included in Rule 26 rather than Rule 34. There is already implicit power to make such an order, and if the provision is only explicit in Rule 34 that might support the argument that it can't be used for other types of discovery.

Rex K. Linder, prepared stmt.: Suggests that the provision should be included in Rule 26(b)(2), for it should be readily applicable to all discovery and will correspond to the concept of proportionality. It implicitly exists already under Rule 26(b)(2), and there seems no logical reason not to make it express.

9. Rule 37(c)

Comments

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Supports the change as appropriate. There may be inherent jurisdiction for this purpose, but the specific incorporation of Rule 26(b)(2) removes any doubt on the subject.

National Assoc. of Railroad Trial Counsel, 98-CV-155: Supports the change.

Federal Practice Section, Conn. Bar Assoc., 98-CV-157: Endorses the change.

Public Citizen Litigation Group, 98-CV-181: Supports the change. In 1992, the Group suggested expanding this provision to cover failure to supplement a discovery response, and it favors it now. A party that has failed to supplement discovery responses should not be allowed to rely on the material withheld at a hearing or trial unless there is substantial justification for its action.

Ohio Academy of Trial Lawyers, 98-CV-189: Supports the change, which could help both plaintiffs and defendants.

Philadelphia Bar Assoc., 98-CV-193: Supports the change. The court's reliance on inherent power to sanction for failure to supplement as required by Rule 26(e)(2) was an uncertain and unregulated ground for imposing sanctions. The amendment also remedies any implication that the express mention of Rule 26(a) and 26(e)(1) in Rule 27(c)(1) demonstrates an intent to exclude a litigant's failure to supplement discovery responses from the realm of sanctionable conduct.

Trial Lawyers for Public Justice, 98-CV-201: Supports the change.

F.B.I., 98-CV-214: Supports the change. By imposing a sanction for failure to seasonably amend responses to discovery, this will eliminate the risk of unfair surprise at trial and purposeful withholding of information.

Martha K. Wivell, 98-CV-236: Supports the change.

U.S. Dep't of Justice, 98-CV-266: This change would correct an omission in the 1993 amendments package, and the Department supports it. It notes that Rule 37 could be further improved by explicitly requiring a good faith effort to obtain information without court involvement before sanctions could be requested or imposed under Rule 37(c)(1).

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports the change. Decisions that have addressed sanctions for failure to supplement under Rule 26(e)(2) confirm the lack of any specific rule to guide courts in imposing sanctions. There would appear to be no rational reason not to apply the sanctions of Rule 37(c) to a party's failure to supplement discovery responses and incorporate the same reasoning for a court to consider a denail of sanctions where the failure to supplement was with substantial justification or harmless.

Testimony

Chicago Hearing

John M. Beal, prepared stmt. and Tr. 119-26: (Chair, Chi. Bar Assoc. Fed. Civ. Pro. Comm.) The CBA has no objection to this amendment.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Fully supports this change. This is a necessary tool to enforce proper disclosures.

10. Comments not limited to specific proposed changes

(a) General observations about package

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Discovery reform is necessary, but the changes should go further toward focusing issues in litigation and adopting a sequential disclosure scheme with plaintiff going first. The broad scope of discovery presently, combined with the absence of bright-line limitations, has caused a great deal of waste. The more the rules are made objective (as by using numerical or other objective limitations) the greater the improvement in practice. In a supplemental comment, these groups add that they wish to "assure the Advisory Committee that [they] strongly support the Committee's efforts to advance changes to discovery practice that are very much needed, by promulgating the Proposed Amendments to Rules 26 and 34 as published. Even though they may not go far enough to address some of the genuine concerns of our members, the Amendments are a well balanced package that recognizes the failures of modern discovery and should set the system on a corrected course toward greater certainty, more precise standards, and a workable structure for discovery that will help correct some of the most serious problems."

Prof. Edward D. Cavanaugh, 98-CV-002: There is no need for these amendments at this time, since discovery is working well in most cases. These changes are likely to create new problems rather than solve old ones. The 1993 amendments have worked, and the rules should not be rewritten every five years. "We should stay the course with the 1993 amendments rather than go down the path charged in the proposed amendments. The federal civil justice system cannot afford yet another period of confusion and uncertainty such as it recently experienced under the now-lapsed Civil Justice Reform Act of 1990." Moreover, across-the-board changes are not indicated, and changes should be focused on the categories of cases that produce problems.

Hon. Avern Cohn (E.D. Mich.), 98-CV-005: Based on 19 years as a judge, concludes that there is no need for a change in the rules if discovery is working fine in most cases. Rule changes won't

solve the problem in cases that have gotten out of control; that's for the judge to handle. "More aggressive judging and less aggressive lawyering in a small number of cases is what is needed."

James E. Garvey, 98-CV-007: Commends and favors the proposed changes.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: Major changes should not be made when discovery is working well in most cases. There are problem cases, but the changes do not target only those cases. The solution in the problem cases is not rule tinkering, but more effective judicial oversight.

Maryland Defense Counsel, Inc., 98-CV-028: Discovery reform is necessary. "While the Maryland Defense Counsel believes that the proposed amendments do not yet bring our Rules of Discovery to the destination where they need to be, they certainly are a far cry better than merely standing still where we are now."

Hon. Bill Wilson (E.D. Ark.), 98-CV-019: The central guidance should come from Rule 1's admonition to pursue fair, efficient results. It is not clear that the 1993 amendments do that, and making them nationally binding seems hard to justify. The up-front activity required under those amendments is overkill in the routine case, and needlessly increases expense. The way out is to set a firm trial date and make sure there is reasonably quick judicial access for problems, particularly discovery problems. Discovery hotlines may be one such solution.

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "These amendments to the FRCP, while not enough and only a beginning, will do more to correct discovery abuse than any singular proposal I've seen in the last fifteen years."

ABA Section of Litigation, 98-CV-050: The Section of Litigation believes that the Advisory Committee has taken a responsible and fair approach to these issues, favoring neither defendants nor plaintiffs and recognizing the need for uniform rules and flexibility in their application to an individual case. The proposed changes should have a positive, but not a dramatic, effect on practice in the federal courts by reducing the time and

money expended in civil litigation.

Lawyers' Club of San Francisco, 98-CV-061: The availability of judicial relief with regard to the narrowing effects of the proposed amendments offers little comfort. The delays and costs involved in pursuing any discovery motion will serve as an effective deterrent to seeking more expansive discovery. It is also likely that the already overburdened district courts will be in a position to actively manage discovery.

Michael S. Allred, 98-CV-081: The biggest problem is failure to respond properly to discovery, particularly by corporate defendants. These changes don't address that, and instead give corporate defendants benefits.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Notes that the efforts of the Advisory Committee to build a full record have been exhaustive.

William A. Coates, 98-CV-096: "These proposed discovery reforms, by addressing the issues of uniform disclosure, narrowing the scope of all discovery and encouraging greater judicial supervision of the discovery process, represent real progress in bringing greater value to discovery."

Hon. Prentice H. Marshall (N.D. Ill.), 98-CV-117: "In short, the discovery amendments are excellent."

Prof. Beth Thornburg, 98-CV-136: (enclosing copy of her article Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals, 52 SMU L. Rev. 229 (1999), which contains observations about the proposals) Like virtually all the changes since the 1980s, the probable impact of these changes, if adopted, will be to curtail discovery. The assumption of all these packages of amendments has seemed to be that the source of discovery abuse is over-discovery. But there is no acknowledgement that resistance to discovery is also important, and nothing to counter that tendency. Moreover, the changes cut back across the board even though the empirical information suggests that problems arise only in a small number of cases. They are likely to drain away more district judge time on disputes that would not otherwise happen, and thereby to limit the judges' ability to perform the tasks they now perform.

Michael S. Wilder, 98-CV-149: (General Counsel, The Hartford) "On behalf of The Hartford, I want to express my strong support for these amendments. The Advisory Committee is going in the right direction."

State Bar of Arizona, 98-CV-153: The Civil Practice and Procedure Committee of the State Bar reviewed the proposals and voted unanimously to recommend their adoption. The Board of Governors for the State Bar then considered and endorsed the Committee's view, so the State Bar "hereby advises, therefore, that it supports the adoption of the proposed amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence in the form circulated in August 1998 for comment by the Judicial Conference Advisory Committee."

Federal Bar Ass'n, Pheonix Chapter, 98-CV-158: Based on a vote of the Board of Directors, the Chapter supports adoption of the proposed amendments.

Richard C. Miller, 98-CV-162: "I view these proposed rule changes merely as an effort to eliminate individual legal rights in order to protect corporate profits."

Nebraska Assoc. of Trial Attorneys, 98-CV-174: Concerned that there has not been adequate time since the 1993 amendments went into effect to assess those changes. Each new change sweeps aside precedent pertinent to the prior version, and this happens too often.

Gary M. Berne, 98-CV-175: Besides commentary on specific changes, this submission contains a critique of the Advisory Committee's use of the empirical material gathered regarding discovery. The Committee gives heavy weight to anecdotal evidence by an "elite" group of "national" attorneys who are involved with the Committee. At the same time, it ignores hard data from multivariate analysis. The problems identified by the Committee don't appear to be serious ones in view of those data. Overall the data indicate that discovery is not too costly, and the most frequently encountered problem is obstruction of discovery or delay.

Trial Lawyers Association of Metropolitan Washington, D.C., 98-CV-180: The proposed changes seem to be premised on the idea

that in large tort litigation both sides have incentives to run up each others' discovery costs unnecessarily. From the plaintiff's perspective, this is simply untrue.

Public Citizen Litigation Group, 98-CV-181: The focus on discovery abuse in the proposals appears to ignore the evidence that the rules function well in the vast majority of cases. Overuse of discovery is rare, and amendments that impose restrictions on discovery in all types of cases are therefore unwarranted. Amendments that might be desirable in a few cases should not be adopted if they would burden the discovery process in ordinary cases. Moreover, focusing judicial management more on those ordinary cases will deflect it from the complex cases where it is most valuable.

Association of Trial Lawyers of America, 98-CV-183: Out of an undifferentiated concern about expense and other matters whose significance has been unduly exaggerated, the Committee has developed proposed rules that would impair access to justice for a wide variety of plaintiffs. Although the proposals emphasize cost and delay, the changes will not improve matters in these regards, and they may increase costs for plaintiffs. Yet the greatest problem with discovery -- failure to comply with proper discovery demands -- goes unremedied.

Russell T. Golla, 98-CV-187: Strongly opposes the proposed changes. Major corporations go to great lengths to hide damaging information, and these changes will give those who seek to frustrate the search for truth additional ammunition. There is no discovery abuse that warrants these changes.

John P. Blackburn, 98-CV-192: "I represent farmers, small businesses, and injured persons. Please do not allow the rights of these persons to be diminished by making it tougher for them to establish and prove their cases. . . . The litigation process is sufficiently difficult and expensive now."

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: "The Lawyers Committee has grave concerns and opposes adoption of the proposed amendments to Rules 5(d), 26(a)(1), 26(a)(4), 26(b)(1), 26(b)(2), 26(d), 30(d)(2) and 34(b) of the Rules of Civil Procedure. . . . [It] will set forth a particularized statement of its concerns and the reasons for its opposition to the

proposed amendments promptly at the conclusion of its review process." In a later-filed 34-page amplification, it states that, overall, the amendments "would have a profoundly adverse effect on the ability of civil rights plaintiffs to prove the merits of their claims [by] transferring a large measure of control of the discovery process from counsel to the courts."

Trial Lawyers for Public Justice, 98-CV-201: The most widespread and serious form of discovery abuse is stonewalling, and this is confirmed by the FJC study. But the proposed changes don't do anything about that problem, and instead will exacerbate stonewalling problems. As a whole, then the package should not be adopted even though some proposals have merit.

Robert L. Byman, 98-CV-225: E-mail message attaching a copy of a column scheduled to be published in the National Law Journal in mid-February concerning the proposed amendments. The column is in the form of a colloquy about the proposals between Bynum and Jerold S. Solovy, in which they discuss strengths and weaknesses of the proposals. It is difficult to state what positions are to be gleaned overall. The column does say there should have been "fierce debate" about the proposals, but that there was not, and it urges readers to weigh in even though the deadline has passed. In that spirit, it adds in a footnote: "To practice what we preach, we have sent the copy for this column to the Advisory Committee."

Ken Baughman, 98-CV-232: "These changes will play into the hands of the hard ball artists and the case churners. The effect will be to raise the cost of litigation to the average citizen and limit his or her access to the court system. . . . [M]ore people will start taking the law into their own hands."

Pamela O'Dwyer, 98-CV-233: Opposes the changes to Rule 26, providing a description of difficulties she has encountered in litigation with railroads.

Jesse Farr, 98-CV-234: "Needless to say, I must oppose rule changes which make discovery more difficult and burdensome."

J. Michael Black, 98-CV-239: "In the past decade our form of government has been rapidly changing. It no longer resembles a republic. It has become a plutocracy and the proposed rule

changes, if enacted, will only act to further the control of special interests over our government."

P. James Rainey, 98-CV-242: These amendments would greatly increase the cost to citizens to bring a lawsuit and effectively deny them their day in court.

NAACP Legal Defense Fund, 98-CV-248: The proposals would work an unintentional but substantial shift in substantive advantage in favor of defendants in the discovery process, especially in suits brought under the federal civil rights statutes.

Lawrence A. Salibra, II, 98-CV-265: Urges resisting anecdotal presentations of "[a] small but disproportionately vocal section of the bar made up of large law firms with corporate clients" whose objections have fueled the movement to make these amendents. Speaking as in-house counsel to a large corporation, he has shown that corporate litigation need not be carried on in the manner these firms have adopted for their own reasons. He attaches the study of CJRA activities in the N.D. Ohio that he spearheaded because it shows that court reform efforts of this sort don't reduce expenses. The problem is in the organization of the legal profession, not in the rules adopted by courts.

Testimony

Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) Doubts that the Advisory Committee has ever had the benefit of the amount of accumulated wisdom on another subject that it has on discovery. It has the input of an assembly of scholars and practitioners representing the entire spectrum of clients, as well as a massive amount of empirical research.

Allen D. Black, prepared stmt. and Tr. 18-30: The Advisory Committee should table all the proposed changes, with the possible exception of the proposal to make disclosure mandatory in all districts. There is no crying need for any of the others. But it is human nature, having invested as much energy as the Committee has in studying discovery, to feel that something

should come of it so that it is not waste. He urges the Committee to resist that temptation.

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense Counsel) The implications of what the Committee does go beyond practice in the federal courts. He serves on the Maryland Rules Committee, and is confident that state practice will be affected by changes in the federal rules on discovery.

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: The changes are not needed because the rules currently provide tools to deal with the problems that prompt the proposals. If there are problems today, that is because the courts are not utilizing the current tools; providing more won't remedy that problem. Discovery is working well in most cases, and it would be a mistake to rewrite the rules for the few cases that cause problems. The 1993 amendments are producing the desired effects, and further changes should not be made after a mere five years.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: The current set of proposed revisions highlights key areas in which reform is most urgently needed. Therefore strongly recommends approval, as these represent real progress in discovery reform.

George Doub, Tr. 142: The proposals are a step in the right direction. They're a small step, and there is nothing revolutionary about them. They seem very evenhanded.

San Francisco Hearing

Maxwell M. Blecher, prepared stmt. and Tr. 5-14: These changes are unnecessary and probably counterproductive. Discovery is not generally a problem, and where it is there is usually a "judge" problem that rule changes won't solve. There is actually very little abuse of discovery.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Discovery, particularly massive document discovery, is the deus ex machina driving litigation costs to absurd levels. Business litigants increasingly are saddled with spiraling expense and diversion of personnel inherent in producing vast volumes of material that frequently has little relevance. The Committee's proposed amendments are a substantial

step in the direction of reason and fairness. A fraction of Shell's cases account for the overwhelming percentage of its total litigation costs. The instances in which discovery is not working are so costly and egregious that remedial efforts are mandated. In some instances, less than one-hundredth of one percent of documents produced have any bearing on the actual issues.

Mark A. Chavez, prepared stmt. and Tr. 108-17: Questions the need to revise the rules to make the changes proposed. At a minimum, further empirical studies should be conducted to demonstrate that a compelling need exists to revise the discovery rules before that is done. The overall thrust of the proposed changes is to limit discovery.

Robert Campbell, Tr. 117-30: (Chair, Federal Rules Comm., Amer. Coll. of Tr. Lawyers) The Advisory Committee has given an extraordinary amount of attention to discovery issues over the last two years, including conferences and other events.

Michael G. Briggs, prepared stmt. and Tr. 155-62: (Gen. Counsel of Houston Indus., Inc.) Although not necessarily endorsing every proposed change equally, HII goes on record to urge that the proposals be adopted in their entirety.

Chicago Hearing

John H. Beisner, prepared stmt. and Tr. 147-54: This package is a masterful compromise. On the one hand, it takes proper account of plaintiff's legitimate need to gather information. On the other hand, it constitutes a measured step toward arresting the use of discovery as a litigation "end game."

Jonathan W. Cuneo, prepared stmt. and Tr. 160-65: There is no evidence supporting aggressive across-the-board changes. Discovery is working well in most cases. Active judicial management can work in the few cases where informational sprawl is a real problem. Moreover, the current changes appear one-sided, and are likely to narrow the amount of information made available through discovery.

Lorna Schofield, Tr. 193-202: (speaking for ABA Section of Litigation) One of the most important features of this package

is that every feature has a provision that allows for judicial discretion. Although the rules try moderately to contract the scope of disclosure and discovery, there is an exception in every case so that a judge can exercise discretion and alter the provisions. A lot of the reaction to the rules from lawyers is due to fear that federal judges won't use that authority sensibly, but there is no reason to assume that and no reason to write rules that assume that. Therefore, the Note material might be modified to emphasize that judges may modify these provisions as needed given the circumstances in a specific case.

Kevin E. Condron, Tr. 259-67: He currently works in an international consulting firm that addresses issues of litigation cost as a corporate planning matter. Based on extensive data review, he does a projection of cost of litigation in different places, and has found that in some venues it is higher than in others. Right now, venue in Texas or Alabama has led to particularly high costs, including discovery costs. There is no real distinction between the rules for discovery in state and federal court, so the differences don't relate to the content of the rules. But he does expect that the narrowing of scope will have a dramatic impact on costs of discovery.

Dean Barnhard, prepared stmt. and Tr. 267-76: The testimony has seemed far too partisan to him. The basic point should be that this package is a package, and that the various proposals work together. Rule 11 says that a plaintiff should have a basis for the allegations in the complaint, and that a defendant should have a basis for the defenses in the answer. That being so, it is perfectly fair that both sides disclose what they have. Everybody's cards should be on the table after disclosure. This flows naturally to narrowing of discovery, for it makes sense that discovery be focused on what's really involved in the case. Then Rule 26(f) and Rule 16 call for the lawyers and the judge to figure out where the case is going and how it should get there. These changes may well provoke early motions, but that is not bad because it will allow the judge to get the case under control. The court-managed stage of discovery fits right into this scheme, and should be retained. The field has not been tilted until now, it has just been muddy.

Robert A. Clifford, prepared stmt.: These proposals are extreme and even drastic proposals to address small problems that usually

correct themselves with due diligence.

Rex K. Linder, prepared stmt.: It is obvious that the Committee has attempted to balance conflicting interests in an effort to control discovery costs without impeding a litigant's opportunity to investigate and prepare its case. The proposed rules are a step in the right direction.

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) The proposed amendments are balanced and will contribute significantly to restoring order and predictability to the civil justice system.

(b) Additional suggested amendments

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports presumptive temporal limitation on document discovery in Rule 34 limiting production to "documents created no more than seven years prior to the transaction or occurrence giving rise to the action." This limitation could be expanded on order of the court.

John G. Prather, 98-CV-003: Proposes the addition of a new Rule 30(b)(8) providing: "Unless otherwise agreed by the parties, depositions shall be taken on a regular weekday, excluding holidays."

Maryland Defense Counsel, Inc., 98-CV-018: Notes that document discovery is the only area in which there is no possibility of numerical limitations by rule, and suggests that in the absence of a national rule providing such limitations there be local authority to adopt limitations by local rule.

Charles F. Preuss, 98-CV-060: Consistent with proportionality principle, would favor a provision presumptively limiting in time the scope of document discovery to a certain time before or after the specific event or transaction at issue.

Federal Bar Council's Committee on Second Circuit Courts, 98-CV-178: The best way to deal with discovery is to require courts to take firm and early control of discovery and tailor it to the needs of the specific cases. Accordingly, the change that should be made is to revise Rule 26 to require hands-on, early judicial oversight of discovery.

Association of Trial Lawyers of America, 98-CV-183: The better focus for the Committee would be on abusive and evasive failures to respond to discovery. In addition, the following areas deserve attention: (1) The distinctive alternative approaches to expert witnesses employed in Oregon and New York, where there are no pretrial depositions, and hence negligible problems of excessive delay and cost; (2) The rapidly expanding role played by discovery of electronic media which, on the one hand, make it easier to store and retrieve information, but, on the other hand,

tend to greatly increase the amount of material to be searched during serious litigation.

Hon. Russell A. Eliason (M.D.N.C.), 98-CV-249: Suggests adopting a cutoff time prior to the end of discovery for filing discovery motions in order to ensure that all motions to comple are before the court and resolved prior to dispositive motions.

Testimony

Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) DRI believes that there should be presumptive time limits placed on discovery of documents and electronic materials. It notes that e-mail messages are more akin to telephone conversations than to written memoranda, and suggests that they should be treated as such. DRI also believes that action should be taken on the problem of preserving privilege objections as to voluminous document productions.

Allen D. Black, prepared stmt. and Tr. 18-30: The one area in which the rules desperately need attention is not included in this package of proposals -- discovery of data and information stored in electronic form. Within a few years most information will be stored in electronic form, and paper documents will be dinosaurs of the past. The current U.S. v. Microsoft trial is an example of these developments. Yet Rule 26(b)(1) still describes the scope of discovery as looking to the location of "books, documents, or other tangible things," and does not even mention information stored in electronic form. Similarly, Rule 30(b)(5) provides a means to compel a deponent to bring "documents or other tangible things" to a deposition, but makes no similar provision for electronically stored data. Rule 34 does make an awkward attempt to reach electronic information, but its language is convoluted and opaque. At the Boston conference, the problems of electronic material were repeatedly raised. Moreover, one in-house attorney for a large corporation stated that he does not consider an e-mail message to be a document because of its "transitory nature." Surely the rules should make clear that e-mail must be produced in discovery if it exists at the relevant time.

Chicago Hearing

Daniel F. Gallagher, Tr. 39-47: Opposes any effort to put the genie of waiver back in the bottle if there has been an inadvertent waiver. The privilege should be jealously guarded and not revived after the fact.

John H. Beisner, prepared stmt. and Tr. 147-54: Proposes that in class actions there be a presumption that disclosure not occur until the class certification question has been resolved.

Sanford N. Berland, prepared stmt. and Tr. 165-71: Urges that sequenced disclosures and phased discovery be used so that defendants know what plaintiff is talking about before they have to formulate their responses. In addition, where a threshold determination will seriously affect the rest of the case, such as class certification, it would make sense to limit disclosure and discovery to that topic until it is resolved. The same sort of thing can be employed where there is an issue that might dispose of the case if addressed early. In addition, it would be desirable to preserve privilege despite the inspection by the party seeking discovery to reduce costs and delay.

Clinton Krislov, prepared stmt. and Tr. 171-77: Opposes involving judges in discovery. But the only way to keep the judges out of it is to adopt a flat rule that everything has to be disclosed. Then there is no occasion for the judges to be involved.

Michael E. Oldham, prepared stmt. and Tr. 235-45: Believes there should be a limit on the number of documents that have to be produced without a court order, and that a presumptive time limit on document production should be adopted. In the District of Colorado, numerical limits work for document production, keyed to the number of requests allowed. In addition, a party's right to amend should be limited more strictly. Furthermore, notice pleading should be eliminated. Rule 8 encourages parties to make frivolous or shallow assertions in pleadings with the expectation that broad discovery will build a case or defense and that they can then amend as needed.

LEONIDAS RALPH MECHAM
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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

April 9, 1999

MEMORANDUM TO THE CIVIL RULES COMMITTEE

SUBJECT: *Agenda Materials for the April 19-20, 1999 Meeting in Gleneden Beach, Oregon*

Attached is the agenda, consisting of two books, for the Civil Rules Committee meeting on April 19-20. Please bring both books with you to the meeting. I have also attached a response from the American College of Trial Lawyers to the Department of Justice's comments on the proposed rule amendments.

The meeting will be held in the Gallery Room of Salishan Lodge, 7760 Highway 101 North, Gleneden Beach, Oregon. It will start each day at 8:30 a.m., and juice, muffins, coffee, and tea will be available each morning.

John K. Rabiej

3 Attachments

cc: Honorable Anthony J. Scirica
Professor Daniel R. Coquillette

American College of Trial Lawyers

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April 6, 1999

VIA EXPRESS COURIER

Mr. Peter G. McCabe, Secretary
Committee on the Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

RE: **Responsive Comments of the American College of Trial Lawyers to the Late Filed Comments of the Justice Department on the Proposed Amendment to the Discovery Rule 26(b) of the Federal Rules of Civil Procedure**

Dear Mr. McCabe:

With the approval of the Advisory Committee Chair, Judge Paul V. Niemeyer, the Committee on Federal Civil Procedure of the American College of Trial Lawyers ("ACTL") respectfully submits this abbreviated response to the March 3, 1999 Comments of the Department of Justice ("DOJ") regarding the Advisory Committee's proposed recommendation to amend Rule 26(b)(1) relating to the scope of discovery in civil cases. The Board of Regents of the ACTL has previously endorsed the proposed amendments.

The ACTL Committee convened a special meeting on Tuesday, March 30, 1999 and spent nearly one full day discussing the March 3 Comments of the DOJ. Based on that meeting this response is made.

1. **The DOJ Comments Do Not Raise New Issues or Questions.**

The March 3, 1999 Comments are thoughtful and interesting, but most of them have been considered in a variety of forms since the Spring of 1996 by the Advisory Committee in its exhaustive study and analysis of discovery reform. Indeed, the Advisory Committee participated in, or hosted, three wide-ranging and different public conferences on discovery at San Francisco, Tuscaloosa, and Boston, as well as at least seven full-scale meetings of the

Committee, itself.[1] Especially notable was the two-day conference in Boston sponsored by the Advisory Committee in September 1997, where eminent professors, judges and practicing attorneys from the public and private sectors (plaintiff and defense) of the Bar gave extended oral and written presentations. Much of what is found in the DOJ March 3 letter was addressed and discussed. A most valued participant at the Boston conference (as well as all the meetings of the Advisory Committee) has been DOJ's own Frank W. Hunger, head of the Civil Division of the Department. Mr. Hunger, a highly experienced trial lawyer, was DOJ's representative and a member of the Advisory Committee for more than six years, and speaking for the DOJ, has fully supported the Advisory Committee's recommended amendments to the discovery rules, including Rule 26(b)(1) on scope of discovery.[2]

2. **The DOJ Comments Urge that the Scope of Discovery Should Have as Its Objective Uncovering New Claims not before the Court Rather than those Claims and Defenses that are Framed by the Pleadings.**

If there has been one principle that has emerged over the last three years of study and analysis, it has been that discovery abuse involving millions of dollars of wasteful expense and parties' time, is most frequent when discovery is an open-ended fishing expedition and does not address the claims and defenses framed by the pleadings. The DOJ Comments make a remarkable argument in that regard at page 9, para. 3:

> In particular, the proposed Advisory Committee Note to the amendment [26(b)(1)] provides that the court would have authority to confine discovery to the pleadings and that - - - without court permission - - - the parties could not develop claims or defenses not identified in the pleadings.

The DOJ is correct in noting that the Federal Rules recognize notice pleading and that the parties are left to the discovery process to develop the facts. But those facts should relate to the claims and defenses raised by the pleadings in the case filed, not by a future case yet to be filed. The minutes of the Advisory Committee reflect the conclusion that discovery abuse occurs and is significant when the inquiry reaches far beyond the framed issues,

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[1]This does not include the days of separate meetings of the Discovery Sub-committee chaired by Judge David F. Levy which looked at scope of discovery issues in great depth and reported to the full Advisory Committee.

[2]The DOJ's knowledge of and involvement in rule making process is also demonstrated by the fact that as a member of the Standing Committee, Deputy Attorney General Eric H. Holder, Jr. approved the proposed amendment to Rule 26(b)(1) to be published for public comment and hearing.

seeking production of millions of pages of documents with only a tiny fraction ever used at trial.

3. **The DOJ may not be Involved in Cases which the Advisory Committee has Noted that Discovery Abuse is Significant.**

While DOJ may employ more lawyers than anyone else, it does not follow that the Department's cases in federal court involve complex discovery cases in which the study and analysis of the last three (3) years has noted significant discovery problems. In a great many of the DOJ cases, discovery travels in only one direction - - - from the private litigant to the government. While the government has many investigative resources and supporting agencies to provide it with a wealth of factual information and evidence, its asserted need for a scope of discovery beyond the "claims and defenses" in a case is not supported by argument or example.

DOJ argues that the current discovery rules are working and cites an out-of-context statement from the RAND Report that existing problems are concentrated in a minority of cases. What we believe the Advisory Committee has concluded over the past several years is that, even though the cases generating significant discovery problems are, in absolute numbers, relatively small, where abuse has occurred it is substantial, onerous and affects the overall discovery mechanism of the federal system. It should not be overlooked that in DOJ environmental cases, exemplars of which are cited by the DOJ at page 8, the Department has sweeping statutory authority, coupled with self disclosure and reporting requirements of industrial parties, to obtain documents and materials that do not depend at all upon the discovery scope of Rule 26(b)(1). See for example, 42 U.S.C. §9604(e) (Section 104(e) of CIRCLA); 42 U.S.C. §7414 (Section 114 of the Clean Air Act); 42 U.S.C. §§ 6927(a) and 6928(e) (Sections 3007(a) and 3008(e) Solid Waste Disposal Act). Sanctions for failure to produce documents and materials in such cases may subject the party opposing the government to major civil and potential criminal penalties that far exceed the sanctions under Federal Rule of Civil Procedure 37.

4. **The DOJ Comments Misconceive the Character of the Change Intended By the Advisory Committee's Recommendation to Amend Rule 26(b)(1).**

Calling the Advisory Committee's proposed amendment to the scope of discovery under Rule 26(b)(1) a "significant structural change" in the "architecture" of discovery, the DOJ Comments miss the signal point that the difference in the scope of discovery as proposed by the Advisory Committee recommendation and the present scope of discovery

standard is more one of emphasis than vivid distinction. Undoubtedly, the great bulk of discovery will operate well under the "claims and defenses" attorney-managed scope of discovery. If a party, including the DOJ, determines that discovery is inadequate under the "claims and defenses" scope, it can move the court for the broadened court-managed "subject matter" scope of discovery. In that event, the court will undoubtedly inquire as to whether the broadened scope of discovery is for purposes of resolving the claims and defenses in this case, or whether it is preparatory for the next case.

One fact which we believe was established by the January 1998 Report of the ACTL to the Advisory Committee is that the virtually unlimited range of discovery under the "subject matter" scope is not only unnecessary, but it has been a principal cause of significant discovery problems.[3]

5. **The DOJ Concern About "Other Circumstances" or "Other Hazardous Substances" Are Resolvable Under the Proposed Amendment to Rule 26(b)(1).**

A common thread which runs through most of the DOJ hypotheticals on potential civil rights and environmental litigation involves the discovery of "other conduct" not directly related to the claim or defense as pled. These suggested concerns are reconciled when the proposed amended Rule 26(b)(1) is viewed in context with Federal Rule of Evidence 404(b). If the target of the discovery is to show course of conduct, intent, knowledge or other factors which may be elements of the claims or defenses before the court, discovery undoubtedly would be proper under the "attorney-managed" claim or defense scope. In the extraordinary case, the request for discovery of "other conduct" would come within the "court-managed" subject matter scope of proposed Rule 26(b)(1). However, if it appears as though the intended discovery is not relevant at all to the pending case, but is pursued to unearth new violations for the next case, the attempted discovery should be denied under either test.

CONCLUSION

The DOJ Comments are narrow in their focus and principally relate only to environmental and civil rights cases to the exclusion of the civil division and others. Because of the role and breadth of responsibilities of the Department of Justice in the federal judicial system, a slightly larger perspective than that represented by the March 3, 1999 Comments could have been expected.

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[3] We respectfully commend to the new members coming on to the Advisory Committee the January 1998 ACTL Report which sets forth the official position of the ACTL to amend the scope of discovery under Rule 26(b)(1) and the reasons for that position.

The DOJ Comments compliment but do not add to the wisdom of the Advisory Committee gained over the last thirty-six months. The proposed amendment to Rule 26(b)(1) involving the scope of discovery does not result in a sea change of the Rule. Rather, the change is one of emphasis and priority. Early case management by the court in establishing pretrial and trial dates at the outset of a case may move it forward with less time consumed, but it has no direct nexus to or impact upon open-ended discovery.

While the original 1996 ACTL proposal to amend the scope of discovery was not fully adopted in the compromise reached by the Advisory Committee in 1998 that has now gone through public hearing and comment, the ACTL submits that the Advisory Committee's proposed recommendation to amend the scope of discovery under Rule 26(b)(1) should be reaffirmed and sent forward to the Standing Committee of the Judicial Conference.

Respectfully submitted,

THE FEDERAL CIVIL PROCEDURE COMMITTEE
of the
AMERICAN COLLEGE OF TRIAL LAWYERS

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cc: Honorable Paul V. Niemeyer, Committee Chairman
Honorable David F. Levy, Sub-committee Chairman
Professor Edward Cooper, Reporter
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CIVIL RULES

APRIL 19-20, 1999

Fred Souk — Scott Atlas ABA Litigation Section — Bob Campbell
Francis Fox ACTL — John Bizzener — Marshic Rubiteen Dow
Al Cortese — Jackson Wm. DRI

✔ COMMITTEE MINUTES

PM

J-NET?

Mass Torts Working Group

Rept submitted 2/15 to Chief Justice.
He agreed to let us publish the report
Civil Committee might bring back the class action rules as part of the review under new committee

NEW CHAIR EVIDENCE?

Prester ltr

BRING BICCY Rules

Local Rules Project

Have project. Are seeking funding.

Attorney Conduct

Standing committee appointed special committee. Lynk & Rosenthal
Will meet May 4- educational & background.
Will meet again in the Fall before advisory committee.
Standing Committee may have proposal in January 2000
McDade amendment now in effect. Draft bills introduced.

Legislation

Grassley leg. to amend R. 30(b)
Y2K pending

II Minutes of Sept 1998 approved

III A. ~~Doo~~ Admiralty amendments

Kasanan met with maritime association & DOJ
FRCP 14(a) & (c) changes are purely conforming
No substantive comments on the proposed rule - only drafting
(B)(1)(a) - Nonessential language - do no
(B)(1)(d) - Change from active to passive voice re delivery of service OK
(B)(1)(e) - "Restraint" of person, rather than "seizure" of person. Reject

because it uses the language of FRCP 64, which refers to seizure of both person + property
Note - Add sentence at end re state law. Agreed
Conform passive voice in (b) to that in (d).

III-B Suits against federal officers R. 4 + 12
Very little comment received.
Cooper Q - Should it apply to Statist subdivisions? Committee said No.
Prester - Literally, if Δ employee is being sued both officially + individually, he must be ~~sued~~ served twice. Add language to make it clear that service is only needed once.
Leave style up to consultation with Garner.
Conform 12(a)(3)(A) to 4(i)(2)(a) by dropping "employee"
Ogden - DOJ prefers crossfire "the other way," by adding "employee" to both 4 + 12.
Lynk - Drop bracketed language. Defeated 4-9,

III A Discovery
Subcommittee fine-tuning recommendations
Vote on substance later

5(d) "Must not" vs. "need not" re discovery materials
Keep "must not" 11-2

p. 9 Note addition re retention of discovery materials
Rejected w/o objection

26(a)(1) - Articulation of the standard for the narrowed initial disclosure obligation.
"may use to support" vs. "supporting" Approved 11-?
Vinson - Add sentence to note to say that this is a narrowing

p. 22 High-end exclusion addition to the note. Rejected 5-8
p. 26 Low-end exclusions
(i) DOJ - admin record - Cooper additions to the Note are fine
(iii) OK as is
(v) + (vi) DOJ says to expand to cover all loans OK as is
(viii) action to enforce an arbitration award
bankruptcy - (vii) proceeding ancillary to proceedings in other courts
Note p. 51 Does not refer to bkcy proceedings. Application of the civil rules to bkcy proceedings are covered by the bkcy rules. No change
Scheffrin - drop (vi) student loan exemption Rejected 1-11
p. 33 Change "info" to "matter" in R. 26(b)(1) w/o objection
p. 34 "background" info in the Note. Examples given.
Include statement that R. 404(b) material is admissible. 3-4 Lose
Approved w/ 1 objection. Reporters can make style changes.
p. 37 Meaning of "relevant" in last sentence OK w/o objection
p. 38 Note - Cost-bearing is a/is good cause
Levi - Add sentence on lines 1223-1227 + footnote 7 on p. 39, but not the # starting on l 1229.
Rowe amend to delete 1223-1227 Carried w/o objection
Keep fn. 7 with change in last line
Bumbaum - Also add sence on lines 1278-1280 in fn 9, p. 40
Approved w/o objection.
p. 41 Location of cost-bearing provision. Move from R34 to R26
Votes 8-2.
p. 45 Differentiated case mgt.
Use first sentence only with one amendment. Carried

[illegible]

p. 4

p. 47 Note material on discovery limits. Rejected
p. 48 R 26(d) moratorium on discovery.
Include note sentence on lines 1536-1538. Rejected vote
p. 49 R 26(f) - Preserve speed in rocket docket courts
Scheindlin drop new lines 1610 to 1626.
Rule + Note language. Approved w/o objection
Cyk - Still requested? PK - flag for the Standing Com.
p. 52 Eliminate the deponent's veto in R 30(d)
OK w/o objection
p. 53 Computing the deposition limitation
Add note material lines 1690-1695. OK
p. 55 Note material on grounds for extending the limit
lines 1737-1788
Ogden - l. 1739 add "for example"
Birnbaum - Delete ls. 1774-1778 Approved.
Love - Delete l. 1739-1742 Approved
Rosenthal - Delete l. 1770-1774 Approved
Struve l. 1760 "in multi-party cases" No
p. 58 Note re nonparty "right" to instruct witness not to answer. Add "new" to l. 1812 Approved.
Rosenthal - Delete sentence on 1814-1817 OK
p. 59 R. 30(f)(1) - Conforms w/ R. 5(d) re non-filing of discovery materials. Does not need publication, but flag for Standing Committee.
p. 61 - Moot - Rule 34(b)
p. 63 Cross-reference to cost-bearing in R 26(b)(2)
also add note material re relocation to R 26.
But now there is no rule change.
Kasanan - Change R 34 at l. 1960-1962 + Note.
Scheindlin - Delete Note 1988-2003

p 5

Kyle - just delete ll. 1996-1999 OK
Cooper 1661 the order "is subject to the limitations of R26(b)(2)(i)..."
OK

M.67 R. 37(c)(1) Clarifies that duty to supplement includes discovery as well as disclosure OK

Tomorrow - 3 motions
1. Rowe 26(b) - Scope
2. Schwerdtfeger - Disclosure
3. Lynk - Cost-bearing

Tuesday ① Rowe 26(b) - Scope
Undo all changes from l. 122 - 132, i.e. restore "subject matter." Will produce satellite litigation
Vote - 4 - 9 (Rowe, Scheffris, Schwerdtfeger, Ogden)
② Schwerdtfeger - Won't make motion because it was tied to the scope change.
③ Lynk - delete lines 23-28 on pgs 65-66 in R34(b)
Vote 5-8

Consent calendar every mtg of matters recommended by the agenda subcommittee. Any member can remove from consent calendar.
Other projects for consideration - pro se rules; forms; masters

5(b) Transmission over receipt 9-4
"any other means, incl. electronic means" 9-1