

**DISCOVERY**  
**REFORM PROPOSALS**  
**DISCOVERY SYMPOSIUM**  
**BOSTON COLLEGE SCHOOL OF LAW**

*File Copy*

**SEPTEMBER 4-5, 1997**

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**A**

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## COMMENTS OF THE TASK FORCE ON DISCOVERY OF THE ABA LITIGATION SECTION CONCERNING ISSUES BEING CONSIDERED BY THE ADVISORY COMMITTEE ON CIVIL RULES

The Task Force on Discovery of the ABA's Litigation Section was created in 1997 to analyze issues and proposals under consideration by the Advisory Committee for Civil Rules dealing with discovery reform and to propose a position on those issues for consideration by the Litigation Section leadership. Because we have not had time to canvass fully the Litigation Section's leadership (and therefore also not had time to present the Section's views to the American Bar Association), these comments reflect a preliminary working consensus of the individuals listed below.

1. Litigation Section Chair: Gregory P. Joseph, New York, NY. Co-chairs of the Task Force: Dennis P. Rawlinson, Portland, OR; Lorna G. Schofield, New York, NY. Participating Task Force Members: Nolan N. Atkinson, Jr., Philadelphia, PA; Richard S. Berger, Los Angeles, CA; Paul J. Bschorr, New York, NY; Prof. W. Burlette Carter, Washington, DC; Susan Stevens Dunn, Research Triangle Park, NC; Anna Engh, Washington, DC; Loren Kieve, Washington, DC; Roberta D. Liebenberg, Philadelphia, PA; Edward P. Liebensperger, Boston, MA; Barbara M.G. Lynn (Litigation Section Chair Elect), Dallas, TX; Barry F. McNeil (immediate past Litigation Section Chair), Dallas, TX; Laurence Pulgram, San Francisco, CA; Michael Silberberg, New York, NY; Geoffrey Vitt, Norwich, VT; H. Thomas Wells, Jr. (Litigation Section Vice-Chair), Birmingham, AL. Also participating but taking no position: Hon. Nancy Friedman Atlas, Houston, TX; Hon. James G. Carr, Toledo, OH.

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## General Principles

We support the following general principles, which are reflected in our positions below and are also likely to affect our position on proposals not addressed in this report.

- Uniformity. We believe that the discovery rules should be uniform throughout the federal courts, except as provided in Fed. R. Civ. P. 83 concerning local district and judicial rules. In other words, the rules should allow the same degree of latitude, but no more than existed prior to the Civil Justice Reform Act.
- Judicial discretion. We believe that judges should be left considerable latitude to adapt discovery proceedings to the case at hand, to the extent consistent with the rules.
- Discovery by negotiation. We believe that counsel, particularly those who practice frequently in a given field, are often in the best position to know what discovery is necessary and how long it will take. Leaving considerable flexibility to the parties also should require less judicial intervention than a fixed rule that can be modified only by court order.
- Early, active and continuing discovery management. We believe that early and active discovery management by the judge assigned to the case will encourage parties to agree to reasonable discovery limits and deadlines. Although we

recognize the overwhelming caseloads of many judges, we nonetheless support an approach that provides prompt judicial access when the parties cannot agree to a discovery plan early in the case or have a discovery dispute.

- Third-party discovery managers. Mediators or special masters handling discovery issues should be the rare exception, particularly where one or more of the parties are not in a position to pay the additional expense involved. The participation of a judicial officer is important to ensure continuity in the pre-trial supervision of a case, and we believe that active judicial involvement (for example, in the form of pre-motion conferences) greatly encourages parties to resolve discovery disputes among themselves without judicial intervention. Although judges may have the discretion to appoint special masters or mediators for discovery, we would not support any rule change that encourages such a practice.

### **Scope of Discovery**

The Task Force believes that discovery may be excessive and burdensome in some cases. We therefore would be receptive to attempts to curtail discovery in appropriate cases. One way to accomplish this result might be to amend Rule 26(b)(1) to cut back on the scope of discovery

However, we are not strong supporters of proposals (1) to limit discovery to that relating "to the claim or defense" of any of the parties or (2) to

eliminate the last sentence of Rule 26(b)(1) -- "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."

Concerning the "claim or defense" proposal, we would not support any revision that would make discovery dependent on the artfulness or extensiveness of the pleadings. Although we believe that the "reasonably calculated" formulation may threaten to overwhelm the other limitations imposed by the discovery rules, we believe that parties should have access to information about potential witnesses and documents that is not itself admissible.

In any event, we would propose amending Rule 26(b)(2) to eliminate a producing party's substantial resources as a factor to be considered in evaluating the burdensomeness of a discovery request. As currently phrased, the rule may be read to allow a party to obtain discovery, no matter how tangential or burdensome, simply because the opposing party can afford to provide it. We would favor retaining a producing party's meager resources as a factor in evaluating the burden of requested discovery.

### **Document Production**

We believe that the extent of document discovery has become a serious problem in large litigation, often imposing unfair burdens and costs on the responding party. We believe that part of the problem is best addressed on a case-by-case basis

through early, active and continuing judicial management. We would also suggest that the Advisory Committee consider the following:

We would favor provisions that would heighten the showing needed for additional discovery after substantial document discovery already has been obtained. We have not yet reached a consensus in support of any particular proposal.

If the Advisory Committee does not recommend some contraction in the scope of discovery, it should consider ways to stage document discovery so that preliminary or dispositive issues are addressed first. Lawyers who usually represent plaintiffs would likely favor merits discovery before damages discovery, for example. On the other hand, lawyers who usually represent defendants would likely favor providing class certification discovery before any class-wide merits discovery in a class action case, or providing initial discovery on product exposure before addressing product defects in a tort case, as other examples.

Although we favor generally the notion of following initial discovery with a settlement conference, we do not believe that such a conference should be mandated by a rule. Rather, we believe that this is a case management issue better addressed on an individual basis.

We do not favor cost-shifting as a means of discouraging excessive discovery. We believe that total or partial cost-shifting may be unfair to parties or practitioners of modest means (and in some cases to other parties, however large their



pocketbooks). In many cases these costs simply may be reallocated to a settling defendant in the form of an increased settlement amount.

In some cases it may be a good idea to depose a document custodian prior to requesting documents; in others this could add to the overall time and cost involved. Likewise, as the RAND study indicates, reducing the time for discovery can often reduce the costs of litigation, but these should remain case management issues that are better addressed on a case-by-case basis.

We did not reach a consensus on the issue of staying discovery during the pendency of motions to dismiss insufficient pleadings. Some of us who usually represent defendants would support a provision like that found in the Private Securities Litigation Reform Act staying discovery during the pendency of motions to dismiss based on the insufficiency of the Complaint, coupled with a provision to preserve documents relevant to the allegations in the Complaint.<sup>2</sup> Such a change also would

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2. The Act provides: "(b) Stay of Discovery; Preservation of Evidence.

(1) In general. In any private action arising under this title, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(2) Preservation of Evidence. During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure." 15

(continued...)

promote the goal of uniformity among federal cases arising in different substantive areas. Those of us who usually represent plaintiffs strongly oppose such a change on the ground that motions to dismiss often remain pending for many months, and memories fade and documents sometimes are lost with the passage of time.

### Privilege Logs

We believe that the practice adopted in some courts of requiring privilege logs, even in the largest cases, often results in excessive costs and burdens to the party seeking to maintain the privilege. However, because Rule 26(b)(5) is unobjectionable, we would not recommend amending it.

As it is, Rule 26(b)(5) does not require a document-by-document log of information pertaining to the privilege, but rather provides:

*When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.*

Fed. R. Civ. P. 26(b)(5) (emphasis added). The Notes expressly recognize that:

Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A

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2. (...continued)  
U.S.C. § 77z-1(b) (1997).

party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden.

Thus both the existing Rule 26 and the accompanying Notes leave room for methods less onerous than a document-by-document log to show the basis for the assertion of privilege -- for example, describing privileged documents by category, submitting privileged documents to a Special Master, and excluding from the log documents found in certain files or from certain time periods.

Nevertheless, document-by-document logs seem to be required by several courts, sometimes by local rule. *See, e.g.,* S.D.N.Y. Civ. R. 26.2(a)(2)(A) (requiring identification of document type, subject matter, date, author, addressee and relationship of author and addressee); *see also, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, MDL 997, 1995 U.S. Dist. LEXIS 15210 at \*4 (N.D. Ill. Oct. 6, 1995) ("party seeking to invoke the privilege bears the burden of proving that it applies, by making a particularized showing for each document or redaction in issue"); *B. Braun Med. Inc. v. Abbott Labs.*, No. 93-3883, 1994 U.S. Dist. LEXIS 9445 at \*2 (E.D. Pa. July 6, 1994) ("Blanket assertions of privilege generally are insufficient. . . . Rather the claim must be made on a document-by-document basis").

Because the rule in its current form is unobjectionable, we do not believe that it should be amended to correct its misapplication by some courts. Many cases

will involve few privileged documents and because the circumstances of every case are unique, we believe that the Advisory Committee should not propose a rule requiring a particular form of privilege disclosure.<sup>3</sup>

### **Mandatory Disclosure**

We favor rescinding the mandatory disclosure requirements in Rule 26(a)(1). Initial mandatory disclosure has been one of the most controversial of the 1993 amendments; approximately half of the courts have elected not to utilize it. Although seen as a way to accelerate the exchange of information and to reduce the duration and expense of discovery, it would appear that it has not achieved either of these goals. The RAND Institute for Civil Justice found no measurable correlation between disclosure (both mandatory and voluntary considered together) and time to disposition or litigation costs. A survey by a subcommittee of the ABA Litigation Section reached similar conclusions.

In addition, initial mandatory disclosure has been criticized for forcing the lawyer out of the traditional advocate's role. In its current form, Rule 26(a)(1) requires the identification of witnesses and disclosure of documents "relevant to disputed facts alleged with particularity in the pleadings." Fed. R. Civ. P. 26(a)(1)(A)-(B). This standard first requires a lawyer to use knowledge gained in the

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3. The Task Force is working on developing practice guidelines for civil discovery to address issues, like this one, that in our view do not merit a rule change.

course of an attorney-client relationship to make a judgment about what is relevant to the adversary's claims and defenses. Then the lawyer must use that knowledge to elicit information and obtain documents from the client for the purpose of turning it over to the adversary. In effect, the rule forces a lawyer out of the role of advocate and into a role at odds with a client's interests -- in a way that may compromise both the client's interests and the attorney-client relationship.

Mandatory initial disclosure also subverts the simple notice pleading contemplated by Rules 1 and 8 by having the parties "detail" their claims so that they can then require the other side to disclose material that relates to these claims.

If initial mandatory disclosure is retained, we would favor narrowing Rule 26(a)(1) to require disclosure of information and documents relating only to a party's own claims and defenses. However, we believe that in some cases even this form of mandatory disclosure would impose unfair burdens and exacerbate the inequities found in discovery. This could happen, for example, in "one-way discovery" cases, such as wrongful death cases and cases broadly challenging the internal or external business practices of a large party (usually a defendant), such as securities fraud, mass tort and antitrust cases. In these cases, "relevant" documents may include virtually every document relating to some aspect of a company's business for a period of years. The party requesting materials, at the very least, should be required to specify what documents and witnesses it seeks.

Although initial disclosure may have its place in some cases, we believe that encouraging the parties to engage in an informal exchange of documents when appropriate is preferable to a rule that attempts to define objectively cases in which disclosure will and will not work.

As stated above, we believe that uniformity of the rules of procedure in the federal courts is an important objective, apart from the substance of the underlying rule. In our view, the mandatory initial disclosure rule is simply too controversial to warrant nationwide adoption.

### **Depositions**

We do not favor presumptive or other limits on the duration of depositions. We believe that the proper length of a deposition is too dependent on the circumstances of any given case, and limits can encourage gamesmanship and increase the need for judicial intervention.

Concerning the number of depositions, we favor the uniform adoption of the presumptive limit of ten contained in Rule 30(a)(2)(A). The parties could agree on a greater or lesser number of depositions under Rule 26(f) and could submit their joint or individual proposals to the Court, which would then enter a Rule 16 scheduling order.

### **Discovery Management**

We would support the uniform adoption of Rule 26(f) requiring an early conference to discuss discovery and other issues. The subparts of the rule might be amended to require the parties to consider and address, as discussed above, (i) the extent and timing of any voluntary initial disclosure, (ii) any staging of document discovery, (iii) the duration and number of depositions, and (iv) discovery cut-off dates.

**B**



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C



# ASSOCIATION OF TRIAL LAWYERS OF AMERICA

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## MEMORANDUM

**TO:** Members of the Discovery Subcommittee, Advisory Committee on Civil Rules  
Professors Richard L. Marcus and Stephen Burbank  
Participants in the Discovery Conference

**FROM:** Robert S. Peck, Director of Legal Affairs and Policy Research

**DATE:** August 15, 1997

**RE:** Comments of the Association of Trial Lawyers of America on possible ideas for rule amendments

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The Association of Trial Lawyers of America is pleased to participate in this continuing dialogue on the Federal Rules' approach to discovery organized by the Advisory Committee on the Civil Rules. At our 1997 Annual Convention, which took place in late July in San Diego, we held a hearing at which members spoke to us about their experiences with respect to discovery in federal litigation. Our responses to the alternatives posed in the memorandum written by Professor Marcus are informed by the experiences of our members, our adopted policies which seek to protect and preserve the civil justice system and the rights of consumers, and several principles that we believe ought to guide any reconsideration of rules governing discovery

We begin by suggesting that discovery is not a problem in the vast majority of cases. Certainly, the empirical evidence seems to bear this out. The most comprehensive study of discovery in the federal courts, conducted by the Federal Judicial Center, indicates that 52 percent of terminated cases involved no discovery requests. Paul R. Connolly, Edith A. Holleman & Michael J. Kuhlman (Federal Judicial Center), *Judicial Controls and the Civil Litigative Process* 28-29 (1978). Only a small minority of cases, less than five percent, experienced more than ten discovery requests. *Id.* at 28. In the rare instances when sanctions were sought, they were generally granted. *Id.* at 23-25. This evidence indicates that the "problem" of discovery abuse is sufficiently rare that wholesale changes in the rules are not warranted.

To the extent that the FJC study dissuaded the 1980 Advisory Committee from adopting discovery rule amendments then under consideration, we believe its findings remain

powerful contraindicators to the similar proposals of today. No empirical findings indicate that the FJC study is no longer valid. In fact, the most massive recent study of discovery practice, albeit one that involved state courts, found strikingly similar results, indicating that the patterns have not changed. Susan Keilitz, Roger A. Hanson & Henry W. K. Daley, *Is Civil Discovery in State Trial Courts Out of Control?*, *St. Ct. J.*, Spring 1993, at 8.

Several other factors argue emphatically against many of the kinds of changes that have been suggested to the Advisory Committee. First, some forms of the discovery abuse that does occur seem to be attributable largely to certain forms of complex commercial litigation. See Francis H. Hare, Jr. and James L. Gilbert, *Discovery in Products Liability Cases: The Plaintiff's Plea for Judicial Understanding*, 2 *Am. J. Trial Advoc.* 413 (1989). It would be a mistake to write new generic discovery rules directed at the abuses in these cases when the effect could well be adverse in other cases, where discovery is neither extensive nor difficult.

Second, the abuses that do occur exist on both sides of the ledger, i.e., in overbroad requests and in underproduction in response to entirely appropriate requests. In fact, most of the testimony presented by ATLA members at our San Diego hearing were horror stories about withheld documents and contentious discovery maneuvers. Contingency-fee lawyers have a significant economic disincentive against prolonging the discovery process, while those lawyers paid on an hourly basis experience the dovetailing of their financial self-interest with their adversarial instincts to make discovery an arena of unnecessary and expensive dispute. See Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 *U. Pa. L. Rev.* 2197, 2200, 2204-05 (1988) (ascribing to the rise of the hourly fee and other changes in the legal profession today's more contentious discovery system). We cannot imagine rules changes that can coexist and appropriately deal with the problems of both excessive and deficient discovery.

Third, many of the kinds of proposals being advanced to the Advisory Committee are anchored in such a substantial change in philosophy undergirding the Federal Rules that we suggest that they should be rejected out of hand. Alternatively, they should be considered only in the context of a rules overhaul that follows a full and detailed debate about whether the premises for the Federal Rules should be changed. As it was written and implemented, the Federal Rules prized the idea that the federal courts should be open and accessible, that process would not predominate over substance, that gamesmanship would be discouraged even while placing a heavy reliance on the adversary process, and that trial by surprise would become a relic. See Charles W. Sorenson, Jr., *Disclosure under Federal Rule of Civil Procedure 26(A) -- "Much Ado about Nothing?"*, 46 *Hastings L.J.* 679, 690-95 and accompanying notes (1995). We agree with those premises. Instead, some of the proposals seem to hark back to the days of the Field Code and detailed pleading rather than fit within the rubric of the Federal Rules and notice pleading.

In the comments that follow, which are tied to each of the categories in the June 2 memorandum written by Professor Marcus, we ask that the above-outlined general observations be considered

*I. Narrowing the scope of discovery*

ATLA views the proposals to narrow the scope of discovery as having undesirable consequences. To the extent that discovery abuse is a problem in the federal courts, the problem is at least as much (and perhaps even more) one of evasive discovery as it is one of excessive discovery. Our experience is validated by a study which found that attorneys encountered unresponsive or incomplete discovery in 60 percent of all cases. The percentage was somewhat higher (80 percent) in large cases and lower (40 percent) in small cases. Late discovery was experienced in half of the cases. Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 Am. B. Found. Res. J. 217

At the hearing ATLA held at its 1997 Annual Convention in San Diego, attorneys testified to similar experiences of documents being withheld, produced late or even destroyed. In a considerable number of instances, the existence of the hidden documents came to light only because other evidence that served no admissible purpose led to it or the documents became available from another, unexpected source. In these instances, the non-complying parties frequently attempted to justify their evasiveness by claiming that the documents were beyond the scope of legitimate discovery or were privileged in some fashion. Any attempt to narrow the scope of discovery would send the wrong signal to those who now improperly withhold material damaging to their litigation posture. They will find such a change to be a validation of their misguided rationalizations for withholding documents and may well encourage further such misconduct.

We also submit that limiting discovery to that which is relevant to specified claims or defenses, as proposed by the American College of Trial Lawyers (ACTL), is at odds with the entire modern system of civil procedure. As Justice Powell wrote for the Court in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 500-01, (1947)), "[c]onsistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues." *Sanders* specifically recognized that discovery was not tied to the merits of a case precisely because "a variety of fact-oriented issues may arise during litigation that are not related to the merits." *Id.* (footnote omitted). The Court gave a non-exclusive list of issues including jurisdiction, venue and class certification as examples of areas where discovery is available even though no claim or defense is necessarily implicated. *Id.* at note 13.

The Court's *Sanders* decision exemplifies the philosophical issue that must be resolved as a necessary precondition to the kind of change proposed by ACTL. Should more rigorous pleadings be used as a means to foreclose access to the courts in cases that can only be developed through discovery? ATLA believes the answer to that question should remain "no." Moreover, the ACTL proposal is unlikely to have much impact on discovery. Lawyers who can meet the pleading burden would write their claims with greater particularity and in a fashion that would implicate precisely the kinds of discovery they anticipated that they would be requesting. Ultimately, rather than narrow the scope of discovery, such a rule would change the way that complaints and answers are drafted. While some have urged a reconsideration of notice pleading, changes in the rules of discovery are not the appropriate way to accomplish or consider such a revolutionary development.

## *2. Reducing the burden of document discovery*

Many of the same problems that exist for narrowing the scope of discovery are evident in proposals to reduce the volume of document discovery. We suggest that there is nothing inherently different about documentary evidence that necessitates different treatment with respect to scope. We do, however, see nothing prejudicial in a rule that might insulate the producing party from an inadvertent waiver of privileges. Similarly, provided that it does not result in undue delay, we do not see a problem in requiring advance judicial approval for additional document production beyond those most obviously relevant to the case, including those that might lead to admissible evidence.

We would submit, however, that a new rule that contemplates shifting production expenses to the party seeking documents would provide a powerful disincentive to injured persons to pursue their day in court. The typical products liability case provides an example of an aggrieved individual without substantial resources who must rely heavily on the discovery of documents from a defendant to prove liability. The need for documentation is undeniable and may well be considerable in volume. Moreover, the defendant has an overwhelming self-interest in making discovery as fruitless, expensive or difficult for the plaintiff as possible. One such tactic used in products cases is to inundate the plaintiff with a massive amount of documents in which the "smoking gun" papers have been skillfully buried so as to be impossible to locate or understand. *See, e.g., Sabel v. Mead Johnson & Co.*, 110 F.R.D. 553 (D. Mass. 1986) (finding non-compliance in the production of 154,000 pages of documents and an inadequate index). We submit that a cost-shifting rule would encourage similar unnecessary production that might be carefully and expertly calculated to be large enough to make the plaintiff's case unduly expensive without crossing the line that might engender judicial sanction. In such instances, the defendant will have succeeded in rendering the prosecution of the case sufficiently problematic for the resource-poor plaintiff that he or she is effectively non-suited.

For many of the same reasons, a rule that required certification by an attorney that the produced documents were reviewed would encourage corresponding overproduction to both force the reviewing counsel into unproductive and wasteful work and to make it difficult to assert that necessary documents were missing. The flip side of this proposal, which would require certification that only requested materials were provided, will prove unavailing to alleviate the burden on the reviewing counsel. Disputes over the construction of discovery requests are a major source of contention between counsel. The recipients of discovery requests are often quite skilled at reading the request literally to avoid production of an obviously relevant document inadequately described or broadly to hide problematic documents. *See, e.g., Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1341 (5th Cir 1978), *Sellon v. Smith*, 112 F R D 9, 12-14 (D Del 1986). Only in the most extreme cases would such overproduction be considered a purposeful evasion of the proposed certification rule, especially if the requested documents were fully represented among those produced. The proposal seeks a behavioral change that a rule cannot accomplish.

Though we are not sanguine that an additional admonition against document destruction would deter the bad actors who now plague the system, we have no objection to such a rule. We are equally skeptical that a rule embracing discovery protocols in specific categories of cases will necessarily work. While such protocols may be useful starting points for discovery conferences that may be supplemented by requests that take into account unique aspects of the immediate dispute, we would caution against establishing the protocols as presumptive limits, which is what we suspect producing parties would assert they are. One reason to withhold such a presumption from a discovery protocol is that it would be used to limit the scope of discovery even where a particular request that fell outside the protocol fit within the expressed scope of discovery contained in the rules. Protocols should not be used as an alternative means of limiting the scope of discovery.

Finally, we note that the proposed rules on document discovery entertained thus far largely do not address the form of discovery abuse experienced most frequently by the plaintiffs' bar. These include withholding or burying documents, raising non-meritorious privilege claims, interpreting document requests narrowly or broadly to suit an obstructionist discovery strategy, and falsifying documents.

### *3. Presumptive time limit for depositions*

Many of our members responded favorably to the idea of a presumptive time limit for depositions. In most instances, a six-hour time limit would be generous. A note of caution was sounded nonetheless. Even though the proposal would eliminate objections not based on privilege, time limits do create a substantial incentive to be obstructionist or dilatory,

characteristics that some witnesses come to naturally enough. Moreover, it will not always be apparent that this is the tactic the witness employed in order to prevent the most fruitful use of the allotted time. We strongly suggest that the burden be placed on the producing party to demonstrate full cooperation during the deposition should a time-limit proposal be adopted.

#### *4. National uniformity of discovery provisions*

Although uniformity has been the sine qua non of the Federal Rules since its inception and the balkanization of the discovery rules as a result of the 1993 amendments makes a national practice unnecessarily complex, we submit that the kinds of discovery abuses that exist cannot be traced to diversified rulemaking.

#### *5. Specifics of uniform rules*

Attorneys who testified at our San Diego hearing found that the initial disclosure requirements in Rule 26(a)(1) have not been burdensome but has also not encouraged any change in discovery culture. The majority of attorneys cooperate; recalcitrant counsel provide only the least useful responses. Initial disclosure does not change that.

Attorneys at the hearing also indicated that in those cases involving complex or considerable discovery the attorney conference and discovery plan was generally helpful. The implication was that in simpler cases such conferences were unnecessary. The only complaint that was aired involved the difficulty in obtaining a time for such a conference when it was attorney-initiated and there were multiple defendants. The testimony indicated that scheduling conferences proved difficult because there was always at least one defense counsel who could not make the meeting when the others could. There was a strong suspicion expressed that this was a strategic move by cooperating defense counsel. These experiences strongly suggest that discovery should proceed without respect to whether the conference has taken place and a discovery plan agreed upon. Thus, we would recommend repeal of the Rule 26 (d) discovery moratorium pending the conference. We would also suggest that there be a more active role for the judge in assuring the timely scheduling of the discovery conference.

#### *6. Case tracking, standardized discovery, and treating "complex" cases differently*

The results of the RAND Institute for Civil Justice study of compliance with the Civil Justice Reform Act convinces us that it is unrealistic to believe that tracking could be implemented with any degree of success. Despite significant interest and some inclusion in the plans, the report indicated that tracking was not employed. We suggest that it would not be prudent to attempt to force such an experiment on the entire federal judiciary through a rules change when it has proven near impossible to implement.



Our earlier comments about standardized protocols, made in response to topic 2, are equally applicable here and are incorporated by reference. There is, however, some value in treating complex cases differently. In exploring such an option, we suggest that there should also be distinctions made between complex commercial litigation, where the parties often have equal access to information, and complex cases sounding in products liability, where the defendant necessarily has the bulk of the information. A helpful discussion of this problem is made in Francis H. Hare, Jr. and James L. Gilbert, *Discovery in Products Liability Cases: The Plaintiff's Plea for Judicial Understanding*, 2 Am J Trial Advoc. 413 (1989).

#### ***7. Limited initial discovery followed by settlement conference***

This idea, which has promise in some cases and is employed by some judges, should not be contained in a rule, but utilized in appropriate cases in the discretion of the judge. One caveat, however, must be remembered. In many of the cases where extensive discovery is sought, extensive disclosure is necessary for the plaintiff to evaluate fully the value of the claim versus the settlement offer. Therefore, in no circumstances do we believe it would be wise for prejudice to attach to such a procedure where the plaintiff insisted that further discovery was necessary to appropriately consider a settlement. Such prejudice would exist in a predisposition to believing that the additional discovery was unnecessary or obstructionist or in some sort of cost-shifting proposal that held the plaintiff responsible for legal fees incurred to obtain an ultimate judgment or settlement no better than what was presented at such a settlement conference.

#### ***8. Standardized brief period for formal discovery***

While we believe that in most instances such an approach would prove workable, we note that it would work against plaintiffs in those instances where defendants engage in evasive discovery tactics. There is considerable experience indicating that delay is one such tactic that might be encouraged by formal time limits on discovery. See, e.g., *Shelton v. American Motors Corp.*, 106 F.R.D. 490, 495 (W.D. Ark. 1985), *rev'd in part*, 805 F.2d 1323 (8th Cir. 1986), *Dean v. A.H. Robins Co.*, 101 F.R.D. 21, 22-25 (D. Minn. 1984); *Fautek v. Montgomery Ward & Co.*, 96 F.R.D. 141, 145 (N.D. Ill. 1982), *Hammond v. Coastal Rental & Equipment Co.*, 95 F.R.D. 74, 76 (S.D. Tex. 1982); *Casson Construction Co. v. Armco Steel Corp.*, 91 F.R.D. 376, 385 (D. Kan. 1980); *Kozlowski v. Sears, Roebuck & Co.*, 71 F.R.D. 594, 597 (D. Mass. 1976), *Bollard v. Volkswagen of America, Inc.*, 56 F.R.D. 569, 575 (W.D. Mo. 1971), *Parrett v. Ford Motor Co.*, 52 F.R.D. 120, 121 (W.D. Mo. 1969).

#### ***9. Imposing a duty on counsel to cooperate in discovery without judicial involvement***

This proposal seems to us another example of one that is well-intentioned and unlikely to be enforced against the most common evasive techniques. As Professor Carrington notes, such a

proposal would not "materially reduce the evils of cost and delay" and might only "effect marginal improvements " Paul D Carrington, \_\_\_ Ala. L. Rev \_\_\_, at 25 (May 27, 1997 draft). We agree that the most important steps a judge can take is "to set a reasonably firm trial date, provide reasonable and tailored parameters to the time for discovery, and rule promptly on discovery disputes " *Id.* Still, we believe that judicial intervention is necessary at times in order to surmount discovery evasion. Any rule in this area, we urge, should take into account that the RAND CJRA study indicated that increased judicial management designed to expedite cases did result in some additional costs for plaintiffs lawyers. Because of the implications for access to justice that more expensive justice entails, we urge that any rule changes be sensitive to that factor so that the courthouse doors are not effectively closed to those who do not have substantial resources but seek redress of grievances through the federal courts

#### *10. Firm trial date*

Nothing concentrates the mind like impending demise or a firm trial date. We note that the RAND study indicated, to the surprise of no one in the profession, that this is the best means toward reducing cost and delay. Still, we believe that such an approach must be flexible, respecting the needs of individual cases. For that reason, the need for uniformity is virtually non-existent. Instead of a rule that sets up a presumptive date for trial after the filing of a complaint, which we believe would be problematic in some districts with heavy criminal dockets, we believe this is an area that should be preserved to individual judicial discretion. Nonetheless, it is a technique that we believe should be greatly encouraged

#### *11. Enhanced cost-shifting in connection with discovery disputes*

For the same reasons we stated in response to category two, reducing the burden of document discovery, we believe it is unwise and destructive of the right of individuals to have access to the courts to impose additional cost-shifting provisions to the discovery rules.

#### *12. Additional improvements or refinements in discovery rules*

Insufficient time was available to explore usefully the variety of areas that Professor Marcus identified as lacunae in the 1993 amendments. ATLA will provide the committee with views on these proposals as the exploration of discovery continues



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August 15, 1997

**VIA FEDERAL EXPRESS**

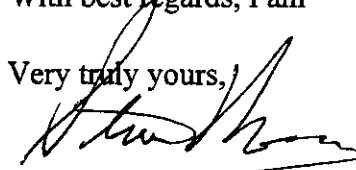
John Rabiej  
Chief, Rules Committee Support Office  
Federal Judiciary Building  
One Columbus Circle, N.E.  
Washington, DC 20002

Dear Mr. Rabiej:

Enclosed herewith please find the Defense Research Institute's Report of the Working Group on Discovery in the Civil Justice System. This document is labeled "Tentative Draft No. 1" because we are still seeking input and ideas from various defense groups, including the International Association of Defense Counsel, the Federation of Insurance and Corporate Counsel, Lawyers for Civil Justice, and other corporate counsel. We believe, however, that the ideas presented here are worthy of consideration and discussion. We hope that you will agree.

With best regards, I am

Very truly yours,

  
Stephen G. Morrison

SGM/mjl

cc: Professor Richard L. Marcus (with enclosures)  
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**DEFENSE RESEARCH INSTITUTE (DRI)**  
**WORKING GROUP REPORT ON DISCOVERY IN THE CIVIL JUSTICE SYSTEM**  
**(TENTATIVE DRAFT #1)**

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## INTRODUCTION

The Defense Research Institute (DRI) accepts the invitation of the Civil Rules Advisory Committee and respectfully presents its position on the question of what changes should be made to the discovery provisions of the Federal Rules of Civil Procedure to reduce cost and delay in litigation.

DRI is a national membership organization that includes nearly 21,000 lawyers involved in the defense of civil litigation, committed to enhancing the skills, effectiveness and professionalism of defense lawyers, anticipating and addressing issues germane to defense lawyers and the civil justice system, promoting appreciation of the role of the defense lawyer, improving the civil justice system and preserving the civil jury.

Although DRI undeniably has an agenda favoring the interests of defense lawyers and their clients, the members who set out to formulate this position paper had a specific focus: to articulate practical ideas for change which will improve the process of discovery, preserve judicial resources and create a system which is better, faster, cheaper and fairer than the system presently in place.

DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. It has taken advantage of the invitation and opportunity to participate in the rules formulation work of the Advisory Committee through submission of written statements, presentation of testimony and participation in meetings like the recent American Bar Association conference at the University of Alabama.

DRI has also helped to develop and promote values, policies and procedures that will instill and ensure excellence and fairness in our civil justice system through Lawyers for Civil Justice, a national coalition of civil defense bar associations, corporations and

insurance companies. Its members have written widely on this subject in its monthly publication, For the Defense, which has a circulation of over 25,000. It has been central to DRI philosophy that excellence and fairness in the civil justice system are inseparable from truly balanced and equitable discovery rules and procedures.

The focus of DRI's proposed changes to the Federal Rules of Civil Procedure is addressed at remedying problems in the current discovery procedures that are unnecessarily increasing the costs and burdens on litigants and the courts. DRI recognizes that as the ever increasing criminal docket pulls federal court resources away from the civil dockets, there will be less and less resources to deal with discovery disputes, making it even more important to decrease the need for court intervention in discovery matters. DRI's proposals are intended to be consistent with the Long Range Plan for the Federal Courts issued by the Judicial Conference of the United States in December 1995, which noted that society's faith in the federal courts depends upon the court's adherence to certain core values. Because society generally views the process as too expensive and too lengthy, DRI has focused its proposals on (1) maintaining and broadening the rules that have proven successful; (2) eliminating or replacing rules that have proven ineffective; (3) limiting the scope and burdens of discovery to within reasonable bounds; (4) decreasing the need for court intervention by moving parties and attorneys toward communication and professionalism and away from satellite litigation in contentious discovery disputes; and (5) bringing consistency and predictability to the process of discovery.

In the current litigation environment, there are two fundamental problems. First, there are few limits being placed upon discovery: relevance is viewed broadly and too

often not as a limitation at all in discovery; and huge costs and expense of discovery in litigation is given short shrift as just a cost of doing business. DRI's proposals are aimed at fair-minded solutions encouraging the courts and litigants to limit the scope of discovery.

Second, increasingly common plaintiffs' tactics are to criminalize the discovery process, attack the opposing attorneys, and cry "cover up" at every opportunity. With courts increasingly tired of refereeing contentious discovery disputes, the corporate defendant faces the real possibility that its answer will be struck or it will be sanctioned so heavily that the verdict seems insignificant. In either event, a written order becomes a damaging piece of the company's "history of discovery abuse" which will surface in other cases for the next quarter century.

For example, a product manufacturer is in business to design, make and sell products. While defending products-liability lawsuits is an inevitable part of the business, that activity cannot be the central focus of the business. This means that the corporate structures that have evolved in the design, manufacturing and sales context exist to serve the primary corporate mission. They do not exist to make a lawsuit easier or harder for plaintiffs to bring, or to make the course of litigation run more or less smoothly.

Nevertheless, in the highly focused environment of a single lawsuit, these corporate structures have come under increasingly successful attack. The plaintiffs' bar has acted as if the corporate defendant's sole mission should be to provide them with information about the product they wish to attack and as if the entire corporation should be organized toward the efficient fulfillment of that mission. Any deviation from this ideal

is viewed, by the plaintiffs' bar, as evidence of "discovery abuse." It is no longer just the product that is under attack; it is the corporate organizational structure as it interacts with the court system that is at issue.

Many in the plaintiffs' bar and a few courts argue that there is something unprofessional about making a proper objection, trying to reasonably narrow the scope of discovery to things rationally related to the case at hand, and carefully communicating discovery problems to the court, the client, and the other side. This argument is wrong and wrong-headed. Some plaintiffs' lawyers would have the courts and the public believe that it is unethical and unprofessional for defense counsel to do anything but respond to all discovery as written and interpreted by the plaintiff's lawyer. They charge the corporate defendant that has had difficulty responding with "stonewalling." They charge the corporate defendant's lawyer who dares object with "aiding and abetting a fraud or crime." They claim that reasonable attempts to define the proper scope of discovery and to limit the cost, burden and harassment of the corporate defendant are evidence of a "conspiracy to cover up."

Finally, plaintiffs' lawyers have done an excellent job of convincing each other and the courts of the value of "sharing" documents and pleadings from one case with plaintiffs in other cases. A corporate defendant thus must assume that any document it has ever produced can and will find its way into the hands of the opposing attorney in a particular case. If a document is even remotely connected to a particular request, but not produced, then the opposing attorney has "indisputable proof" of "stonewalling."

With this background, DRI submits proposals designed to address these problems with basic solutions and specific recommendations for changes to the following Rules of Civil Procedure:

1. Scope of Discovery - Rule 26
2. Proportionality: A Critical But Sparingly Utilized Limitation on Discovery — Rule 26(b)(2)(i-iii)
3. Early Judicial Intervention and Mandatory Disclosures — Rules 16 and 26(a)
4. Limitations on Document Requests — Rule 34
5. Reviving The Presumption Against Sanctions and Creating A Reasonable Safe Harbor Provision - Rule 37
6. Procedure For Asserting and Challenging Claims of Privilege — Rule 26(b)(5)



## SCOPE OF DISCOVERY UNDER Fed.R. Civ.P. 26(b)(1)

### I. EXECUTIVE SUMMARY

- Much of the undue cost and delay associated with discovery disputes today results from the steady expansion of the permissible scope of discovery.
- This scope should be limited in some reasonable way to provide a more workable, efficient mechanism that better serves the ends of justice.
- The appropriate limitation can be achieved by deleting from current Rule 26(b)(1) the phrase, "subject matter involved in the pending action, whether it relates to the," so the rule would provide "relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party."
- Similar recommendations have been made by an increasing number of groups since first being made by the American Bar Association over twenty years ago.

### II. PROPOSED RULE 26(b)(1)

**(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

**(1) In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the ~~subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party,~~ including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. 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.

### III. DISCUSSION

The recommendation of DRI regarding the scope of discovery permitted by Rule 26(b)(1) is not new. Following a National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice sponsored by the Judicial Conference



of the United States, the Conference of Chief Judges and the American Bar Association in 1976, the ABA Section of Litigation created a "Special Committee for the Study of Discovery Abuse." The Committee met in extended sessions from August 1976 to September 1977 to consider revisions to the Federal Rules of Civil Procedure. Its First Report appearing at 92 F.R.D. 137, 157 (1981), recommends an amendment to Rule 26(b)(1) substantially identical to the amendment being strongly recommended by DRI and others at this time.

The Committee Comments appearing following the proposed changes observe that sweeping and abusive discovery is encouraged by permitting discovery confined only by the "subject matter" of a case rather than limiting it to the "issues" presented.

This Advisory Committee on Civil Rules circulated for public comment an initial report adopting most of the ABA proposals as reflected at 77 F.R.D. 613 (1978). When the Advisory Committee released a revised report for further comment in February 1979, however, the Advisory Committee decided that an early discovery conference with preliminary identification of issues and adoption of a plan of discovery would resolve the scope of discovery problems. 80 F.R.D. 323 (1979). As a result, the ABA Special Committee issued its Second Report in November 1980. It indicated that two additional studies had become available after the February 1979 revised report of the Advisory Committee. The studies were identified as Ellington, *A Study of Sanctions for Discovery Abuse* (Department of Justice, 1979) and Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses* (American Bar Foundation, 1980). The ABA Special Committee Second Report said the new studies confirmed its view that there remained serious discovery problems demanding immediate correction, including the unnecessary use of discovery, the improper withholding of discoverable information and misuse of discovery procedures. It again recommended an amendment to Rule 26(b)(1) almost identical to the recommendation being made by DRI at this time. 92 F.R.D. 137, 140 (1981). Both reports were approved by the ABA Board of Governors.

The ABA Committee said the amendment to subdivision (b)(1) was intended to redirect the thinking of the bench and bar away from the almost limitless "subject matter" standard and toward a more direct focus on the pending "claims and defenses."

The Advisory Committee Note to the 1983 amendments to Rule 26(b)(1) confirms that the problem was again confronted when they were being considered. The Advisory Committee acknowledged that excessive discovery and evasion or resistance to reasonable discovery requests continued to pose significant problems, but it sought to solve the problems by adding a paragraph providing for greater judicial involvement in the discovery process.

The Report on Discovery Under Rule 26(b)(1) of the Committee on Discovery of the New York State Bar Association Section on Commercial and Federal Litigation indicates it was based on and considers recent opinions, articles and treatises dealing with Rule 26(b)(1) and the results of the Report of the Survey of the Bar of New York

State Bar Association. 127 F.R.D. 625 (1989). The Committee reported it found that Rule 26(b)(1) provides such a broad definition of relevance that it encourages waves of discovery requests and objections, and results in excessive and costly motion practice without enhancing the truth-finding process. It recommended an amendment to Rule 26(b)(1) that is substantially identical to the recommendation being made by DRI at this time. 127 F.R.D. 625, 634 (1989).

Although the 1993 amendments to Rule 26(a)(1) linked the mandatory pre-discovery disclosure obligation to "claims and defenses alleged with particularity in the pleadings," there was still no language reducing parameters to the scope of discovery under Rule 26(b)(1).

#### **IV. CONCLUSION**

DRI expresses its sincere appreciation to this Advisory Committee for again agreeing to consider solutions to problems of undue expense and delay associated with discovery. The developed case law and experience of the last several years demonstrate that the scope of discovery continues to be so broad that it is itself a source of discovery abuse. At a time when the Congress is reviewing various versions of results of the Civil Justice Reform Act procedural rules experimentation process, it is critical that the Advisory Committee reaffirm its role in the Rules Enabling Act process which DRI strongly supports. Placing limits on the use of discovery and prescribing conferences have not remedied abuses arising from the scope of discovery. It is now time to more clearly define the actual scope of the discovery obligation by tying it more closely to the actual claims and defenses as is being urged by a growing number of groups, including The American College of Trial Lawyers, the United States Chamber of Commerce and the Product Liability Advisory Council.



## PROPORTIONALITY: A CRITICAL BUT SPARINGLY UTILIZED LIMITATION ON DISCOVERY - RULE 26(b)(2)

### I. EXECUTIVE SUMMARY

- Rule 26 was amended in 1983 to guard against redundant and disproportionate discovery.
- In the 14 years since the 1983 amendment, courts have rarely utilized the rule to limit discovery, as was intended.
- Courts have misinterpreted and misapplied the limitations and the mandatory language included in the rule.
- Disproportionate, expensive, and burdensome discovery continues to be a problem with the current discovery system, which would be rectified by courts utilizing the limitations in the rule.

### II. PROPOSED RULES 26(b)(2)(i)-(iii) AND PROPOSED ADVISORY COMMITTEE NOTES

#### A. PROPOSED RULE 26(b)(2)

(2) **Limitations.** By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36 and 34. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the proposed discovery in resolving the issues.

The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c). Additionally, if a party makes a request for a limitation of discovery under this subsection, the court shall analyze and make findings concerning the proportionality of the discovery requested consistent with this subsection and order that such discovery be had only if it is appropriate in light of these limiting factors.

## B. PROPOSED ADVISORY COMMITTEE NOTE

### 1998 Amendment

In 1983, then Rule 26(b)(1), which was moved to subsection b(2) in 1993, was modified to add safeguards to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery. The change was made in 1983 to reverse the previous message that discovery was virtually unlimited. The change to more limited and proportional discovery was intended to be a major shift in the liberality formerly accorded to discovery. However, in the fifteen years since the change of the rule to more limited and proportional discovery, there have been a paucity of reported cases implementing this amendment, evidencing that no major shift has actually occurred. See 8 Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice & Procedure § 2008.1, at 121 (2d ed. 1994) (concerning proportionality and lack of response to 1983 amendment).

Because of the ever increasing complaints with the costs, expense, and delay involved in today's discovery process, we are emphasizing further the obligations of courts to be more aggressive in identifying and discouraging discovery overuse. The amended rule is again intended to encourage judges to perform the proportionality analysis called for under Rule 26(b)(2) in considering all discovery requests.

Additionally, Rule 34 has been amended to expressly note that decisions related to the production of documents are expressly governed by Rule 26(b)(2).

## III. DISCUSSION

In 1983 the discovery rules of the Federal Rules of Civil Procedure were dramatically changed in an attempt to limit widely perceived discovery abuses. One of the most important amendments was an addition to Rule 26(b) requiring courts to limit discovery in specified circumstances. Unfortunately, with very few exceptions, district courts and magistrate judges across the nation have literally ignored the explicit requirements of what is now Rule 26(b)(2)(i)-(iii). This discussion describes the almost total disregard of those requirements and suggests modest means by which courts may be induced to implement them.

### A. The Language and History of Rule 26(b)(2)(i)-(iii)

Before the 1983 Amendments, the last sentence of Rule 26(a) stated: "Unless the court orders otherwise under subdivision (c) of this rule [providing for protective orders], the frequency of use of these methods is not limited." In 1983, that sentence was deleted from Rule 26(a) and a new sentence was added to Rule

26(b)(1). The new sentence expressly required that courts "shall" limit the "frequency or extent of use of discovery methods" upon determining that "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."

The 1983 amendment was intended "to guard against redundant or disproportionate discovery" and "to encourage judges to be more aggressive in identifying and discouraging discovery overuse." Advisory Committee Notes to 1983 Amendment. Accord Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2008.1 (1994) ("Wright & Miller") (purpose was "to promote judicial limitation of the amount of discovery on a case-by-case basis to avoid abuse or overuse of discovery through the concept of proportionality"). The Reporter for the Advisory Committee characterized the change as a "180 degree shift" from the previous invitation to expansive discovery:

Until last August, the last sentence in rule 26(a) said: "Unless the court says otherwise, go ye forth and discover." That had been the message of the last sentence of rule 26(a). In 1983, we decided it was a lousy message. That sentence has been stricken and replaced, quite literally, by the reverse message which you now find in rule 26(b). Rule 26(b) now says that the frequency and extent of use of discovery shall be limited by the court if certain conditions become manifest. Just realize the 180-degree shift between the last sentence of the old rule 26(a) and the new sentence. Judges now have the obligation to limit discovery if certain things become manifest. The things that are then listed in the paragraph are basically the evils of redundancy and disproportionality.

Arthur R. Miller, *This August 1983 Amendments to the Federal Rules of Civil Procedures: Promoting Effective Case Management and Lawyer Responsibility* 32-33 (1984) (quoted in Wright & Miller, § 2008.1 at n.3).

In 1993, the Portion of Rule 26(b)(1) that included subsections (i), (ii), and (iii) was moved to paragraph 2 of Rule 26(b), and minor revisions were made to the wording of subsection (iii). Rule 26(b)(2) now reads:

By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited

2. Only a Few Courts Have Applied the Factors in (i) Through (iii).

Only nine cases discussing Rule 26 in this 14-year period actually contain an analysis of the wording, the factors, and the principles of Rule 26(b)(1)(i) through (iii) -- or, after December 1993, Rule 26(b)(2)(i) through (iii). In the first of these, the court stated:

I believe it would be helpful to the parties to take cognizance of the Notes of Advisory Committee on Rules in its discussion, in part, of the recent amendment to Rule 26(b)(1), effective August 1, 1983.

The first element of the standard, Rule 26(b)(1)(i) is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information. Subdivision (b)(1)(ii) also seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories. The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak [sic] litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms.

Therefore, AVCO's motion to compel and request for production of documents is granted in part and denied in part.

City Consumer Services, Inc. v. Horne, 100 F.R.D. 740, 748-49, 38 Fed. R. Serv. (Callaghan) 936 (D. Utah 1983). This first case was decided on December 21, 1983,

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information essential to developing their case, that we are left with the firm conviction that the discovery order he issued, when he issued it, was erroneous. Our conclusion is consistent with the evolving concept of the district judge's managerial responsibility in complex litigation. Although amended Fed. R. Civ. P. 26(b)(1), which expands that responsibility, did not take effect until August 1, 1983, after the discovery order in issue here was issued, the Advisory Committee's Note indicates that the purpose of the amended rule is in part to remind federal district judges of their broad powers -- and, we believe, correlative responsibilities --under Rule 26.

Marrese v. Am. Academy Ortho. Surgeons, 726 F.2d 1150, 1162 (7th Cir. 1984). A review of later opinions, however, reveals that this strong statement by the Seventh Circuit on responsibility to limit has not affected the approach taken by the district courts and magistrate judges.

just months after the 1983 Amendments took effect. It reflects the kind of analysis that, at a minimum, should have introduced almost every subsequent opinion addressing a motion for discovery limitations.

The fullest analysis of the principles of cost-benefit analysis to limit discovery appears in U.S.A. v. Clean Harbors, No. C-89-109-6, 1995 U.S. Dist. LEXIS 5683, at 11-12 (D.N.H., Feb. 21, 1995), an unpublished opinion (available on Lexis, but not reported):

As the court has alluded to previously, there is a recognized maxim that discovery is properly limited in instances where the burden or expense of the proposed discovery outweighs its likely benefit. Fed.R. Civ.P. 26(b)(2). Further, Rule 26 empowers a court to "impose conditions on discovery in order to prevent injury, harassment, or abuse of the court's process." Bridge C.A.T. Scan Assocs. v. Technicare Corp., 710 F.2d 940, 944-45 (2d Cir. 1983). Given this maxim, it is difficult for the court to subscribe to Clean Harbors' Assertion that the information requested is within the entire parameters of discoverable information.

In support of its argument concerning discoverable information, Clean Harbors suggests to the court that, even if the time necessary to conduct and acquire the requested documents were substantial, the fact that the documents are relevant to the case warrants their discovery. Clean Harbors' argument borders on the disingenuous.

Superficially, the court emphasizes that:

relevancy . . . does not automatically entitle a plaintiff to discovery. Besides the explicit exclusion of privileged matters from the scope of rule 26(b), "Rule 26 (c) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b)." Fed. R. Civ. P. 26, Notes of Advisory Committee on Rules, Subdivision (b) (1970) Amendment). See In re Racticel Foam Corp., 859 F.2d 1000 (1st Cir. 1988). In addition, in 1983, Rule 26 (b) (1) was amended to expand district court judges' power to limit discovery requests. Mack v. Great Atlantic and Pacific Tea Co., 871 F.2d 179, 187 (1st Cir. 1989).

Santiago v. Fenton, 891 F.2d 373, 379 (1st Cir. 1989).

Reviewing the, requests for documents, it is clearly evident that Clean Harbors does not attempt to limit its inquiry to certain time periods. Rather, Clean Harbors takes the unruly and broad approach of requesting



"all documents . . ." or "All manuals, guidance, directives, memoranda, deposition transcripts, trial transcripts, arbitration transcripts. . ." Simply reading Clean Harbors' requests, there are no indications concerning the extent to which Chicago is obligated to conduct or end its research. See Williams v. City of Dothan, No. 82-226-S (M.D. Ala., March 28, 1983). If the court allowed such broad language to guide discovery, there is little doubt that Chicago would be forced to search its archives, since business inception, in order to comply with Clean Harbors' requests.

Recognizing the potential effect of requiring Chicago to look for tens of thousands of files at a potential expense of thousands of person hours and hundreds of thousands of dollars, the court is heedful of the fact that it must apply a forceful use of the reins on a restive horse and disallow such broad discovery requests. See Scroggins v. Air Cargo, Inc., 534 F.2d 1124 (5th Cir. 1976).

U.S.A. v. Clean Harbors, No. C-89-109-L, 1995 U.S. Dist. LEXIS-4683, at \*11-12 (D.N.H., Feb. 21, 1995).

This image of reining in a horse comes directly from the language of the Advisory Committee Notes to the 1993 Amendment quoted above, and is also alluded to in a 1995 District of Massachusetts opinion, which quotes the commentary:

Like Rule 30(a)(2), Rule 26(b)(2) assumes some specificity, with respect to numbers and names, regarding the depositions a party seeks. Further, since a court must determine the cumulative effect of the proposed discovery, as well as the opportunity for the party to obtain the information through other means, the rule also appears to assume that discovery has at least commenced. Any ambiguity is clarified by Local Rule 26.2(B)(2), which requires a party to exhaust available discovery before seeking leave for additional discovery events.

These rules were promulgated to enable courts to maintain a "tighter rein" on the extent of discovery and to minimize the potential cost of "[w]ide-ranging discovery" and the potential for discovery to be used as an "instrument for delay or suppression." See commentary to Rule 26(b)(2).

Whittingham v. Amherst College, 163 F.R.D. 170, 171-12 (D. Mass. 1995).

The fullest discussion of the commentary and philosophy of the 1993 Rule change appears in another unpublished Lexis decision:

Discovery in a civil action is not some fundamental right, to be pursued as long and to whatever extent as a party may desire. It is a

rather recent innovation. Indeed, in criminal cases, where the stakes are often far higher than they are in civil cases, the discovery remains limited. Experience has demonstrated that the discovery rules can be and sometimes are abused, and there is presently an ongoing effort to curb such abuses. Parties are often, and non-party witnesses are always, coerced participants who should not be held hostage to the personal perceptions of a party seeking discovery as to what is desirable or appropriate. The 1993 amendments to the Federal Rules of Civil Procedure reflect that effort. Rule 1 now expressly states that the rules should be "administered to secure the just, speedy and inexpensive determination of every action." The cooperation of counsel is emphasized. Rule 26(b)(2) expressly authorizes courts to limit the length of depositions when discovery is unreasonably cumulative, the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought or the burden or expense of the proposed discovery outweighs its likely benefit. [ . . . ]

Those amendments are consistent with the objectives of the Civil Justice Reform Act. Pursuant to that statute this district has adopted, as has every other district, a Delay & Expense Reduction Plan. Pursuant to that Plan a committee of attorneys has been appointed to consider guidelines and rules for discovery practice. The Advisory Group, which developed the recommendations upon which the Plan is based, concluded that the scope of allowable discovery should balance cost against likely benefit. It suggests that cost-shifting be considered when the scope of discovery moves toward being overly burdensome and expensive. That suggestion echoes the clear results of a survey of federal practitioners in this district.

The discovery rules are not a ticket to an unlimited, never ending exploration of every conceivable matter that captures an attorney's interest. Parties are entitled to a reasonable opportunity to investigate the facts -- and no more.

Vakharia v. Swedish Covenant Hospital, No. 90 C 6548, 1994 U.S. Dist. LEXIS 2712, at \* 2-5 (D. N.D. Ill. March 2, 1994), adhered to, reconsideration denied, 1994 U.S. Dist. LEXIS 11828 (Aug. 23, 1994).

But such words and reasoning are rare. As demonstrated in section A above, this sort of cost-benefit analysis is simply not being conducted consistently, even though it has been permitted and encouraged since August 1983. (There is not even one opinion per year in the last 14 years providing any detailed evaluation based on the factors in subsections (i) through (iii).)

C. Reasons That Factors in Rule 26(b)(2)(i)-(iii) Should Be Applied

Not only are courts required to limit discovery upon finding one or more of the predicate conditions specified in Rule 26(b)(2)(i)-(iii), but there are substantial public policy reasons why courts should apply those sub-parts more often.

1. The Application of Rule 26(b)(2)(i)-(iii) Is Needed to Improve Judicial Efficiency and the Public Perception of Litigation.

For efficiency and fairness in the courts, and to ensure that the public perceives the courts as efficient and fair, discovery needs to be reasonably restrained:

Indeed, the Expense and Delay Reduction Plan, adopted by the U.S. District Court for the District of Massachusetts pursuant to the requirements of the Civil Justice Reform Act, 28 U.S.C. § 471, imposed the limitations on the number of depositions, interrogatories and requests for admissions, in order to encourage cost-effective discovery. At least one court has noted the "Public's dissatisfaction with exorbitantly expansive discovery, and the impact that the public outcry has had upon our discovery Rules." Eisenach v. Miller-Dwan Medical Center, 162 F.R.D. 346, 348-49 (D. Minn. 1995).

Whittinghan v. Amherst College, 163 F.R.D. 170, 171-12 (D. Mass. 1995). The court in Eisenach observed that "any current view that the deficiencies in pleading may be cured through liberalized discovery is at increasingly mounting odds with the public's dissatisfaction." 162 F.R.D. at 349.

2. The Application of Rule 26(b)(2)(i)-(iii) Is Needed to Preserve Scarce Government Resources.

Rule 26(b) has been used with some frequency to shield government agencies from disruption of their work. For example, "a court may use Rule 26(b) to limit discovery of agency documents or testimony of agency officials if the desired discovery is relatively unimportant when compared to the government interests in conserving scarce government resources." Exxon Shipping Co. v. U.S. Dept of Interior, 34 F.3d 774, 779-80 (9th Cir. 1994), citing, e.g., Moore v. Armour Pharmaceutical Co., 927 F.2d 1194, 1198 (11th Cir. 1991) (considering the "cumulative impact" of repeated requests for the testimony of Center for Disease Control researchers working on a cure for the AIDS virus in upholding a decision to quash a subpoena under Rule 45).

One court, citing Rule 26(b), singled out depositions of government employees as a significant exception to otherwise broad discovery:

Despite the generally permissive approach to discovery in the federal courts, the court does not believe that parties to an employment discrimination case should be able to depose EEOC investigators as a matter of course. . . . The EEOC has plenty of work to do investigating

new complaints, and its principal responsibility is to serve the public as a whole, not to work for the benefit of particular litigants. Accordingly, the court finds under Rule 26(b)(2) that plaintiff should not be permitted to depose Murdock on the facts that he turned up in his investigation of plaintiff's claims.

Leyh v. Modicon, Inc., 881 F. Supp. 420, 425 (S.D. Ind. 1995).

3. The Application of Rule 26(b)(2)(i)-(iii) Is Needed to Prevent, or at Least Limit, Harassment.

A correct formulation of the rule was recently recognized: "Despite such a broad interpretation [of relevance in discovery practice], the frequency and extent of the use of permissible discovery methods shall be limited by a court's discretion, as guided by the factors set forth in Rule 26(b)(2). . . . This rule directs a court to examine the burdens potentially to be borne by the various parties if the contemplated discovery is performed, and to limit such if it determines that the burdens or expenses of the discovery outweighs the benefits." Tri-Star Pictures, Inc. v. Unger, No. 88 Civ. 9129 (DNE), 1997 U.S. Dist. LEXIS 2458, at \*24-25 (S.D.N.Y. March 6, 1997), quoting Vorhes v. McMahon, No. 95-CV0398E(F), 1996 U.S. Dist. LEXIS 12390 (W.D.N.Y. Aug. 2, 1996).

The corollary to this is: "When the discovery to be obtained is through the deposition of a senior executive, a court must remain mindful that 'permitting unfettered discovery of corporate executives would threaten disruption of their business and could serve as a potent tool for harassment in litigation.'" Tri-Star Pictures at \*25-26, quoting Wertheim Schroder & Co., Inc. v. Avon Prod., Inc., No. 91 Civ. 2287, 1995 U.S. Dist. LEXIS 79, at \*2 (S.D.N.Y. Jan. 9, 1995) (quotation and citation omitted). Thus, some courts have protected senior management from depositions when the proposed deponents do not have unique, personal knowledge of the information sought by the opposing party. See, e.g., Mulvey v. Chrysler Corp., 106 F.R.D. 364, 366 (D.R.I. 1985) (refusing to permit deposition of Chrysler's president, Lee Iacocca). In doing so, however, courts have relied almost exclusively on Rule 26(c) and have ignored Rule 26(b)(2)(i)-(iii).

In addition, on a national scale, the judicial system must consider the immense cost to society of diverting scientists, engineers, physicians, economists, and other professionals from important tasks such as developing new, safer products, curing disease, and consummating transactions. These non-executives, and many others, have important roles in society. Thus, it is not only government officials and CEOs and CFOs of large corporations who must be shielded from excessive discovery and discovery abuses through an application of Rule 26(b).

4. The Application of Rule 26(b)(2)(i)-(iii) Is Needed to Protect Privacy Interests

In 1984, the Supreme Court observed:

It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties.

Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2208 (1984) (a protective order is limited to the context of the discovery, and does not restrict the dissemination of the information if gained from other sources; does not offend the First Amendment). In a footnote to his comment, the Court alluded to "the inadequate oversight of discovery by trial courts" that "sometimes" occurs. Id. at n. 20

#### IV. Conclusion

Because of the infrequent use of Rule 26(b)(2)(i) through (iii) we urge that, at a minimum, the Advisory Committee Notes to Rule 26,(b)(2) be amended to include a statement that courts must undertake the analysis under sub-sections (i) through (iii) if requested and should do so "upon their own initiative" whenever it appears that discovery may be being overused or abused, and another statement clarifying and stressing that, upon finding unreasonable or disproportionate discovery, the court must act to restrain it.

It is not enough for the parties to argue, or for the court to reason, that; for example, in a case with \$50 million in dispute, any and all discovery is warranted. The discovery sought still must be non-redundant, not unduly expensive, and not excessive considering the importance of the information, according to the factors itemized in the Rule. "Liberal discovery" and "expansive discovery" and "discovery with a wide scope" must be tempered by the constraints of Rule 26 that have been in effect, but almost never employed, since August 1983.

D-III

**FEDERAL RULE OF CIVIL PROCEDURE 26(a)(1):  
PROPOSAL ON REVISING MANDATORY DISCLOSURE**

**AND**

**FEDERAL RULE OF CIVIL PROCEDURE 16:  
PROPOSAL ON EARLY JUDICIAL INTERVENTION**

**I. EXECUTIVE SUMMARY**

- DRI approves the goal of the 1993 amendments to Rule 26(a), i.e., to make discovery of fundamental facts;
  - faster
  - less formalized
  - a product of communication, not contention, between counsel
- DRI agrees that the meet-and-confer requirement of Fed.R. Civ.P. 26(f) has furthered that goal.
- DRI does not believe that mandatory disclosure of Fed.R. Civ.P. 26(a) has furthered that goal. Among other things:
  - Discovery requests are simple to draft and many lawyers maintain "form" discovery requests; consequently, the time and expense "saved" by eliminating this step are minimal.
  - Conversely, Rule 26(a) places significant burdens on the responding party, particularly on a corporate defendant which may have millions of documents, throughout the country and the world. For example, Rule 26(a):
    - is ineffective in reducing written discovery since document requests are usually served in any event;
    - unreasonably increases the costs of litigation;
    - requires multiple searches of documents: one for the "mandatory disclosure" phase and a second once document requests are received;

- requires counsel to anticipate what is "relevant" to the other party. The parties will inevitably disagree on the scope of "relevance" and "particularity in the pleadings";
  - permits general unsupported allegation to trigger wide-ranging open-ended discovery;
  - is incompatible with notice pleadings standards.
- Consequently, DRI recommends that Fed. R. Civ. P. 26(a), as currently drafted, be repealed.
  - DRI suggests that an Initial Disclosure process with the following components would be a preferable way to effectuate prompt, less formalized disclosure of essential case facts:
    - a. Disclosure would be sequential, with plaintiff proceeding first.
    - b. As its **Initial Disclosure**, plaintiff would, within 15 days of filing the Complaint:
      - (1) provide a narrative description of the incident that led to the filing of the case;
      - (2) set forth the specific causes of action for which plaintiff currently has factual support, specifying for each cause of action what defendant did or failed to do;
      - (3) provide a description and computation of any damages claimed;
      - (4) make available for inspection all documents currently known to plaintiff and within his or her custody that support the claim, including all damage documents. [This subsection is intended to address the essential documents reasonably known and available to the party at this preliminary stage of the case. Production under this subsection is without waiver or limitation of the party's ability or right to identify or rely upon other documents that support his or her case at some later date in the proceedings];
      - (5) identify all witnesses currently known to have material information that supports the claim. [This requirement is subject to an analogous caveat to the one above relating to documents.]



- c. Within 45 days of receipt of plaintiff's Initial Disclosure, the defendant would make its Initial Disclosure, which would:
- (1) confirm whether defendant was properly identified in the complaint and, if not, state the correct identification and state whether defendant will accept an amended summons and complaint reflecting the correct identification;
  - (2) state defendant's version of the incident that lead to the filing of the complaint (including identification of key participants);
  - (3) set forth precisely the affirmative defenses for which defendant currently has factual support and provide the factual support for each such affirmative defense;
  - (4) make available for inspection any insurance agreement that may be liable to satisfy part or all of a judgment which may be entered in the action;
  - (5) make available for inspection all documents currently known to defendant and within his or her custody that support the defenses to the claim. [This subsection is subject to the same caveat as in plaintiff's disclosure in § b(4) above]
  - (6) identify all witnesses currently known to have material information that supports any defense. [This subsection is subject to the same caveat as in plaintiff's disclosures in § b(5) above.]
- d. Within 30 days of the date on which these Initial Disclosures have been exchanged, the parties would conduct a meet-and-confer under FRCP 26(f) to discuss what additional documents may exist and may be subject to an agreement to produce. This would allow the parties, who have the most familiarity with the issues and types of documents potentially available, to reach agreement on specific documents to be produced, and to more clearly identify those subject to dispute.
- e. Within 15 days of the meet-and-confer, the parties would jointly submit to the court a **Proposed Scheduling Order** containing:

- (1) both Initial Disclosures;
  - (2) a list of those documents agreed to be exchanged;
  - (3) a list of all known potential witnesses identified by name, address and phone number;
  - (4) any proposed Protective Order (or competing proposals for same);
  - (5) a Discovery Plan or Plans (or competing proposals for same).<sup>4</sup>
- f. As soon as practicable after the filing of the Proposed Scheduling Order, the court would schedule a **Rule 16 Pretrial Conference** to discuss the Proposed Scheduling Order and to finalize the discovery schedule.

This proposal recommends a blending of existing Rules 16(a) and 16(b) such that the conference would be mandatory and would address all issues addressed in those existing subsections. The proposal also recommends that this conference occur after submission of initial disclosures and a proposed discovery order.

- g. In cases where discovery is unusually complex, the court may schedule, on at least 20 days notice, a Discovery

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<sup>4</sup> The Discovery Plan could address any matter in the case but would typically include:

- a. the subjects on which discovery will be needed;
- b. a proposed completion date for discovery;
- c. the maximum number of interrogatories, requests for admissions and document requests, with response dates;
- d. the maximum number of depositions, together with any proposed limitation on the length of depositions;
- e. due dates for expert reports;
- f. date for supplementation of discovery responses;
- g. parties' suggestion on how to expedite this position of the action;
- h. deadlines for joinder;
- i. deadlines for dispositive motions;
- j. other pretrial matters.

If the parties could not agree on a Joint Discovery Plan, each party can provide their own proposal.

Conference. No later than 7 days before the conference, the parties must have met, conferred and submitted a report outlining what has been done to date; what remains to be done; and where discovery disputes exist. Supplemental briefing is permitted to accompany the Report.

The rationale for and details of this proposal are set forth in greater detail in Section V below.

## II. PROPOSED CHANGES TO RULE 26(a)(1)

A. Repeal Current Rule 26(a)(1)

B. PROPOSED RULE 26(a)(1):

(A) Plaintiff shall file and serve its Initial Disclosures within 15 days of filing the Complaint which shall:

(i) provide a narrative description of the incident that led to the filing of the case (including the identification of key participants);

(ii) set forth the specific causes of action for which plaintiff currently has factual support, specifying for each cause of action what defendant did or failed to do;

(iii) provide a description and computation of any damages claimed;

(iv) make available for inspection all documents currently known to plaintiff and within his or her custody that support the claim, including all damage documents;

(v) identify all witnesses currently known to have material information that supports the claim.

(B) Within 45 days of receipt of plaintiff's Initial Disclosure, the defendant shall file and serve its Initial Disclosure, which shall:

(i) confirm whether defendant was properly identified in the complaint and, if not, state the correct identification and state whether defendant will accept an amended summons and complaint reflecting the correct identification;

- (ii) state defendant's version of the incident that led to the filing of the complaint (including identification of key participants);
    - (iii) set forth precisely the affirmative defenses for which defendant currently has factual support and provide the factual support for each such affirmative defense;
    - (iv) make available for inspection any insurance agreement that may be liable to satisfy part or all of judgment which may be entered in the action;
    - (v) make available for inspection documents currently known to defendant and within his or her custody that support the defenses to the claim;
    - (vi) identify all witnesses currently known to have material information that supports any defense.
  - (C) Within 30 days of the date on which these Initial Disclosures have been exchanged, the parties shall conduct a meet-and-confer pursuant to Rule 26(f) and shall, in addition, discuss what additional documents may exist and may be subject to an agreement to produce. The parties shall also attempt to agree on any Protective Order.
  - (D) Within 15 days of the meet-and-confer, the parties shall jointly submit to the court a Proposed Scheduling Order containing:
    - (i) both Initial Disclosures;
    - (ii) a list of those documents agreed to be exchanged;
    - (iii) a list of all known potential witnesses identified by name, address and phone number;
    - (iv) any proposed Protective Order (or competing proposals for same);
    - (v) a Discovery Plan or Plans (or competing proposals for same).
- The form of order is attached hereto at Exhibit A.
- (E) As soon as practicable after the filing of the Proposed Scheduling Order, the court shall schedule a Rule 16 conference.

(F) The court may, in its discretion, conduct Discovery Conferences. Unless exigent circumstances are present, the court shall provide 20 days notice of any such conference. No later than 7 days before any such conference, the parties shall submit a discovery report to the court identifying:

(i) what discovery has been conducted;

(ii) what discovery remains to be taken;

(iii) where disputes exist and the party's position on such disputes.

Any party may file a supplemental brief with respect to disputed issues.

### III. DISCUSSION

#### A. INTRODUCTION

The objectives of the Federal Rules of Civil Procedure are set forth clearly in Rule 1: "They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Our system of civil justice, however, has been criticized as being too slow, too expensive and unjust.<sup>5</sup> Some blame the lawyers, others blame the courts, and yet others blame the rules that define the course of civil actions. Although many proposals have been advanced, and some implemented, there is a growing consensus that additional changes should be made.

The proposal outlined in this portion of the DRI position paper stems from several premises: (1) the parties, who are best able to identify and develop the issues in a given case, should be given every encouragement to work together to ensure that the case is being developed efficiently, timely and consistent with judicial expectations; (2) the parties should voluntarily disclose as much as possible about their respective

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<sup>5</sup> In 1988, the Foundation for Change and The Brookings Institution convened a task force to recommend ways to alleviate the excessive cost and delay associated with litigation. What resulted was a task force report that made numerous recommendations to expand judicial resources and to adopt procedural reforms. The Brookings Institution (1989). Also, the Chief Justice of the United States appointed a Federal Courts Study Committee, which began work in 1988. The committee recommended several modifications to the system, including alternative dispute resolution, early judicial involvement in case management, and phased discovery. The Federal Court's Study Committee (1990). President Bush also created a Council on Competitiveness to consider reforms to the system. The report of the Council proposed modifying the rules on expert procedures, limiting the number of cases, reducing the size of jury awards, and making the existing judicial resources more efficient through case management techniques and streamlined discovery. President's Counsel on Competitiveness (1991).

positions as early as possible; and (3) early oversight by an informed court is important to ensure that the parties are meeting their obligations, impending problems are resolved swiftly, and the future course of case preparation mapped. In general, these objectives can be achieved by requiring the parties to confer early and often, report their respective positions to the judge in proposed orders and meet with the court early in the process and again at a more mature stage of discovery.

## B. THE CURRENT SYSTEM

1. Mandatory Disclosure. As amended on December 1, 1993, Rule 26(a)(1) imposes mandatory disclosure requirements on the parties. Without waiting for discovery requests, each party is to provide to the other party (1) the identity of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings; (2) documents, data compilations and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings; (3) a computation of any category of damages claimed by the disclosing party, with supporting documentation; and (4) any insurance agreement where the proceeds may be used to satisfy part or all of the judgment.

Because a significant number of districts elected to opt-out of the mandatory disclosure requirements, Rule 26(a)(1) is not uniformly in effect throughout the country. As of March 28, 1997, the mandatory disclosure rules were in effect in 49 districts, but not routinely in effect in the other 45 districts. Federal Judicial Center, *Implementation of Disclosure in United States District courts (March 1997)*. Judges and attorneys have had over three years experience with the mandatory disclosure rules. The ever-growing viewpoint is that the procedures are not achieving the desired objectives

The Civil Justice Reform Act ("CJRA") was passed in 1990 in an effort to reduce the delay and expense of litigation in federal courts. The CJRA required each federal district court to develop a case management plan in an effort to achieve these goals. It also created a pilot program to test six principles of case management. One of the six case management principles was to encourage cost-effective discovery through voluntary exchanges and cooperative discovery devices. The CJRA required an eventual independent evaluation to determine the effects of the various case management techniques, and the RAND Institute for Civil Justice was asked to conduct the independent evaluation. RAND recently completed this evaluation and has prepared an extensive report of its findings and conclusions.

All of the districts involved in the RAND evaluation had adopted some variant of voluntary or mandatory exchange of information. The RAND Institute for Civil Justice, *An Evaluation of Judicial Case Management under the Civil Justice Reform Act*, at 61 (1996). In evaluating the results of the various early disclosure processes, RAND found that neither voluntary nor mandatory early disclosure had a significant effect on how long it took to dispose of a case or how many lawyer hours were involved. The

RAND Institute for Civil Justice, *supra*, at 68. "The findings on satisfaction and fairness suggest that lawyers do not like a district policy of mandatory early disclosure. They were both significantly less satisfied and a little less prone to call management fair when this district policy existed." *Id.* at 68.

Furthermore, in 1995, the Committee on Pretrial Practice and Discovery of the ABA Section of Litigation (the "ABA Committee") initiated a survey of plaintiffs' and defendants' attorneys who have operated under the rule 26(a)(1) mandatory disclosure requirements. In reviewing the results of the survey, the ABA Committee concluded that:

Analysis of the survey results suggest that Rule 26(a)(1) disclosure has not had a significant impact on federal civil litigation. To the extent that it has had any measurable effects, most are negative. The survey provided no evidence that, at the one year mark, disclosure had reduced discovery costs or delays. Nor did the responses suggest that disclosure has reduced conflict between adversaries during the discovery process. Consequently, during its first year of implementation, disclosure has not resulted in the systematic improvements for which its proponents had hoped.

Committee on Pretrial Practice and Discovery, *Mandatory Disclosure Survey: Federal Rule 26(a)(1) After One Year*, at 1 (1996). A sizeable majority of the respondents wanted the mandatory disclosure requirements eliminated from the rules. *Id.* at 6.

Commentators have also criticized the mandatory disclosure requirements. See e.g., Tobias, Automatic Disclosure and Disuniformity in the Ninth Circuit, 41 Wayne L. Rev. 1385, 1399 (1994) ("The above analysis shows that the interdistrict court and intrastate disuniformity created by the automatic disclosure procedure has imposed numerous disadvantages. Most important, disclosure has complicated federal and state civil practice and has increased cost and delay."); Issacharoff, Unintended Consequences of Mandatory Disclosure, 73 Tex. Law Rev. 753, 786 (1995) ("[I]t is difficult to escape the conclusion that the mandatory disclosure procedure is misguided.") Hence, Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rule Amendments and the Just, Speedy, and Inexpensive Determination of Every Action, 67 Tul. L. Rev. 179 (Spring 1994); Sorrenson, Disclosure Under Federal Rules of Civil Procedure 26(a) – "Much Ado About Nothing?", 46 Hastings L.J. 679 (March 1995); Lasso, Gladiators Be Gone: The New Disclosure Rules Compel a Re-examination of the Adversary Process, 36 B.C.L. Rev. 479 (May 1995); Belleau, A Critique of the "New Discovery Rules" – Raising More Questions Than They Answer . . . Business as Usual in the Federal Court, 42 Jul. Fed. Law. 36 (July 1995). There is little logical or empirical evidence to preserve the mandatory disclosure aspects of Rule 26(a)(1). Alternatives need to be advanced.

2. **"Meet and Confer" Requirement.** Fed.R. Civ.P. 26(f) requires the parties to "meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan." The plan should include the following:

(1) What changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitation should be imposed; and

(4) Any other orders that should be entered by the court under subdivision (c) [the entry of protective orders] or under Rule 16(b) and (c) [dealing with the entry of scheduling orders and the subjects to consider at pretrial conferences].

Fed.R. Civ.P. 26(f).

The general framework for these provisions was derived from amendments to the rules enacted in 1980. That change was driven by widespread criticism of discovery abuse. The 1980 amendment envisioned a two-step process. The first set was for the parties to agree on an acceptable plan. The second step of the process authorized the court to hold a "discovery conference" and to enter an appropriate order governing discovery. See 1980 Advisory Committee Notes. Because this process was elective, to be invoked only at the request of a party facing discovery problems, it was sparingly used. It turned out that early judicial involvement in the discovery process was managed through scheduling orders entered pursuant to Rule 16(b) or through other judicial mechanisms. Accordingly, in 1993, Rule 26(f) was amended to remove the provisions for a discovery conference. While the Advisory Committee noted that judicial control of discovery is desirable, it was believed that appropriate judicial oversight could be accomplished through Rule 16 conferences. See 1993 Advisory Committee Notes. As the Advisory Committee noted:

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of a judicial supervision.



Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

Preserved in the 1993 amendments was the requirement that the parties meet and confer on an appropriate scheduling order to submit to the court.

The meet and confer provisions of 26(f) seem to be effective and well-received. In the Report of the ABA Committee on Pretrial Practice and Discovery, the survey showed that increased communication between opposing counsel was a "positive result." ABA Committee on Pretrial Practice and Discovery, *supra*, at 30-31. The ABA Committee noted that these desirable effects could have been achieved by the Rule 26(f) meet and confer provisions themselves, without mandatory pre-discovery disclosure. *Id.* Commentators have also observed that a meet and confer rule may be a better solution for resolving discovery problems. *See, e.g.,* Bell, Automatic Disclosure and Discovery - The Ruse to Reform, 27 Ga. L.Rev. 1 (Fall 1992).

3. Early Judicial Intervention. Rule 16(b), which was added by amendment in 1993, provides for the earliest judicial involvement in the case management and discovery process. As the Advisory Committee noted at that time: "Rule 16(b) assures that the judge will take some early control over the litigation . . . ." Interestingly, however, Rule 16(b) does not require a meeting with the judge. It simply provides that, after receiving the parties' Rule 26(f) report, the judge can enter a scheduling order "after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means . . . ." This order shall issue as soon as practicable, but in any event within 90 days after the appearance of a defendant or within 120 days after the complaint has been served on a defendant. Fed.R. Civ.P. 16(b). The scheduling order entered by the judge shall limit the time (1) to join other parties and to amend the pleadings; (2) to file motions; and (3) to complete discovery.

Additionally, the scheduling order may modify the time for disclosure under Rule 26(a) and 26(e)(1), may set a final pretrial conference and trial date, and may include any other matters appropriate to the circumstances of the case. Fed.R. Civ.P. 16(b).

Even though Rule 16(b) does not require a hearing, the court is allowed under Rule 16(a) to hold an early pretrial conference. Rule 16(a) allows the court to hold a conference for such purposes as: (1) expediting the disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because

of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation; and (5) facilitating the settlement of the case. Additional subjects that the court and counsel may consider at a pretrial conference are identified in Rule 16(c). The effectiveness of a Rule 16(a) pretrial conference is dependent upon an informed and committed judge, well-prepared counsel and a mutual commitment to make the process work.

Although advantages flow from involving the court early in the litigation process, it has also resulted in some untoward effects:

There also have been difficulties with the pretrial orders that issue following Rule 16 conferences. When an order is entered far in advance of trial, some issues may not be properly formulated. Counsel naturally are cautious and often try to preserve as many options as possible. If the judge who tries the case did not conduct the conference, he could find it difficult to determine exactly what was agreed to at the conference. But any insistence on a detailed order may be too burdensome, depending on the nature or posture of the case.

See, 1983 Advisory Committee Notes. The sanctity of the early Rule 16 pretrial order is heightened when one considers the schedule imposed in the order "shall not be modified except upon a showing of good cause and by leave of the district court or, when authorized by local rule, by a magistrate judge." Fed.R. Civ.P. 16(b). Also, sanctions can be imposed for failing to obey such a pretrial order. Fed.R. Civ.P. 16(f).

Clearly, advantages and efficiencies are achieved when the trial court intervenes at an early stage to assert control over the case and to schedule deadlines for completion of important pretrial steps. Flanders, *Case Management and Court Management in United States District Court*, at 39, Federal Judicial Center (1977). RAND, in evaluating the effects of CJRA, concluded that: "[e]arly judicial case management is associated with both significantly reduced time to disposition and significantly increased work hours." See, RAND Institute for Civil Justice, supra, at xxiii.

The principal problem with the early orders entered under Rule 16(a) or 16(b) is that there is no effective and expressly sanctioned follow-up conference with the court on discovery-related matters. It is important to invoke judicial oversight on a prospective basis in the early stages of litigation, and Rule 16 allows this. Yet, under Rule 16, the next authorized judicial conference is the final pretrial conference, which generally is scheduled on the eve of trial. Fed.R. Civ.P. 16(d). Most parties, therefore, are judicially unmanaged during the discovery process. The court's authority can be invoked by either party filing a motion to compel. Yet, motions to compel provide for only isolated invocation of judicial oversight. In certain cases, more is required.

Requiring the parties to meet and confer on discovery matters, to submit a discovery report to the court, and to participate in a discovery conference will result in a more efficient management of the more complicated case. Invoking judicial oversight at a more mature stage of discovery may minimize any tendency toward over-discovery by the discovering party, and under discovery by the responding party. Such a rule would also laudably allow the parties to discuss the course of discovery in a context more positive than under the current rules, which requires such discussions only preparatory to the filing of a motion to compel.

C. GENERAL OUTLINE FOR INITIAL DISCLOSURE/EARLY JUDICIAL INTERVENTION PROPOSAL

What follows is a general outline of the proposed changes that would allow early and more effective exchange of fundamental case information. Further details will be provided in the ensuing section.

1. An Initial Disclosure process will modify existing Rule 26(a). The parties will now be required to agree on a much more detailed scheduling order; to disclose the known factual support for the claims and defenses; and to describe what information has been voluntarily exchanged by the parties.

2. The Rule 16(b) and 26(f) conferences will be preserved.<sup>6</sup> The hope is that the court, by reviewing the detailed proposed scheduling order which is the product of the parties' joint effort, will be more knowledgeable and effective in the early pretrial stage. At the conference, the court is encouraged to take any additional steps that would streamline the discovery and trial preparation phases.

3. Rule 26(f) and Rule 16 will be amended to permit a "discovery conference" in certain cases. The cases subject to the discovery conference shall be set by local rule or, in particular cases, agreed to by the parties or ordered by the court. The parties must meet and confer prior to the discovery conference to prepare a discovery report. The role of the Court at the discovery conference is to resolve discovery disputes, evaluate the extent of discovery and determine the appropriateness of further discovery. The court shall enter a discovery order at the hearing.

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<sup>6</sup> Because the amendments to Rules 16 and 26 have occurred in serial fashion, they are choppy in certain respects. If one were to start from scratch, the "proposed scheduling order" might be denominated a "case management order," because that is a more apt description. The conferences envisioned by Rule 16(a), (b) and (c) might all be consolidated into a "case management" conference, which implicates, among other things, the entry of the proposed case management order. These and other selected housekeeping amendments could streamline the process and make it more consistent. To accomplish this, however, would require some significant changes in the terminology and organization of the applicable rules.

D. STEP-BY-STEP ANALYSIS OF THE INITIAL DISCLOSURE/EARLY JUDICIAL INTERVENTION PROPOSAL

By now, it is widely agreed that Rule 26(a)(1) does not accomplish its goals. It does not decrease the time to disposition, lessen the costs of litigation or increase the satisfaction level of lawyers and judges. Two other discovery mechanisms, however, seem to accomplish these objectives – (1) early "meet and confer" conferences among counsel where discovery plans are established, issues resolved and the parties get the first crack at assessing their needs in a particular lawsuit; and (2) early judicial intervention, where a court can approve or modify the parties' discovery plan. The proposal set forth below modifies mandatory disclosure, but expands the opportunities for the parties to determine the course of the case, with the court available to be sure the pretrial discovery is being handled consistent with the objective of achieving a "just, speedy and fair resolution of disputes." The following is a more detailed explanation of the various components of the proposal. The process will be described chronologically, following the filing of the case.

a. Step 1 – Initial Disclosure.

- (1) Sequenced Disclosure. The initial disclosures of the parties should be sequential, with plaintiff proceeding first. There are several reasons for this sequence. First, the plaintiff has advance knowledge of the lawsuit and, thus, advance time to collect relevant documents and information. Second, while notice pleading excuses a plaintiff from providing factual detail in the complaint, Rule 11 requires such factual detail to be known to plaintiff and his or her counsel as of the date of filing. Third, because the factual detail provides a better understanding of the case for a defendant that pure notice pleading and because it is already known to plaintiff and plaintiff's counsel, it is reasonable to require early disclosure so as to better enable a defendant to comprehend the cases and formulate responsive disclosures.<sup>7</sup>

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<sup>7</sup> The District of South Carolina opted out of Rule 26(a) disclosures and adopted Local Rules providing for mandatory responses to court ordered interrogatories. S.C.L.R. 7.03-09. According to its Rules, the plaintiff must file its court ordered interrogatories at the time it files its complaint, *id.* at 7.05, and the defendant must later file its responses to the court ordered interrogatories within 30 days of its answer or the plaintiff's service of its court ordered interrogatories. DRI's proposal for staged responses is similar to that adopted by the District of South Carolina.

Plaintiff's initial disclosure will occur within 15 days of filing the complaint; defendant's initial disclosure will be due within 45 days of plaintiff's disclosure. Defendants are given additional time because the lawsuit may require investigation of numerous individuals and documents without prior notice, all of which takes a significant amount of time. Should a plaintiff wish a more expedited process, that plaintiff is free to file its initial disclosure at an earlier date, thus triggering defendant's 45-day response period on a more expedited basis.

(2) Content of Initial Disclosures. Plaintiff and defendant have essentially reciprocal disclosure obligations, including:

- a narrative description of the incident that lead to the filing of the case;
- the claims (for plaintiff) and defenses (for defendant) and the factual support that currently exists for each such claim or defense;
- disclosure of all documents and witnesses that support the disclosing party's claim or defenses.

In addition, a plaintiff must disclose damage information and a defendant must disclose insurance information and information concerning whether defendant was properly identified in the complaint.

Parties may resist laying out factual support for their position at so early a stage. However, the intent of this initial disclosure process is simply to require the parties to state what they know, rather than "sandbag" to a later stage of the proceedings. The groundwork of such a requirement is already in the rules. Rule 11 imposes an obligation on all parties to make factual allegations that either have evidentiary support or are likely to have evidentiary support after further investigation or discovery. Fed.R. Civ.P. 11(b)(3). There is a provision for filing a motion for a more definite statement, which may seek a fuller exposition of the underlying facts. Fed.R. Civ.P. 12(3). Rule 26(f) requires the parties to meet to discuss the "nature and basis of their claims and defenses . . . ." At the Rule 16 pretrial conference, the court may formulate and simplify the issues, including eliminating frivolous claims or defenses and seeking admissions of fact from the parties. Fed.R. Civ.P. 16(c)(1), (3). Finally, Rule 33 expressly authorizes contention interrogatories, which would require the parties to

state the factual support for their claims and defenses in the early stage of the litigation. Fed.R. Civ.P. 33(c). Indeed, some courts have mandatory interrogatories that seek essential factual information. Requiring disclosure of basic factual information without requiring resort to these other mechanisms will both educate the parties and permit the court to focus on the appropriate case management opportunities.

What follows is the discussion of some of the more significant aspects of the proposed initial disclosures:

(a) **Narrative description of the incident(s) that led to the filing of the case.** For plaintiff's disclosure, this category is intentionally broad, but is intended to permit the plaintiff some latitude depending on the particular case. In a products case, the plaintiff may describe (1) the plaintiff; (2) the defendant's role in the incident; (3) the product in question; (4) how the incident occurred; and (5) specifically how it is claimed the product malfunctioned or caused the injury. In a patent infringement case, for example, the plaintiff may describe (1) the particular patents at issue; (2) the plaintiff and its connection to the patents; (3) the defendant and its connection to the patents; and (4) specifically how the patents were infringed. Finally, in an employment discrimination case, the plaintiff can describe (1) the plaintiff; (2) the length, nature and other pertinent aspects of the employment relationship; (3) how the plaintiff alleges discrimination; and (4) the relevant discussions and evaluations arising out of the relationship. As can be seen, most of this information is within the province of plaintiff and is not dependent on conducting occasional discovery.

The purpose of this section for the defendant is to respond to plaintiff's factual statement of the case, as well as to provide the court with sufficient background information to allow an understanding of the defense position. Rather than simply deny plaintiff's version, the defendant should state affirmatively the basis for the denial. Although the defendant at this stage has not been given an opportunity to conduct formal discovery, the defendant should provide the information it has currently available. In a products case, for example, the defendant could describe the product in question, the relevant circumstances of manufacturing and selling the product, and generally the circumstances of the incident. In a patent infringement case, the defendant could describe the patents in question and how they were not infringed by the defendant. Finally, in an employment

discrimination case, the defendant can describe the circumstances of plaintiff's termination or affected employment opportunity. The defendant may choose to address why plaintiff's pleaded causes of action do not have factual support.

**(b) Statement of the causes of action or defenses for which the party currently has factual support, setting forth the factual support for each.** The typical federal court complaint lists a garden variety of causes of action. Not every cause of action will have factual support, nor is this required under the rules. Rule 11 simply requires that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . ." Fed.R. Civ.P. 11(b)(3). Accordingly, while Rule 11 requires the plaintiff to conduct a pre-filing investigation, often many causes of action are pleaded without an underlying factual basis. The hope is that these causes of action will be supported by facts developed during discovery, or withdrawn before trial. This section requires the plaintiff to identify the causes of action on which it will primarily rely and provide factual support for each of the causes of action. Additional facts will obviously be developed during discovery, but plaintiff should provide opposing counsel and the court with available supporting facts at the outset. For example, in a typical products case, the plaintiff may allege that the product is defective in manufacture, design and warnings. If the plaintiff has factual support for a defective design claim, but no evidence of a defective manufacturing claims, that should be identified in the initial disclosure. This provision is not without precedent. The inquiry about what the plaintiff claims the defendant did or failed to do that entitles plaintiffs to relief is incorporated in "mandatory interrogatories" adopted by some districts.

Just as plaintiff must identify its principal causes of action, the defendant should identify its affirmative defenses and any factual support for each such affirmative defense. Again, this provision is not intended to bootstrap the defendant in any way. It will, however, provide the court with an understanding of what affirmative defenses are most critical, what facts support them, and legally how they may defeat plaintiff's claims. Some may argue that this is controversial in that the defendants must lay out and support

their defenses in the early stages of the case. The affirmative defenses, however, must be stated in the answer. This provision will allow the defendant to encourage the court to focus on particular defenses, either for discovery or for dispositive motions.

(c) **Description and computation of any category of damages, making available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered.** This disclosure relates only to plaintiff and is derived essentially from existing Rule 26(a)(1). It should not be too onerous for the plaintiff, in the early stages of the case, to set forth what is known about damages and injuries. Not only will this information provide an avenue for further discovery, it also allows for an early assessment of the stakes at issue in the case. This information will also be useful to the court in discharging its obligations under Rule 26(b)(2), where the court must balance the burden and expense of proposed discovery against its likely benefit.

(d) **Identification and production of any insurance agreement.** This provision is derived from existing Rule 26(a)(1)(D). This information should be readily available to the defendant. It is customary that this information be provided early in the process.

(e) **Production of documents that support the party's case.** One of the most problematic provisions of the existing rule is 26(a)(1)(B), which requires production of all materials "relevant to disputed facts alleged with particularity in the pleadings." It is almost inevitable that parties will, in good faith, disagree to some extent about what is or is not "relevant" in a given case. The rule thus incorporates, as its standard for production, an issue on which parties inevitably disagree. This invites mistrust, disputes and controversy, which perhaps explains why in most cases parties serve the same formal discovery regardless of whether "mandatory" disclosure has occurred (as a means to protect against a different construction of "relevance").

In contrast, each party is able to conclude for itself what documents support its case; no disputes or mistrust are



involved. Documents key to the parties' claims are thus produced, and such production will also help to highlight those documents the parties consider most supportive of their positions.

This initial production is intended to encompass only documents reasonably known and available to the party at this early stage of the case. The provision is not intended to preclude later production or claims that documents produced later in the case also support the party's claims or defenses.

This rule would not require the initial disclosure of nonsupportive documents. However, the adverse party will clearly request these documents through existing discovery mechanisms in any event. Second, parties often take the position that certain potentially nonsupportive documents are not "relevant" to the particular case at hand and thus would not produce them under the existing rule in any event. Finally, the meet-and-confer provision of this proposal (see below) provides an opportunity for the parties to voluntarily exchange "nonsupportive documents.")

(f) **Identification of witnesses.** This provision is derived from existing Rule 26(a)(1)(A), but is limited to witnesses currently known to have material evidence that supports the claim (for plaintiff) or the defenses (for defendants). The rationale is similar to that set forth above with respect to supporting documents.

The rule as currently drafted calls for identification of "each individual likely to have discoverable information relevant to disputed facts stated with particularity in the pleadings." This could require the identification of hundreds if not thousands of individuals. For example, if the allegation is that environmental contamination occurred due to poor handling practices at an industrial plant over a 20-year period, hundreds if not thousands of employees and former employees are arguably "likely to have discoverable relevant information." This imposes a substantial burden on defendants and does not materially assist the plaintiff in ascertaining helpful information.

b. Step 2 -- Meet and Confer (Rule 26(f)). Within 30 days of the date on which the initial disclosures were exchanged, the parties are to conduct a "meet-

and-confer" conference. This section of the proposal incorporates the basic provisions of Rule 26(f) but also modifies and expands them.

In this proposal, the meet-and-confer occurs after the initial disclosures. This is considered preferable to the current rule, which can result in the meeting before the initial disclosures and thus before the parties have a sound understanding of the opponent's case. Once the parties have had a chance to digest the information provided through the initial disclosure, they can more effectively discuss what else must be done.

In addition to the topics of discussion listed in Rule 26(f), the parties should be required to discuss the voluntary production of "nonsupporting documents." Based on the initial production of supportive documents, each party will have a better understanding of the type of documents maintained by the opponent and thus a basis to request voluntary production of additional documents. For example, in a defective car case, a defendant would likely produce supporting testing reports in its initial disclosure and plaintiff would then likely request any additional testing reports.

One of the disadvantages of the current Rule 26(f) is that, although the parties are required to confer on a number of subjects, only a limited amount of information is required to be included in the "Report of Parties' Planning Meeting." See, Form 35 to the Federal Rules of Civil Procedure. Essentially, the report requires information on pre-discovery disclosures, a discovery plan, and proposed deadlines. Not only should the parties be required to address a wide range of issues at the Rule 26(f) conference, but they should memorialize their discussions in a form that will be helpful to the court. By receiving this expanded information, the court can more effectively guide the parties through the case management and discovery phases.

It is desirable, therefore, to encourage counsel to meet to discuss the respective positions on various issues, including discovery. This should be done before undertaking formal discovery or invoking any judicial oversight. It is believed that the more information provided as part of this early meet and confer process, the more streamlined and efficient the process will become.

Consequently, this proposal includes a provision for a Proposed Scheduling Order to be submitted 15 days after the meet-and-confer conference. Cast as a proposed order, it adds the authority and mandate of the court to that to which the parties have agreed. In addition, it will provide an opportunity for the court to review the content of the initial disclosures to ensure appropriate detail has been included. A form for the Proposed Scheduling Order (adapted from Form 35) is attached as Exhibit A.

In essence, the Proposed Scheduling Order includes:

- information derived from both initial disclosures and the meet-and-confer;

- a listing of all documents initially exchanged;
- a list of all known witnesses that support the claim and defense;
- any proposed protective order (or competing proposals for same);
- any discovery plan (or competing proposals for same);
- this discovery plan may include a provision for future (or periodic) discovery conferences.

See Exhibit A.

c. Step 3 -- Rule 16 Scheduling Conference. Under this proposal, existing Rules 16(a) and 16(b) would be blended to require a mandatory conference with the court as soon as practicable after the filing of the Proposed Scheduling Order. The objectives of the conference include:

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will be protracted because of lack of management;
- (3) discouraging wasteful pretrial activity;
- (4) improving the quality of the trial through a more thorough preparation;
- (5) facilitating the settlement of the case;
- (6) establishing deadlines;
  - (a) to joint other parties;
  - (b) to amend pleadings;
  - (c) to file motions;
  - (d) to complete discovery;
- (7) ruling on proposed protective orders;
- (8) ruling on the proposed scheduling order; and

- (9) addressing other matters appropriate to the circumstances of the case, including the matters listed in Rule 16(c).

This proposal also ensures that the initial conference occurs only after the initial disclosures, and meet-and-confer have been completed and the resultant information incorporated into a proposed order. This enables both the parties and the court to discuss case management issues on a more informed basis, thus enhancing the quality and productiveness of the discussion.

d. Step 4 -- Formal Discovery. At any time, either party may serve interrogatories, requests for admissions and requests for production of documents as authorized by the scheduling order. Within the time allotted by the rules, each party shall respond or object to these requests. This entire process shall be governed by the existing discovery rules and practices. The parties shall pursue discovery diligently and attempt to resolve their differences amicably. In addition to pursuing paper discovery, either party may take depositions as authorized by the scheduling order.

e. Step 5 -- Discovery Conference. For cases where discovery problems are anticipated, the court may schedule periodic Discovery Conferences. This may be done in the initial scheduling order or by later order as the problems arise. If a case is subject to the discovery conference procedures, the following provisions would apply:

(1) Meet-and-confer. No later than 14 days before the conference, the parties shall confer to attempt to resolve any existing discovery disputes.

(2) Discovery Report. No later than 7 days before the discovery conference, the parties shall submit a discovery report to the court. The discovery report shall provide information in the following categories: (1) what written discovery has been exchanged; (2) what documents have been exchanged or made available for inspection and copying; and (3) what depositions have been taken. The discovery report shall address discovery issues both retrospectively and prospectively. In the retrospective sense, to the extent that there are lingering discovery disputes that are appropriate for judicial resolution, these disputes should be identified in the report. Both sides should state their respective positions on these discovery disputes. Supplemental briefing will be permitted, in the discretion of each party. Prospectively, the discovery report shall identify what, if any, additional discovery is sought by each party. The party seeking additional discovery should state why the additional discovery is necessary and appropriate under the rules. A party opposing such additional discovery shall state the basis of the opposition. The primary objective of the discovery report is to provide factual and legal information to the court so that the remaining course of discovery can be properly managed.

(3) Discovery Conference. The discovery conference serves several significant objectives. The first is to allow resolution of existing discovery disputes. To this extent, it is similar to a hearing on a motion to compel. The second significant objective is to define the course of future discovery. The court may entertain whether a party should be allowed another set of interrogatories, another request for admissions, or another request for production of documents. There may be some issue about the taking of additional depositions.

Under the existing Rules of Civil Procedure, the courts are authorized to limit discovery. Rule 26(b)(2) allows the court to limit discovery if it is determined that: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues. The problem is that too few judges enforce these limitations. Under this proposal, the discovery conference allows them an opportunity to do so.

At the discovery conference, the court may also invoke the protective order provisions of Rule 26(c) by ordering, among other things, that discovery not be had, that discovery may be conducted only on specified terms and conditions, that discovery may proceed only by a method of discovery other than that selected by the party seeking discovery, or that the scope of discovery be limited to certain matters. The court may also assess the expenses of discovery on one party or the other. The court may also be asked to address the scope of a party's duty to supplement under Rule 26(3). The discovery conference ought to encourage all parties to take reasonable positions in discovery. The court can deal with a discovering party's efforts to overreach with unreasonable discovery requests. It can also deal with a party's refusal to provide appropriate discovery under the rules. The court shall enter a discovery order, which memorializes its rulings and charts the course for the conclusion of discovery.

#### **IV. CONCLUSION**

Over the years, the bench and bar have had the opportunity to judge the effectiveness of various case management processes. The current proposal eliminates those procedures that have proven costly and ineffective, while preserving those that have promoted efficiency, economy and fairness. The proposal does not require a wholesale restructuring of the Federal Rules of Civil Procedure. Rather, it effects a fine-tuning of the process. Parties are required to conduct substantive discussions at an early stage of the proceedings. They are required to report to the court. The court must provide effective judicial management in an early scheduling conference, and, as necessary, a later discovery conference. It is not anticipated that significant additional judicial resources will be committed to this effort. Not all cases will be subject to the

discovery conference requirement. Additionally, the discovery conference may simply take the place of a hearing on a motion to compel. If a court's expectations are consistent and well articulated, the parties may be able to work through their discovery problems without the need of a discovery conference or other judicial oversight.

[Adapted from Form 35 of the Federal Rules of Civil Procedure]

IN THE UNITED STATES DISTRICT COURT  
\_\_\_\_\_ DISTRICT OF \_\_\_\_\_

_____	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Docket No. _____
	:	
_____	:	
	:	
Defendant.	:	

**PROPOSED SCHEDULING ORDER**

[The purpose of this questionnaire is for the parties to share basic information about the claims and defenses in this case and to propose a discovery plan. This information is to be used by the trial judge in managing the discovery and pretrial aspects of the case. It is understood that the case has recently been filed and, as discovery progresses and more information is gathered, the parties will have a better understanding of their respective positions. In completing this questionnaire, the parties should share the information presently known and attempt to narrow the claims, defenses and expected discovery.]

1. Pursuant to Fed.R. Civ.P. 26(f), a meeting was held on (date) at (place) and was attended by:

(Name) for plaintiff(s)  
(Name) for defendant(s) (party name)

2. Plaintiff's Statement of Case and Factual Bases of Claims.

a. Describe the incident(s) that lead to the filing of the case.

**EXHIBIT A**

[The purpose of this section is for plaintiff to set forth the factual basis of this lawsuit. Information to be provided includes identity of the plaintiff the relationship with the defendant, and a statement of the case. This section should be adapted to the particular type of case at issue, i.e., personal injury, commercial, discrimination, etc.]

b. Set forth precisely the causes of action for which you currently have factual support, setting forth for each cause of action what the defendant did or failed to do that entitles you to the relief sought for that cause of action.

[The court understands that plaintiff has likely included a number of causes of action in the complaint. In this section, the plaintiff should identify the causes of action for which there exists factual support, and candidly identify those causes of action for which factual support is either absent or incomplete. Plaintiff in doing so, is not waiving the right to pursue these causes of action or develop additional factual support for all pleaded causes of action.]

c. Provide a description and computation of any category of damages claimed by you, making available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered.

[The purpose of this section is to provide defendant with a description of the injuries and damages claimed by plaintiff adapted to the particular claims raised in the case. For example, in a personal injury case, plaintiff should set forth the nature and extent of the claimed injuries, their degree of permanence, the identity of health care providers who have treated plaintiff and the nature and extent of damages claimed by plaintiff.]



3. Defendant's Statement of Case and Factual Bases of Defenses.

a. If you are improperly identified, state your correct identification and whether you will accept service of an amended summons and complaint reflecting the correct identification.

b. State your version of the incident(s) that lead to the filing of the case.

[The purpose of this section is for the defendant to respond to the factual statement of the case provided by plaintiff. It is understood that the case is only recently filed and that defendant has perhaps not had an opportunity to describe itself its relationship with plaintiff and its factual response to what plaintiff claims that defendants did or failed to do that entitles plaintiff to the relief sought in the action.]

c. Set forth precisely the affirmative defenses for which defendant currently has factual support, and provide the factual support for each such affirmative defense.

[The court understands that the defendant may have set forth a number of affirmative defenses in the answer. In this section, the defendant should set forth those affirmative defenses for which defendant currently has factual support, and candidly identify those affirmative defenses for which factual support is currently absent or incomplete. Defendant, in doing so, is not waiving the right to pursue these affirmative defenses or develop additional factual support for all affirmative defenses.]

d. Identify, and produce for inspection and copying, any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

4. Plaintiff's Voluntary Disclosures.

a. What documents, data compilations and tangible things have you produced or agreed to produce to defendant.

[The purpose of this section, and the corresponding section for the defendant, is for each party to identify what materials it has voluntarily produced or agreed to produce to opposing counsel. The parties are encouraged to discuss their respective informal discovery requests and produce materials voluntarily in advance of the service of interrogatories, documents requests and requests for admission.]

b. What individuals with potential discoverable information have you identified by name, address and telephone number.

5. Defendant's Voluntary Disclosures.

a. What document, data compilations and tangible things have you produced or agreed to produce to plaintiff.

b. What individuals with potential discoverable information have you identified by name, address and telephone number.

6. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

a. Discovery will be needed on the following subjects: [brief description of subjects on which discovery will be needed.]

b. All discovery commenced in time to be completed by (date).  
[Discovery on (issue for early discovery) to be completed by (date).]

c. Maximum of \_\_\_\_ interrogatories by each party to any other party. [Responses due \_\_\_\_ days after service.]

d. Maximum of \_\_\_\_ requests for admission by each party to any other party. [Responses due \_\_\_\_ days after service.]

e. Maximum of \_\_\_\_ depositions by plaintiff(s) and \_\_\_\_ by defendant(s).

f. Each deposition [other than of \_\_\_\_\_] limited to maximum of \_\_\_\_ hours unless extended by agreement of parties.

g. Reports from retained experts under Rule 26(a)(2) due:

-- from plaintiff(s) by (date)

-- from defendant(s) by (date)

h. Supplementations under Rule 26(e) due (time(s) or intervals)).

7. Protective Order. Identify whether either party has insisted on the entry of a protective order under Fed.R. Civ.P. 26(c) and, if so, whether the opposing party has agreed or will agree to the entry of the requested protective order.

8. Recommendations of the Parties. Consistent with Rule 16(a), state whether parties have any recommendations on the following subjects:

a. How to expedite the disposition of this action.

b. How the court can establish early and continuing control so that the case will not be protracted because of lack of management.

c. How the parties can avoid wasteful pretrial activities.

d. How to improve the quality of the trial through more thorough preparation.

e. How to facilitate the settlement of the case.

9. Discovery Conference. State whether, by local rule or agreement of the parties, this case should be scheduled for a discovery conference under Fed.R. Civ.P. 16(d). If so, provide the following information.

- a. The discovery report will be filed by (date).
- b. The discovery conference will be held on (date and time).

10. Deadlines and Trial Date.

a. Plaintiff should be allowed until (date) to join additional parties and until (date) to amend the pleadings.

b. Defendant should be allowed until (date) to join additional parties and until (date) to amend the pleadings.

c. All potentially dispositive motions should be filed by (date).

d. Settlement [is likely] [is unlikely] [cannot be evaluated prior to (date)] [may be enhanced by use of the following alternative dispute resolution procedure:

\_\_\_\_\_].

e. Final lists of witnesses and exhibits under Rule 26(a)(3) should be due

-- from plaintiff by (date)

-- from defendant by (date)

f. Parties should have \_\_\_\_\_ days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).

g. The case should be ready for trial by (date) [and at this time is expected to take approximately (length of time)].

Date: \_\_\_\_\_



**LIMITATIONS ON DOCUMENT REQUESTS - RULE 34****I. EXECUTIVE SUMMARY**

- Rulings on document requests should always be based upon the relevance and proportionality of the requests.
  - The broad standard accorded to "relevance" in discovery matters often places no limits on discovery leading to overbroad requests.
  - Rule 26(b)(2) limitations on proportionality of discovery are most applicable to rule 34 document requests and should be expressly incorporated.
    - The burdens of document production can be extensive and should be limited when documents are only tangentially related to the case.
    - Courts should be encouraged to order less burdensome discovery or alternatively shift the burden of the costs associated with responding to expensive document production when the requested documents are only tangentially related to the case.
- Rule 34 should recognize that the requesting party has a duty to participate in the document production process.
  - Instead of using requests for production of documents as weapons to seek discovery sanctions, the requesting party should have a responsibility to participate in the process of identifying the documents it seeks.
  - Requiring attorneys to communicate and be involved in the process will increase the efficiency of producing documents and decrease the court's involvement in discovery disputes.
- Local rules are not being used to manage document production and express authorization needs to be added to rule 34.
- Rule 34 should recognize that special burdens exist with computerized or electronic documents and should specifically address those issues.

**II. PROPOSED RULE 34****Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes**

(a) **Scope.** Any party may serve on any other party a request, (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(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; provided, however, that prior to moving for an order under Rule 37(a) the moving party must have consulted with the objecting party concerning the specifics of the objections, made a good faith effort to obtain the documents without court action, and performed all of the duties set forth in section (e) below.

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.

(c) **Persons Not Parties.** A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.

(d) **Limits on Discovery.**

(1) The limitations on discovery provided for in Rule 26(b)(2) are expressly incorporated herein.

(2) Documents shall not be discoverable unless relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party.

(3) In addition to the mandatory limitations under Rules 34(d)(1) and (2) above, the court, in its discretion, may place limitations on the production of documents which are only potentially, conditionally or tangentially relevant or admissible in the case, as opposed to documents which are essential to the claims and defenses brought by the parties, including (i) ordering that discovery not be had; (ii) shifting the costs and attorneys fees related to the production of non-essential documents to the requesting party, especially in cases between parties of equal or similar financial condition; or (iii) ordering the parties to proceed with less expensive methods of discovery pending the requesting party's establishment of a need for the requested documents.

(e) **Duties of Requesting Party.** The requesting party has a duty to participate in the process of document production, including (i) describing requests with reasonable particularity, (ii) consultation with an objecting party concerning the scope of documents requested, (iii) narrowing or defining the scope of the requests where reasonable and practicable, (iv) identifying specific documents or categories of documents which have not been produced which are sought by the requesting party and are either known to or thought by the requesting party to exist, and (v) identifying the basis or source of information suggesting the existence of additional responsive documents.

(f) **Modification or Limitation By Local Rules.** These rules may be modified or limited by Local Rule, including the timing and circumstances for Rule 34 requests for production and the number of requests each party can make.

(g) **Computerized Documents.** Although computerized documents, such as databases, electronic mail, and other electronically stored information, are subject to production under Rule 34, when large quantities of computer data are responsive to requests or are in a form which makes the examination or production of such information overly burdensome or expensive, the court shall place limitations on the production of such materials consistent with Rule 26(b)(2)



and may, in its discretion, grant other protection, including (i) shifting costs and attorneys fees, especially in cases between parties of equal or similar financial condition; or (ii) ordering the production of only portions of the computerized documents which are located by relevant computer searches against the database. In addition, courts should grant special protection against the waiver of privilege by the production of certain privileged documents among large volumes of computer databases, where appropriate.

### III. DISCUSSION

#### A. INTRODUCTION AND HISTORY OF RULE 34

Prior to 1970, document productions under Rule 34 were more limited than other forms of discovery, requiring a showing of "good cause" before production of documents would be ordered. In 1964, the Supreme Court recognized that the showing of good cause was "not a mere formality" but rather was "a plainly expressed limitation on the use of the Rule." Schlagenhauf v. Holder, 379 U.S. 104 (1964); see generally 8A Wright, Miller & Marcus, Federal Practice & Procedure § 2205 (2d ed. 1994). Some courts viewed the "good cause" requirement as requiring that "special circumstances make it essential to the preparation of the moving party's case that the desired information be made available to him." See Federal Practice, supra, at 367 n.5 and accompanying text.

Since then, the scope, breadth, expense, and burden of document production has completely reversed its course. In 1970, Rule 34 was amended to eliminate the requirements of showing "good cause." Ever increasing demands for a broader and broader scope of documents, often characterized as "fishing expeditions,"<sup>8</sup> became the rule rather than the exception.

By 1983, the overuse of discovery, especially Rule 34 document requests, had reached such a point that Rule 26 was amended to "guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery . . ." 1983 Advisory Committee Note. Despite the amendment in 1983 to include the court's obligation to prohibit disproportionate discovery, the limitations of Rule 26(b)(2) have been virtually ignored. See, 8 Wright, Miller & Marcus, Federal Practice & Procedure § 2008.1, at 121 (2d ed. 1994) ("The paucity of reported cases implementing this amendment shows that no radical shift has occurred.")

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<sup>8</sup> Prior to 1970, broad discovery requests characterized as "fishing expeditions" were generally denied. See, e.g., Service Liquor Distr., Inc. v. Calvert Distillers Corp., 16 F.R.D. 344 (D.N.Y. 1954) (Rule 34 was not intended to allow fishing excursions); Tobin v. WKRZ, Inc., 12 F.R.D. 200 (D. Pa. 1952) (fishing expeditions could take place in interrogatories or depositions but not in Rule 34 request for documents).

In addition to the overuse of discovery requests, unfortunately Rule 34, in combination with Rule 37, has become an ever increasing device to obtain a tactical advantage in the case rather than a mechanism to obtain documents. Too often the tactic of plaintiff's attorneys is to wage a war against the credibility of a corporate defendant by attacking its document production. Instead of seeking to obtain the documents necessary to prepare for the trial of the case, Rule 34 document productions become the secondary battlefield where plaintiffs seek to criminalize the discovery process, attack the opposing attorneys, and cry "cover-up," in the hopes of receiving a sanction in the case and a damaging piece of the company's "history of discovery abuse" which will be used against it for the next quarter of a century.

This proposal discusses the mechanism by which the courts can once again reverse the time, expense, and burden on the courts and the parties by (1) enforcing reasonable limitations on the scope of document requests; and (2) focusing plaintiffs and defendants alike on mutual responsibilities of participating in the process of document production instead of focusing on ways to attack the opposing party.

B. RULINGS ON DOCUMENT REQUESTS SHOULD ALWAYS BE BASED UPON THE RELEVANCE AND PROPORTIONALITY OF THE REQUESTS

1. The Broad Standard Accorded to "Relevance" In Discovery Matters Often Places No Limits On Discovery Leading to Overbroad Requests

In Amcast Indust. Corp. v. Detrex Corp., 138 F.R.D. 115 (N.D. Ind. 1991), the court cited the problem: "The request in this instance represents not merely a 'fishing expedition,' but as one court described it, an effort to 'drain the pond and collect the fish from the bottom.'" Id. at 121 (quoting In re IBM Peripheral EDP Devices Anti-Trust Litigation, 77 F.R.D. 39, 41-42 (N.D. Cal. 1977)). Thus, to prevent overbroad discovery, courts must place some restraints on the scope of "relevance" in discovery.

a. Discovery Standard For Relevance

Rule 26(b) specifically requires that parties may obtain discovery that is "relevant to the subject matter involved in the pending action." Fed.R. Civ.P. 26(b)(1) However, the standard generally cited for relevance in discovery is whether a request "appears reasonably calculated to lead to the discovery of admissible evidence." Id. Rule 26(b)(1) makes this statement to indicate that documents need not be admissible to be discoverable. Although the scope of relevance for purposes of discovery should not be limited by the rules of evidence concerning admissibility (e.g., hearsay documents may not be admissible, but should be discoverable), there must be limits to relevance in discovery.

limits for Rule 34. And the subsequent provisions of Rule 26(b)(2) that require courts to limit discovery method when the courts determine that discovery is unreasonably cumulative, or the benefits of the proposed discovery are outweighed by the costs, appear to be directed to the scope of discovery in individual cases rather than to the management of cases generally, through local court rules.

This lack of explicit authorization to limit discovery request under Rule 34 is important, for at least one federal circuit court has held that local court rule restricting discovery under Rule 34 is in conflict with the Federal Rules of Civil Procedure, and thus invalid. Holloway v. Lockhart, 813 F.2d 874 (8th Cir. 1987). At issue in Holloway was a local rule which conditioned discovery requests for prisoner petitions on first obtaining leave of court. Id. at 874, 877. The Eighth Circuit stated that "[t]he conflict between the local rule, which requires leave of court before filing a request for production of documents, and Fed.R. Civ.P. 34(b) which permits such requests without leave of court, is clear. Accordingly, Local Rule 23(VIII)(B)(6) is invalid, and we so hold." Id. at 880. If this reasoning is applied to Rule 34 restrictions found in other local court rules, rules such as Rule 4.4 of the U.S. District Court for the Middle District of Georgia may similarly be held invalid, at least until the Federal Rules of Civil procedure are revised to explicitly allow the same kind of restrictions that are authorized for Rules 30, 33, and 36.

#### 6. Other Court Decisions Have Placed Few Restrictions on the Use of Rule 34

A second LEXIS search, of federal court decisions since 1970, revealed that there have been well over one thousand federal court cases addressing, or at least mentioning, Rule 34.<sup>19</sup> A review of 150 of these cases turned up no court decisions significantly limiting discovery under Rule 34. At the most, the courts have simply enforced existing limitations by insisting that parties adhere to the procedural requirements of the rules. See, e.g., R. W. Int'l Corp. v. Welch Foods, Inc., 937 F.2d 11, 16-17 (1st Cir. 1991) (denying Rule 37 sanctions against the possessor of documents until the requestor of documents has sought an order to compel production); Premier Resort Krabi, Ltd. v. Mohawk, Inc., Civ. No. 96-2128-EEO, 1997 U.S. Dist. LEXIS 373, at \*3,4 (D. Kan., January 14, 1997) (prohibiting parties from sidestepping Rule 34 procedures by requesting the production of documents in Notices of Deposition); Ledbetter v. United States, CA3 96-CV-0678-x, 1996 U.S. Dist. LEXIS 20039, at \*3,4, (N.D. Tex., December 18, 1996) (requiring that requests for documents be made formally before seeking an order to compel production); Schartz v. Unified School Dist. No. 512, Civ. No. 95-2391-EEO, 1996 U.S. Dist. LEXIS 19123, (D. Kan., December 18, 1996) (finding a violation of Rule 34 where a request for documents used language that was too general or all-encompassing); and Schwartz v. Marketing Publishing Co., 153 F.R.D.

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<sup>19</sup> The LEXIS search was done in the GENFED library, NEWER file, which picks up all federal court cases since 1944. 1970 was the year that Rule 34 was amended to eliminate the good cause requirement.

16, 21 (D. Conn. 1994) (denying an order to compel production for documents that were requested only informally, instead of according to the procedures set out in Rule 34).

Thus, local courts are authorized to make and amend rules in ways not inconsistent with the Federal Rules of Civil procedure (see Fed.R. Civ.P. 83), and to limit discovery requests by order or local rule (see Fed.R. Civ.P. 26(b)(2)). But to date, with few exceptions, the courts have not used local court rules to significantly limit discovery requests under Rule 34. Local court rules affecting Fed.R. Civ.P. 34 are as likely to liberalize discovery as to limit discovery. It is possible that local rules implementing limits significantly more restrictive than those found in Rule 34 would be held to be inconsistent with Rule 34, and thus invalid, because local court restrictions on Rule 34 have not been explicitly authorized. See Fed.R. Civ.P. 26(b)(2); Holloway v. Lockhart, 813 F.2d 874, 880 (8th Cir. 1987). Court decisions demonstrate a willingness on the part of the courts to enforce the procedural requirements of Rule 34, but show little if any initiative to impose more substantial limits on Rule 34 discovery. It seems likely that changes will need to be made to existing Rules 26-34 before the courts will be authorized, and willing, to place more significant limitations on the use of discovery under Rule 34.

**E. RULE 34 SHOULD RECOGNIZE THE SPECIAL BURDENS RELATED TO COMPUTERIZED DOCUMENTS AND DATA COMPILATIONS AND PROVIDE SPECIFIC GUIDELINES FOR ADDRESSING THOSE ISSUES**

In 1970, Rule 34(a) was amended to expressly include computer or electronic documents including in the definition of documents: "other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." Even back in 1970, the Advisory Committee noted that there may be unique issues concerning burden and expense related to computer databases and electronic documents:

The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden of expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.

Committee Note, 48 F.R.D. at 527.

The foresight of the committee in recognizing in 1970 that the costs and burdens associated with searching for and producing computerized documents may take on unique challenges needing limitations was not misplaced. With technology leaping generations every few years, the use and storage of information by computerized or

electronic media has expanded exponentially. Documents, which in 1970 would have filled a warehouse, can now be stored on a single data cartridge. Additionally, documents are not only knowingly maintained, but computers often create, through back-up mechanisms, and maintain unknown copies of archived information. Furthermore, documents maintained on back-up data files are often randomly created and difficult to search or index. Thus, even when an active database is deleted, computers may maintain back-up files which are randomly stored and organized. Thus, a party may have documents it is not even aware of.

As we move into the information age, the explosion in the capacity to retain information on computer databases raises significant issues related to how documents are to be produced in the future. While data may be more easily stored, it may not be easy or inexpensive to review or produce.

For example, the five boxes of documents in a corporate client's office may expand to an equivalent of ten thousand boxes when a data cartridge containing some responsive material is discovered. At first glance, it would seem easy to produce - simply copy the data cartridge and turn it over. However, it is then discovered that the data cartridge also contains irrelevant information, trade secret information, other personal and confidential information, and even privileged information. Thus, the production of the data cartridge could result in the loss of trade secrets, confidential information, and privileges. On the other hand the cost of reviewing every page of each document on the database may cost over a million dollars. This is a real situation many corporations are currently facing.

The problem is compounded when liberal interpretations of "relevance" are utilized in measuring discoverability; strict views of waiver of privilege are applied; and general notions that a party should bear the expense of producing documents. Thus, there are challenging issues related to computerized documents which courts and litigants now face, and the issues will dramatically increase in the years to come.

Despite the explosion of the increased capacity to retain information on computerized media since 1970, there have not been any changes to the Federal Rules of Civil Procedure addressing the unique issues raised. DRI proposes that certain limitations, at a minimum, should be expressly recognized. many of which were originally recognized back in 1970.

First, the rules should recognize that computer documents create unique issues, especially concerning the massive quantity of information at issue and the expense of producing such information. Therefore, a separate provision of Rule 34 should be created to address computerized documents, which can be modified and amended as future issues are raised.

Second, courts should be given the express authorization to shift costs associated with computerized documents when appropriate. Computerized documents are highly

likely to be the types of documents that contain small portions of relevant information, within a much larger bank of information.<sup>20</sup> Thus, courts should be encouraged to utilize cost shifting as a mechanism to increase the efficiency of such searches.

Third, the rules should recognize that computer aided searches may be the most appropriate method for searching computerized documents for responsive information. Thus, a requesting party may be requested to identify various search commands that it seeks, and the producing party can conduct such searches and produce the responsive information found.

Finally, the rules should recognize that historical views of waiver of privilege should not apply in the same manner to computerized materials as to other written documents. When the only economical way to produce computerized materials is in mass, the inadvertent production of documents among millions of documents on computer databases should be not be viewed as a voluntary waiver and loss of privilege.<sup>21</sup>

#### IV. CONCLUSION

The greatest burden currently being placed on parties in the discovery process is the ever expanding scope of document productions. The standard for "relevance" has generally been broadly construed, the limitations under Rule 26(b)(2) have been sparingly applied, and the explosion of electronic and computerized documents has tremendously expanded the quantities of potential documents available. It is time to reign in the cost and expense currently being assessed against corporate America during the discovery process. DRI's proposals are submitted to address these problems and burdens in a fair and even-handed manner.

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<sup>20</sup> Some courts have already recognized fee shifting to be appropriate related to the production of computerized documents. See In re Air Disaster at Detroit Metro. Airport, 130 F.R.D. 634 (E.D. Mich. 1989); Adams v. Dan River Mills, Inc., 54 F.R.D. 220, 222 (W.D. Va. 1972); Penk v. Oregon Stat Bd. of Higher Education, 816 F.2d 458 (9th Cir. 1987); Pearl Brewing Co. v. Jos. Schlitz Brewing Co., 415 F. Supp. 1122 (S.D. Tex. 1976).

<sup>21</sup> The problems associated with producing computerized documents are currently being addressed differently by the courts. See e.g. CIBA-Geigy Corp. v. Sandoz, 916 F. Supp. 404 (D.N.J. 1995) (court held that the party waived the privilege of certain documents by producing a corporate database which contained certain privileged documents); United States v. Keytone, 885 F. Supp. 672, 676-77 (M.D. Pa. 1994) (court held that the party unknowingly waived the privilege for certain privileged e-mail messages by inadvertently producing them in discovery); but see Transamerican Computer Co. v. IBM, 573 F.2d 646 (9th Cir. 1978) (no waiver by inadvertent production).

D-V

## REVIVING THE PRESUMPTION AGAINST SANCTIONS AND CREATING A REASONABLE SAFE HARBOR PROVISION UNDER RULE 37

### I. EXECUTIVE SUMMARY

- There is a presumption that any objection to discovery is unjustified and should be sanctioned. Unfortunately, that presumption is squarely within the four corners of Rule 37. While initially providing a necessary incentive, this presumption of abuse has long run its course.
- The solution to this problem is to eliminate the presumption of discovery abuse from sections (a), (b) and (d) of Rule 37. The proposed amendment would retain the "substantial justification" standard currently used in the Rule, while converting the Rule to a rebuttable presumption against sanctions. Specifically, the proposed amendment would provide that the court shall sanction a party by requiring payment of the prevailing counsel's expenses and attorney's fees, if and only if the party's actions were "without substantial justification."
- As discovery becomes increasingly contentious and sanctions become more frequent and more severe, the role of Rule 37 in discovery becomes crucial. Recognizing such, it is critical that the Advisory Committee address the lack of specificity and guidance in Rule 37(b)(2). Establishing provisions that create minimal safeguards and that codify the well-reasoned decisions that provide some level of consistency is paramount to conforming Rule 37 to a practical rule that ensures fairness, symmetry and certainty in its application.
- The solution to this problem is to adopt an amendment that is an even-handed structural approach to codifying the better reasoned decisions addressing sanctions under Rule 37(b)(2). Additionally, it should create a "semi-safe" harbor provision for "active" "good-faith" efforts at compliance that is not so impregnable or irrebuttable so as to encourage abusive discovery tactics. It should also establish safeguards that employ the generally accepted restraints fundamentally necessary to a consideration of litigation-ending sanctions.



II. PROPOSED RULE 37 and ADVISORY COMMITTEE NOTES

A. Proposed Rule 37:

Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion for Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court. An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, and the court finds that the movant made a good faith effort to obtain the disclosure or discovery without court action, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless only if the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery, without court action, or that the opposing party's nondisclosure, response, or objection was without substantial justification ~~substantially justified, or that~~ and no other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless only if the court finds that the making of the motion was without substantial justification ~~substantially justified, or that~~ and no other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(a) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. Such sanctions shall only be imposed against a party or person, however, if the court finds that the party's or person's actions were without substantial justification.

(b) Failure to comply with order

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person

designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may, in accordance with section (b)(3) of this rule, make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A),(B), and (C) of this subdivision, unless the party failing to comply shows that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless only if the court finds that the making of the motion was without substantial justification ~~substantially justified, or that~~ and no other circumstances make an award of expenses unjust.

### (3) Limitations on Sanctions

(i) General Sanctions. Sanctions may be imposed upon a party or person under subdivision (b)(2) only if the court finds that the party's or person's failure to comply with an order was without substantial justification, unless other circumstances would make the imposition of

sanctions unjust. In considering the appropriate sanction, the court should consider: (1) the efficacy of less drastic sanctions; and (2) the degree of prejudice to the adversary.

(ii) Severe Sanctions. In addition to the findings in subsection (a), sanctions of dismissal, default judgment, or other litigation-ending sanction, shall not be imposed unless, upon a showing of clear and convincing evidence, the court finds: (1) the noncomplying party acted willfully or in bad faith; and (2) the noncompliance substantially prejudiced the adversary. In assessing the appropriateness of such sanction, the court shall also consider: (1) the meritoriousness of the claim or defense involved; (2) whether the party was warned that failure to comply would lead to dismissal or default; (3) the public policy favoring disposition of cases on their merits; and (4) the efficacy of less drastic sanctions.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b) (2) of this rule and may include informing the jury of the failure to make the disclosure, provided that the sanctions imposed under this provision shall comport with subdivision (b)(3).

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall not make the order unless if it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (b) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) **Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.**

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule, provided that the sanctions imposed under this provision shall comport with subdivision (b)(3). Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure ~~unless only if the court finds that the failure was~~ without substantial justification ~~substantially justified or that~~ and no other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) [Repeated. Pub.L. 96-481, Title II, § 205(a), Oct. 21, 1980, 94 Stat 2330]

(g) **Failure to Participate in the Framing of a Discovery Plan.** If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

(h) Safe Harbor Provision. There is a rebuttable presumption that a party's or person's conduct does not constitute a lack of substantial justification if: (1) the party made an active good faith effort to comply; or

(2) the noncomplying party timely raised the discovery issue and brought it to the opposing party's or court's attention for disposition within the time deadlines of the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure.

## B. PROPOSED ADVISORY COMMITTEE NOTES

### 1. Response to Request For Production of Documents

A rebuttable presumption in favor of "substantially justified" conduct and "active good faith" by a party should exist if a party responding to a request for production of documents has performed the following:

- (a) Timely provided a response to a request for production of documents, specifically identifying documents which have been or will be produced and identifying specific objections to the objectionable requests;
- (b) Conducted a reasonable search for non-objectionable documents, consisting of:
  - (1) investigation of persons likely to have possession of responsive documents; and
  - (2) making a request for materials from persons or employees of party likely having responsive materials;
- (c) produced non-objectionable, responsive documents discovered in the search;
- (d) Upon request by the requesting party, has met and conferred concerning the scope of the production request; and
- (e) supplemented documents of any additional responsive documents within a reasonable time of discovery their existence.

### 2. Interrogatory Responses

A rebuttable presumption in favor of "substantially justified" conduct and "active good faith" should exist if a party responding to interrogatories has performed the following:

- (a) Timely provided a response to the interrogatory, specifically identifying specific objections and providing responsive answers to the non-objectionable portions of the interrogatory;
- (b) Investigation of persons and documents likely to have information responsive to the interrogatory;
- (c) Upon request by the requesting party, has met and conferred concerning any objections to the interrogatories; and
- (d) provided supplementation to any interrogatory within a reasonable time of any additional responsive information.

### III. DISCUSSION

#### A. INTRODUCTION

Courts are becoming increasingly impatient with refereeing contentious discovery disputes. At the same time, hiding behind the truism that the discovery rules must be liberally construed, parties continue to stretch the permissible bounds of discovery. Efforts to preserve fundamental fairness and reason by defining sensible limitations to the scope of discovery are becoming increasingly difficult. The task is made all the more difficult by the unlimited access to the discovery of millions of electronic files in the corporation's computer database. As truculent discovery disputes become the norm, substantial monetary and litigation-ending sanctions are becoming common place. As a result, attempts to criminalize the discovery process are being fueled by a strong incentive and met with growing success.

In this environment, despite all efforts by a responding party to set forth good-faith objections and reasonable limitations, discovery disputes are difficult to avoid. Propounding parties, faced with these incentives, are too quick to cry foul, and routinely attack the response as a matter of course. This often forces corporate defendants into a Hobson's choice of caving-in to baseless claims of discovery abuse, or facing the real possibility of severe sanctions if the dispute is brought before the court. Rule 37 as currently drafted exacerbates these problems in two significant ways.

First, there is a presumption that any objection to discovery is unjustified and should be sanctioned. Unfortunately, that presumption is squarely within the four corners of Rule 37. While initially providing a necessary incentive, this presumption of abuse has long run its course.

Second, as discovery becomes increasingly contentious and sanctions become more frequent and more severe, the role of Rule 37 in discovery becomes crucial.

Recognizing such, it is critical that the Advisory Committee address the lack of specificity and guidance in Rule 37(b)(2). Establishing provisions that create minimal safeguards and that codify the well-reasoned decisions that provide some level of consistency is paramount to conforming Rule 37 to a practical rule that ensures fairness, symmetry and certainty in its application.

## B. RULE 37

### 1. The History of Rule 37

Rule 37 establishes procedures for ensuring compliance with the discovery provisions set forth in Rules 26 to 36. The intent of the rule is to "provide generally for sanctions against parties or persons unjustifiably resisting discovery." Fed.R. Civ.P. 37 advisory committee notes (1970 amendments).

The Rule was originally adopted in 1938, and was entitled "Refusal to Make Discovery; Consequences." See generally Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2280 (1994).

Under this initial draft of the Rule, courts were required to impose sanctions such as expenses and fees, if and only if it found that the defeated party acted "without substantial justification." Fed.R. Civ.P. 37 (1938). Given this formulation of the Rule, despite its clear allowance for sanctions, courts were reluctant to impose the sanctions on parties or counsel. See Fed.R. Civ.P. 37 advisory committee notes (1970 amendments); Ryan, Hazards of Vexatious Conduct in Litigation, 30 Def. L.J. 123, 129 (1981); Note, Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process, 44 U. Chi. L. Rev. 619, 629 (1977). When sanctions were imposed, they generally served a remedial function. Moreover, sanctions as a whole were substantially less severe and were not offered to punish parties in the name of deterrence.

For 32 years after its adoption, with the exception of one insignificant amendment in 1949, Rule 37 stood virtually unchanged.

### 2. The 1970 Amendment to Rule 37

Experience demonstrated a number of defects in the rule, and in 1970 the Supreme Court adopted several amendments to address these issues. Fed.R. Civ.P. 37 advisory committee notes (1970 Amendment) ("Experience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed.").

One of the perceived 'defects' originated from the Rule's incorporation of provisions for both the 'refusal' and the 'failure' to properly respond to discovery. While the Supreme Court made clear in 1958 that there was no distinction between these terms, Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v.



Rogers, 357 U.S. 197, 207 (1958), lower courts continued to conclude that certain good faith 'failures' did not amount to sanctionable 'refusals.' See, e.g., Hinson v. Michigan Mut. Liability Co., 275 F.2d 537 (5th Cir. 1960); Kearns v. Seven-Up Co., 30 F.R.D. 333, 334 (D.C. Pa. 1962).

To address this issue and put an end to the controversy, the 1970 amendments to Rule 37 replaced all references to 'refusal' to comply, with 'failure' to comply. This change made clear that under Rule 37, even innocent parties acting in good faith could be subject to sanctions.

The 1970 amendments also addressed another perceived defect – the reluctance of the courts to impose sanctions under Rule 37 to address the problem of discovery abuse. As the Advisory Committee made clear, while the existing provisions of Rule 37 provided the requisite authority to impose sanctions for expenses and fees, courts had nevertheless displayed an unwillingness to do so.

The present provision of Rule 37(a) that the court shall require payment if it finds that the defeated party acted without "substantial justification" may appear adequate, but in fact it has been little used. Only a handful of reported cases include an award of expenses, and the Columbia Survey found that in only one instance out of about 50 motions decided under Rule 37(a) did the court award expense. It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary.

Fed.R. Civ.P. 37 advisory committee notes (1970 amendments).

To address this reluctance on the part of the judiciary to sanction discovery abuse, the Rule was explicitly amended to create an incentive within the rule to "encourage" courts to impose the sanctions available under Rule 37. Id. ("the change in language is intended to encourage judges to be more alert to abuse occurring in the discovery process ... it presses the court to address itself to abusive practices").

In considering an amendment to provide this encouragement, the Committee was faced with the growing perception that most discovery disputes implicitly involved some level of discovery abuse. This presumption of guilt of discovery abuse found its way squarely into the amendment to the Rule.

The Committee was ultimately convinced that with the growing prevalence of discovery abuse, and the reluctance of courts to impose sanctions, the rule should be amended to encourage courts to "ordinarily" impose the sanction of costs and fees whenever they were forced to resolve a discovery dispute. Id. ("[t]he proposed change provides in effect that expenses should ordinarily be awarded unless a court finds that

the losing party acted justifiably in carrying his point to court"). While the Committee elected to retain the "substantial justification" language to protect against unwarranted sanctions, it shifted the burden towards a presumption of guilt of discovery abuse, regardless of the good faith nature of the challenge. *Id.* (the amendment "places the burden on the disobedient party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust").

The rule as amended in 1970 provided, as it does today, that expenses and fees "shall" be awarded "unless ... the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust." Fed.R. Civ.P. 37(a), (b) and (d).

### 3. The Effect of Presumptive Sanctions and the Criminalization of Discovery

With the 1970 amendments, the standard of "substantial justification" remained, and aside from some added encouragement, the courts' general authority to sanction under Rule 37 went unchanged. The amendments' clarification that the innocent failure to comply with discovery would be sanctionable, combined with the shift in the burden towards a presumption of discovery abuse, accomplished the immediate effect the Advisory Committee set out to achieve -- sanctions in civil litigation under Rule 37 exploded during the 1980s in an effort to control discovery abuse.

Over the course of the last twenty five years, however, the fundamental goal of the amendments has been lost. A variety of changes in the discovery landscape have resulted in a Rule that needs immediate fixing. With the vast expansion in the scope of permitted discovery, the overall breadth of discovery available as a result of the use of computer databases, and the rise in severity of sanctions that have become a regular fixture in discovery disputes, the amendments to Rule 37 have ultimately fueled an unintended fire of satellite litigation over discovery sanctions.

Contending that the rules of procedure must be liberally construed, parties continue to expand the scope of discovery, seeking almost any topic even remotely related to their allegations or the conduct the opposing party. At the same time, as discovery attempts to keep pace with technology, corporate defendants are being required to review, analyze and produce millions of electronic files, in addition to the sometimes overwhelming production of ordinary documents. In addition, plaintiffs in different litigation against the same corporation are collaborating more than ever by pooling documents and sharing responses to discovery requests -- all in the purported name of verifying "full disclosure." See, e.g., Francis H. Hare, Jr., et al., Full Disclosure: Combating Stonewalling and Other Discovery Abuses, pp. 166-67 (1994) (encouraging this practice among plaintiffs as a means to flush out suspected discovery abuse and obtain judicial sanctions against corporate defendants). All of this makes it increasingly easy for parties to raise suspicions and fears of discovery abuse.

Indeed, despite the massive amounts of documents being produced, often in several litigation matters at once, any perceived inconsistency between an interrogatory answer in one case and an interrogatory answer in another case can become the basis of a claim of "evasion." Any distinction between the documents produced in once case and the documents produced in another can become the basis of a claim of "suppression."<sup>22</sup> In short, plaintiffs are becoming too familiar with the opportunity to consistently cry foul.

Facing this, parties and courts no longer need a rule that presumes discovery abuse in every dispute and strongly encourages sanctions with little or no guidance or certainty. Today, the unchecked allowance for increasingly severe sanctions and the general shift of burdens under Rule 37 has simply added to the problem by arming counsel with ammunition with which to pursue needless and unnecessary claims of discovery abuse. Moreover, at a time where many parties are already adept at pointing the discovery finger as a tactical measure, the problems are compounded by the severe types of litigation-ending sanctions that have become common place conclusions to discovery disputes brought before frustrated courts.

Under the existing provisions of Rule 37, the corporate defendant faces considerable uncertainty given the absence of any consistency in the various circuit's approach to imposing sanctions. These parties also face a real possibility that without prior notice, and despite the absence of any willful failure to comply or appropriately respond, their answer will be struck or they will be sanctioned so heavily that the verdict seems insignificant.

Left unrestrained, and devoid of any guidance, Rule 37 will continue to spurn wasteful and costly satellite litigation regarding the imposition of sanctions. Rule 37 should not continue to provide an unneeded incentive in a time when discovery is becoming a tactical weapon aimed at the chance of obtaining these powerful sanctions against corporate defendants.

While the original intent of the 1970 amendments was to make clear to the judiciary that the rules should not shield defendants from sanctions, it was never intended that the amendments should ultimately function as a sword for plaintiff's anxious to take advantage of increasingly powerful sanctions.

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<sup>22</sup> Aggressive plaintiffs counsel contend, for example, that: "[p]roducts liability defendants routinely produce different information and documents to different plaintiffs who have asked identical questions, even though one law firm usually serves as a national litigation coordinator and clearinghouse for each type of case. The different responses and documents are convincing evidence of the defendant's bad faith approach to discovery." James E. Butler, Jr. & Patrick A. Dawson, The Bench as Battleground: The Discovery Process is Broke and Only Judges Can Fix It, 21-22 (1992).

4. DRI's Proposed Amendments Are Intended To Provide Safeguards for Imparting Symmetry, Certainty and Fairness into Rule 37(b)(2)

This article proposes reasonable amendments to Rule 37 that address this growing problem: (1) the removal of the presumption of discovery abuse from sections (a), (b) and (d); and (2) the codification of reasonable standards for assessing the appropriate severity of the sanction to be imposed; and (3) the creation of a reasonable, but rebuttable, safe harbor provision. These amendments are intended to restore symmetry to the rule's application, reduce satellite litigation, and codify the better-reasoned safeguards that are currently being employed in a majority of the circuits.

At the outset, the proposed amendment adopts the "substantial justification" standard currently employed throughout the Rule. It also requires the court in selecting an appropriate sanction to at least consider: (1) the efficacy of a less drastic sanction; and (2) the prejudicial effect upon opposing counsel.

The proposed amendment goes on to specifically limit the entry of a dismissal, default judgment or other litigation-ending sanctions to instances where the court finds by clear and convincing evidence that: the noncomplying party acted willfully or in bad faith, and the noncompliance substantially prejudiced the adversary. It further codifies certain additional considerations noted above that should be addressed by the court prior to the imposition of such severe sanctions.

Finally, the proposed amendment creates a rebuttable presumption that sanctions are not warranted under the "substantial justification" standard if a party makes an "active good-faith effort to comply" with the order or discovery requests at issue or, alternatively, affirmatively raises the existence of the discovery issue with the opposing party or the court for resolution. The proposed advisory committee note also provides guidance of the types of conduct that should give rise to a rebuttable presumption of "substantial justification" or "active good-faith effort to comply" when responding to Rule 33 and Rule 34 discovery requests.

C. REVIVING THE PRESUMPTION AGAINST SANCTIONS

The shift in burdens to a presumption of discovery abuse provided a necessary incentive at the outset. This amendment to Rule 37 served its role of encouraging the judiciary to sanction parties to reduce discovery disputes. With a judiciary that is now well aware of its ever expanding authority to sanction, however, the presumption of abuse under Rule 37 is unwarranted. In today's litigation climate, where it has become too easy to cry foul, and too difficult to ensure that reasonable good faith efforts will avoid undue sanctions for discovery, the incentive under Rule 37 has shifted from encouraging parties to provide full and fair disclosure, to providing additional encouragement to parties to seek sanctions with claims of discovery abuse.

The solution to this problem is to eliminate the presumption of discovery abuse from sections (a), (b) and (d) of Rule 37. As delineated above, this amendment would retain the substantial justification standard, while converting the rule to a rebuttable presumption against these sanctions. Specifically, the proposed amendment would provide that the court shall sanction a party by requiring payment of the prevailing counsel's expenses and attorney's fees, if and only if the party's actions were "without substantial justification." See Proposed Amendments to 37(a)(4), 37(b)(2), and 37(d) above. This would be consistent with the presumption recently employed under section (g) of Rule 37 which provides that expenses and fees "may" be awarded "if a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan ..." Fed.R. Civ.P. 37(g).

Notably, removing this presumption does not dilute the authority of the court to sanction. Such authority lies squarely within the provisions of Rule 37. As Judge Charles Renfrew explained, "[t]he basic cause of the underutilization of sanctions is not their unavailability but the courts' unwillingness to use them." Renfrew, Discovery Sanctions: A Judicial Perspective, 67 Calif. L. Rev. 264, 271-272 (1979). While this unwillingness to impose sanctions warranted an incentive under the 1970 amendments, the removal of the presumption as suggested herein will do little to quiet courts clear willingness to sanction parties today. Any level of unwillingness on the part of the judiciary has long been removed, and the need for an incentive is gone. Under the current circumstances, a more balanced Rule 37, devoid of a negative presumptions or incentives, is more appropriate.

In short, a party's conduct in responding to discovery in complete good faith, by providing reasoned and responsible disclosures, should no longer be presumed to be sanctionable, such that a party should be required to pay costs. Reviving the presumption against a sanction of costs for all discovery disputes, as provided for under the original draft of Rule 37, will allow a party to presume that reasonable and good faith conduct will not result in unwarranted costs being imposed upon counsel or the client. This is significant at a time when it is becoming more and more difficult for even the most ethical of corporate defendants to avoid discovery disputes and unwarranted sanctions.<sup>23</sup>

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<sup>23</sup> For example, under the current version of Rule 37, the court in LFE corp. v. Drytek, Inc., 36 FR Serv 2d 985 (DC Mass 1983), held that despite the fact that the defendant's objections to several of plaintiff's discovery requests were made in good faith, and despite the fact that the parties had resolved their differences as to seven of the eleven discovery requests to which objections had been made, an award of expenses as a sanction under Rule 37(a)(4) was appropriate. While the defendant's good faith in opposing the motion was not doubted, the court nevertheless held that the defendant's objections were not justified to the extent necessary to avoid such an assessment under Rule 37.

## D. CODIFICATION OF STANDARDS FOR SEVERITY OF SANCTIONS

### 1. Asymmetry and Uncertainty in Rule 37(b)(2)

Left unchecked, Rule 37(b)(2) has become an unpredictable source for the application for severe sanctions on parties who are deemed to have failed to comply with discovery orders and requests. In its present form, Rule 37 authorizes courts to impose sanctions "as are just." Fed.R. Civ.P. 37(b)(2)(A). While the rule sets forth examples of sanctions which may be considered in the courts' discretion, there are neither specific limitations nor reasonable guidelines for the imposition of such sanctions.

While this presented little problem in 1935 when the rule was adopted, and in 1970 when the rule underwent its last substantial modification, the rule is no longer used to guide a judiciary that is reluctant or unwilling to impose sanctions. Federal courts across the country are increasingly quick to impose severe sanctions which they deem just under Rule 37(b)(2). See, e.g., National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (endorsing, even encouraging, other courts to utilize the extreme sanction of dismissal when appropriate, adding that such sanctions must be available not merely to penalize the offending party but to deter others who are tempted to engage in similar conduct)<sup>24</sup>; Philips Medical Sys. Int'l B.V. v. Bruetman, 982 F.2d 211 (7th Cir. 1992) (\$19 million default judgment entered for plaintiff; defendant's counterclaim dismissed); Frame v. S-H, Inc., 967 F.2d 194 (5th Cir. 1992) (\$10.2 million default judgment remanded for hearing on damages; liability determination upheld); Adriana Int'l Corp. v. Thoeran, 913 F.2d 1406 (9th Cir. 1990), cert. denied, 498 U.S. 1109 (1991) (default judgment in excess of \$8 million).

The asymmetry and lack of uniformity which has developed across the circuits, while not surprising given the absence of any guidance under the rule, is at best troubling. Parties, and particularly corporate defendants who often face litigation in several circuits, face uncertainty and speculation regarding the potential for the various sanctions. Actions which warrant a standard sanction in one circuit may lead to most severe sanction in another.

### 2. Severity in Rule 37(b)(2)

The absence of uniformity and certainty in the application of the rule is most concerning in the context of the court's increasing willingness to impose litigation-ending sanctions. As the Fifth Circuit recently warned, such sanctions involve a "question of life or death, or to be or not to be ... We are thus loath to approve of the dismissal of a case as a sanction ... without evidence of the maleficent conduct that justifies death." FDIC v. Conner, 20 F.3d 1376, 1381, 1383 (5th Cir. 1994).

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<sup>24</sup> National Hockey dramatically shifted the previously permissible justifications for imposing sanctions by encouraging courts to impose harsh sanctions for deterrence purposes.

While several circuits have articulated specific factors that must be considered in imposing these sanctions upon litigants who fail to comply with discovery orders and requests, other circuits have failed to identify any reasonable guidelines. The First, Second, Seventh, Eighth and Eleventh Circuits have yet to articulate a specific set of standards.<sup>25</sup> Even among the circuits that have delineated standards, no single approach is followed by more than one circuit.<sup>26</sup> As recently described by one commentator, the imposition of sanctions has essentially become "a game of chance -- a roll of the dice." Jodi Golinsky, The Second Circuit's Imposition of Litigation-Ending

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<sup>25</sup> For a detailed discussion of the general approaches adopted by these circuits, see Jodi Golinsky, The Second Circuit's Imposition of Litigation-Ending Sanctions For Failures to Comply With Discovery Orders: Should Rule 37(b)(2) Defaults and Dismissals Be Determined by a Roll of the Dice?, 62 Brook. L. Rev. 585 (1996). Golinsky notes that the First Circuit strictly construes Rule 37(b)(2), favors adherence to the National Hockey general deterrence doctrine, and encourages the use of litigation-ending sanctions when necessary. Id. at 598. After reviewing numerous decisions, she notes that it is difficult to determine what type of misconduct will be deemed sufficient to warrant litigation-ending conduct in the Seventh Circuit. Id. at 599. The Eighth Circuit's imposition of such sanction is policy driven, and the cases reveal that courts must review less severe sanctions unless the party's failure was deliberate or in bad faith. Finally, the Eleventh Circuit appears to clearly require a finding of wilfulness for the imposition of such sanctions.

<sup>26</sup> The Circuits that have explicitly set out factors to be considered in this analysis have adopted the following approaches: **3rd Circuit**: (1) extent of party's personal responsibility; (2) prejudice to adversary; (3) history of dilatoriness; (4) wilfulness or bad faith; (5) effectiveness of lesser alternative sanctions; and (6) meritoriousness of claim or defense - see, e.g., Harris v. City of Philadelphia, 47 F.3d 1311, 1330 n.18 (3d Cir. 1995); **4th Circuit**: (1) existence of bad faith; (2) amount of prejudice to the adversary, which necessarily includes an inquiry into the materiality of the evidence not produced; (3) the need for deterrence of the particular sort of noncompliance; and (4) the effectiveness of less drastic sanctions - See, e.g., Mutual Fed. Sav. and Loan Ass'n v. Richards & Assocs., Inc., 872 F.2d 88, 92 (4th Cir. 1989); **5th Circuit**: (1) existence of wilfulness or bad faith accompanied by clear record of delay or contumacious conduct; (2) violation of the discovery order attributable to the client instead of the attorney; (3) violating party's misconduct substantially prejudices the opposing party; and (4) a less drastic sanction would not substantially achieve the desired deterrent effect - see, e.g., FDIC v. Conner, 20 F.3d 1376, 1380-81 (5th Cir. 1994); **6th Circuit**: (1) whether the adversary was prejudiced by the dismissed party's failure to cooperate, (2) whether the dismissed party was warned that failure could lead to dismissal; and (3) whether less drastic sanctions were imposed or considered before dismissal was ordered - see, e.g., Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994); **9th Circuit**: (1) public's interest in expeditious resolution of litigation; (2) court's need to manage its dockets; (3) risk of prejudice to party seeking sanctions; (4) public policy of favoring disposition of cases on their merits; and (5) availability of less drastic sanctions - see, e.g., Henry v. Gill Indus. Inc., 983 F.2d 943, 948 (9th Cir. 1993); and the **10th Circuit**: (1) degree of actual prejudice to the defendant; (2) amount of interference with the judicial process; (3) culpability of the litigant; (4) whether the court warned the party in advance that dismissal of that action would be a likely sanction for noncompliance; and (5) efficacy of lesser sanctions - see, e.g., Jones v. Thompson, 996 F.2d 261, 264 (10th Cir. 1993)

Sanctions For Failures to Comply With Discovery Orders: Should Rule 37(b)(2) Defaults and Dismissals Be Determined by a Roll of the Dice?, 62 Brook. L. Rev. 585 (1996).

As apparent, however, even under these varied approaches, there are a few discernable sound principles that are consistent among many of the circuits -- willfulness or bad faith, prejudice to the opposing party, and a consideration of the efficacy of lesser sanctions.

a. Willfulness or Bad Faith

It is generally recognized that litigation-ending sanctions should not be imposed in the absence of willfulness or bad faith. This principal emerged from the Supreme Court's decision in Societe Internationale, which was embraced to a limited extent in the 1970 revision to Rule 37 that substituted the word "failure" for "refusal." 357 U.S. 197 (1958). This amendment made clear that courts may impose certain sanctions for the "failure" to comply with discovery orders or requests despite the absence of any willfulness by the party. It also made clear, however, that the consideration of willfulness would remain a relevant factor in the selection an appropriate sanction. Fed. R. Civ. P 37 advisory committee notes (1970 amendments) ("Willfulness' continues to play a role ... in the choice of sanctions"). While the advisory committee notes and the decision in Societe Internationale point out that severe sanctions are only appropriate if there is proof of willfulness or bad faith, Rule 37 contains no such provision.<sup>27</sup>

Notably, there was a prior suggestion that this doctrine should be written into the Rule in 1959,<sup>28</sup> but the Advisory Committee elected not to incorporate such a provision in the 1970 amendments. As noted above, however, it is indisputable that while litigants faced a judiciary unwilling to impose sanctions in 1970, litigants today face a myriad of differing factors in each individual circuit that determines whether such sanctions are appropriate. Today's litigants also face a judiciary more than willing to impose litigation-ending sanctions when it deems such sanctions "just."

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<sup>27</sup> "Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to an inability, and not to willfulness, bad faith, or any fault of petitioner." Societe Internationale, 357 U.S. at 212.

<sup>28</sup> See Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2283 n.18 (1994) (noting that "the proposal was to say in the rule that an involuntary dismissal with prejudice cannot be invoked unless the recusant is in willful bad faith and the party has, by his conduct, demonstrated a discernible lack of confidence in the merits of his case") (citing Comment, Recent Innovations to Pretrial Discovery Sanctions: Rule 37 Reinterpreted, 1959 Duke L.J. 278, 290).



b. Prejudice to the Opposing Party

Another common factor, and the only one that is recognized by every circuit which has set forth a specific set of factors, is the consideration that litigation-ending sanctions should not be warranted unless the opposing party is prejudiced by the non-compliance. Unfortunately, there is little consensus regarding the significance or level of prejudice necessary to justify the imposition of severe sanctions. Compare, Henry v. Gill Indus., Inc., 983 F. 2d 943, 948 (9th Cir. 1993) (risk of prejudice to opposing party considered a "key" factor); Federal Deposit Ins. Corp. v. Conner, 20 F.3d 1376 (5th Cir. 1994)(requiring "substantial prejudice"); Coane v. Ferrara Pan Candy Co., 898 F.2d 1030, 1032 (5th Cir. 1990) (same); Mutual Fed. Sav. & Loan Ass'n v. Richards & Assocs., Inc., 872 F.2d 88, 92 (4th Cir. 1989) (prejudice analysis necessarily includes a consideration of the materiality of the evidence the party being sanctioned failed to produced). Two things are clear from a review of the pertinent decisions: (1) there remains no certainty or symmetry in the application of this factor; and (2) the courts agree with the basic principal that litigation-ending sanctions are unwarranted unless a party is significantly or substantially prejudiced by the party's failure to respond adequately to the discovery.

c. Consideration of the Efficacy of Lesser Sanctions

A final factor that is consistently found among the better- reasoned decisions, is the recognition that prior to the imposition of litigation-ending sanctions, the court should carefully consider the efficacy of lesser sanctions. See, e.g., Harris v. City of Philadelphia, 47 F.3d 1311, 1330 n.18 (3d Cir. 1995); Mutual Fed. Sav. and Loan Ass'n v. Richards & Assocs., Inc., 872 F.2d 88, 92 (4th Cir. 1989); FDIC v. Conner, 20 F.3d 1376, 1380-81 (5th Cir. 1994); Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994); Henry v. Gill Indus. Inc., 983 F.2d 943, 948 (9th Cir. 1993); Jones v. Thompson, 996 F.2d 261, 264 (10th Cir. 1993). This principle is sound and it is logical to require this consideration prior to imposition of any significant sanctions under Rule 37(b)(2).

E. CREATING A SAFE HARBOR PROVISION

Similar types of safe harbor provisions have been adopted in other contexts. For example, the Securities Act encompasses a "safe harbor" provision for forward-looking statements, which essentially provides that a party making a forward-looking statement shall not be liable for any materially misleading statements contained therein if it has performed certain generally accepted tasks. 15 U.S.C. § 78u-5(c). Similarly, a party responding to discovery should be granted a rebuttable presumption (or semi-safe harbor) that its conduct was substantially justified if it has performed the tasks ordinarily or routinely performed in responding to discovery.

## 1. Active Good Faith Effort To Comply

By currently providing for sanctions for the "failure" to comply, Rule 37 permits the imposition of sanctions regardless of whether the party acted in good faith or completely "refused" to comply. To address this, the Rule attempts to protect parties that acted with "substantial justification" but offers no guidance regarding what actions will suffice. The proposed amendment clarifies that parties who assert an "active good faith attempt to comply" shall not be sanctioned under this standard. This is consistent with case law which recognizes that sanctions should not be imposed on parties who made good faith efforts to comply. See, e.g., Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992) (recognizing Rule 37 sanctions are inappropriate when party has taken reasonable step to comply, but finding that party before the court had not acted in good faith); Cullins v. Heckler, 108 F.R.D. 172 (S.D.N.Y. 1985) (award of expenses and fees not warranted where party made a good faith effort to comply); Curtin v. Curtin, 90 F.R.D. 582, (N.D. Ohio 1981) (refusing to impose sanctions despite prior counsel's dilatory tactics when party and new counsel were acting in good faith); In re Westinghouse Elec. Corp. v. Uranium Contracts Litigation, 563 F.d 992 (10th Cir. 1977) (error to hold party in contempt under Rule 37 when party had made a good faith effort to comply); Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970) (district court erred in striking claim where party made good faith effort to comply); Technitrol, Inc. v. Digital Equipment Corp., 62 F.R.D. 91 (N.D. Ill. 1973) (same); see generally, Robert Koets, Sanctions for Failure to Make Discovery Under Federal Civil Procedure Rule 37 as Affected by Defaulting Party's Good Faith Efforts to Comply, 134 A.L.R. Fed. 257 (1996) ("sanctions ... are not ordinarily applied where the defaulting party has made an active, good-faith effort to comply).

However, the definition of "active good faith" in this context may also present difficulty in defining. Therefore, DRI also proposes that the advisory committee note give guidance related in at least two contexts: responses to Rule 33 and Rule 34 requests.

### a. Response to Request For Production of Documents

A rebuttable presumption in favor of "substantially justified" conduct and "active good faith" by a party should exist if a party responding to a request for production of documents has performed the following:

- (1) Timely providing a response to a request for production of documents, specifically identifying documents which have been or will be produced and identifying specific objections to the objectionable requests;

- (2) Conducted a reasonable search for non-objectionable documents, consisting of:
    - (a) investigation of persons likely to have possession of responsive documents; and
    - (a) making a request for materials from persons or employees of party likely having responsive materials;
  - (3) production of non-objectionable, responsive documents discovered in the search;
  - (4) Upon request by the requesting party, has met and conferred concerning the scope of the production request; and
  - (5) supplementation of documents of any additional responsive documents within a reasonable time of discovery their existence.
- b. Interrogatory Responses

A rebuttable presumption in favor of "substantially justified" conduct and "active good faith" should exist if a party responding to interrogatories has performed the following:

- (1) Timely providing a response to the interrogatory, specifically identifying specific objections and providing responsive answers to the non-objectionable portions of the interrogatory;
- (2) Investigation of persons and documents likely to have information responsive to the interrogatory;
- (3) Upon request by the requesting party, has met and conferred concerning any objections to the interrogatories; and
- (4) providing supplementation to any interrogatory within a reasonable time of any additional responsive information.

B. Noncompliant Party Affirmatively Raises Issue With Opposing Party or Court For Disposition

A rebuttable presumption of "substantial justification" and "active good faith" should exist where the party against whom sanctions are sought affirmatively raises the discovery issue which is the basis of the alleged sanctionable offense. It should be presumed that a party who openly raises an issue with the opposing party and timely

files a motion for protective order, or takes the other appropriate measure, was not acting in bad faith. Parties and even different courts differ on legal interpretations, and during the course of the discovery process there may be close calls which are subject to debate. There may be reason to assert an objection which is well-reasoned and rational, but which is contrary to the then existing law. However, a party should not be sanctioned for affirmatively taking a reasonable position advocating the change in existing law or in distinguishing the current law from the specific issue at hand. For example, under Rule 11, it recognizes that the certification is only that "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed.R. Civ.P. 11(b)(2) (emphasis added).<sup>29</sup> Thus, if instead of hiding or ignoring the issue, a party affirmatively raising an issue to which there could be a reasonable difference of opinion, but to which the party objects, it should be presumed that the party is acting in good faith.

#### IV. CONCLUSION

If properly applied these proposed amendments to Rule 37 can lead to appropriate judicial restraint in the application of the Rule while reducing the ever increasing amount of satellite litigation addressing sanctions.

The amendments provide an even-handed structural approach to codifying the better reasoned decisions addressing sanctions under Rule 37(b)(2). Additionally, they create a "semi-safe" harbor provision for "active" "good-faith" efforts at compliance that is not so impregnable or irrebuttable so as to encourage abusive discovery tactics. They also establish safeguards that employ the generally accepted restraints fundamentally necessary to a consideration of litigation-ending sanctions.<sup>30</sup> Significantly, the amendments achieve these goals while retaining the flexibility in the Rule necessary to permit the court broad discretion to impose an appropriate levels of sanctions. These or similar amendments are paramount to imposing some level of symmetry, fairness and certainty in the application of Rule 37.

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<sup>29</sup> We note that Rule 11 was recently amended to include a "safe harbor" provision allowing a party to withdraw the challenged paper within 21 days of a party filing a motion for sanctions under the rule. Fed.R.Civ.P. 11(c)(1)(A).

<sup>30</sup> As one author aptly notes, "As criticism regarding discovery abuse mounts, and courts increasingly employ severe sanctions to curb the abuse, the critical role Rule 37 will play in federal courts cannot be overstated. Perhaps it is time to reconsider the lack of specificity and guidance in Rule 37(b)(2) with respect to litigation-ending sanctions, and conform it to the process and approach already employed by a majority of circuits " Golinsky, at 662

**D-VI**

## **DRI'S PROPOSED CHANGES TO FEDERAL RULE 26(b)(5) RELATED TO ASSERTION OF PRIVILEGE**

### **I. EXECUTIVE SUMMARY**

- Rule 26(b)(5), which governs objections to discovery on the grounds of privilege and/or work product, was added to the Federal Rules of Civil Procedure effective 1993.
- While the rule as written does not require that a responding party provide a document-by-document index in every instance that it makes an objection on the grounds of privilege or work product, courts have interpreted the rule as containing such a requirement.
- The rule as written requires that the information about the material withheld be provided at the time the written response is served. In cases involving production of numerous documents, complying with this requirement within the thirty days given for serving a written response is an impossibility.
- In cases involving production of numerous documents, generating a document-by-document privilege index is a costly and burdensome exercise, and the burden is disproportionately placed on the corporate defendant.
- In some instances, requesting parties will demand costly and burdensome privilege logs from the responding party, even though the material withheld is clearly privileged or otherwise outside the proper scope of discovery.
- In some instances, a document cannot be placed on a document-by-document privilege index without revealing privileged information.
- According to the Advisory Committee comments, a responding party may waive its privilege objection if the party does not strictly comply with the rule.
- These problems can be addressed if the rule is modified to provide for a two to three-step process whereby the responding party provides notice, through a general description of the documents withheld, that it is withholding otherwise discoverable information from discovery. The requesting party could then lodge a good faith challenge to that objection and request additional information and support for the privilege claim. The court would only become involved if the parties could not agree on the type of information to be provided or the schedule for providing such information.

## II. PROPOSED CHANGES TO RULE 26(b)(5)

(A) When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall notify the requesting party in its discovery responses that it is withholding otherwise discoverable material under a claim of privilege and/or work product and shall generally describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) If the requesting party in good faith believes that the material withheld is subject to discovery despite the claim of privilege or work product, it shall so notify the responding party in writing and request that the responding party provide additional information about the material withheld. The responding party shall thereafter, within a reasonable time, provide additional information about the material withheld sufficient to support the claim of privilege or protection and in a manner that will not reveal information itself privileged or protected. The amount of detail to be provided and the schedule for providing the additional information shall be proportional to the number and type of documents involved. If the parties are unable, after good faith negotiations, to agree on the amount of detail to be provided at this time or on the schedule for providing such additional information, they may seek the guidance of the court. If the court determines that either party has not participated in this process in good faith, it may order sanctions.

## III. DISCUSSION

### A. RULE 26(b)(5)

Rule 26(b)(5)'s clear purpose is to require parties to supply their opponents with enough information about material withheld from discovery under a claim of privilege that the opposing party can contest the claim, if he or she believes the material withheld to be discoverable despite the privilege<sup>31</sup> or that the claim is improper.

The rule provides:

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<sup>31</sup> For example, if the material were "ordinary" work product, then the opposing party could try to discover it by showing "substantial need" of the information and "inability, without undue hardship, of getting the same information through other means." Fed.R. Civ. P. 26(b)(3).

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Fed.R. Civ. P. 26(b)(5). While the rule does not literally require that the objecting party provide a document-by-document list of materials withheld (i.e. a "privilege log"),<sup>32</sup> courts that have interpreted the rule have applied it as if it does contain such a requirement. Moreover, the failure to provide such a log in a timely manner could result in a finding of waiver. Fed.R. Civ.P. 26(b)(5), advisory committee notes.<sup>33</sup>

The rule as it has been interpreted and applied puts a disproportionate burden on products liability defendants, for the reasons set forth below. The suggested changes would address three problems posed by the current version of the rule: they would make clear that the initial description of material withheld from discovery could be made in a general way, instead of by way of a document-by-document list; they would make clear that any challenge to the claim of privilege would have to be made in good faith; and they would provide a reasonable period of time for providing additional information in support of a privilege claim, should the claim be challenged.

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<sup>32</sup> The rule only requires a party objecting to discovery on grounds of privilege to "make the claim expressly" and to provide a description of the "nature of the documents . . . not produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Fed.R. Civ. P. 26(b)(5).

As the advisory committee notes to the rule states:

Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

Fed. R. Civ. P. 26(b)(5) advisory committee notes. In addition, the rule specifically provides that the description shall be done in a way that does not reveal "information itself privileged or protected."

<sup>33</sup> But see First Savings Bank, F.S.B. v. First Bank Sys., Inc., 902 F. Supp. 1356 (D.Ks. 1995)(setting aside magistrate's order, finding waiver too serious a sanction for noncompliance with rule 26(b)(5)).



## 1. Special Problems With the Rule As Applied

The rule as it has been applied presents serious problems, especially to corporate defendants in products liability cases. Courts have a tendency to permit broad discovery in a products case and there is a marked difference in the status of the parties. This means that the burden of discovery falls primarily on the corporate defendant. In addition, products liability defendants often face very broadly worded discovery requests intended to "catch" documents not otherwise asked for in other discovery. When this type of "dragnet" request is read broadly, it can encompass litigation-related, lawyer-created kinds of materials residing in a manufacturer's litigation files.

In other words, by simply wording a discovery request in a certain way, a plaintiff can literally demand material created by attorneys and other representatives of the party in the course of defending products liability actions. For example, a plaintiff might ask for "any and all documents concerning other incidents involving this product." Because of the breadth of this type of request, it literally asks for material from the files of cases involving similar defect allegations. Reports of consulting engineers, litigation crash tests, attorney-client correspondence, and attorney evaluation letters fall into the category of "any and all documents concerning other incidents involving the product." Reviewing other litigation files and specifically identifying these types of materials on a privilege log is a costly exercise. Moreover, the result can be a road map through the defendant's litigation strategy in other cases.

### a. The Burdensome and Revealing Privilege Log

While the rule as written does not necessarily require a document-by-document list in all instances that a party lodges a privilege objection, courts that have interpreted the rule have applied it as if it does contain such a requirement.<sup>34</sup> One particularly troublesome decision is Mader v. Motorola, Inc., 1994 W.L. 535125 (N.D. Ill. 1994) from the Northern District of Illinois. In this case, instead of simply requesting that the defendant produce any witness statements taken for the case, plaintiff asked for "all

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<sup>34</sup> See, e.g., Corrigan v. Methodist Hospital, 158 F.R.D. 54 (E.D. Pa. 1994) (defendant physician's general privilege objection to request for expert reports from other malpractice actions inadequate, ordering compliance with the rule); Rodger v. Electronic Data Systems Corp., 155 F.R.D. 537 (E.D.N.C. 1994) (ruling that disclosure of any documents withheld under claim of privilege, through "log" of such documents, "mandated" by rule); Resolution Trust Corporation v. Bright, 157 F.R.D. 397 (N.D. Tex. 1994) (permitting RTC to redact certain portions of privileged documents already reviewed in camera, but still requiring RTC to notify defendants of redactions by complying with rule); Braun Medical, Inc. v. Abbott Laboratories, 1994 W.L. 422287 (E.D. Pa. 1994) (in patent case, requiring document-by-document list of privileged documents over defendant's objections that such a list would be too burdensome and would reveal privileged information).

documents relating to any statements from any individual or group of individuals concerning matters in this case." Id. at 9. The defendants responded as follows:

Defendants object to this request as calling for documents protected by the attorney-client privilege and the attorney work product doctrine. Subject to and without waiving that objection, defendants will produce the statement of Sandy Carsello. Defendants further state that they have attorney notes of interviews of potential witnesses conducted by attorneys for the defendants and that these attorney notes are protected by the attorney-client privilege and the attorney work product doctrine and will not be produced. Id. at 8.

This response and objection clearly contained a "description of the nature of the documents withheld" which should have been sufficient under the rule. It alerted the requesting party that material was being withheld, described that material as "attorney notes" of witness interviews, and "expressly" claimed that the notes were protected from discovery as privileged and as work product. Attorney notes of witness interviews are opinion work product, the most highly protected form of work product. Hickman v. Taylor, 329 U.S. 495 (1947). It is difficult to see what more telling description defendants could have provided.

The court did not agree, commenting that

[P]laintiff has no way of knowing whether defendants' blanket characterization of their documents is appropriate, as defendants have not provided a privileged document log. Absent a description of what documents are at issue, plaintiff is not in the position to make a showing necessary to overcome work product immunity for particular documents. Id. at 10.

The court then ordered the defendants to respond to the discovery request by providing a privilege log "as [rule 26(b)(5)] requires." While the court made clear that the defendants would not need to disclose the subject matter of the interviews with witnesses, it did require them to provide the names of persons interviewed. Id. at 10, n.7.

This opinion is clearly wrong. First, names of persons interviewed by an attorney in the course of preparing his client's case are protected from discovery, as a host of courts have pointed out.<sup>35</sup> In requiring a log of these interviews, the court here required

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<sup>35</sup> See, e.g., Laxalt v. McClatchy, 116 F.R.D. 438 (D. Nev. 1987) (identities of witnesses interviewed by investigators in connection with litigation protected as work product); Commonwealth v. First Nat'l Supermarkets, Inc., 112 F.R.D. 149 (D. Mass. 1986) (holding that

defendants to give plaintiffs information they were not entitled to have. Second, plaintiffs did not have a right to the material withheld in this instance, no matter what kind of "need" they might have shown.<sup>36</sup> Thus, knowing which witnesses the opposing counsel had interviewed added nothing of practical utility to the discovering party's store of knowledge, but rather unnecessarily revealed defense counsel's work product.

More importantly, the defendants' objection, as set forth in their discovery response, was completely adequate to fulfill the purpose of the rule. It told plaintiffs exactly what defendants were "withholding" and in language that should have alerted plaintiffs to the nature of the material at issue. The kind of additional information plaintiffs would have gleaned from a "log" would not have "assist[ed]" them in determining whether defendants' "characterization" of these interviews was "appropriate." Besides giving them the names of interviewees, which plaintiffs were not entitled to have, a document-by-document list likely added little to plaintiffs' understanding of the "nature of the material withheld."

In making this requirement, the court in Mader evidenced a "form over substance" approach to the application of rule 26(b)(5). This approach, which appears to be in line with the approach taken by other courts, has created unnecessary discovery burdens in products liability cases and has endangered the protections that should be afforded privileged information.

#### b. The Problem of Timing

Besides the problems presented by the application of the rule in these kinds of situations, the rule as written presents another problem: the timing of compliance. The rule as written implies that it must be complied with at the time that the discovery responses are served. In the case of large document productions, the responses are often served prior to the production itself and sometimes prior to the completion of the document review by defense counsel. If the court is going to interpret the rule to require a document-by-document list, then providing such a list within the 30 day response period is, in such situations, impossible. In practice, responding parties have tried to solve this problem by postponing the provision of the "log" until the documents are actually produced or, in some cases, even later. Given the language of the rule and the

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names of persons interviewed by attorney, as well as date and place of interview, protected from discovery by work product doctrine); Board of Educ. v. Admiral Heating and Ventilating, Inc., 104 F.R.D. 23 (N.D. Ill. 1984) (distinguishing interrogatories asking for names of persons with knowledge from those asking for names of persons interviewed); Uinta Oil Refining Co. v. Continental Oil Co., 226 F. Supp. 495 (D. Utah 1964) (sustaining objection to interrogatory seeking names of all persons from whom plaintiffs had requested statements).

<sup>36</sup> While the Supreme Court has not yet ruled that attorney notes of interviews are completely and forever beyond the scope of discovery, it has made it clear that it would take an unusual set of circumstances for the material to be subject to discovery.

admonition of the advisory committee, this practice may not always protect a litigant from claims of waiver.

c. The Bad Faith Challenge

Mader v. Motorola, Inc., 1994 W.L. 535125 (N.D. Ill. 1994), illustrates another problem that products liability defendants often face with regard to the rule, that is, the bad faith challenge to the privilege objection. Rule 26(b)(5)'s clear purpose is to require parties to supply their opponents with enough information about material withheld from discovery under a claim of privilege that the opposing party can contest the claim, if he or she believes the material withheld to be discoverable despite the privilege<sup>37</sup> or that the claim is improper. Unfortunately, this purpose often gets lost in the heat of battle. Some plaintiffs' counsel will challenge any claim of privilege or work product, just so the defendant will have to jump through the hoops of meeting its burden to "prove" the claim is valid.<sup>38</sup>

In Mader, the objection made clear that the responding party was withholding attorney notes of witness interviews, material which is widely viewed as opinion work product and thus beyond the scope of discovery. Plaintiff was not entitled to that information and was not entitled to the attorney's notes. Moreover, plaintiff's counsel likely knew that the material was work product and that he or she was not entitled to the information. Yet the plaintiff challenged the claim and demanded a privilege log. The result was a log that set forth for plaintiff the names of persons defense counsel had interviewed, in other words, that set forth the defense counsel's opinion work product.

A rule that results in this kind of disclosure contradicts the basic purposes of privileges and the work product doctrine. When the Supreme Court articulated the work product doctrine in Hickman v. Taylor, 329 U.S. 495 (1947), the Court pointed out that "it is essential that a lawyer work with a certain degree of privacy . . .," reasoning that, if discovery of such material were permitted:

much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interest of the clients and the cause of justice would be poorly served.

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<sup>37</sup> For example, if the material were "ordinary" work product, then the opposing party could try to discover it by showing "substantial need" of the information and "inability, without undue hardship, of getting the same information through other means." Fed. R. Civ. P. 26(b)(3).

<sup>38</sup> See, e.g., James E. Butler, Jr. & Patrick A. Dawson, *The Bench As Battleground: The Discovery Process is Broke and Only Judges Can Fix It*, THE VERDICT, May/June 1992, at 19-20.

Id. at 511.

If courts interpret rule 26(b)(5) to require, in every instance, a document-by-document list of an attorney's work product just because such information falls within the scope of a broadly-worded discovery request, then attorneys will be less sure that their work will be entitled to that "certain degree of privacy" and the problems foreseen by the Supreme Court could be at hand.

#### **IV. CONCLUSION**

The proposed changes to Rule 26(b)(5) would address the problems outlined above: they would clarify that only a general description of the material withheld is required at the time the responsive discovery pleading is provided; they would provide a reasonable period of time for providing more detail, if such were necessary; and they would require the requesting party to avoid privilege challenges that were made just for the sake of requiring the responding party go through the exercise of generating a privilege log. The proposed changes would also permit the parties to address their disputes over timing and detail to the court, if necessary. The court would have the power to sanction either party if it found that either were unnecessarily seeking court guidance.

These proposed changes would add much needed clarity to the rule and would assist both litigants and the courts by minimizing the likelihood of bad faith challenges to a claim of privilege.

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TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.

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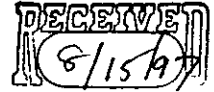
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August 15, 1997



Via Courier

John Rabiej  
Rules Committee Support Office  
Federal Judiciary Building  
One Columbus Circle, N.E.  
Washington, DC 20002

Re: Conference on Discovery of the Advisory Committee on the Civil Rules,  
September 4 and 5, 1997

Dear Mr. Rabiej:

Enclosed please find two (2) copies of the Statement of Trial Lawyers for Public Justice and the TLPJ Foundation for the above-referenced Conference on Discovery.

Thank you very much for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "F. Paul Bland".

F. Paul Bland, Jr.

cc (including enclosure):

The Honorable David F. Levi  
Professor Richard L. Marcus  
Professor Stephen Burbank  
Jeffrey Barist, Esq.  
Gregory Joseph, Esq.  
John Scriven, Esq.  
Neil A. Goldberg, Esq.  
Robert S. Peck, Esq.

**STATEMENT OF  
TRIAL LAWYERS FOR PUBLIC JUSTICE  
AND  
THE TLPJ FOUNDATION  
FOR THE CONFERENCE ON DISCOVERY  
OF THE ADVISORY COMMITTEE ON THE CIVIL RULES  
SEPTEMBER 4 AND 5, 1997**

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**August 14, 1997**



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## INTRODUCTION

Trial Lawyers for Public Justice is a national public interest law firm that specializes in precedent-setting and socially significant tort and trial litigation and is dedicated to pursuing justice for the victims of corporate and government abuses. Litigating throughout the federal and state courts, Trial Lawyers for Public Justice prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

The TLPJ Foundation is a non-profit charitable and educational membership organization that supports Trial Lawyers for Public Justice activities and educates the public, lawyers, and judges about the critical social issues in which we are involved. It currently has over 1500 members, primarily plaintiff's trial lawyers and law firms, who participate in formulating the organization's policies and work as cooperating counsel on Trial Lawyers for Public Justice cases. The TLPJ Foundation's members regularly represent plaintiffs in a broad range of personal injury, commercial, civil rights, tort, and other cases in the federal courts. For ease of communication, we will hereafter refer to Trial Lawyers for Public Justice and the TLPJ Foundation collectively as "TLPJ."

As part of its efforts to ensure the proper working of the civil justice system, TLPJ is dedicated to monitoring and commenting upon proposals to change the Federal Rules of Civil Procedure. In February of this year, for example, TLPJ commented on proposed amendments to Rule 23. In previous years, TLPJ has also commented upon a number of other proposals to amend the civil rules, such as recent proposals to amend Rule 26(c).

Because the discovery rules govern a crucial part of our civil justice system, TLPJ welcomes the opportunity to comment upon the proposed changes to the discovery rules collected by the Special Reporter to the Discovery of the Advisory Committee on the civil rules. TLPJ thanks the Advisory Committee for inviting TLPJ to participate in this conference.

### SUMMARY

This Statement will open with our comments upon some of the ideas and proposals discussed in the June 2, 1997 memorandum from Richard Marcus, Special Reporter to the Discovery Subcommittee, to Participants in the Discovery Conference ("the Special Reporter's Memorandum"). In these comments, we first respectfully take issue with the overall premises and focus of concern in the Special Reporter's Memorandum. TLPJ suggests that the most serious and widespread form of discovery abuse is "stonewalling" i.e., the willful refusal to respond to proper discovery requests. While the Special Reporter apparently begins from the premise that discovery imposes excessive costs, we argue that there is no serious, scholarly empirical work to justify system-wide restrictions upon discovery. We also point out that restrictions on discovery would prevent many plaintiffs with strong claims from receiving justice. Finally, we argue that stonewalling is widespread, and document that responding parties regularly withhold documents, destroy evidence, "dump" tens of thousands of irrelevant and scrambled documents upon their opponents, and refuse to responsively answer interrogatories.

In Part II of this Statement, we explain that several of the proposals addressed in the Special Reporter's Memorandum, proposals which seek to narrow and restrict discovery, would greatly harm the administration of civil justice in the federal system. We take issue

with proposals to limit the scope of discovery, to require judicial approval before allowing parties to request documents, to require requesting parties to pay the fees and costs of responding parties, and similar proposals aimed at reducing and restricting discovery practice. These proposals would have the effect of denying any realistic remedy to consumers and victims with valid claims, by denying needed evidence to plaintiff's. Several of the proposals would have the effect of encouraging stonewalling, and none of these proposals address the most serious types of discovery abuse.

In the third part of this statement, we endorse some of the other proposals set forth in the Special Reporter's Memoranda, including the proposals to require parties not to destroy potentially discoverable documents; to place presumptive time limits on depositions; to restore uniformity to the federal courts; and to encourage the more frequent imposition of discovery sanctions. In TLPJ's view, these proposals would help discourage stonewalling and related discovery abuses, and would improve the operation of the federal civil justice process.

Finally, in Part IV below, we suggest a number of additional proposals not mentioned in the Special Reporter's Memorandum that TLPJ believes would strengthen and improve the discovery rules, and would discourage stonewalling. The first of these proposals would require counsel and parties to certify that all properly demanded discoverable documents that could be located through a reasonable search have been produced. This would clarify and affirm the discovery obligations of responding parties. TLPJ also proposes that the rules be amended to forbid "secret partial answers," where parties do not indicate that they are withholding information as a consequence of their objections. This widespread practice is

abusive and often deceptive, and it should be ended. TLPJ further suggests that the rules be amended to codify the prevailing caselaw requiring privilege logs, since responding parties routinely assert unsubstantiated and thus improper objections based upon claims of privilege. TLPJ also urges the Advisory Committee to create model interrogatories in order to discourage abusive objections to straightforward queries.

**I. NOTWITHSTANDING THE SPECIAL REPORTER'S FOCUS UPON THE SUPPOSED EXCESS COSTS OF DISCOVERY, THE MOST SIGNIFICANT FORM OF DISCOVERY ABUSE IN THE FEDERAL SYSTEM IS STONEWALLING**

**A. There Is Not Sufficient Evidence that Discovery Imposes Excessive Costs to Justify Sharply Restricting Discovery.**

The Special Reporter's Memorandum, and some of the materials attached to that memorandum, begin with the premise that discovery in the federal civil justice system poses excessive and unjustified costs upon large institutions, and therefore needs to be restricted. TLPJ challenges the notion that discovery generally imposes excessive costs on a system-wide basis. Some of the Proposals to restrict discovery set forth in the Special Reporter's Memorandum have been previously rejected precisely because there was no empirical support for such premises. The last time the Advisory Committee on the Civil Rules considered the issue of whether reports of excessive discovery costs justified narrowing the scope of discovery under Rule 26, it concluded that "we are not satisfied on the present record, including such empirical studies as have been made, that changes suggested so far would be of any substantial benefit." Memorandum of Walter R. Mansfield, Chairman, Advisory Committee on Civil Rules, 85 F.R.D. 538, 542 (1979). TLPJ is aware of no new serious, scholarly work or rigorous empirical evidence establishing that the costs of discovery exceed

its very real benefits, or even establishing the true scope of those costs.<sup>1</sup> Professor Cooper, the Advisory Committee's Reporter, has written of "aching complaints" about the cost of discovery, see attachment to the Special Reporter's Memorandum, and this concern animates all of the comments and proposals set forth in Professor Cooper's memorandum. This sort of anecdotal evidence, however, does not justify the sort of sweeping system-wide changes to sharply restrict discovery that are contained in the Special Reporter's Memorandum.

The lack of empirical support for proposals to restrict discovery is particularly striking in light of the many recent significant changes to federal discovery practice in the United States. Significant changes to the federal rules were enacted in 1993, and the many important provisions of the Civil Justice Reform Act of 1990 also have affected the practice of discovery in the federal courts. TLPJ knows of no extensive scholarly study of the precise costs and benefits of discovery that has occurred in the wake of these changes.<sup>2</sup>

Simply put, the parties seeking to limit discovery may have "aching complaints" of harm to

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<sup>1</sup> See also Charles Sorenson, Disclosure Under Federal Rule of Civil Procedure 26(a) --"Much Ado About Nothing?", 46 Hastings L.J. 679, 688 (1995) ("This examination suggests that discovery abuse may not be as overwhelming a problem in terms of litigation cost and delay as it has incessantly been portrayed."); Linda S. Mullenix, Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking, 46 Stan. L. Rev. 1393, 1396 (1994) ("There is no strong evidence documenting the alleged massive discovery abuse in the federal courts. The rulemakers never established the existence of discovery abuse before embarking on their crusade to revamp discovery. Indeed, existing empirical studies challenged the received notion of pervasive discovery abuse.")

<sup>2</sup> See also 6 James Wm. Moore et al., Moore's Federal Practice ¶ 26.02 (3d. ed. 1997) ("The perception that parties abuse the discovery tools is widely held and is undoubtedly accurate in certain categories of cases. The extent of such abuse is in fact not known. This ignorance reflects both differences over the meaning of abuse and the absence of empirical data across cases. Given this uncertainty, efforts at reform have not been tailored and their success, almost by definition, is equally unknown.")



their self-interest, but they have not produced the kind of hard evidence that the Advisory Committee should demand before drastically reducing the scope of discovery allowed to litigants in the federal courts.

**B. Restricting Discovery Would Undermine and Harm the Civil Justice System by Effectively Preventing Plaintiffs With Valid Claims from Receiving Justice.**

In reality, full and fair discovery is essential to the civil justice system. If discovery were significantly restricted, that would prevent a great many consumers and victims with strong claims from receiving justice. While the Special Reporter's Memorandum discusses a variety of proposals in measured, scholarly language, the proposals to sharply restrict discovery (addressed below in Part II of this statement) cannot be veneered as merely "neutral" changes to the rules. These proposals would greatly redound to the benefit of one side -- and only one side -- in civil litigation: defendants. Plaintiffs have the burden of proof in our system, and without access to evidence to support each element of their claims, they will not be able to prevail. Corporate defendants generally have a good deal of information about their practices and policies, the persons who designed and implemented those practices and policies, and the reasons behind the practices and policies. Plaintiffs require this information to go forward. The fundamental reality of the discovery process is that plaintiffs lack information and need it, while defendants have information and do not want to give it up. This lends to what we view as the most significant form of discovery abuses: stonewalling.

**C. The Advisory Committee Should Address The Most Significant Form of Discovery Abuse: Obstruction and Stonewalling.**

The discovery process is routinely abused in the federal courts by defendants seeking

to avoid legitimate discovery requests. Every day, responding parties, and particularly large corporations, ignore their discovery obligations under the federal rules of civil procedure. In our experience, responding parties regularly stonewall, play games (particularly “hide the pea”), and refuse to fully answer proper discovery requests.

Stonewalling arises, in large part, from two related phenomena. First, responding parties have very strong incentives to stonewall. If a party is guilty of serious wrongdoing, but nearly all of the actual proof of this wrongdoing is in its possession, it faces a powerful temptation to prevent that proof from ever seeing the light of day. As noted above, many plaintiffs could never succeed in their actions without access to the defendant’s documents, and nearly all large defendants are quite aware of this reality.

The second factor giving rise to stonewalling is the absence of accountability for stonewallers. The overwhelming experience of TLPJ and its supporters is that it is often extremely difficult to get federal judges to address discovery disputes. Many federal judges have extremely heavy dockets (particularly due to the rapid expansion of federal crimes within the last decade) and demonstrate very little interest in discovery disputes. Even in particularly egregious instances of discovery abuse, parties in civil matters must wait a long time to get a judge’s attention.

As a result of these two factors, stonewalling has become a widespread, systemic problem throughout the federal civil justice system. One study found that one half of 1,500 litigators surveyed believed that unfair and inadequate disclosure of material prior to trial is a “regular or frequent” problem. Deborah Rhode, Ethical Perspectives on Legal Practice, 37 *Stan. L. Rev.* 589, 598-99 (1985) (citation omitted). Another careful survey found that

"sixty-one percent of the lawyers interviewed complained about some form of evasion."

Wayne D. Brazil, Civil Discovery: Lawyers' Views on Its Effectiveness, Its Principle Problems and Abuses, Am. B. Found. Res. J. 787, 829 (1980). Then-Professor, now Judge

Brazil added:

It would be difficult to exaggerate the pervasiveness of evasive practices or their adverse impact on the efficiency and effectiveness ( for information distribution) of civil discovery. Evasion infects every kind of litigation and frustrates lawyers in every kind of practice. With the possible exception of the role of the courts, no aspect of the discovery process stands in greater need of extensive critical scrutiny.

Id. See also Earl C. Dudley, Discovery Abuse Revisited, 26 U.S.F.L. Rev. 189, 194-95 (1992) ("Common tactics include spuriously narrow constructions of the discovery requests, frivolous (and frequently undisclosed) withholding of information on privilege grounds, and deliberately evasive or unresponsive answers to interrogatories or questions at deposition.") (footnotes omitted). As several other commentators recently put it:

Stonewalling is simply the failure or refusal to provide discoverable information properly requested by the opposing party. It occurs in many forms, ranging from groundless objections to the actual destruction of evidence. Unfortunately, this type of abuse has reached epidemic proportions in complex tort cases. Practitioners have observed this trend. It also is apparent from the marked increase in reported cases imposing sanctions for various forms of stonewalling.

Francis H. Hare, Jr.; James L. Gilbert; Stuart A. Ollanik, Full Disclosure: Combating Stonewalling and Other Discovery Abuses xxxi (1994). As Ralph Nader and Wesley Smith have written:

As the cases below suggest, some corporate lawyers routinely make specious objections, withhold documents, reinterpret questions asked of their clients, ignore those parts of questions they would rather not answer, and twist the common meaning of language to avoid disclosing documents. These tricks force their adversaries to go to court repeatedly to obtain information to which

they are entitled under the law.

Such stonewalling serves three primary purposes: It makes corporate lawyers a lot of money, it exhausts the legal opposition, and it keeps discoverable information from being disclosed.

Ralph Nader and Wesley J. Smith, No Contest 102 (1996).

In our experience, stonewalling is particularly widespread with respect to document requests. Responding parties around the United States routinely refuse to produce discoverable materials, and routinely interpret what is "discoverable" very narrowly. The initial response to many requests for production is a series of objections, but no actual documents. For many responding parties, a document request or document deposition is viewed not as giving rise to a serious obligation under the rules, but instead as the opening step in a negotiation. The next step for the requesting party in this type of litigation is the presentation of a motion to compel. Motions to compel rarely end up in front of the court, however, either because the requesting party accepts less information than that to which it is entitled in exchange for avoiding further time and costs in litigating the motion to compel, or because (after extensive delay and unnecessary expenditure of resources) the requesting party eventually gets most or all of what it wanted.

Even when those motions succeed in pressuring the responding party to eventually divulge most of the material requested, parties resisting discovery can still receive substantial benefits from the practice, because the motions practice wears down their opponents and brings about substantial delay.<sup>3</sup> E.g., James E. Butler and Jason L. Crawford, The

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<sup>3</sup> See Hare, et. al, Full Disclosure at 94 ("delay can be nearly as effective in concealing the facts [as evidence destruction or suppression] .... Delay, with its inevitable consequence of increased expense, is the most common form of discovery abuse.")

Boundaries of Zealous Advocacy: Properly Representing Consumers Against Corporations and their Discovery Tactics, 31:4 Tort & Ins. L.J. 977, 984 (Summer 1996) ("sometimes defendants produce some responsive . . . documents on an intermittent basis to feign good faith. The object of the tactic is to harass plaintiffs counsel," and to undermine a coherent strategy of discovery).

At the same time that many crucial documents are withheld, another common abuse is the use of "dump truck" discovery. All too often, large companies respond to straightforward discovery requests by dumping tens or hundreds of thousands of scrambled documents including a large number of nonresponsive documents, upon the requesting party. Instead of a sip of water, the requesting party receives the full force of a fire hose in the face. This form of discovery abuse has become a common experience for TLPJ and its members. It has also been recognized by commentators. See Hare, et al., Full Disclosure at 117 ("The prevalence of attempts to subvert meaningful discovery by responding to specific inquiries with volumes of documents -- undifferentiated as to subject matter and with no meaningful index -- has been well documented.")<sup>4</sup>; Mark A. Dombroff, Dombroff on Unfair Tactics § 1.20 at 35 (2d. ed. 1988):

A "shuffled deck" response to a request for production occurs when the party producing documents them in a format or manner which approximates what occurs after a deck of cards has been shuffled. The documents have been "reorganized", and all original structure or format has been removed.

In a "smoking gun" response, a responding party attempts to hide an incriminating or particularly damaging document in a "boxcar" load of documents and makes the gratuitous offer to permit the requesting party to

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<sup>4</sup> The footnote accompanying this passage cites 13 illustrative federal cases where courts recognized (and condemned) this practice of "dump truck discovery."

review all the documents in the load, hoping to intimidate the opponent into submission.

. . .

The Section of Litigation of the American Bar Association has recognized that "it is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance." Report of the Special Committee for the Study of Discovery Abuse 22 (1977).

In addition, the actual destruction of discoverable evidence is widespread in civil litigation in the United States. The recently reported jokes of Texaco officials as they stood around shredding documents offended millions of Americans, but few experienced litigators were surprised to learn that a large corporate defendant was destroying evidence. See Charles R. Nesson, Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action, 13 *Cardozo L. Rev.* 793 (1991) ("spoliation is an effective and growing litigation practice that threatens to undermine the integrity of civil trial process"); Nader and Smith, No Contest at 134-57 (discussing a series of cases -- involving toxic torts, products liability and medical malpractice -- where defendants destroyed important evidence); Hare, et al., Full Disclosure at 141 ("Judging from the sheer number of reported cases, the destruction, alteration, and other spoliation of evidence by a party or prospective party to litigation have become widespread in the past decade") (footnotes omitted); Butler & Crawford, The Boundaries of Zealous Advocacy, at 979 ("A manufacturer will often hide, destroy, or otherwise fail to produce incriminating evidence"); and Stephen Marzen and Lawrence Solum, "The Law of Professional Responsibility," in Destruction of Evidence 267 (J. Gorelick, S. Marzen & L. Solum, eds, 1989) ("there is substantial evidence that attorney participation in the destruction of evidence is a frequent occurrence").

The experience of TLPJ and its members confirms the judgment of these commentators that document destruction is widespread. In one recent illustrative TLPJ case, a consumer deception class action, two days after the complaint was filed TLPJ learned that one of the defendants in the case (a large, well-known financial institution) had placed literally dozens of garbage bags of documents in a dumpster. One of the bags was recovered by an employee of a business neighboring the defendant, who had read about the suit in a newspaper. The bag proved to be filled with documents related to the case. The only sanction yet visited upon that defendant for this conduct was the entry of an order prohibiting further destruction of documents. In our experience, the destruction of documents in that case was rare only in the sense that it was so easily detected.

It should be noted, moreover, that stonewalling is not limited to document discovery. In our experience, interrogatories rarely elicit much responsive information, because of widespread abuses by responding parties. Many lawyers report that the interrogatory has become a nearly useless discovery device in federal civil litigation. Lawyers almost never draft interrogatory responses that directly and fully answers a question. Boilerplate objections possessing only a passing relevance to the interrogatory asked are very common, and it often appears that interrogatory answers are more the product of cut-and-paste word processing than serious lawyering.<sup>5</sup> Nearly every interrogatory that is posed in many cases is objected to on the supposed grounds that it is overly broad, that responding to it would be

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<sup>5</sup> Numerous commentators have reached the same conclusion as TLPJ in this respect. E.g., W. Bradley Wendel, Rediscovering Discovery Ethics, 78 Marq. L. Rev. 895, 905 (1996) ("Lawyers, fearful of waiving any conceivable objection to a discovery request, respond to simple interrogatories with a torrent of boilerplate objections and mindless pettifoggery.")

burdensome, that its wording cannot be understood, that answering it might reveal the work-product of the counsel for the responding party, and the like.<sup>6</sup>

The foregoing only begins to describe a few of the ways in which responding parties regularly abuse the discovery process in federal litigation.

In short, in largely focusing upon the perceived costs of discovery, the Special Reporter's Memorandum has given insufficient attention to the most widespread and serious form of discovery abuse -- stonewalling. Stonewalling prevents many deserving parties from receiving justice, imposes great costs upon the system, and constitutes the willful refusal to comply with the Rules. If the Advisory Committee intends to amend the Federal Rules of Civil Procedure to combat discovery abuse, it should direct its efforts at preventing stonewalling.

**II. TLPJ STRONGLY OPPOSES SEVERAL PROPOSALS DISCUSSED IN THE SPECIAL REPORTER'S MEMORANDUM ON THE GROUNDS THAT THEY WOULD UNREASONABLY RESTRICT AND NARROW NECESSARY DISCOVERY.**

**A. The Proposals to Narrow the Scope of Discovery As Defined in Rule 26 Would Greatly Harm the Civil Justice System.**

The Special Reporter's Memorandum discusses a proposal to sharply narrow the scope of permissible discovery under Rule 26, with respect to all discovery devices. Alternatively, the memo discusses a second proposal to limit the scope of discovery solely with respect to document requests. Under these proposals, discovery would only be

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<sup>6</sup> This abuse is particularly striking, when one considers that some of the large institutions that complain the most about the cost of discovery are also often among the worst offenders in not answering interrogatories, even though interrogatories are often the most cost-effective means of obtaining information.



It is not entirely clear how the proposed rule would differ from the doctrines emerging from this caselaw, other than that it appears that the Special Reporter apparently would like to protect more information than is currently protected. The problem with the proposal, in large part, is that it is not self-evident what types of production would be truly "inadvertent." Accordingly, TLPJ suspects that the proposed rule would create a good deal of litigation as to what the term "inadvertent" means. For example, if counsel for a party review a document, and decide that it is not privileged, and then later change their mind and decide to assert a privilege, can the party then assert a claim of privilege and argue that the original production was "inadvertent"? Such a claim of privilege would almost certainly be waived under the current caselaw, but perhaps the proposed rule change would permit such a change of heart.

TLPJ sees no reason to reject a well-developed body of caselaw that wisely balances a number of relevant factors and replace it with a one-size-fits-all solution sought by some responding parties.

**III. TLPJ Supports Some of the Proposals Already Before the Advisory Committee that Would Genuinely Reform and Improve the Discovery Process.**

**A. The Federal Rules Should Clearly Provide that, As Soon as Litigation is Commenced, Parties Must Preserve and Retain Documents, Files, and Records that Are Potentially Discoverable.**

TLPJ strongly endorses the proposal set forth in the Special Reporter's Memorandum for an amendment "to limit destruction of potentially discoverable materials." It is surprising, and deplorable, that there should be a need to amend the Federal Civil Rules of Procedure to expressly bar the destruction of documents. One would hope that the ethical

rules governing attorneys would have been sufficient to eliminate this practice.<sup>9</sup>

Unfortunately, as noted in Part I-C above, the existing guidelines have frequently failed to prevent the destruction of discoverable materials.<sup>10</sup> Evidence collected by a number of commentators, as well as the experience of TLPJ and its members, suggests that parties responding to discovery all too frequently destroy discoverable documents and materials after a case was initiated.

Accordingly, there is clearly a need to bolster and more firmly articulate the standards governing such behavior. The Rules Advisory Committee should take a very strong stand against this most egregious form of discovery abuse. We agree that the Federal Rules should make it explicitly clear that the destruction of discoverable materials is improper and sanctionable conduct.

**B. The Federal Rules Should Place Presumptive Time Limits on Depositions.**

The Special Reporter's Memorandum lists a proposal to place presumptive time limits on depositions, and references an earlier proposal to cap depositions at six hours. TLPJ approves of this proposal, with two crucial caveats.

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<sup>9</sup> Several Federal courts have recognizes that litigants have a duty to preserve evidence that they know or reasonably should know is discoverable, and is either (a) likely to be requested during discovery; or (b) the subject of a pending discovery request. E.g. National Association of Radiation Survivors v. Turnage, 115 F.R.D. 543 (N.D. Cal. 1987); William T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443 (C.D. Cal. 1984).

<sup>10</sup> See also Ricardo Cedillo and David Lopez, Document Destruction in Business Litigation from a Practitioner's Point of View, 20 St. Mary's L.J. 637, 664 (1989) ("All other things aside, present ethical provisions and federal and state laws unfortunately will not encourage attorneys to constrain client destructions of evidence or deter lawyers themselves from participating in destruction and concealment.")

rulemaking. District courts throughout the federal system have adopted individual sets of local rules, and some districts have frequently and repeatedly amended those rules. In addition, some districts have also imposed a broad variety of additional rules labelled "Discovery Guidelines" that further regulate discovery practice.

TLPJ does not contend that most or all of the various local rules around the nation are themselves harmful or bad ideas. Indeed, several of our own proposals for changes to the federal rules discussed in Part IV, *infra*, are drawn from local rules in different district courts. Nonetheless, the sheer diversity of discovery procedures has sadly Balkanized the federal district courts. Practices differ from district to district nearly as much as they differ from state to state.

In addition, even within many federal district courts, there are often quite wide variations in the discovery practices permitted or required by individual judges. A good many U.S. district judges have prepared their own individual sets of rules, and promulgate them as part of a scheduling order or as a stand-alone set of rules. This spreading practice creates further diversity in the federal courts, and is yet another step from the ideal of a largely uniform federal practice.

The Special Reporter's Memorandum suggests that uniformity might be particularly desirable with respect to the mandatory disclosure provisions added to Rule 26 in 1993. TLPJ agrees that uniformity is desirable with respect to these provisions, and agrees that mandatory disclosure should be enacted on a nationwide basis. Nonetheless, we caution the Rules Advisory Committee not to place too much hope or emphasis on the mandatory disclosure provisions.

In the experience of TLPJ and its members, the mandatory disclosure rules have had little positive impact upon discovery practice. The vast majority of corporate defendants interpret their obligations under the disclosure rules so narrowly that remarkably little information is usually disclosed. While a few TLPJ members have reported good experience, most reports are discouraging. The provisions have been widely abused, and the experiment has not been a success. Automatic disclosure is, at best, a complement to full formal discovery by traditional methods. While we see only limited value to mandatory disclosure, we do not wish to see it eliminated at time when the thrust of most of the proposals in the Special Reporter's Memorandum is to restrict and narrow discovery. In a setting where a number of traditional and significant discovery devices may be sharply curtailed, TLPJ is loathe to see the discovery provisions limited as well. If the Advisory Committee is seriously considering acting to restrict document discovery, it should not also limit the disclosure provisions.

**D. Federal Judges Should Set Firm Trial Dates Within a Short Time After the Filing of the Complaint.**

TLPJ also endorses the goal discussed in the Special Reporter's Memorandum of setting firm trial dates at an early stage of a case. Special Reporter's Memorandum at 5. Generally speaking, delay in civil litigation harms individual consumer and victim plaintiffs and redounds to the benefit of corporate defendants. In TLPJ's experience, nothing leads a defendant to take a case more seriously, or brings them to the bargaining table more quickly, than the firm prospect of a trial date in the near future. Accordingly, TLPJ endorses the suggestion in the Special Reporter's Memorandum that district courts set firm trial dates. To the extent that this procedure gives rise to standardized, reasonable and brief periods for

formal discovery, TLPJ endorses those results as well.

These "rocket-docket-style" proposals can only succeed, however, if certain crucial caveats are recognized. First, district courts must be available to rule on discovery disputes promptly. Second, district courts must be prepared to adjust the schedule if either party commits serious discovery abuse. If one party refuses to respond to discovery in a timely manner, abusive behavior cannot be allowed to compress the discovery period of the other party. When rocket dockets are inflexibly administered, they can encourage discovery abuse and stonewalling.

TLPJ had a recent experience, which was by no means unusual, in the Southern District of Virginia's "rocket docket." In this case, a corporate defendant produced no documents and responded to no interrogatories until two business days before the scheduled hearing on a motion to compel. Because of the defendant's supposed busy schedule and the difficulty of getting the court to schedule a discovery hearing, however, this defendant was able to delay making any response to written discovery requests until the six month discovery period was down to the last six weeks. District courts must take care to adjust discovery periods and trial dates in such circumstances, or responding parties will be given powerful new incentives to stonewall.

**E. Federal Courts Should More Frequently Impose Sanctions for Discovery Abuse.**

One of the issues mentioned in the Special Reporter's Memorandum is "enhanced cost shifting," referring to the possibility of increasing the frequency with which judges enter discovery sanctions. TLPJ believes that discovery sanctions should be handed out more frequently. For a wide variety of reasons, our experience suggests that many judges are

reluctant to hand down discovery sanctions. Accordingly, serious discovery abuses -- refusals to answer proper discovery requests, the posing of numerous completely unjustified and improper objections, and even the destruction and spoliation of evidence -- often go unpunished in the federal courts. As noted in Part I-C above, this lack of accountability permits and encourages a good deal of discovery abuse.

**IV. IN ADDITION TO THE PROPOSALS SET FORTH IN THE SPECIAL REPORTER'S MEMORANDUM, TLPJ PROPOSES SIX ADDITIONAL IMPROVEMENTS TO THE FEDERAL RULES TO DETER AND REDUCE DISCOVERY ABUSE.**

As noted above in Part I, responding parties regularly and routinely ignore their discovery responsibilities under the Federal Rules of Civil Procedure. There is all too often a failure of accountability. The following proposals seek to restore accountability to discovery practice in civil litigation in the federal courts.

**A. The Federal Rules Should Require Counsel and Parties to Certify that All Properly Demanded Discoverable Documents that Could Be Located Through a Reasonable Search Have Been Produced.**

In Part I, above, we discussed the well-documented fact that parties in civil litigation regularly do not produce (and often destroy) properly requested, discoverable documents. For the discovery system to work properly, responding parties and counsel must understand that, if a proper discovery request calls for material that is discoverable, that the responding party is obliged (1) to conduct a reasonable search for that material, and (2) to produce the information discovered in that search.<sup>11</sup> Accordingly, the rules should make the obligations

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<sup>11</sup> If a party is not going to fully respond to a discovery request because it believes the request is objectionable, it should be required to explicitly say that it is not fully responding in its answer. See Part IV - B, below.

of responding parties as clear as possible, and require responding parties and responding counsel to affirm under oath that they have met those obligations.<sup>12</sup> Requiring our proposed certification under oath by both parties and counsel should help clarify these obligations to responding parties and make them easier to enforce.

Responding parties should also be required to describe the steps taken to conduct a "reasonable search." As discovery proceeds, it may become clear that a responding party has failed to look for documents in a place or places where those documents are very likely to be found. If that failure is too blatant, a court could use the description of the search to hold a party responsible. This would surely discourage a good deal of stonewalling, concealment and discovery abuse.

**B. The Federal Rules Should Direct that No Party May Decline to Respond to a Discovery Request Under Cover of an Objection, Unless that Party Specifically States that it is Not Fully Responding to the Request.**

An extremely common form of discovery abuse could be termed the "secret partial answer." It usually takes the following form: a party responding to a request or interrogatory sets forth a variety of objections, and then, after some caveat such as "without waiving this objection," provides some answer. The problem with this approach is that neither the requesting party nor any reviewing court can determine from such a response whether the answers that follow the objection are complete answers, or whether the answering party has chosen to withhold information in reliance upon its objections. All too

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<sup>12</sup> Improved accountability will also require strengthened judicial enforcement of the discovery rules. Thus in Part IV-F, below, we urge that steps be taken to make it easier to get hearings on discovery matter, and in Part III-E, above, we endorse the Special Reporter's suggestion that discovery sanctions should be more frequently entered.

often, responding parties choose to make only partial responses, and either withhold information that is harmful to their case or do not inform their opponents of material they wish to preserve as a surprise.<sup>13</sup> When (and if) the requesting party learns of these omissions, the answering party is likely to defend its partial answer on the grounds that the requesting party should have guessed that information was withheld, in light of the fact that the answer was made notwithstanding the objection.

A related abuse is initiating a discovery battle to drain an opponent's resources when there is no underlying information. Responding parties frequently refuse to produce documents, and then, after an extensive discovery battle, indicate that no such documents exist. Requiring a party to state up front whether material is genuinely being withheld as a consequence of an objection would eliminate this abuse as well.

At least one district court has taken steps to address these practices. The United States District Court for the District of Maryland has enacted Discovery Guidelines, and Guideline 9(a) states:

A party may object to an interrogatory, document request, or part thereof, while simultaneously providing partial or incomplete answers to the request. If a partial or incomplete answer is provided, the answering party shall state the answer is partial or incomplete.

(emphasis added).

TLPJ urges the Advisory Committee to adopt this rule, or some close variant of it,

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<sup>13</sup> TLPJ's experience that this practice is commonplace has been confirmed by commentators. *E.g.*, Hare, *et al.*, Full Disclosure at 89 ("The plaintiff may not challenge the objection because a response has been given; however, the manufacturer may actually be using the objection to conceal the incomplete nature of its response instead of directly stating that its response is incomplete.")



throughout the federal system. TLPJ also urges the adoption of a rule requiring that responding parties indicate that there are no responsive documents, when that is in fact the case. If a discovery request is truly objectionable and does not merit a full response, a responding party should be willing to (and should be required to) say so, so the parties and the judge can evaluate the issue. If no information exists that is responsive to a discovery request, the responding party should be willing to say that, too.

**C. The Federal Rules Should Specifically Require Responding Parties to Produce Detailed Privilege Logs When They Advance Privilege Claims.**

Before answering written discovery requests (either interrogatories or requests for production), many responding parties will set out global or "general" objections to every single request. The most common general objection is a vague invocation of privilege. Typical of this genre is the following objection recently posed by a defendant in a TLPJ case involving allegations of consumer deception:

[Defendant] also objects to the plaintiff's Requests for Production to the extent that they seek information and documents privileged from discovery under the attorney-client privilege, the work-product doctrine, or otherwise.

This general objection was not elaborated upon with respect to any particular information or documents said to be privileged. In the experience of TLPJ and its members, this response is all too common. Parties invoking claims of privilege regularly fail to offer any specifics to support those claims.

It is true that there is a substantial body of case law demonstrating that global privilege claims, without supporting specific facts, are insufficient. As one court stated, "blanket assertions of privilege are decidedly improper," a "fact [that] should no longer be 'news' to a responding party." Eureka Financial Corp v. Hartford Acc. & Indem. Co., 136

F.R.D. 179, 182 (E.D. Cal. 1981). The requirements for a privilege log have been repeatedly set out in the case law. E.g., Taylor v Florida Atlantic Univ., 132 F.R.D. 304, 306 (S.D. Fla. 1990) ; Wei v. Bodner, 127 F.R.D. 91, 96 (D.N.J. 1989); Research Institute for Medicine and Chemistry v. Wisconsin Alumni Research Found., 114 F.R.D. 672, 675 (W.D.Wis. 1987); Petz v. Ethan Allen, Inc., 113 F.R.D. 494, 497 (D. Conn. 1985); In re Uranium Anti-Trust Litig., 552 F. Supp. 517 (N.D. Ill. 1982); FTC v. Lukens Steel Co., 444 F. Supp. 803, 806 (D.D.C. 1977); International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 93-94 (D. Del. 1974); Camco, Inc. v. Baker, 45 F.R.D. 384, 387 (S.D. Tex. 1968).

Despite this case law, however, global and supported privilege objections are often blithely interposed to written discovery requests. Accordingly, some Federal District Courts have adopted firm local rules to ensure that parties provide proper support for their privilege claims. In the U.S. District Court for the Southern District of Florida, for example, local Rule 26.1(G)(6)(b) provides:

(b) Where a claim of privilege is asserted in objecting to any interrogatory or document demand, or sub-part thereof, and an answer is not provided on the basis of such assertion:

(i) The attorney asserting the privilege shall in the objection to the interrogatory or document demand, or sub-part thereof, identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

(ii) The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(A) For documents: (1) the type of document; (2) general

subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressee of the document, and, where not apparent, the relationship of the author and addressee to each other;

(B) For oral communications: (1) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and the place of communication; (3) the general subject matter of the communication.

In one sense, there is little new in this proposed rule. When the issue has been fully litigated, federal courts always insist that responding parties provide a privilege log.

Nonetheless, the extremely widespread practice of asserting privilege objections without providing any log suggests that the current caselaw is not sufficient to enforce compliance with this important requirement. TLPJ suggests that, if the Federal Rules of Civil Procedure were amended to make this requirement explicit, then responding parties would feel far more constrained to meet it, and this abusive discovery practice would occur less often.

**D. The Federal Rules Should Provide Model Interrogatories, Both With Respect to Certain General Issues and With Respect to Common Types of Cases, But the Existence of These Model Interrogatories Should Not Prevent Parties from Also Crafting A Reasonable Number of Additional Interrogatories Tailored to the Specific Case.**

Model interrogatories can help address some of the common abuses described in Part I-C above. Consider, for example, the following interrogatory in an auto tort case:

State how the INCIDENT occurred, giving the speed, direction, and locations of each vehicle involved:

(a) just before the INCIDENT;

(b) at the time of the INCIDENT;

(c) just after the INCIDENT.

In the experience of TLPJ and its members, in federal litigation this interrogatory would be more likely than not to elicit some or most of the following objections: (1) the interrogatory is "burdensome"; (2) the interrogatory is "vague"; (3) the interrogatory "cannot be understood," or is "unclear"; (4) the interrogatory calls for the work-product of the responding party; (5) the interrogatory is "compound"; (6) the interrogatory is "overbroad"; (7) the interrogatory exceeds the duties of the party under the Federal Rules; etc. Surprisingly few parties would simply fully answer this interrogatory. Each of these objections has been raised against this interrogatory or some version of it, and often by competent lawyers at large, well-known firms.

The problem with all of this is that there is nothing wrong with the interrogatory; it should just be answered. All of these objections are improper. No experienced lawyer would dare to voice any of these objections in front of a judge in a trial. Yet lawyers nearly always raise such objections in interrogatory answers.

In California's state courts, however, responding lawyers can not object to and then ignore this interrogatory with any some hope of impunity, because it is a form interrogatory (number 20.8) approved by the Judicial Council of California. The California Code provides that "A party may propound to another party (1) 35 specially prepared interrogatories, and (2) any additional number of official form interrogatories . . . that are relevant to the subject matter of the pending action." Cal. Civ. Proc. Code § 2030(c). A number of other states, including Florida and Maryland, have also propounded some standard form interrogatories.

The promulgation of form interrogatories can help strip away many of the improper

objections that are routinely set forth to simple interrogatories, and TLPJ members in states providing such forms report that they have significant value in deterring such objections.

It is important to note, however, that the promulgation of form interrogatories must not be used to replace the use of individually crafted interrogatories. No team or commission of attorneys, no matter how experienced or farsighted, could possibly foresee all (or even most) of the interrogatories that should be asked by competent counsel in a given case. There will very often be some important point well worth pursuing that relates to the particular facts, setting and parties in a given case. To attempt to cover all situations in advance would be presumptuous, and would ignore the role that competent counsel must play in tailoring discovery requests to a particular set of facts. As noted above, California law provides that the form interrogatories are available in addition to specially prepared interrogatories. TLPJ knows of no state whose rules limit the interrogatories that a party may ask exclusively to the model interrogatories.

**E. Rule 26(a)(2), Relating to Expert Witness Disclosures, Should Not Be Applied to Treating Physicians.**

Treating physicians serve a unusual role as fact witnesses and expert witnesses. On the one hand, they will generally testify about their direct observations of the condition of an injured party. On the other had, their specialized training and knowledge should allow them to draw conclusions of a sort that ordinary witnesses may not.

With respect to the detailed written disclosures required by Rule 26(a)(2), TLPJ suggests that treating physicians should not be treated like other experts are treated. In this context, they should be treated as fact witnesses.

First, litigation already imposes burdens on the time of treating physicians, and many

are already quite reluctant to serve as witnesses in a lawsuit. Courts that require these physicians to prepare detailed written reports before they can offer opinions merely make federal litigation even more burdensome to the doctors, and make it even harder for parties to convince physicians to testify. Many district courts already seek to minimize these burdens on doctors, encouraging the use of de bene esse depositions so that doctors need not be inconvenienced by trial schedules. Exempting treating physicians from Rule 26(a)(2), which some district courts already do in their local rules, would serve the same purpose.

Second, there is no great need for such reports. Traditional discovery devices such as depositions and reviewing subpoenaed medical records are more than adequate to allow a party to learn the treating physician's opinions and the bases for those opinions.

**F. It Should Be Easier to Get a Hearing on Discovery Motions.**

As this statement has related above, many district courts do not closely supervise discovery. For a variety of reasons (many of which are outside of the control of the district judges), it is very hard to get any sort of timely hearing on discovery motions throughout much of the federal system. As was also pointed out above, this lack of supervision has the unfortunate effect of encouraging broader discovery abuse.

Accordingly, TLPJ urges that the Advisory Committee attempt to fashion steps to make it easier to have discovery motions heard. This would help return some accountability to the process of responding to discovery requests, and thus help reduce stonewalling and discovery abuse.

The Special Reporter's Memorandum states that "the Advisory Committee is aware that some judges make themselves available by telephone to resolve discovery disputes or

provide otherwise accelerated methods for hearing discovery motions . . . ." Special Reporter's Memorandum at 6. TLPJ is also familiar with district judges who follow such practices, and we strongly endorse the suggestion that accelerated dispositions of discovery disputes be encouraged.

### CONCLUSION

Discovery abuse is a widespread reality in federal civil litigation today. Responding parties regularly withhold information in order to gain an advantage, and they often get away with this behavior because, in part, the rules are insufficiently firm in several respects.

TLPJ urges the Advisory Committee to take strong steps to address stonewalling, and to adopt the proposals discussed in Parts III and IV of this statement.

At the same time, TLPJ strongly urges the Advisory Committee not to proceed with the proposals aimed at restricting discovery discussed in Part II, above. These proposals would encourage still further stonewalling, and would deny justice to many individual consumers and victims.

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August 18, 1997

Mr. John Rabiej, Chief  
Rules Committee Support Office  
Federal Judiciary Building  
One Columbus Circle, N.E.  
Washington, D.C. 20002

Dear Mr. Rabiej:

Enclosed is the Product Liability Advisory Council's submission to the Advisory Committee on Civil Rules for inclusion in the briefing materials that will be mailed to participants in the September 4-5, 1997 Conference on Discovery at Boston College. By letter dated August 11th, Professor Richard Marcus requested that we send our submission to the other participants in the bar group panel. We have done so, and have also sent a copy to Professor Burbank.

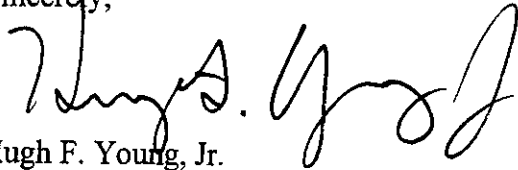
We welcome the invitation we received from Judge David F. Levi, on behalf of the Civil Rules Advisory Committee to participate in the Committee's inquiry into possible changes to the rules governing discovery. We appreciate that crafting discovery rules to govern the diversity of litigation before the federal courts is a daunting task. And we are grateful to the Advisory Committee for this chance to share our perspectives with them as they undertake this significant and extraordinarily important mission.

It is important to note that PLAC's comments are specifically relevant to cases in which large volume document production is commonplace. We appreciate that the Advisory Committee must craft rules applicable to all kinds of litigation, including cases in which large scale document discovery is unknown. In the attached materials, we have made a concerted effort to address the specific questions posed to us in Judge Levi's letter, namely

1. **"...for the position of your organization on the question of what changes, if any, should be made to the discovery rules to reduce the cost and delay in litigation."**
2. **"Perhaps your organization may be particularly well suited to address the problems associated with large scale document discovery."**

We hope our comments provide useful insight to the Advisory Committee as it continues to explore rules changes governing discovery. We understand that the process is a lengthy one and we look forward to sharing our perspective on these matters when we meet with the Advisory Committee at Boston College early next month.

Sincerely,

A handwritten signature in black ink, appearing to read "Hugh F. Young, Jr.", written in a cursive style.

Hugh F. Young, Jr.  
Executive Director

enclosure

cc: PLAC Executive Committee



Comments of the Product Liability Advisory Council

to

The Advisory Committee on Civil Rules of the  
Committee on Rules of Practice and Procedure of the

Judicial Conference of the United States

“Discovery Practice in High Volume Document Discovery Cases”

August 18, 1997

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## **Attachments**

1. List of Corporate members of the Product Liability Advisory Council
2. Comments of the Honorable Wayne D. Brazil, Magistrate Judge, U.S. District Court for the Northern District of California. These comments were delivered at a workshop of the Pretrial Practice and Discovery Committee of the ABA Section of Litigation, held on Monday, August 4, 1997 at the St. Francis Hotel in San Francisco.
3. Copy of PLAC survey form

## **Introduction and Overview**

### **What is the Product Liability Advisory Council?**

PLAC is a non-profit professional association of product liability defense counsel. PLAC's corporate members<sup>1</sup> collectively are parties to numerous personal injury lawsuits every year premised primarily on design defect claims and/or failure to warn claims. The products produced by PLAC's corporate members are diverse--automobiles, trucks, airplanes, drugs, medical devices, chemicals, food and beverage products, personal care products, appliances, tobacco, power tools and firearms-- to name just a few. Even a cursory examination of the personal injury cases moving through the state and federal court systems in this country will reveal that a significant percentage of them involve injuries associated with the use (and misuse) of PLAC-member company products.

In addition to 125 corporate members, PLAC has more than 300 sustaining members--attorneys in private practice who are the outside trial and appellate counsel for PLAC's corporate members. By virtue of the expense and risk associated with today's product liability litigation, the private practitioners who defend product liability cases for most large product manufacturers are among the most experienced and capable defense counsel in the nation.

### **How do PLAC's members view discovery problems in their product litigation?**

PLAC welcomes this opportunity to share our views with the Advisory Committee because our members are daily participants in the civil litigation process. Our comments and suggestions are **not** derived from an academic or theoretical perspective. Quite the contrary, in fact. Our comments are derived from the world in which the discovery rules are applied in the context of high risk, high visibility, controversial, contentious, and all too often, **un-civil** litigation practice in courtrooms in every state and in every federal jurisdiction.

PLAC believes that the Federal Rules of Civil Procedure simply should not be drafted from a perspective of "one size fits all". One participant in past efforts to reform the discovery rules has recently observed that while most litigation in federal district courts is comprised of small cases where less than \$100,000 is at stake, it is still important for rules writers to keep in mind the different litigants who utilize the system<sup>2</sup>. Clearly, litigants of relatively small claims, in relatively simple,

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<sup>1</sup>A list of PLAC's corporate members can be found in Attachment 1.

<sup>2</sup>Comments of the Honorable Wayne D. Brazil, Magistrate Judge, U.S. District Court for the Northern District of California. These comments were delivered at a workshop of the Pretrial

straightforward cases deserve a set of procedural and evidentiary rules that facilitate “the just, speedy and inexpensive determination” of their cases. Litigants in large, complex, discovery-intensive cases deserve no less.

While undoubtedly **not** envisioned by past authors of Rules amendments, the application of today’s discovery rules (at least in complex, product liability cases) oftentimes has little to do with the search for relevant evidence to prove a stated cause of action. Instead the rules themselves (or more precisely, the judicial application of those rules) have created an alternative means of recovery in totally meritless litigation. The plain truth is that discovery today, in complex product liability cases, is often a one-way coercive “game” that has as its goal not the fair adjudication of a claim but instead the coercion of a settlement.

In product litigation virtually all discovery burdens and costs fall on the defendant. And it is not at all theoretical that the cost of production, particularly of overly expansive, indulgent discovery can exceed the value of a case.

The present system demands **more** judicial involvement in discovery disputes in complex cases at a time when judges are yearning for **less**. It may be true that in simple cases a judge’s admonition to “work things out” between the parties is all that is needed. In a simple case, maybe just a little judicial involvement and awareness is needed.

But what if there is absolutely no incentive for one of the parties to work things out? In the absence of willing and vigilant judicial participation in the discovery process, and particularly with the generous notion of “relevance” in Rule 26, much discovery practice in products cases today amounts to nothing short of a brutal “discovery war”.

PLAC’s members often deal with a situation where plaintiffs’ counsel -- particularly when handling a products case of dubious merit -- will attempt to “win” their cases by bombarding the manufacturer-defendant with overreaching document requests, which are generally sustained. Tactically, there are three primary reasons why plaintiffs’ attorneys wage discovery war:

1. to coerce an “economic settlement” by forcing a manufacturer to incur attorneys fees that are disproportionate to the value of the case;

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Practice and Discovery Committee of the ABA Section of Litigation, held on Monday, August 4, 1997 at the St. Francis Hotel in San Francisco. Excerpts of Judge Brazil’s comments can be found in Attachment 2.

2. to exploit mistakes and omissions in large-scale document productions by seeking outcome-determinative “sanctions” under the guise of the manufacturer having “withheld” or untimely produced documents; and
3. to “poison” a court’s perception of a corporation so as to receive favorable discretionary rulings on *all* matters, both discovery and trial related.

There is little incentive for plaintiffs’ attorneys to discontinue the strategic manipulation of the discovery rules. The fact that individual plaintiffs possess few if any documents limits the practical ability of a manufacturer to engage in arms-length negotiation with the plaintiffs’ attorneys to agree on reasonable limits to the scope of discovery. Indeed, the incentive for plaintiffs’ attorneys is to escalate this form of discovery abuse for the reasons described above, secure in the belief that the expansive concept of Rule 26 relevancy will effectively insulate them from all but the most egregious and unethical misconduct.

All of this has had a profoundly negative impact on the legal profession. The level of acrimony, incivility, and malicious motion practice in modern litigation is frequently appalling. And with courts increasingly tired of refereeing contentious discovery disputes, manufacturers face a real possibility that their answers will be stricken or otherwise sanctioned in a manner that is grossly disproportionate to the alleged mistake or omission.

### **The PLAC Survey**

Information of the kind necessary to respond to Judge Levi’s invitation was not something PLAC had at hand when the invitation was received. In fact, detailed information about a particular company’s discovery practice is generally closely held and confidential. This is particularly true of information that enumerates the costs associated with discovery, and the internal organization of corporate legal departments to deal with discovery practice.

In order to gather sufficient information to be responsive to the Advisory Committee’s request to address issues associated with large scale document discovery, PLAC designed and administered a survey to its corporate members.<sup>3</sup> Time available to design and administer the survey, and the amount of time given to companies to complete the survey was very short. In designing the survey form, large portions of the Federal Judicial Center’s survey form were used as templates, sometimes with little modification.

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<sup>3</sup> A copy of the survey is Attachment 3.

The survey was sent to PLAC's corporate members on June 13, 1997. Most of the survey forms were received by July 15. A few more were received at the end of July. Because of the sensitive nature of much of the material in each response, companies were promised confidentiality and anonymity. In order to compile and evaluate the responses, it was therefore necessary to redact identifying information before any evaluation of the materials was possible. Summer travel, conflicts in schedules, and most recently the strike at United Parcel Service all combined to make the preparation of this submission a rush to the finish line. So what else is new--we are, after all, lawyers.

We have been mindful of Judge Levi's and Professor Marcus' desire to have materials circulated to conference participants in advance of the meeting and we have been able to compile these materials to facilitate their review before the Boston conference. However, we would like to reserve the right to supplement these materials, and note, too, that PLAC's Executive Committee, while it has had a chance to review the survey results, has not formally adopted any of the specific recommendations that its individual member company's have proposed. We will welcome the chance to share our point of view on specific proposed rules changes as they emerge from the work of the Advisory Committee.

Of 125 survey forms sent out, 30 were returned. Given the scope of the information sought, and the need to get various approvals to submit such confidential information to PLAC, we are pleased with this level of response. We think that the results of our survey are representative of what many, if not most large manufacturing companies face in products litigation, and are thus revealing in identifying the scope of some of the problems manufacturing defendants face in large sale document discovery practice.



## Executive Summary of the PLAC Survey Responses

Virtually all respondents to the PLAC Survey expressed their overriding concern with two aspects of present discovery practice--overly broad discovery which is permitted by Rule 26, and the lack of judicial involvement in or concern with discovery problems and disputes.

### 1. The scope of discovery in Fed.R.Civ.P. 26(b)(1) is too broad.

The existing rule allows discovery that is too broad. In complex, discovery-intensive product liability cases it encourages "fishing expeditions" that result in huge document production burdens being placed on defendants -- even when the plaintiff has failed to include any discernible theory of liability or causation in the pleadings.

Possible changes to Rule 26(b)(1) that would narrow the scope of discovery could include **deleting** from the present rule the language shown ~~lined through~~ and in [brackets] and adding one of the choices of language shown in ***boldface italics***:

#### Rule 26(b)(1)

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the ~~[subject matter involved in the pending action, whether it relates to the]~~ claim or defense of the party seeking discovery or the claim or defense of any other party, including the description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought ~~[appears reasonable calculated to lead to the discovery of admissible evidence.]~~ (choose one of the alternatives a, b and c shown below )

- a. ***"is relevant to disputed facts alleged with particularity in the pleadings."*** (this is same standard used for pre-discovery disclosure under Rule 26(a)(1)), or
- b. ***"is relevant to a disputed issue framed by the pleadings."*** or
- c. ***"is otherwise demonstrably relevant to the claims or defenses of the parties."***

The present **scope** of discovery is one of two primary factors that have transformed product liability discovery practice into a kind of economic war of attrition that has more to do with coercing settlements than it does with determining the *bona fides* of causes of action.

**2. Judges must involve themselves early in the discovery process and take an active role in resolving discovery disputes.**

The second contributing factor in the growth of abusive discovery practice in complex product liability litigation is the lack of judicial participation in it. Simply put, some judges will not control discovery. They will not apply the rules that do exist. Still others truly believe that their admonition to “work things out” is sufficient to control parties to litigation in which hundreds of millions of dollars are at stake, and just the cost of responding to document discovery requests can cost the producing party in excess of \$1,000,000.

These substantial costs of discovery, virtually all of which are borne by defendants in product liability cases are amply demonstrated by the following figures reported by PLAC’s members in their product litigation: in product liability cases where *total* litigation expenses equaled \$227,350,000 disclosure and discovery expenses averaged 58% or \$131,863,000 and document production expenses alone averaged 30% or \$68,205,000.<sup>4</sup>

Rules can be earnestly and brilliantly crafted. And the changes sought in our civil litigation system by such rules changes can be, and are, well-intentioned. But judges must **apply** the rules we have for them to be of any consequence whatsoever in resolving the problems associated with discovery practice today under the present set of rules, or tomorrow with whatever rules changes emerge from the Advisory Committee’s deliberations.

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<sup>4</sup> 17 of the 30 survey responses included figures sufficient to produce this compilation.

## Specific PLAC Survey Findings

### “One-Way” Discovery

“One -Way” discovery describes the situation where one “side” of a case has all, or virtually all, of the relevant documents. In a classic products case, the product manufacturer is on the receiving end of most document requests. By way of contrast, in a lawsuit suit between commercial parties of comparable size, the ability of each party to “wage discovery war” serves to deter either party from making overreaching document requests.

Inherent in product litigation is the fact that it is the rare products case where the defendant will not have substantially more documents than does the plaintiff. In most cases, where the plaintiff’s discovery requests are focused on the alleged product defect and are limited to a reasonable time period, one way discovery is not an unfair burden but is simply a reality.

However, one-way discovery should not be used for purposes of harassment or to gain an unfair advantage. Discovery requests which are vague and which are unrelated to a specific claim of defect are unfairly burdensome. Not infrequently, the requests operate as a fishing expedition where plaintiff has filed his complaint but clearly has not performed any investigation into the accident and has no theory of liability. The discovery sought is sought to determine if there is any reason to bring the lawsuit in the first place.

### PLAC Survey

Do you think “one-way discovery” is a problem in your product litigation?	87% say yes
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In the “one-way” discovery examples cited by each of the 30 respondents, defendants in the aggregate produced a total of <b>1,131,763 pages</b> of documents compared to a total of only <b>24,265 pages</b> produced by plaintiffs in the aggregate -- a ratio of nearly <b>47 to 1</b> .
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With respect to overreaching document requests, the Committee might consider proposing the following rules amendments:

- A) An amendment to Rule 34(a) requiring the plaintiff to share the cost of identifying, retrieving and reviewing documents in an amount (to be determined by the court) that is consistent with the plaintiff’s financial means, thereby providing some incentive for the plaintiff to undertake a cost-benefit analysis of this discovery requests.

- B) An amendment to Rule 16(b) requiring that the court consider “appropriate modification or enlargement of any pretrial scheduling order” consistent with the magnitude of the discovery burden that the plaintiff seeks to impose on the defendant, which again would require the plaintiff to balance his desire in obtaining voluminous information with his competing desire to obtain speedy resolution of his cause of action. The current rule precludes modification of the scheduling order except upon a defendant’s showing of “good cause.” The presumption should be exactly the opposite when a court sustains over broad discovery specifications.
- C) An amendment to Rule 34(a) clarifying the scope of third-party documents that may properly be deemed to be in the “possession, custody, or *control*” of a manufacturer. Plaintiffs’ counsel frequently abuse the concept of “control” by insisting that a manufacturer produce documents in the possession of its suppliers, advertising agencies, and overseas affiliates. Some courts unfortunately take an expansive view of the word “control” which has contributed to further escalation of this form of discovery abuse. We recommend amending the rule to delete “control” from the scope analysis. If, however, a party attempts to divert its documents from discovery under the amended rule by sending them to another location, then an exception to the amended rule should be triggered obligating the party to produce the documents.

### “Input-Output”

“Input-Output” is a term that refers to the relationship of documents produced in response to discovery requests from the opposing side, documents copied by the opposing side and documents introduced at trial.

#### PLAC Survey

1. Do you think disproportionality is a problem?	83% say yes
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With respect to the “*input-output*” issue of whether the expense and burden of document production is worth the effort in terms of actual use of the documents at trial, the data from the 14 of the 30 companies who responded with data on this point show that out of a total of **10,158,150** documents produced by defendants before trial, only **6,006 (0.06%)** were actually introduced at trial by plaintiffs.

Of the following options, which do you think would significantly reduce the “input/output” problem in your litigation?

Options	% choosing this option
Narrowing the definition of what is discoverable (Rule 26(b))	66%
Narrowing the definition of what documents are discoverable (Rule 34)	50%
Limiting-or further limiting-the time within which to complete discovery	33%
Increasing court management of discovery	43%
Increasing availability of district or magistrate judges to resolve discovery disputes	36%
Imposing fee-shifting sanctions more frequently and/or imposing more severe sanctions for violations of discovery rules or orders	43%

### Safe Haven Provision

#### PLAC Survey

Do you think that once a party has demonstrated that a <i>bona fide</i> attempt was made to locate and disclose documents responding to a document request (even though relevant documents are subsequently located that were not initially disclosed) that the Federal Rules should create a “safe harbor” to shield the party from discovery sanctions?	80% say yes
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The federal rules currently require that the party responding to discovery supplement any response as necessary. The federal rules should provide a “safe harbor” to shield the party from discovery sanctions after a party has made a *bona fide* attempt to locate and disclose documents regarding a particular document request. After the parties have made a demonstration that an attempt was made to locate the documents, the federal rules should specifically provide that sanctions cannot be issued. Such attempt to locate documents could be demonstrated by an affidavit showing that a knowledgeable company representative originally made a *bona fide*

attempt to locate responsive documents by searching all known, logical sources, specific criteria might include:

1. Documentation of interaction with the client to inquire about the location of the records
2. Documentation of a systematic review of the documents
3. A demonstration of the ambiguous nature of the requests following efforts to negotiate the scope of the request
4. Confirmation of the agreement to modify the request, if one exists
5. An affidavit from the client or lawyer attesting to good faith efforts.

### **General Problems in Disclosure or Discovery**

While the PLAC Survey form was designed primarily to elicit comments on costs and problems associated with large scale document discovery, we also asked our members to comment on more general problems. Here is a cursory review of those comments:

#### **1. Initial disclosure**

Problem	% agree
a-Disclosure is too brief or incomplete	30%
b-Disclosure is excessive	26%
c-Disclosed materials are also requested in discovery	56%
d-Opposing parties fail to supplement or update the disclosures	33%
e-Disclosure occurs only after a motion to compel or an order from the court	13%
f-Sanctions are imposed for failure to disclose	6%

## 2. Document production

Problem	% agree
a-Requests are vague	76%
b-Requests are not tailored to the type of case	76%
c-Requests are propounded with an ulterior motive (imposing undue burden)	76%
d-An excessive number of documents are requested	70%
e-Materials provided are excessive or disordered	10%
f-Parties fail to respond in a timely fashion	23%
g-Parties fail to respond adequately	30%

## 3. Oral depositions

Problem	% agree
a-There are too many depositions	33%
b-Too much time is taken in some or all depositions	50%
c-Corporate depositions are noticed with an ulterior purpose (harassment)	73%
d-Attorneys coach witnesses during depositions	36%
e-Attorneys improperly instruct witnesses not to answer questions	16%
f-Attorneys act unreasonably to annoy, embarrass, or oppress the deponent or counsel	26%

## 4. Expert disclosure

Problem	% agree
a-Expert disclosure is too brief or incomplete	56%
b-Expert disclosure is too expensive	6%
c-Expert disclosure is too close to the trial date	56%
d-Parties fail to supplement or update their disclosures	40%

## General Narrative Comments

Respondents were invited to answer the following question:

**If you were the witness before the Civil Rules Advisory Committee in September, what would you say in answer to Judge Levi? What part of the system is broken? How should it be fixed. What discovery rules need changes, and how should they be changed? What would the language of such rules changes look like.**

What follows are the most concise of those comments. These comments have been taken verbatim from the surveys received, and have been edited only to redact identifying information in the interest of anonymity.

### Company 1

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1. In response to Judge Levi, we believe that PLAC should suggest that Federal Rule 26, which requires mandatory disclosure, is over broad and burdensome. Too often the rule is abused in large scale document discovery cases. The rule should be changed to require the plaintiffs and defendants to negotiate and identify common core issues that should be the subject of the mandatory initial discovery. Then, the rule should require the plaintiffs to be limited to thirty (30) interrogatories which could be used to identify any additional documents that may be relevant to the litigation. The plaintiffs then should be given a limited number of requests for production to seek those specific documents. If the plaintiffs submit a document request that is over broad and all encompassing, rather than specifically identifying the requested documents specific to the product that allegedly caused the harm, then the plaintiff should be made to “show cause” for such an over broad request. Defendants should then be given the opportunity to respond and provide affidavits or evidence as to the overburdensome nature of the request. If the plaintiff is allowed to pursue the request, then the rules should require that the plaintiffs incur the expense of locating and producing the requested documents in response to the broad request.

2. The discovery rules should be changed in several ways.

First, the definition of relevant discovery should be narrowed to allow only the discovery of relevant evidence. The term “reasonably calculated to lead to the discovery of admissible evidence” allows fishing expeditions.



Second, automatic disclosure should be eliminated in favor of an initial discovery management conference with the court. Discovery rules should be changed to increase the role of the court in supervising discovery, especially at the beginning. Critical to the management of discovery is an understanding by the court and the parties of what persons have knowledge of the relevant facts and the existence and location of the relevant documents. With that knowledge, the court can then direct the discovery. Requiring an early discovery conference with the court would accomplish these things.

- (1) Both the court and the parties would be forced to learn about the case. What are the important issues? What type of documents exist and where are they located? Who are the people most knowledgeable about the case?
- (2) The court could then enter orders directing discovery. This direction would include imposing limitations on discovery, directing toward discovery certain areas and away from others, and ordering certain discovery.

The problem with existing discovery, from our view, is that because it is not managed by the court, the discovery is not effectively limited. The federal "relevance" definition is not an effective limitation to discovery because it does not allow a court to hear the parties views on the direction in which the discovery should proceed.

Unlimited and unfocused discovery is simply not workable. Requiring the parties to talk about the case before the court allows the court to limit and focus the discovery. This will protect against the wholesale review or production of documents.

3. Insufficient judicial attention fosters misconduct and abuse by parties and their counsel. The "philosophy of pretrial discovery," rather than ambush is good in my opinion.

## **Company 2**

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The legal system in this country has created a burden on companies to forever keep documents that have been previously produced in discovery. From a pure cost standpoint, it is terribly expensive to maintain and warehouse such documents. Much, if not all, of the paper could be destroyed under a document retention policy, but for the requirement that they be kept because the documents have been previously produced. None of the documents serve any utility to the company beyond production in litigation.

Documents that are in daily use by a company are difficult to organize, copy and control for purposes of production in litigation. Moreover, they mean and represent different things to different people. For example, engineers use words to mean things quite differently than marketing people, yet plaintiff's attorneys are permitted to obtain all kinds of documents from all kinds of departments, for vast time periods and ask the sole designated corporate representative about the documents when the representative will not understand the purpose, meaning, context, etc. of the documents.

### **Company 3**

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In our view, it is not the federal or state rules of civil procedure per se, but rather their application which have lead to the inequities of civil discovery in product liability actions. Although federal and states rules themselves can be rewritten with reform in mind, one must always remember that they are subject to their application by individual jurists, and also to other constraints and limitations which can be created by local rules of court which should not, but which often do, take over and control key issues in discovery (e.g., number and length of depositions and number and length of various discovery requests).

It will only be through the early, active and aggressive judicial management of discovery in a lawsuit, and not once a dispute arises, that many of the horror stories concerning discovery sanctions against corporate defendants can begin to be eliminated. The movement in this country towards various forms of alternative dispute resolution (ADR) should provide a basis to direct these types of disputes towards that type of a resolution. In our view, not only would the time and cost savings be significant, but it would also be more predictable.

### **Company 4**

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I would ask that the Rules provide for tighter Judicial Control over discovery; particularly document discovery and that the Rules define more narrowly what documents must be produced. I would also ask that parties who demonstrate that they've acted in good faith be protected from sanction awards should their opponent discover a new relevant document. Much of the discovery abuse (documents) appears to be focused on harassing parties by seeking enormous volumes of documents and by attempting to "catch" a party failing to produce a document. These measures may remove this harassing element and allow the parties to focus on seeking the truth.

## **Company 5**

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We recently produced over 28,000 engineering documents in a product liability suit. The plaintiff's counsel requested copies of approximately 4,000 of the documents. During trial, 6 were offered. The document search to obtain the documents exceeded 1,000 hours of engineering and in-house time, and 1,000 hours of attorney time to review all documents produced. The net result was that 6 documents were offered by plaintiff's counsel at trial. We were fortunate and won the case. A similar case resulted and the same documents were produced. The plaintiff did NOT use any documents at trial. We won the case.

Limitations have become necessary (unfortunately, because of the abusive nature and misuse of this trail weapon). Facts are very seldom at issue limiting what is requested. Therefore, the procedure is in need to limitation to avoid the unfortunate misuse of this tool to "bring defendant companies to their knees" by plaintiffs demanding the omnipotent "any and all" everything that might lead to discoverable evidence. Judges are reluctant to place limitations on document discovery and additional rules are required to provide balance. This current right is being misused generally by plaintiff's to extract settlements, not based on the facts of the case, but on increasing the cost to defend.

- 1) Put in place strict discovery and expert deadlines. Move the cases to the trial docket.
- 2) Tell judges that their rulings on discovery disputes are important to litigants. We can't always "work it out" and plaintiffs are not entitled to free wheeling discovery from a company. The relevancy rules are vague (perhaps necessarily so) and contemplate and require relevancy determinations!

## **Company 6**

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The system is broken because:

1. Courts are not taking an active role in resolving discovery disputes. Instead, they tell the parties to "go work things out," but plaintiffs have no incentive to "work things out."
2. Courts do not recognize the tremendous expense and difficulties associated with large document productions; and
3. Plaintiffs' counsel believe that they have nothing to lose by filing motions for sanctions alleging discovery abuse by defendants.

The system can be fixed by:

1. More involvement of District Court judges in discovery matters;
2. Carefully considering defendant's relevancy objections and burdensomeness objections to plaintiffs discovery requests, and splitting the productions costs between the parties; and
3. Providing defendants with attorneys fees associated with responding to plaintiffs' meritless motions for sanctions.

In addition the following change should be made.

1. Rule 26(b)(5) should be modified to make clear that a privilege log is not due simultaneously with discovery responses, but rather within a reasonable time (depending on the scope of the production) if requested by the opposing party. Further, Rule 26(b)(5) should provide that in the event of additional privileged documents being located after an initial privilege log is produced, the log may be reasonably supplemented to include the additional documents.
2. Rule 26 should be modified to provide heightened work product protection for computerized litigation support systems. Corporate defendants in complex product liability cases are forced to create databases to efficiently manage their document productions. Recent decisions allowing plaintiffs to have access to opposing party's litigation support system suggest that a plaintiff may be able to make the requisite showing of "substantial need" merely by demonstrating that the database is "already paid for" and plaintiffs should not have to incur "duplicative" costs. Such liberal construction of exceptions to work product protection create a disincentive to assemble litigation support systems and foster inefficiencies during discovery.

Finally, we believe that courts need to better understand the burdens associated with overly broad and demanding discovery requests. We regularly receive grossly over broad discovery requests, many of which are sustained by the courts. These types of document requests call for the production of documents having nothing to do with the litigation. Moreover, they require a tremendous amount of time and energy to search for, review and copy the irrelevant but responsive documents. Here are some actual examples of these types of overly broad and demand document requests:

"Please produce all documentation, videotapes, film, audiotapes, still photographs and/or other electronically stored data or information referencing any and all crash testing, either vehicle to vehicle or vehicle to barrier (moving or fixed) in which there

is a frontal impact to one or more of the vehicles involved.”

“Describe any and all analyses, surveys, studies, tests, investigations, or examinations done by you, or on your behalf, or reviewed by you, which relate to or reflect any and all hazards likely to be associated with the use of light trucks, including information sufficient to locate these documents.”

“Identify all testing performed on or behalf of defendant regarding [this type of vehicle] relating to vehicle stability, wheel and/or wheel axle durability and rollover, and with regard to each test, identify the persons who conducted such tests, the documents, photographs and/or videotapes related to such tests, and identify the persons having custody of such documents.”

*Again, it bears repeating that all of these requests were upheld by the courts.* We believe that our objections to these types of discovery requests need to be more carefully considered by the courts. Unfortunately, we are forced by courts over and over gain to respond to these requests as written, and to invest a significant amount of time and money into the gathering of such documents. In the end, though, we are generating information that is almost wholly irrelevant and which is rarely used by plaintiffs or us. Instead, the plaintiffs merely look for mistakes or omissions in the productions and serve the all-too-familiar motions for sanctions or for default judgment. These are the types of discovery requests which drive litigation costs up so high, waste the resources of the parties and the courts, and perpetuate the incivility and malicious motion practice that is ubiquitous in today’s litigation environment.

The time has come to recognize plaintiff’s discovery abuse as a problem and to do something about it.

## **Company 7**

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To reduce discovery abuse:

1. Require the plaintiff to identify the specific defect at the start of the case (plaintiffs, of course, should have performed an investigation and should have a theory of defect before filing suit);
2. Require experts to identify all theories at their depositions and in their reports, and do not allow new theories to surface at trial;
3. Education of and committment from the judiciary (1) to treat injured plaintiffs and

corporate defendants fairly and evenhandedly in regard to discovery problems, and (2) to resolve discovery disputes based on a thorough understanding of the case.

4. A reasonable statute of repose, which would help establish an outside time period for document requests.

In repeat litigation, documents are circulated among plaintiff's bar. Especially if it involves a discontinued product, the universe of discovery is finite. Yet, plaintiff's attorneys keep asking for the same documents over and over again and file sanctions motions if even one document is missing, even if they have a copy (no prejudice). I would remove the availability of any sanctions unless plaintiff first submits such a document to defendant and defendant fails to authenticate it.

## **Company 8**

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We believe that Rule 26(b)(2)(ii) does not need to be modified, but instead utilized more by courts. Under this rule, the courts "shall" limit discovery when "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

This rule clearly requires the courts to limit discovery when the burden outweighs the benefit. However, rarely do courts attempt to evaluate the benefits of the proposed discovery compared with the burden and expense of the proposed discovery. Instead, they typically ask the parties to "go work things out" or they permit discovery, despite the burden and expense.

We believe that courts need to more frequently conduct the cost/benefit analysis and to recognize the legitimate objections raised by corporate defendants based on burden and expense.

F-1

## **Attachment 1**

List of Corporate members of the Product Liability Advisory Council



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**CORPORATE MEMBERS/ PRODUCT LIABILITY ADVISORY COUNCIL, INC.**

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18-Aug-97

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<b>3M</b>	<b>Case Corporation</b>
<b>ACRISON, Inc.</b>	<b>Caterpillar, Inc.</b>
<b>Allegiance Healthcare Corporation</b>	<b>CBI Industries, Inc.</b>
<b>AlliedSignal, Inc.</b>	<b>Chrysler Corporation</b>
<b>Aluminum Company of America</b>	<b>Ciba-Geigy Corporation</b>
<b>American Automobile Manufacturers Assoc.</b>	<b>Clark Material Handling Company</b>
<b>American Brands, Inc.</b>	<b>Club Car, Inc.</b>
<b>American Home Products Corporation</b>	<b>Coleman Company, Inc., The</b>
<b>American Suzuki Motor Corporation</b>	<b>Continental General Tire, Inc.</b>
<b>Andersen Corporation</b>	<b>Coors Brewing Company</b>
<b>Anheuser-Busch Companies</b>	<b>Corning Incorporated</b>
<b>Atlantic Richfield Company</b>	<b>Daewoo Motor America</b>
<b>BASF Corporation</b>	<b>Dana Corporation</b>
<b>Baxter International, Inc.</b>	<b>Deere &amp; Company</b>
<b>Bayer Corporation</b>	<b>Dow Chemical Company, The</b>
<b>Becton-Dickinson &amp; Company</b>	<b>Eaton Corporation</b>
<b>Beech Aircraft Corporation</b>	<b>Eli Lilly and Company</b>
<b>BIC Corporation</b>	<b>Emerson Electric Co.</b>
<b>Black &amp; Decker (U.S.) Inc.</b>	<b>Estee Lauder Companies</b>
<b>BMW of North America, Inc .</b>	<b>Exxon Corporation, USA</b>
<b>Boeing Company, The</b>	<b>FMC Corporation</b>
<b>Bridgestone/Firestone, Inc.</b>	<b>Ford Motor Company</b>
<b>Briggs &amp; Stratton</b>	<b>Freightliner Corporation</b>
<b>Bristol-Myers Squibb Company</b>	<b>Gates Rubber Company, The</b>
<b>Brown-Forman Corporation</b>	<b>General Electric Company</b>
<b>Budd Company, The</b>	<b>General Motors Corporation</b>
<b>C.R. Bard, Inc.</b>	<b>Glaxo Wellcome Co.</b>

Goodyear Tire & Rubber Company, The  
Great Dane Trailers, Inc.  
Guidant Corporation  
H.B. Fuller Company  
Harnischfeger Industries Inc.  
Heil Company, The  
Hoechst Celanese Chemical Group, Inc.  
Hoechst Marion Roussel, Inc.  
Honda North America, Inc.  
Hyundai Motor America  
International Paper Company  
Isuzu Motors America, Inc.  
Johnson Controls, Inc.  
Kaiser Aluminum & Chemical Corporation  
Kawasaki Motors Corp., U.S.A.  
Kolcraft Enterprises, Inc.  
Kraft Foods, Inc.  
Loewen Group International, Inc.  
Lorillard Tobacco Company  
Lucent Technologies Inc.  
Mack Trucks, Inc.  
Maytag Corporation  
Mazda (North America), Inc.  
Medtronic, Inc.  
Melroe Company  
Mercedes-Benz of N. America, Inc.  
Michelin North America, Inc.  
Miller Brewing Company  
Mitsubishi Motor Sales of America, Inc.

Monsanto Company  
Motorola, Inc.  
Navistar International Transportation Corp.  
Nissan North America, Inc.  
O.F. Mossberg & Sons, Inc.  
Otis Elevator Co.  
Owens-Corning Fiberglas Corporation  
PACCAR Inc  
Panasonic Company  
Pentair, Inc.  
Pfizer Inc.  
Pharmacia and Upjohn, Inc.  
Philip Morris Companies, Inc.  
Porsche Cars North America, Inc.  
Procter & Gamble Co., The  
Raymond Corporation, The  
RJ Reynolds Tobacco Company  
Rover Group, Ltd.  
Schindler Elevator Corp.  
Sears, Roebuck and Company  
Sherwood, a Division of Harsco Corporation  
Simon Access-North America  
Smith & Nephew Richards, Inc.  
SmithKline Beecham Corporation  
Snap-on Incorporated  
Sofamor Danek Group, Inc.  
State Industries, Inc.  
Sturm, Ruger & Co., Inc.  
Subaru of America

**Textron Inc.**  
**Thomas Built Buses, Inc.**  
**Toro Company, The**  
**Toshiba America Incorporated**  
**Toyota Motor Sales, USA, Inc.**  
**TRW Inc.**  
**UST(U.S. Tobacco)**  
**Volkswagen of America, Inc.**  
**Volvo Cars of North America, Inc.**  
**Vulcan Materials Company**  
**Westinghouse Electric Corporation**  
**Whirlpool Corporation**  
**Yamaha Motor Corporation, U.S.A.**

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## **Attachment 2**

Comments of the Honorable Wayne D. Brazil, Magistrate Judge, U.S. District Court for the Northern District of California. These comments were delivered at a workshop of the Pretrial Practice and Discovery Committee of the ABA Section of Litigation, held on Monday, August 4, 1997 at the St. Francis Hotel in San Francisco.

What follows below, in boldface text, are the comments of the Honorable Wayne D. Brazil, Magistrate Judge, U.S. District Court for the Northern District of California. These comments were delivered at a workshop of the Pretrial Practice and Discovery Committee of the ABA Section of Litigation, held on Monday, August 4, 1997 at the St. Francis Hotel in San Francisco. The purpose of the workshop was to discuss the activity of the Civil Rules Advisory Committee in looking at discovery problems, and to place the current effort in historical context.

[bracketed comments relate to text of the PLAC submission]

**“...the world of civil discovery is very much invisible. It’s not one monolithic whole. What I mean is that there is a big difference between discovery in small and medium sized cases and big cases and we have found that discovery problems in small cases basically weren’t substantial. Discovery problems in big cases could be. And I say could be because in some big cases there are some substantial and some cases there weren’t.”**

**“[But there’s a big difference in those universes and one of the things that rule writers have to keep constantly in mind is for whom are we writing rules? And at least until 1993 we were always writing rules for everyone. The center of gravity for everyone is a small case. What I mean by that is -- I’ve never seen -- now correct me if the Rand Study has something on this -- but for my 13+ years of experience sitting in federal court here in San Francisco -- a huge range of cases here -- the 5th or 6th biggest jurisdiction in the country in terms of population -- even in that setting -- and Silicon Valley with all those huge sexy class actions, even in that setting -- I think the median case in our court is probably \$50,000, \$60,000, \$70,000, \$75,000 in real value. Those are the center of litigation gravity. Those are the cases for which national rules must be written -- cannot be written primarily or exclusively for huge product liability cases, huge securities cases.]”**

**“In smaller cases, to bring back the Chicago research, there wasn’t enough room -- not enough economic incentive and evidentiary room for a whole lot of jockeying or manipulation and people basically found out what they needed to know -- people found out basically what they needed to know -- few medicals or who saw what and settled the case. The big cases were a different story -- in the big cases some arguably substantial discovery problems in a fairly substantial percentage of big cases. And the problems we put into two simple-minded categories: a) resistance and evasion; b) over discovery on the other. Resistance and evasion was at least as big a problem as over discovery. What we did, we went out and interviewed all these people in-depth, we had an instrument for interviewing people and we interviewed a huge range of practitioners -- little firms, big firms, everything to get some sense of a representative sample and then when we analyzed our results we did some telephone follow-up to make sure we weren’t off base. And we emerged with a modest amount of confidence that what we had was fairly reliable. All opinions were surveyed -- none of it “empirical” in the sense that Rand has recently tried.”**

**“And so we had these two major kinds of problems coming up in a fairly a hefty percentage of cases. [And whose to blame -- Whose fault is all of this? The answer -- the judges -- they don't police the system and impose sanctions. They are all "weannies" and "wimps". They are not interested. They don't know that the center of litigation is discovery so they don't give us any service. Huge percentages of lawyers when you asked them open-ended question and closed-ended question of what's the main problem --- the judges -- not us -- the judges. And that actually is important because that fed one of the ideas that we a failures in the 1983 amendment process.] Anyway we found lots of other things -- a fairly severe level of infection of tactics in discovery, but again mostly in the larger cases. I finished that work right at the time the litigation section then was finishing under Ray Lundquist -- I don't how many of you know him or were around when he was doing this -- a huge subcommittee of a litigation section who was working on discovery reform in the late 70's. He was one of several leaders of this effort. I finished my work just at the time they were finishing their proposals that went to the advisory committee and eventually tried to get higher. As you may know, in 1980 the litigation section of the ABA made it very hard pressed to get scope of discovery reduced from what it is now to what it has been since the late 1930's back to either issues or claims and defenses. And the Advisory Committee came within an inch -- and I wasn't there but that was my historical read -- they came very close to adopting the view but backed off. And backed off for reasons I think are still very worth of consideration -- and recently cited in a background paper for this conference Boston conference next month.”**

**“Judge Mansfield, chair of the pertinent committee, and he describes why the committee in 1980 decided not to shrink formally the scope of discovery. There were several reasons one is that he said discovery is really bad in some cases but in most cases it is not bad and that was the committee's perception even after being heavily lobbied or inputted from the ABA that had a different view but anyway that was the committee's view; the second big thing that stuck out in my mind was Judge Mansfield and some of the other members were concerned about impact that a change in the scope of discovery would have on other aspects of litigation.”**

**“...I think litigation reform is like dealing with an amoeba -- you push and you find something that is a problem and you attack it and you try to fix it and it regroups somewhere else completely intact and what it is that it is regrouping is problems, difficulty, human nature, things not working right, being too expensive -- it regroups -- it will find some other place because we are fundamentally competitive creatures. I don't like that, I should have been born a priest in the 13th century, but we are fundamentally competitive creatures so it regroups and more specially what Judge Mansfield was worried about and other members of the committee as well if we change discovery, and if discovery is arguably the center of litigation, people aren't going to accept a change and role over and go home and say okey now it's skinnier -- instead they are going to over plead...”**





### **Attachment 3**

Copy of PLAC survey form

## Discovery Abuse Survey

\_\_\_\_\_

\_\_\_\_\_

Please designate a contact person (if different from the person shown above) with whom we may discuss your responses or from whom we may gather additional information.

Name: \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

# Table of Contents

## Discovery Abuse Survey

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- A. How does your company analyze costs associated with document discovery?
- B. Company wide product litigation expenses, and percentages attributable to sub-tasks.
- C. Case specific expenses, and percentages attributable to sub-tasks

### Section Two      pages 5-7

- A. “one way discovery”
- B. “input/output”

### Section Three    pages 8-10

- A. Problems in disclosure or discovery
- B. Court management of/involvement in discovery practice
- C. Changes in rules or case management practices

### Section Four    page 11

Your chance to share anecdotal responses highlighting document discovery abuse problems and recommendations for rules changes

## *Section One*

### **A. How does your company analyze costs associated with document discovery?**

Questions 1-4 pertain to **document discovery** costs and the extent to which your company has the capability to track these specific costs in individual cases, and in the aggregate for your product litigation.

1. Does your company *track* **document discovery** costs (as a **distinct** component of litigation costs) in product litigation?

Yes

No

2. Do you require bills for **document discovery** costs to utilize the ABA Litigation Code Set?

Yes

No

3. Some other specific code or annotation that identifies **document discovery** costs by sub-task?

Yes

No

4. Has your legal department ever *analyzed* **document discovery** costs for your product litigation?

Yes

No

*questions continue on the next page*

Questions 5-7 pertain to **all kinds of discovery**.

5. Does your company differentiate between costs of that discovery which is responsive versus reactive?

Yes

No

6. Do you have any information comparing discovery costs to the value of a case?

Yes

No

7. Does your company compile or track discovery costs by state or region?

Yes

No

**If your answer to any question above (1-7) is “yes”, please provide a narrative on a separate sheet of paper, labeled 1A costs**

**B. Company wide product litigation expenses, and percentages attributable to sub tasks.**

1. Please estimate the total product litigation expenses for your company, including such items as expert witness fees, transcript fees, litigation support fees, and fees for attorneys and paralegals, but excluding any expenses relating to appeals.

\$ \_\_\_\_\_

2. Approximately what percentage of the total litigation expenses for your company were associated with disclosure and discovery activity?

\_\_\_\_\_ % of the total litigation expenses

3. Approximately what percentage of the total litigation expenses were associated with document discovery activity?

\_\_\_\_\_ % of the total litigation expenses

4. Please indicate the approximate percentage of total discovery expenses allocable to each of these types of discovery. Figures shown should add up to 100%. Include estimates of the expenses of motions activity in the categories to which the motion pertained.

\_\_\_\_\_ % Meet and confer/discovery planning

\_\_\_\_\_ % Initial disclosure of documents and materials by rule or order, or voluntarily

\_\_\_\_\_ % Expert disclosure of discovery

\_\_\_\_\_ % Depositions

\_\_\_\_\_ % Requests for and/or production of documents not disclosed at any initial disclosure

\_\_\_\_\_ % Interrogatories

\_\_\_\_\_ % Other (please describe:)

### C. Case specific expenses, and percentages attributable to sub tasks.

Can you provide PLAC with figures specific to a case, or category of cases, for the following:

1. Total product litigation expenses including such items as expert witness fees, transcript fees, litigation support fees, and fees for attorneys and paralegals, but excluding any expenses relating to appeals.

\$ \_\_\_\_\_

2. Approximately what percentage of the total litigation expenses were associated with disclosure and discovery activity?

\_\_\_\_\_ % of the total litigation expenses

3. Approximately what percentage of the total litigation expenses were associated with document discovery activity?

\_\_\_\_\_ % of the total litigation expenses

4. Please indicate the approximate percentage of total discovery expenses allocable to each of these types of discovery. Figures shown should add up to 100%. Include estimates of the expenses of motions activity in the categories to which the motion pertained.

\_\_\_\_\_ % Meet and confer/discovery planning

\_\_\_\_\_ % Initial disclosure of documents and materials by rule or order, or voluntarily

\_\_\_\_\_ % Expert disclosure of discovery

\_\_\_\_\_ % Depositions

\_\_\_\_\_ % Requests for and/or production of documents not disclosed at any initial disclosure

\_\_\_\_\_ % Interrogatories

\_\_\_\_\_ % Expense associated with opposing discovery motions

\_\_\_\_\_ % Other (please describe):

5. Can you estimate the number of pages produced in any specific product liability case? How many? Cost of production?

6. For the same case, how many pages of documents were selected by plaintiffs counsel for copying?

## Section Two

### A. "One way discovery"

This term describes the situation where one "side" of a case has all, or virtually all, of the relevant documents. In a classic products case, the product manufacturer is on the receiving end of most document requests. By way of contrast, in a lawsuit suit between commercial parties of comparable size, the ability of each party to "wage discovery war" serves to deter either party from making overreaching document requests. Not only is there not an incentive for the plaintiff in a products case to limit document requests, there is presently every incentive to make such requests as broad as possible in order to increase the possibility that a manufacturer's failure to produce a relevant document might give rise to the so called "**sanctions tort**".

We are looking for **anecdotal as well as quantitative information** about your company's experience with this problem. Please start by answering this question:

1. Do you think "one way discovery" is a problem in your product litigation?

Yes

No

2. If you can provide **quantitative** information (pertaining to a particular case, or series of cases) please try to answer the following question:

a. Please compare the number of documents your company produced in response to all document discovery requests by plaintiff and the number of documents the plaintiff produced in response to all document requests by you.

# of documents plaintiff produced \_\_\_\_\_

# of documents you produced \_\_\_\_\_

3. If you can provide **anecdotal information**, please do so on a separate sheet(s) of paper labeled "one way discovery" and describe your own perspective on this problem as it affects your company's litigation.

4. In narrative form, would you give us your perspective on the "one way discovery problem"? Can you propose any solutions to it that balance the rights of access to relevant evidence with the economic costs and dangers of overreaching?



5. Do you think that once a party has demonstrated that a *bona fide* attempt was made to locate and disclose documents responding to a document request (even though relevant documents are subsequently located that were not initially disclosed) that the Federal Rules should create a “safe harbor” to shield the party from discovery sanctions?

Yes

No

6. Please list the criteria for the “good faith” showing of compliance with the document request.

7. How would the “safe harbor” provision of the rules be written?

**Please answer questions 3-7 on a separate sheet of paper, labeled “one way discovery”.**

## B. "Input/Output"

This term refers to the disproportionality of documents requested and documents used. We are looking for **anecdotal as well as quantitative information** about your company's experience with this problem. Please start by answering this question:

1. Do you think disproportionality is a problem?

Yes

No

2. If you can provide **quantitative** information (pertaining to a particular case, or series of cases) please try to answer the following questions:

Please compare the number of documents produced in response to all document discovery requests and the following:

a.

# of documents produced

\_\_\_\_\_

# of documents **copied** by plaintiff

\_\_\_\_\_

b.

# of documents produced

\_\_\_\_\_

# of documents **introduced at trial**  
by plaintiff

\_\_\_\_\_

3. If you can provide **anecdotal information**, please do so on a separate sheet(s) of paper labeled "input/output" and describe your own perspective on the "input/output" problem in your litigation.

4. Of the following options, which do you think would significantly reduce the "input/output" problem in your litigation?

- Narrowing the definition of what is discoverable (Rule 26(b))
- Narrowing the definition of what documents are discoverable (Rule 34)
- Limiting—or further limiting—the time within which to complete discovery
- Increasing court management of discovery
- Increasing availability of district or magistrate judges to resolve discovery disputes
- Imposing fee-shifting sanctions more frequently and/or imposing more severe sanctions for violations of discovery rules or orders
- Other changes (specify) ( **separate sheet of paper labeled "input/output"** )

## *Section Three*

### **A. Problems in disclosure or discovery**

Which, if any, of the following types of problems do you think occur routinely in the product litigation your company defends?

*Please check all that apply.*

#### **Initial disclosure**

- Disclosure is too brief or incomplete
- Disclosure is excessive
- Disclosed materials are also requested in discovery
- Opposing parties fail to supplement or update the disclosures
- Disclosure occurs only after a motion to compel or an order from the court
- Sanctions are imposed for failure to disclose
- Other (please specify): **( separate sheet of paper labeled 3A initial disclosure)**

#### **Document production**

- Requests are vague
- Requests are not tailored to the type of case
- Requests are propounded with an ulterior motive (imposing undue burden)
- An excessive number of documents are requested
- Materials provided are excessive or disordered
- Parties fail to respond in a timely fashion
- Parties fail to respond adequately.
- Other (please specify): **(separate sheet of paper labeled 3A document production)**

#### **Oral depositions**

- There are too many depositions
- Too much time is taken in some or all depositions
- Corporate depositions are noticed with an ulterior purpose (harassment)
- Attorneys coach witnesses during depositions
- Attorneys improperly instruct witnesses not to answer questions
- Attorneys act unreasonably to annoy, embarrass, or oppress the deponent or counsel
- Other (please specify): **(separate sheet of paper labeled 3A oral depositions)**

#### **Expert disclosure**

- Expert disclosure is too brief or incomplete
- Expert disclosure is too expensive
- Expert disclosure is too close to the trial date
- Parties fail to supplement or update their disclosures
- Other (please specify): **(separate sheet of paper labeled 3A expert disclosure)**

#### **Other problems**

- Please identify any other problems with disclosure or discovery:  
**( separate sheet of paper labeled 3A other)**

## B. Court management of/involvement in discovery practice

Please indicate whether any of the following problems regarding the courts' management of discovery occur routinely in the product litigation your company defends?

*Please check all that apply*

### **Discovery planning and implementation**

- There are no time limits on discovery and such limits are needed
- The time allowed for discovery is too long
- The time allowed for discovery is too short
- The court allows too many extensions of the deadline to complete discovery
- The court allows too many extensions of time to respond to discovery requests
- The court is too rigid about deadlines
- Other (please specify): ( **separate sheet of paper labeled 3B discovery planning**)

### **Limitations on discovery**

- There are insufficient limits on interrogatories and such limits are needed
- There are insufficient limits on depositions and such limits are needed
- There are insufficient limits on document discovery and such limits are needed
- There are insufficient limits on admissions and such limits are needed
- Limits on interrogatories are too lenient
- Limits on interrogatories are too restrictive
- Limits on depositions are too lenient
- Limits on deposition are too restrictive
- Limits on document discovery are too lenient
- Limits on document discovery are too restrictive
- Limits on admissions are too lenient
- Limits on admissions too restrictive
- Other (please specify): ( **separate sheet of paper labeled 3B limitations**)

### **Rulings on motions**

- There is no decision maker available to rule on disputes during depositions
- Rulings on discovery motions take too long
- There are no rulings on discovery motions and such rulings are needed
- Other (please specify): ( **separate sheet of paper labeled 3B motions**)

### **Sanctions**

- There are no rulings on sanctions motions and such rulings are needed
- Rulings on sanctions motions take too long
- Rulings on sanctions motions are generally too lenient
- Rulings on sanctions motions are generally too harsh
- Other (please specify): ( **separate sheet of paper labeled 3B sanctions**)

### **Other problems**

- Please identify any other problems with the courts' management of discovery:  
( **separate sheet of paper labeled 3B other**)

## Supplemental Materials

***Discovery Management:  
Further Analysis of the  
Civil Justice Reform Act Evaluation Data***

***James S. Kakalik, Deborah Hensler,  
Daniel McCaffrey, Marian Oshiro,  
Nicholas Pace, Mary Vaiana***

# ***Discovery Management Study***

- **Further analysis of our main CJRA evaluation data**
- **Requested by Judicial Conference Advisory Committee on Civil Rules**
- **Research supported by ICJ core funds and by the ABA Section on Litigation**
- **Preliminary draft available is unreviewed and unedited. Please do not quote.**

# ***Discovery Management Study Focus***

- **Provide objective data about lawyers' work on discovery**
- **Assess judicial management policies**
  - **Early disclosure requirement**
  - **Discovery plans**
  - **Limits on interrogatories**
  - **Limits on discovery cutoff time**
- **Lack data to consider**
  - **Limits on depositions**
  - **Limits on document discovery**
  - **Issues of privilege**
  - **Methods lawyers use to manage discovery outside court purview**



# ***Outline***

- **Brief overview of main CJRA evaluation data and findings**
- **Lawyer work hours on discovery and in total for various types of cases**
- **Evaluation of discovery management policies**

# ***The Civil Justice Reform Act of 1990***

- **Ambitious experiment to cut cost and delay in federal courts**
  - **Required certain districts to adopt pilot package of case management procedures**
  - **Mandated independent evaluation**

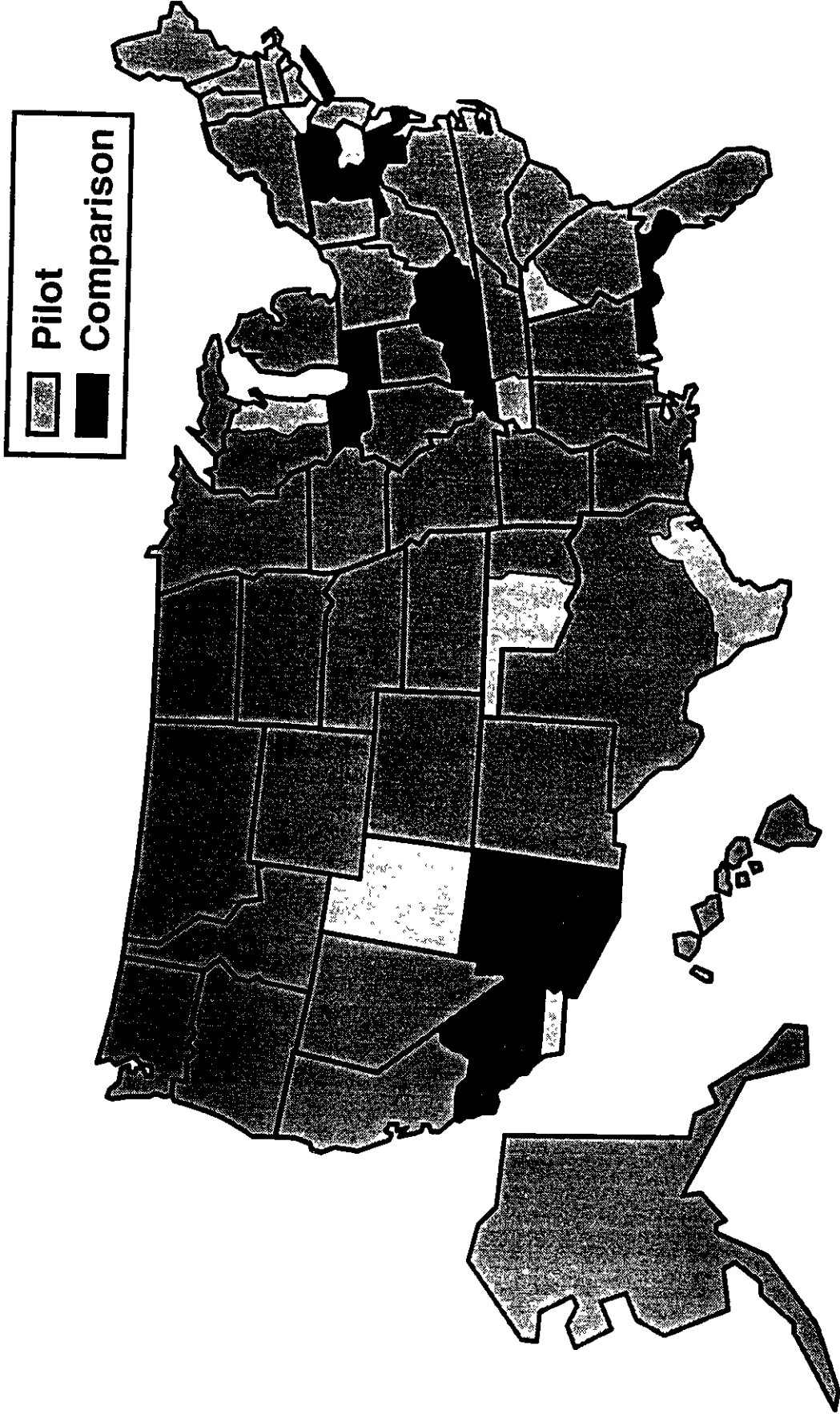
## ***Bottom Line of RAND's Main Evaluation***

- **Mandated pilot package of case management procedures, as implemented, had little effect on cost or delay**
- **Some highly touted reforms had no major effect**
- **We identified a balanced package of procedures that could cut time to disposition substantially with no change in costs**

# ***Objectives of the Evaluation***

- **Describe judicial case management policies and procedures used in 10 pilot and 10 comparison districts**
- **Measure effects of case management policies on
  - **Time to disposition**
  - **Costs of legal counsel and related expenses, and costs of judge work time**
  - **Participants' satisfaction with process and views of fairness****
- **Make recommendations regarding efficacy of various case management policies**

# *The 20 Districts in the Study*



# ***Data and Methods***

- **Detailed case level data**
  - **Court data bases and case records**
  - **Judge, ADR provider, lawyer, litigant, and docket surveys for 12,000 + cases**
  - **Time sheets reflecting judge’s work on each case**
  - **District plans, rules, and documents**
- **Quantitative and qualitative methods**
  - **Multivariate statistical analyses using case level data**
  - **Interviews with judges and lawyers, and prior research, to help interpret empirical findings**

# ***Early Judicial Management Significantly Reduces Time to Disposition***

- **Early judicial management without setting a trial date reduces median time by about 1.5 months**
- **The component of early management that had biggest effect was setting trial date early**
- **Early management that includes setting trial date early reduces median time by additional 1.5 to 2 months**

# **Early Judicial Management Increases Costs**

**Early                      Not Early**

**Cost per litigant  
(median)**

**\$12,000**

**\$9,000**

**Lawyer work hours  
(median)**

**95**

**60**



# ***Reducing Discovery Cutoff Time Significantly Reduces Time and Costs***

- ✳ Shortening district median time to discovery cutoff from 6 to 4 months:
  - Reduces time to disposition by 1.5 months
  - Reduces lawyer work time by 17 hours
  - Does not change lawyer satisfaction or views of fairness

# ***Judicial Case Management Reform Appears to Have Limited Role to Play in Reducing Litigation Costs***

- **Except for judicial control of discovery cutoff time, none of the case management procedures significantly reduced litigation costs**
- **What explains variation in litigation costs?**
  - **5% explained by case management policy**
  - **95% explained by characteristics of case and lawyers and by other variables**

# ***But Case Management Procedures Have Substantial Effect on Time to Disposition***

- **What explains variation in time to disposition?**
  - **50% explained by case management policy**
  - **50% explained by case characteristics and other variables**
- **A balanced package of case management policies could speed cases without affecting litigation costs, satisfaction, or fairness**
  - **Early judicial case management**
  - **Early setting of a trial date**
  - **Reducing time to discovery cutoff**

# ***Outline***

- **Brief overview of main CJRA evaluation**
- **Lawyer work hours on discovery for various types of cases**
- **Evaluation of discovery management policies**

# Median Lawyer Work Hours by Case Closure Point

Measure	Closed before issue joined	Closed with issue joined, in less than 9 months	Closed with issue joined, after 9 months
% of Cases	28	27	45
Median total lawyer work hours per litigant	20	35	80
% of total lawyer work hours on all cases	13	14	73
% with zero discovery work hours	72	37	15
Median discovery lawyer work hours per litigant	0	3	20
% of discovery lawyer work hours on all cases	8	12	80

# ***How Lawyers Spend Their Time***

	<b>Cases Closed After Issue Joined, After 9 or More Months</b>	
	<b>Average Hours</b>	<b>Percent</b>
<b>Preparation for trial and trial</b>	<b>26</b>	<b>11</b>
<b>Alternative dispute resolution</b>	<b>6</b>	<b>3</b>
<b>Discovery, including motions</b>	<b>83</b>	<b>36</b>
<b>Motions, excluding discovery</b>	<b>36</b>	<b>16</b>
<b>Confer with judicial officer</b>	<b>7</b>	<b>3</b>
<b>Other work after filing case</b>	<b>55</b>	<b>24</b>
<b>Other work before filing case</b>	<b>15</b>	<b>7</b>
<b>Total</b>	<b>232</b>	<b>100</b>

# **Discovery Work Is Modest for Majority of General Civil Cases**

**Bottom 75% of cases lasting 9 mo., based on lawyer work hrs. Top 10% of cases lasting at least 9 mo.**

<b>Average total lawyer work hours</b>	<b>66</b>	<b>1452</b>
<b>Median total lawyer work hours</b>	<b>55</b>	<b>950</b>
<b>Average discovery lawyer work hours</b>	<b>19</b>	<b>601</b>
<b>Median discovery lawyer work hours</b>	<b>12</b>	<b>300</b>
<b>Median percent discovery hours are of total lawyer work hours</b>	<b>25%</b>	<b>36%</b>

# Complexity of Case Increases Lawyer Work Hours

Low and High  
Medium Complex  
Complex

Average total lawyer work hours	171	432
Median total lawyer work hours	70	150
Average discovery lawyer work hours	64	147
Median discovery lawyer work hours	17	42
Median percent discovery hours are of total lawyer work hours	25%	28%



# ***Discovery Difficulty Increases Lawyer Work Hours***

Measure	Low and Medium Discovery Difficulty	High Discovery Difficulty
Average total lawyer work hours	167	503
Median total lawyer work hours	72	140
Average discovery lawyer work hours	54	205
Median discovery lawyer work hours	15	50
Median percent discovery hours are of total lawyer work hours	25%	33%

# High Stakes Increase Lawyer Work Hours

Measure	Stakes	
	less than \$500,000	\$500,000 or more
Average total lawyer work hours	126	483
Median total lawyer work hours	68	172
Average discovery lawyer work hours	36	190
Median discovery lawyer work hours	17	48
Median percent discovery hours are of total lawyer work hours	25%	30%

# ***Outline***

- **Brief overview of main CJRA evaluation**
- **Lawyer work hours on discovery for various types of cases**
- **Evaluation of discovery management policies**

# ***Discovery Plans Appear Worthwhile When Coupled with Early Management***

- **Early management WITHOUT discovery plan adds to cost of litigation**
- **Early management WITH discovery plan does NOT significantly add to cost**
- **High complexity, difficult discovery, and high stakes cases appear to especially benefit from discovery plans**
- **No major effect of discovery plan on time to disposition, lawyer satisfaction or fairness**

# ***Findings on Early Disclosure Policy***

- **Voluntary early disclosure associated with**
  - **Lower total litigation costs**
  - **Higher lawyer satisfaction**
- **Mandatory early disclosure does not significantly**
  - **Reduce costs, even for subsets of cases**
  - **Affect time, lawyers' satisfaction, or views of fairness**

# ***Findings on Limiting Interrogatories***

- **Limits on interrogatories appear to be associated with**
  - **Lower discovery costs**
  - **Lower total costs of litigation**
  - **Higher lawyer satisfaction**
- **No indication that policy has negative effects**

# ***Findings on Shortening Discovery Cutoff Time***

- **Shorter discovery cutoff time associated with**
  - **Reduced time to disposition**
  - **Reduced litigation costs**
- **No significant effect on**
  - **Lawyer satisfaction**
  - **Views of fairness**

# ***Discovery Management Policy Conclusions***

## **Policy**

### **What the data say**

- **Discovery plans**
- **Supported when coupled with early judicial case management**
- **Mandatory early disclosure**
- **Not supported**
- **Limits on Interrogatories**
- **Appear beneficial**
- **Shortening discovery cutoff time**
- **Strongly supported**



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## MEMORANDUM

**TO:** Secretary, Advisory Committee on Civil Rules  
(For Participants in Discovery Conference)

**FROM:** Alfred W. Cortese, Jr.

**DATE:** August 18, 1997

**RE:** Two Additional Suggested Amendments to the Discovery Rules

---

This memorandum offers some brief preliminary reflections prompted by the excellent materials recently circulated for the Boston Discovery Conference.

It is likely that among the most common complaints that will be heard at the Conference is that discovery, particularly "one way" document discovery in complex, high stakes litigation, is unnecessarily burdensome, costly and wasteful and that in many instances discovery is driven by the effort to sanction the adverse party for responding in "bad faith" rather than to develop information supporting the claims or defenses in the case.

In an ideal world, perhaps the solution to many of the problems plaguing discovery in modern litigation would be stringent application of the existing rules, particularly rules such as F.R.C.P. 26 (b)(2). But, that is not the way it has been working. As a result, at least some discovery rule changes seem warranted. My personal preference would be for drastic revision of the process based in part on some of the recommendations in Lord Woolf's report: (1) Greater judicial supervision over the discovery process; (2) Early binding definition of issues which limit the scope of discovery and further proceedings; and (3) limits on document discovery to include production of core information through the Rule 16 (f) process (not mandatory Rule 16(a)(1) disclosure), with additional discovery available only on a showing of good cause. Accordingly, I urge that the committee work toward wholesale change by considering the full range of options available, including at least the following additional amendments:

1. The American College and many others have made and will make a forceful case for changing the scope of discovery under Rule 26(b)(1) from “relevant to the subject matter” to “relevant to the claim or defense....” I fully support such a change and suggest, in order for it to have the desired effect, that it be accompanied by deleting or amending the last sentence of Rule 26 (b)(1) to focus discovery on information that is demonstrably relevant to the claim or defense. If deletion of the “reasonably calculated to lead to discovery” sentence is considered problematic because of a desire to permit discovery, for example, of relevant hearsay information, the sentence could be amended along the following lines: “The information sought need not be admissible at trial if the information sought ~~appears reasonably calculated to lead to the discovery of admissible evidence~~ is otherwise demonstrably relevant to the claim or defense of any party.”

2. Many have suggested that the burden of document discovery should be reduced. Others have decried the lack of any objective guidance as to what is or is not producible under the present discovery rules. Thus, in order to improve the determinacy of the document discovery rules, I would suggest consideration of something in the nature of a “bright line”, presumptive time limit on requests for production of outdated documents. For example, Rule 34 might be amended to incorporate the following concept: There is a presumption, which may be rebutted for good cause shown, that inspection need not be permitted of documents created more than \_\_ years prior to the transaction or occurrence giving rise to the claim or defense of any party [or prior to commencement of the action or prior to the period of the applicable statute of limitations].

Thank you for the opportunity of presenting the above modest “additions” to the many sound suggestions that will be considered at the Boston Conference.

*This Document is a draft version of a report  
that the ABA Section of Litigation will publish Fall 1997.  
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## **The Scope Of Discovery In The Federal Courts**

**A Survey of Published, Post-1980 Cases From  
The Federal Courts Regarding  
The Scope of Permissible Discovery In Civil Litigation**

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**Federal Rules Revision Subcommittee  
Co-Chairs, Kathleen L. Blaner & Lance A. Harke  
Pretrial Practice and Discovery Committee  
Section of Litigation  
American Bar Association Monograph**

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# **I. SUMMARY OF SCOPE OF DISCOVERY RESEARCH**

## **A. RESEARCH PROJECT OBJECTIVE**

In early 1996 the Advisory Committee on Civil Rules, the civil rulemaking arm of the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference, announced that it was going to evaluate the need to make changes to the rules governing discovery. The evaluation was undertaken in response to the continuing call for discovery reform from numerous segments of the bench and bar, as well as from members of Congress.<sup>1</sup> Among the topics that were identified for study was the scope of discovery.<sup>2</sup>

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<sup>1</sup>See May 17, 1996 Memorandum from Honorable Patrick E. Higginbotham, Chair, Advisory Committee on Civil Rules, to Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure, Report of the Advisory Committee on Civil Rules, p. 2; Advisory Committee on Civil Rules, U.S. Judicial Conference, Draft Minutes of the Civil Rules Advisory Committee, April 18-19, 1996, pp. 2-4; *see also* Advisory Committee on Civil Rules, U.S. Judicial Conference, Discovery Reform Proposals, October 1996.

<sup>2</sup>The current scope of discovery was established in 1970 amendments to the Federal Rules of Civil Procedure in Rule 26(b). *See* Fed. R. Civ. P. 26, Advisory Committee Notes, 1970 Amendment, FED. CIV. JUDICIAL PRO. & RULES 136-38 (West 1997 ed.). That Rule defines the scope of discovery as follows:

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. 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.

(2) **Limitations.** By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties

(continued...)

This Subcommittee, a part of the ABA's Section of Litigation Pretrial Practice and Discovery Committee, decided to review published federal court cases regarding the scope of discovery to evaluate how the standard set forth in Rule 26(b) has been interpreted and applied on a case-by-case basis. We hoped this effort would help inform deliberations about the need for discovery reform and encourage intelligent public debate about the scope of discovery.

**B. OVERVIEW OF THE RESEARCH PARAMETERS**

We reviewed approximately 400 published cases from twelve (12) of the thirteen(13) judicial circuits that comprise the federal court system. We focused on published cases from 1980 to the present, that were available on LEXIS or Westlaw, and that discussed the scope of discovery permissible under Federal Rule of Civil Procedure 26(b). Reviewers were instructed to review all cases that discussed Rule 26(b). Cases that dealt with privileges were disregarded and are not reported in the research analysis. Likewise, cases that concerned other aspects of Rule 26, such as 26(a)(1) concerning mandatory disclosure or 26(c) regarding protective orders, were not reviewed. The numbers of cases found and reviewed are shown in Table 1 that follows.

**TABLE 1. NUMBER OF CASES BY CIRCUIT AND COURT**

	<b>TOTAL CASES</b>	<b>Appellate Court</b>	<b>District Court</b>
<b>First Circuit</b>	60	10	50
<b>Second Circuit</b>	31	9	22
<b>Third Circuit</b>	74	16	58
<b>Fourth Circuit</b>	19	3	16
<b>Fifth Circuit</b>	35	17	18
<b>Sixth Circuit</b>	20	6	14
<b>Seventh Circuit</b>	32	9	23
<b>Ninth Circuit</b>	35	6	29
<b>Tenth Circuit</b>	19	8	11

<sup>2</sup>(...continued)

resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

	TOTAL CASES	Appellate Court	District Court
Eleventh Circuit	44	11	33
D.C. Circuit	12	1	11
Federal Circuit	19	7	12
Total	400	103	297

Subcommittee members generally each took responsibility for reviewing and analyzing one or two federal judicial circuits. Three individuals divided responsibility for reviewing cases from the Third Circuit. One judicial circuit -- the Eighth Circuit -- was not reviewed due to a shortfall of active subcommittee members and time constraints.

Subcommittee members were instructed to identify all cases in their respective jurisdictions that discussed the scope of discovery, including both its substantive and quantitative parameters. Members were given a worksheet to complete for each case they reviewed and were asked to record factual information regarding the parties, the legal issues, and factual outcomes. A copy of the worksheet is shown as Exhibit A.<sup>3</sup>

Members also used the same analytical outline to help classify and discuss cases, so that each member's analysis and discussion would focus on similar topics and be written in a common format. A copy of the analytical outline is shown as Exhibit B. Not all cases are discussed individually in the analysis sections for each circuit. While we cannot call our research comprehensive for all federal courts, it is a very thorough examination of the published opinions in the judicial circuits that were reviewed.

## C. OVERVIEW OF RESEARCH RESULTS

### 1. Observations

Our research suggests the following observations about the current scope of discovery as set forth in Rule 26(b):

---

<sup>3</sup>Worksheets were not completed, or not completed in their entirety, for a small number of cases. This is reflected in some of the charts when the totals shown do not add up to 400. In other instances, the chart totals exceed 400 when more than one response was possible for each case.



1. More discovery disputes are resolved by compelling production of the challenged discovery, at least in part, than by denying it. That result is to be expected in light of our finding that courts have interpreted Rule 26(b) in a way that usually resolves in favor of discovery doubts about whether an item is relevant. Consequently, our research suggests that when discovery is requested, it is rarely denied altogether.
2. There has been little meaningful judicial refinement of the scope of discovery in Rule 26(b) since adoption of the current formulation in 1970. It has remained an ambiguous and indeterminate standard, whose application results in discovery decisions that are highly fact-based and subjective.
3. The indeterminacy of the current standard makes it difficult to predict the parameters of the information that will be discoverable in a given case and it results in inconsistent and even conflicting discovery rulings in similar cases.
4. Inconsistencies in the way the scope of discovery has been interpreted and applied from case to case, and court to court, prevent litigants from developing settled expectations about their discovery obligations in particular types of litigation, and thus actually may encourage continued contentiousness and discovery disputes.
5. One of the most common disputes reflected in the published cases involves the discoverability of information about similar or related actions, products, research, situations, conduct, time periods, employees, or people. This type of dispute was especially common in employment discrimination cases. No clear pattern or method of analysis has emerged in these cases to help ensure consistent results from case to case or circuit to circuit.
6. Courts often place quantitative and temporal limits on the production of otherwise discoverable information when cause for such restriction is shown.
7. Defendants raised twice as many objections to discovery demands as plaintiffs.
8. Courts are most likely to limit or prohibit discovery altogether when it is requested from a non-party to the litigation.

## 2. Recommendations

1. Provide more objective, predictable boundaries for the scope of discovery -- a bright line rule or bright line perimeter. For example, discovery could be limited

to cover no more than a fixed number of years prior to the act that is the subject of the litigation. Such limits are analogous to statutes of limitations, and would serve similar policy objectives.

2. Improve the determinacy of the standard used to decide whether information is discoverable.
3. Establish disincentives for parties to engage in discovery of information beyond that needed to prepare the case in chief.

#### **D. DISCUSSION OF RESEARCH RESULTS**

Our review indicated that courts have interpreted the Rule 26(b)(1) standard broadly. The most far-reaching articulation of the standard that we came across provided that "discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action." *Brunswick Corp. v. Suzuki Motor Co.*, 96 F.R.D. 684, 686 (E.D. Wis. 1983); accord *Finch v. Hercules, Inc.*, 149 F.R.D. 60 (D.Del. 1993). Another view that sounds a similar note provides that "[w]here relevance is in doubt, the rule indicates that the court should be permissive." *Truswal Sys. Corp. v. Hydro-Air Eng'g, Inc.*, 813 F.2d 1207, 1212 (Fed. Cir. 1987). The Ninth Circuit even disregards the pleadings. See *Miller v. Pancucci*, 141 F.R.D. 292, 296 (C.D. Cal. 1992)(discovery "is not limited to only those specific issues raised in the pleadings.")(citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).<sup>4</sup> As one procedural authority has noted tongue-in-cheek, "when in doubt, discover."<sup>5</sup>

Given the strong preference for discovery that courts have read into the current formulation of Rule 26(b), it comes as no surprise that courts almost always permit at least some discovery when it has been requested. Cases where discovery has

---

<sup>4</sup>The 1978 U.S. Supreme Court case, *Oppenheimer Fund, Inc. v. Sander*, 437 U.S. 340 (1978), is used as the primary authority for defining the scope of discovery in the Ninth Circuit, and is often relied on heavily in other circuits as well. However, *Oppenheimer* was not a Rule 26(b) scope of discovery case. It was a Rule 23(b)(3) class action and the issues involved had to do with the obligation to provide notice of the action to missing class members and the methods for doing that. Although the Court opined about the scope of discovery under Rule 26, it was dicta. Nonetheless, that decision has been the purported basis for granting very broad discovery rights ever since.

<sup>5</sup>Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 Minn. L. Rev. 1, 19-22 (1984).

been requested but denied altogether are very, very rare,<sup>6</sup> unless it is requested from a non-party to the litigation.<sup>7</sup>

1. Who Opposed Discovery?

When a challenge to a discovery request was raised, we found that it was more than twice as likely that it would be a defendant who raised it. See Table 2.<sup>8</sup>

	Plaintiff	Defendant	Non-party, witness or cross-motions
First Circuit	16	38	6
Second Circuit	6	24	1
Third Circuit*	11	23	2
Fourth Circuit	7	13	4
Fifth Circuit	9	23	3
Sixth Circuit	6	14	0
Seventh Circuit**	1	11	6

<sup>6</sup>See *Territorial Court of the Virgin Islands v. Richards*, 673 F. Supp. 152, 162 n.10 (D.V.I. 1987), *aff'd*, 847 F.2d 108 (3d Cir.) *cert. denied*, 488 U.S. 955 (1988) (no discovery warranted when issues are largely legal); *English v. Cowell*, 117 F.R.D. 132, 136 (C.D. Ill. 1986) (granting motion for protective order and staying further discovery). There also are certain types of cases where the litigants choose to take no discovery at all, such as social security adjudications, veterans claims, and similar matters, because there is a complete record already in place from prior administrative proceedings. This report does not consider those types of cases.

<sup>7</sup>See, e.g., *Raphael v. Aetna Casualty & Surety Co.*, 744 F. Supp. 71 (S.D.N.Y. 1990) (discovery of criminal investigation materials from law enforcement officials not permitted in civil suit involving same issues but no law enforcement officials); *In re Snyder*, 115 F.R.D. 211 (D. Az. 1987) (discovery from research author who was stranger to the litigation was denied).

<sup>8</sup>In some instances it was not possible to determine which party initiated the discovery dispute because both sides were seeking discovery and opposing it at the same time. Thus, the numbers in this table do not always add up to the total number of cases that were reviewed in each circuit.

Ninth Circuit	5	29	3
Tenth Circuit	7	9	4
Eleventh Circuit	11	27	6
Federal Circuit	3	10	6
D.C. Circuit	1	9	2
Totals	83	230	43

\*N.J & Pa. only  
\*\*Wis. & ND Ill only

Our finding that defendants object to discovery more than twice as much as plaintiffs begs the question of whether a discovery rule that is substantially more onerous to one side of the litigation than the other is a fair, neutral rule. One of the driving principles behind the civil rules has been that the rules should be neutral and not advantage or disadvantage one side of the V. more than the other. But our research suggests that the scope of discovery, or perhaps discovery generally, is not neutral; defendants dispute discovery requests almost three times as often as plaintiffs.

## 2. Outcome of Discovery Disputes

Opposition to a discovery request, more often than not, was not successful. Our research shows that discovery disputes were resolved in favor of denying the request in full in only one third of the cases reviewed. See Table 3.

	Discovery Request Granted	Granted in part, denied in part	Discovery Request Denied
First Circuit	22	15	21
Second Circuit*	2	4	3
Third Circuit	15	23	10
Fourth Circuit	10	3	6

Circuit	Number of Cases	Percentage	Total
Fifth Circuit	22	4	23
Sixth Circuit	4	6	10
Seventh Circuit	12	5	5
Ninth Circuit	17	9	10
Tenth Circuit	8	3	7
Eleventh Circuit	16	11	15
D.C. Circuit	6	4	2
Federal Circuit	7	5	7
Totals	141(40%)	92(26%)	119(33.8%)

\*Appellate cases only

The published cases that discussed the scope of discovery did not develop or contain any particular analytical framework that could be used to objectively determine the scope of discovery from case to case. Most discovery disputes were resolved based on highly idiosyncratic factors that are difficult to explain, have little application from case to case, and thus, are indeterminate as rules of decision. Indeed, the cases reviewed recited the standard from Rule 26(b) in almost talismanic fashion, explained that it should be liberally construed, and then went on to a highly subjective analysis that could just as easily conclude that discovery should be granted as not granted. Compare *Diabo v. Baystate Medical Center*, 147 F.R.D. 6, 11 (D. Mass. 1993) (discovery of blood donor's identity permitted) with *Ellison v. American Nat'l Red Cross*, 151 F.R.D. 8, 11 (D.N.H. 1993) (discovery of blood donor's identity denied); compare *Floyd-Mayers v. American Cab Co., Inc.*, 130 F.R.D. 278 (D.D.C. 1990) (granting discovery of defendant's financial records for issue of punitive damages) with *Skinner v. Aetna Life Insurance*, No. 83-0679, slip op. (D.D.C. Feb. 1984) (denying discovery of financial records for issue of punitive damages).

In some cases, stymied courts would refer back to the pleadings as a touchstone for determining relevancy. See, e.g., *McLaughlin v. McPhail*, 707 F.2d 800, 806-07 (4th Cir. 1983); *Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408 (M.D.N.C. 1992). But that practice was not uniformly followed. See *Miller v. Pancucci*, 141 F.R.D. 292, 296 (C.D. Cal. 1992) (discovery "is not limited to only those specific issues raised in the pleadings."); *Brunswick Corp. v. Suzuki Motor Co.*, 96 F.R.D. 684 (E. D. Wis. 1983) ("relevancy must be construed liberally and with common sense rather than measured by the precise issues raised by the pleadings . . . ." *Id.* at 686.) Some courts

based the scope of discovery upon the cause of action or statute in question. *See, e.g., Textile Workers Pension Fund v Oltremare*, 764 F. Supp. 287 (S.D.N.Y. 1989).

### 3. Disputes Based On Relevancy Or Discretionary Limits

The issues raised in the discovery disputes we reviewed can be readily classified as involving either the relevancy of the requested information or the need for the court to exercise its discretion to place limits on otherwise relevant, discoverable information. Many decisions discussed both relevancy and discretionary limitations.

<b>Table 4. DECISIONS BASED ON RELEVANCY OR DISCRETIONARY LIMITS</b>		
	Relevancy	Discretionary Limits
First Circuit	12	13
Second Circuit	13	17
Third Circuit	49	47
Fourth Circuit	10	12
Fifth Circuit	15	20
Sixth Circuit	13	10
Seventh Circuit	13	9
Ninth Circuit	22	16
Tenth Circuit	11	7
Eleventh Circuit	10	14
D.C. Circuit	5	7
Federal Circuit	11	8
Totals	184	180

One common issue that emerged over and over again as the subject of discovery disputes had to do with the discovery of information about the occurrence of similar or related events, conduct, people, or products. For example, litigant A would seek all company accident reports. Litigant B would produce accident reports, but only for the year in which litigant A's accident occurred and only for the division of the

company where the accident occurred. Litigant A would file a motion to compel. The published cases provided no neutral rules of decision nor common answers to apply to these types of issues -- the results of these disputes could not be predicted in advance with any more certainty than a toss of the coin. This problem was particularly pronounced in employment discrimination cases. *See, e.g., Jackson v. Montgomery Ward & Co.*, 173 F.R.D. 524 (D.Nev. June 18, 1997)("[I]n Title VI cases, courts should avoid placing unnecessary limitations on discovery.") (citing *Robbins v. Camden City Bd. of Educ.*, 105 F.R.D. 49, 55 (D.N.J. 1985) (citing *Trevino v. Celanese Corp.*, 701 F.2d 397, 405 (5th Cir. 1983))).

The lack of any bright line rule governing the scope of discovery regarding similar events and occurrences seems to reflect a larger policy conflict among courts about the role of discovery in civil litigation. Courts that embrace the view that a lawsuit should only be filed after it has been determined that the plaintiff has a legally cognizable complaint are less likely to allow the litigants freedom to delve into related or similar matters. The Federal Circuit has best expressed this viewpoint as follows:

Clearly, discovery is allowed to flesh out a pattern of facts already known to a party relating to an issue necessarily in the case. At the other extreme, requested information is not relevant to the 'subject matter involved,' in the pending action if the inquiry is based on the party's mere suspicion or speculation.

*Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318 (Fed. Cir. 1990); *see also Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422 (Fed. Cir. 1993).

On the other hand, some courts have viewed discovery as a vehicle to determine whether the plaintiff has a viable legal claim against the defendant in the first place. *See Miller v. Pancucci*, 141 F.R.D. 292, 296 (C.D. Cal. 1992) (discovery "is not limited to only those specific issues raised in the pleadings."); *Brunswick Corp. v. Suzuki Motor Co.*, 96 F.R.D. 684 (E. D. Wis. 1983). Indeed, that interpretation is hardly surprising in light of the U.S. Supreme Court's statement in *Hickman v. Taylor*, 329 U.S. 495 (1947), that the discovery rules authorize a "fishing expedition" through an opponent's files.

Courts holding the latter view of the role of discovery are more likely to allow plaintiff to explore similar situations in discovery -- earlier versions of the product in a product liability lawsuit; complaints of race discrimination in a lawsuit claiming gender discrimination; nationwide records of accidents at a litigant's factories instead of accident records only from the plant where the plaintiff was injured. *See, e.g., Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996) (discovery of other airline

positions was permitted in pilot's age discrimination case); *Duke v. University of Texas*, 728 F.2d 994 (5th Cir. 1984) (plaintiff permitted discovery of tenure files for applicants in other departments of university); *Scaturro v. Warren and Sweat Mfg. Co. Inc.*, 160 F.R.D. 44 (M.D.Pa. 1995)(discovery permitted of information about prior accidents and repair measures in product liability litigation); *Jackson v. Harvard University*, 11 F.R.D. 472, 475 (D. Mass. 1986) (plaintiff permitted discovery of tenure files for other faculty on tenure list and for years other than the present).

This conflict in views about the basic purpose of discovery pervades discovery practice generally, although we observed the dichotomy most readily in the context of the employment discrimination disputes just discussed. As long as this conflict exists among federal courts about the appropriate role of discovery, it seems unlikely that the inconsistencies in rulings will be resolved. At times various courts have attempted to refine the methodology for determining whether requested information fell within the scope of discovery. For example, the Seventh Circuit attempted to formulate an analytical framework beyond Rule 26(b) where judges were instructed to compare the hardship to the party seeking discovery if discovery were denied to the hardship to the party resisting discovery if discovery were granted. See, e.g., *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1158 (7th Cir. 1984); see also *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 565 (7th Cir. 1984). The Federal Circuit also has attempted to provide additional structure to guide courts making discovery decisions as explained above. Neither of these approaches has been accepted on a regular basis by any other circuit court.

## E. CONCLUSIONS

One goal of our legal system has been the development of clear, precise legal standards that inform individuals about their lawful entitlements and obligations so that they can conform their behavior to the substantive law. The importance of clear, brightline rules of civil procedure is equally clear, since the procedural rules determine the extent to which the civil justice system operates fairly, neutrally, and efficiently.

The amorphous, indeterminate standard that currently defines the scope of discovery, however, is sharply at odds with this ideal. Action to address the flaws in the current discovery standard is needed.

Individual courts or circuits acting on their own are not likely to solve the problems we observed in the cases under the current discovery standard. Indeed, the courts have been interpreting and applying the current standard for twenty-seven years and no meaningful refinement of the standard has emerged. Thus, we conclude



that the courts cannot do it alone, and suggest that the most desirable way to improve the clarity, objectivity, predictability, and fairness of the discovery process lies in discovery reform via the Rules Enabling Act process.

Reforms should focus on changes to the discovery rules that would provide clear, objective boundaries for discovery, boundaries based on the needs of the litigants to prepare their existing claims and defenses. With more clear-cut boundaries in place, litigants will be in a better position to predict with a high degree of certainty what their discovery obligation is. A more balanced, neutral discovery obligation also may make discovery less contentious; litigants are more likely to cooperate if they believe the system is not weighted against them. Finally, the discovery rules should be amended to deter discovery in excess of what is necessary to litigate a claim on the merits.

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Printed in the United States of America

American Bar Association  
750 North Lake Shore Drive  
Chicago, Illinois 60611-4497

Grateful acknowledgment is made to Pepper, Hamilton & Scheetz LLP and Steel Hector & Davis for their generous support of this project.

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ISBN:

**RAND**

*Discovery Management:  
Further Analysis of the  
Civil Justice Reform Act Evaluation Data*

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Daniel McCaffrey, Marian Oshiro,  
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*DRU-1658-ICJ*

*September 1997*

*Prepared for the Advisory Committee on Civil Rules  
of the Judicial Conference of the United States*

***RAND Institute for Civil Justice***

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This Draft is intended to transmit preliminary results of RAND research. It is unreviewed and unedited. Views or conclusions expressed herein are tentative and do not necessarily represent the policies or opinions of the sponsor. Do not quote or cite this Draft without permission of the author.

## PREFACE

This draft is intended to transmit preliminary results of RAND research. It is unreviewed and unedited. Analyses, views and conclusions expressed herein are tentative and subject to revision. Do not quote this draft without the permission of the author

In 1996, RAND completed the independent evaluation mandated by the Civil Justice Reform Act of 1990. The four reports that comprise that evaluation are:

*Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act*, RAND, MR-800-ICJ, by James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana, 1996. This executive summary summarizes three technical reports that document RAND's evaluation of the Civil Justice Reform Act (CJRA) of 1990. It provides an overview of the purpose of the CJRA, the basic design of the evaluation, the key findings, and their policy implications. It was prepared for the Judicial Conference of the United States.

The three summarized reports are:

*Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts*, RAND, MR-801-ICJ, by James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana, 1996. This document traces the stages in the implementation of the CJRA in the study districts. the recommendations of the advisory groups, the plans adopted by the districts, and the plans actually implemented.

*An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, RAND, MR-802-ICJ, by James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana, 1996 (hereinafter referred to as "our main evaluation report"). This document presents the main descriptive and statistical evaluation of how the CJRA case management principles implemented in the study districts affected cost, time to disposition, and participants' satisfaction and views of fairness.

*An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act*, RAND, MR-803-ICJ, by James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana, 1996 This document discusses the results of an evaluation of mediation and

neutral evaluation designed to supplement the alternative dispute resolution assessment contained in the main CJRA evaluation.

After we completed our main CJRA evaluation, the Advisory Committee on Civil Rules of the Judicial Conference of the United States asked RAND's Institute for Civil Justice to conduct further analyses of the Civil Justice Reform Act evaluation data to see if additional light could be shed on discovery management, to assist the Committee in their consideration of possible changes in the Federal Rules of Civil Procedure related to discovery. The Committee also asked the Federal Judicial Center to conduct a major new survey of lawyers to gather additional information about discovery.

This document is intended for use by those involved with the rule making process and other policy makers, as well as by litigants, lawyers, judges, and others interested in civil case discovery management.

The additional RAND analyses reported here are funded in part by a special contribution from the American Bar Association Section on Litigation and in part by Institute for Civil Justice core funds which come from a broad range of contributors.

Views and conclusions expressed herein do not necessarily represent the policies or opinions of the Judicial Conference or the American Bar Association Section on Litigation.

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## SUMMARY

Curbing civil discovery abuse has been high on the agenda of the court reform movement for more than two decades. Concern about excessive and inappropriate discovery in the federal courts led to amendments to the Federal Rules of Civil Procedure in 1980, in 1983, and again in 1993, contributed to the passage of the Civil Justice Reform Act of 1990, and stimulated the adoption of local court rules concerning discovery in many federal jurisdictions. Similar concerns in the state court system have led to the adoption of state and local court rules regulating discovery, as well as statutory reform in many jurisdictions.

Much of the concern about discovery abuse is based on anecdotal data. Empirical research has not produced evidence of widespread abuse of discovery. However, because researchers have focused on the quantity of discovery, rather than its quality, the available studies do not speak to one central issue in the discovery debate—namely the appropriateness of discovery for the issues in controversy in individual cases. Further, even if discovery is appropriate in quantity and quality for the general run of civil litigation, it may be a legitimate source of public policy concern in particular types of litigation—for example, high stakes cases and complex litigation.

The study described in this report was undertaken at the request of the Advisory Committee on Civil Rules of the Judicial Conference of the United States. Based on further analyses of data assembled in the course of RAND's evaluation of the Civil Justice Reform Act,<sup>1</sup> the study was designed to assist the Committee in their consideration of possible changes in the Federal Rules of Civil Procedure related to discovery. To that end, we assembled descriptive information about a random sample of cases, focusing on discovery. We then analyzed the efficacy of the following types of discovery management policies in reducing lawyer work hours and time to disposition, and the effects of these management policies on lawyer satisfaction and views on fairness.

- Early case management and discovery planning,
- Early disclosure,
- Good faith efforts in resolving discovery disputes,
- Limiting interrogatories, and
- Shortening discovery cutoff time.<sup>2</sup>

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<sup>1</sup>The RAND evaluation of the Civil Justice Reform Act of 1990 was completed in 1996. The results are documented in Kakalik, James S., et al., 1996.

<sup>2</sup> Due to lack of sufficient data, we could not evaluate policies limiting the number or length of depositions, limiting document discovery, or dealing with issues of privilege. We also had insufficient data to evaluate methods lawyers use to manage discovery outside the

## BACKGROUND AND SCOPE OF THIS STUDY

The Civil Justice Reform Act (CJRA) of 1990 required each federal district court to develop a plan for civil case management to reduce costs and delay. Ten district courts, denoted "pilot" district courts, were required to adopt plans that incorporated certain case management principles through December 1995. The evaluation of the CJRA, which was mandated in the legislation, focused on the consequences of that pilot program. RAND's evaluation focused on the 10 pilot districts and 10 other districts selected for comparison. Together the 20 districts had about 1/3 of the civil caseload in the nation.

Several of the management policies encompassed in the CJRA evaluation focused on discovery. They included early judicial control of pretrial processes, requiring lawyers to jointly prepare a discovery-case management plan early in the case, disclosing information early without formal discovery, requiring good-faith efforts to resolve discovery disputes before filing motions, and limiting interrogatories and other forms of discovery.

We further evaluated the results of these policies, focusing on general civil cases<sup>3</sup> filed in 1992-93, because the CJRA made substantial changes in how discovery was managed in some districts. We also focused on cases closed after issue was joined, because most discovery occurs after that point.

As in the main evaluation, we used both descriptive tabulations and statistical techniques to assess policy effects. In addition in this current study, we evaluated the management policies when used in various combinations, such as early management used in combination with discovery plans and early scheduling of a trial date. We also separately analyzed subsets of cases or lawyers, such as high complexity cases only, high stakes cases only, contingent fee lawyers only, or tort cases only. For each type of case, data include time to disposition, lawyer satisfaction with judicial case management, lawyer views on the fairness of judicial case management, total lawyer work hours per litigant, lawyer work hours on discovery, and the number of discovery motions filed.

We consider lawyer work hours to be the best available measure of how case management affects litigation costs because it has uniform meaning regardless of attorney

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court's purview or to evaluate the quality and appropriateness of discovery on the study cases.

<sup>3</sup>In practice, federal district courts split the civil caseload into two categories—those types of cases that usually receive minimal or no management, and those general civil litigation cases to which the district's standard case management policies and procedures apply (and which are of primary concern for evaluation of discovery management principles and techniques). Minimal management is usually applied to prisoner cases (other than death penalty cases), administrative reviews of Social Security cases, bankruptcy appeals, foreclosure, forfeiture and penalty, and debt recovery cases

fee structure or geographic variations in attorney fee rates and can be used consistently for both in-house lawyers and outside counsel. Consequently, in the statistical analyses we use lawyer work hours as our measure of costs. We present information on both total lawyer work hours and lawyer work hours on discovery, and those two measures are highly correlated. However, we think the total is a better measure than the lawyer hours spent on discovery because our interviews suggest that some types of discovery management may reduce discovery hours by shifting lawyer work to other types of activity (disclosure as a substitute for some discovery, or an alternative dispute resolution session as a substitute for some discovery, for examples.) In addition, lawyers may differ in whether or not they report a given type of work activity as discovery-related (interviewing experts in direct preparation for trial, for example.)

We note that we are measuring time and cost objectively by using time to disposition and lawyer work hours. Our main evaluation surveys, and some other research studies, also asked for lawyers' subjective opinions about whether time and cost were increased or decreased when a particular case management technique was used. It is important to note that the objective and subjective data do not always agree, and we believe that the objective data are more reliable.

In our main evaluation, we obtained discovery management policy information at the district level from court documents, local rules, and interviews with judges and clerks in each of the 20 study districts. We gathered discovery management information, case and lawyer characteristics, time to disposition, stakes, cost, lawyer work hours, satisfaction, fairness and other detailed information at the case level from court dockets and from lawyer and judge surveys for 5222 cases filed in 1992-93 after the CJRA was passed. For those 5222 cases, we received survey responses from 67 percent of the judges (3280) and 47 percent of the lawyers (4061 out of 9423 surveyed).

### **DESCRIPTIVE INFORMATION ABOUT LAWYER WORK HOURS ON VARIOUS TYPES OF CASES**

About a fourth of the general civil cases close before issue is joined, another fourth close after issue is joined and within 270 days after filing, and nearly half close after issue is joined and more than 270 days after filing

As shown in Table S 1, the likelihood of lawyers working on discovery is very low for cases that close before issue is joined, and high for cases that last more than 270 days. The median time lawyers reported spending on discovery for cases with issue joined that close within 270 days is only three hours, whereas the median is 20 hours for those cases that

close more than 270 days after filing. In fact, cases that last more than 270 days require about three quarters of all total lawyer work time, and about 80 percent of all lawyer work time on discovery.

**Table S.1**  
**Information by Case Closure Point**

Variable	Case closure point		
	Before issue joined	After issue joined, in 270 days or less	After issue joined, over 270 days
Percent in category	28	27	45
Median total lawyer work hours per litigant	20	35	80
% with zero discovery work hours	72	37	15
Median lawyer work hours on discovery per litigant	0	3	20
Median percent discovery hours are of total lawyer work hours	0	14	25
% of total lawyer work hours on all cases	13	14	73
% of discovery lawyer work hours on all cases	8	12	80

Overall, lawyer work hours on discovery are zero for 38 percent of general civil cases, and low for the majority of cases. Discovery is not a pervasive litigation cost problem for the majority of cases. The empirical data show that any problems that may exist with discovery are concentrated in a minority of the cases, and the evidence indicates that discovery costs can be very high in some cases. Subjective information from our interviews with lawyers also suggests that the median or typical case that is not “the problem” is the minority of the cases with high discovery costs that generates the anecdotal “parade of horrors” that dominates much of the debate over discovery rules and discovery case management.

Since we are concerned with discovery management policies in this report, we shall focus the remainder of this summary on these 1624 general civil cases that closed at least 270 days after filing and consumed the vast majority of lawyer work time on discovery. We developed a general profile of how lawyers spent their time on this category of cases, as shown in Table S.2.

**Table S.2**  
**How Lawyers Spend their Work Hours:**  
**General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days**  
**and with Lawyer Work Hours Reported**

Type of Work	Average lawyer work hours per litigant	Percent of total
Trials, including direct preparation for trial	26	11%
Alternative dispute resolution after filing	6	3%
Discovery after filing, including motions	83	36%
Motion practice, excluding discovery	36	16%
Other pretrial conferences or talks with judicial officer	7	3%
Other time worked AFTER filing federal case, on research, investigation, writing, talking with parties and lawyers outside court, or anything else related to the litigation	55	24%
All time worked BEFORE filing federal case, in preparation for filing case	15	7%
<b>Total work hours per litigant</b>	<b>232</b>	<b>100%</b>

Time spent on discovery is moderate for the majority of cases. The average lawyer work hours per litigant is 232, of which an average of 36 percent or 83 hours is spent on discovery including discovery motions. The median discovery hours as a percent of total lawyer work hours is 25 percent. Whether we consider median or average percentages, discovery accounts for approximately one fourth to one third of total lawyer work hours per litigant for general civil litigation. Discovery accounted for less than half the lawyer work hours in all the subsets of general civil cases that we examined.

We looked at various types of cases and lawyers separately and found:

- High complexity cases consume about four times as many median lawyer work hours as low complexity cases, but the median *percentage* of total lawyer work time devoted to discovery is about the same.
- Cases in which the difficulty of discovery was reported to be “high” consume about three times as many total lawyer work hours and five times as many lawyer work hours on discovery as cases for which the difficulty of discovery was “low.”<sup>4</sup> However, even for the cases with “high” difficulty discovery, the median *percentage* of the total lawyer work time devoted to discovery is still only about one third.
- There is a significant difference between plaintiffs’ and defendants’ attorneys in terms of total work hours. The former reported spending a median of 100 total work hours per litigant; the latter spent a median of 75. However, these two groups did not differ significantly in the amount of work time spent on discovery per litigant.
- We did not find a significant difference between hourly and contingent fee lawyers in lawyer work hours.
- Attorneys from larger firms (more than 5 attorneys) work significantly more hours per litigant, in total and on discovery, than their counterparts from smaller firms;<sup>5</sup> however, the fraction of time they spend on discovery is about the same.
- Higher stakes cases are associated with significantly higher lawyer work hours, both in total and on discovery, and the fraction of total hours spent on discovery is higher
- We found no statistically significant difference in lawyer work hours between tort, contract, or other types of cases. However, we believe the tort and contract

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<sup>4</sup> Lawyers and judges were asked “When this litigation began, how would you have rated this case in terms of ... difficulty of discovery....” It is possible that some people filling out the survey after the litigation was closed reported greater difficulty of discovery because they knew lawyer work hours were high, rather than their initial view when the litigation began

<sup>5</sup> These data may reflect some systematic bias because litigants may prefer to hire large firms to handle more complex and more costly cases



categories are too aggregated, with too heterogeneous a composition within each category, to be meaningful in studying lawyer work hours.<sup>6</sup>

- Finally, we categorized lawyers on cases by their total work hours: bottom 75%, top 25%, and top 10%. The top 10% had a median of 950 total work hours per litigant, but the median *percentage* of lawyer work hours spent on discovery was still only 36 percent.

## EVALUATION OF DISCOVERY POLICIES

### Findings on Early Case Management and Discovery Planning

In the main CJRA evaluation, we found that early case management predicted significantly reduced time to disposition; coupling early management with setting a trial schedule early predicted significant further time reductions. We further analyzed these two early management and trial scheduling policies, both with and without the requirement for a discovery plan.

There was little difference in time to disposition with or without a discovery plan if a trial was scheduled early; however, cases closed significantly earlier if discovery planning took place *in the absence of* an early trial schedule.

[To be inserted here in final report. estimates of differences between not managing early and managing early with and without discovery planning.]

We also examined the consequences of these various policy mixes on subsets of cases. In general, the policies have consistent effects across various types of cases. However, we did find that the 25% most costly cases appear to especially benefit from the early setting of a trial schedule; indeed, early management of those cases without scheduling a trial date did not significantly reduce their time to disposition. Cases that are high in complexity, high in discovery difficulty, or high in stakes appear to especially benefit from the use of discovery – case management plans

Our analysis of total lawyer work hours (our measure of costs) further supports the efficacy of requiring discovery – case management plans. Early case management reduces time to disposition, but this policy also tends to increase lawyer work hours. However, if the district also requires discovery – case management plans in combination with early management, there is not a significant increase in lawyer work hours.

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<sup>6</sup> Smaller, more narrowly defined categories should be studied, but we had too few cases in our sample to do subcategories within tort, contract and other types of cases in detail.

[To be inserted here in final report: estimates of differences between not managing early and managing early with and without discovery planning.]

Our interviews suggested reasons why early management may increase lawyer work hours. Lawyers need to respond to a court's management--for example, talking to the litigant and to the other lawyers in advance of a conference with the judge, traveling, and spending time waiting at the courthouse, meeting with the judge, and updating the file after the conference. In addition, once judicial case management has begun, a discovery cutoff date has usually been established, and attorneys may feel an obligation to begin discovery. Doing so could shorten time to disposition, but it may also increase lawyer work hours on cases that were about to settle when the judge began early management. The CJRA data indicate that cases that are managed early have a higher likelihood of having lawyer hours spent on discovery.

However, when a district requires discovery – case management plans, the increase in lawyer work hours associated with early management appears to be offset by benefits associated with the required planning, and the net effect is no significant increase in lawyer work hours. There are at least two plausible explanations for this outcome. First, the planning itself may produce the benefit. The requirement that the lawyers jointly meet and prepare a discovery – case management plan for submission to the court may result in more efficient litigation with less lawyer work hours. Another plausible explanation is that the judges in districts that require plans may also manage cases differently and better (in ways that we did not measure) than judges in districts that do not require plans.

When we looked at various subsets of cases, we found no strong evidence that the effects of early management and discovery planning were restricted to certain types of cases. Nor did we find that early management, setting a trial schedule early in the case, or requiring a discovery plan had any statistically significant effect on lawyer satisfaction or views on fairness.

### **Findings on Early Disclosure**

Our analysis does not support the policy of mandatory early disclosure as a means of significantly reducing lawyer work hours and thereby reducing the costs of litigation, or as a means of reducing time to disposition. We find that mandatory early disclosure requirements are not associated with either significantly reduced lawyer work hours or with significantly reduced time to disposition. Some people suggested that if we had looked at subsets of cases, such as those that were more or less complex or had more or less difficulty with discovery, we might have found a subset of cases for which this policy was effective

We have explored many different subsets of cases, including subsets based on stakes, complexity, and discovery difficulty. We found no strong evidence that a policy of early mandatory disclosure reduced time to disposition or lawyer work time on any of the subsets of cases examined.

In districts where early disclosure is voluntary, attorneys who choose it have significantly lower work hours. However, this result appears to reflect selection bias, i.e., these attorneys who voluntarily disclose may be less contentious or may be on less contentious cases and hence spend fewer total work hours on the case. If early disclosure were effective in reducing lawyer work time, we would expect to see evidence of this effect on mandatory disclosure cases too.

One of the difficulties with early disclosure that may help explain its lack of a significant effect is compliance; lawyers report that when disclosure is done on a mandatory basis, it is full disclosure for about half of the cases and only pro forma disclosure for the other half

#### **Findings on Good Faith Efforts to Resolve Discovery Disputes**

We found no significant relationship between any of the variables studied and reported good faith efforts to resolve discovery disputes before filing a motion.

#### **Findings on Limiting Interrogatories**

Our analysis lends support to the policy of limiting interrogatories as a way to reduce lawyer work hours and thereby reduce litigation costs. There is no statistical evidence that limiting interrogatories increases litigation costs, and it appears to have significant benefits for several subsets of cases.

#### **Findings on Shortening Discovery Cutoff Time**

Shortening discovery cutoff significantly reduces lawyer work hours and thus litigation costs, and reduces time to case disposition. When we looked at subsets of cases, these significant decreases in lawyer work hours and time to disposition remain in most instances, with some exceptions such as low complexity cases which are less likely to be affected by shortening discovery cutoff because they require less discovery.

[To be inserted here in final report. estimates of differences between managing with shorter and longer discovery cutoff times ]

**Generalizing to Other Cases, Judges, and Districts**

Our analysis provides a reasonable estimate of the effects of policy for the cases, judges, and districts that we observed in the CJRA data. However, it is more difficult to determine the outcomes of policy if implemented on different cases, or by different judges in the same or different districts. Judges who *choose* to implement certain policies and management procedures may differ from other judges in their basic approach to case management or in their personalities. These differences could affect the way a policy is implemented, and, consequently, the policy's effect. For example, enthusiastic managerial judges may set trial schedules early, require meaningful discovery plans, and work hard on settlement, thus leading to early case closure or reduced costs; however, having less enthusiastic non-managerial judges set trial schedules early and require discovery plans may not engender a similar effect.

**ACKNOWLEDGMENTS**

This further analysis of the CJRA evaluation data focusing on discovery management is funded in part by a contribution from the American Bar Association Section on Litigation. We are grateful for their support

## **1. DISCOVERY MANAGEMENT: BACKGROUND AND FRAMEWORK FOR DISCUSSION**

### **INTRODUCTION**

The Civil Justice Reform Act (CJRA) of 1990 required each federal district court to develop a plan for civil case management to reduce costs and delay. To provide an empirical basis for assessing new procedures adopted under the act, the legislation also provided for an independent evaluation. Ten district courts, denoted "pilot" district courts, were required to adopt plans that incorporated certain case management principles through December 1995. The evaluation focused on the consequences of that pilot program.

The Judicial Conference and the Administrative Office of the U.S. Courts asked RAND's Institute for Civil Justice to evaluate the implementation and the effects of the CJRA in these districts. The RAND reports on that main evaluation were completed in 1996 and are listed in the preface.

After we completed our main CJRA evaluation, the Advisory Committee on Civil Rules of the Judicial Conference of the United States asked RAND's Institute for Civil Justice to conduct further analyses of the Civil Justice Reform Act evaluation data to see if additional light could be shed on discovery management, to assist the Committee in their consideration of possible changes in the Federal Rules of Civil Procedure related to discovery. The Committee also asked the Federal Judicial Center to conduct a major new survey of lawyers to gather additional information about discovery.

This document contains RAND's further analyses of the CJRA evaluation data, focusing on discovery management.

### **OVERVIEW OF THE CJRA**

The CJRA created a pilot program that required ten federal district courts to incorporate certain case management principles into their plans and to consider incorporating certain other case management techniques. The evaluation included ten other districts to permit comparisons; these districts were not required to adopt any of the case management principles or techniques

The ten pilot districts selected by the Committee on Court Administration and Case Management of the Judicial Conference of the United States were: California (S), Delaware, Georgia (N), New York (S), Oklahoma (W), Pennsylvania (E), Tennessee (W), Texas (S), Utah, and Wisconsin (E). The Judicial Conference, with advice from RAND, also selected

the following ten comparison districts: Arizona, California (C), Florida (N), Illinois (N), Indiana (N), Kentucky (E), Kentucky (W), Maryland, New York (E), and Pennsylvania (M). Using several methods, we confirmed that the pilot and comparison districts are comparable and adequately represent the range of districts in the United States. Together, the 20 study districts have about one-third of all federal judges and one-third of all federal case filings.

### **The Six Case Management Principles**

The act directs each pilot district to incorporate the following principles into its plan:

1. Differential case management;
2. Early judicial management;
3. Monitoring and control of complex cases;
4. Encouragement of cost-effective discovery through voluntary exchanges and cooperative discovery devices;
5. Good-faith efforts to resolve discovery disputes before filing motions; and
6. Referral of appropriate cases to alternative dispute resolution programs.

Pilot districts *must* incorporate these principles, while other districts *may* do so.

### **The Six Case Management Techniques**

The act directs each district to *consider* incorporating the following techniques into its plan, but no district is *required* to incorporate them:

1. Joint discovery/case management plan;
2. Party representation at each pretrial conference by an attorney with authority to bind that party regarding all matters previously identified by the court for discussion at the conference,
3. Required signature of attorney and party on all requests for discovery extensions or trial postponements;
4. Early neutral evaluation;
5. Party representatives with authority to bind to be present or available by telephone at settlement conferences; and
6. Other features that the court considers appropriate.

### **FEATURES OF THE RAND EVALUATION**

The main CJRA evaluation is designed to provide a quantitative and qualitative basis for assessing how the case management principles and techniques identified in the CJRA affect litigants' costs (measured in both attorney work hours and money), time to disposition, participants' satisfaction with the process, views of fairness of the process, and judge work time required.

Our main descriptive and statistical evaluation of how the CJRA case management principles affected cost, time to disposition, and participants' satisfaction and views on fairness are presented in a RAND Institute for Civil Justice report entitled *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, MR-802-ICJ, by James S. Kakalik, Terence Dunworth, Loral A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana, 1996 (hereinafter called "main evaluation report")

### **Data Sources**

The evaluation is based on extensive and detailed case-level data from January 1991 through December 1995. Data sources include:

- Court records;
- Records, reports, and surveys of CJRA advisory groups;
- The districts' cost and delay reduction plans;
- Detailed case processing and docket information on a sample of cases;
- Surveys of judicial officers on their activities, time expenditures, and views of CJRA;
- Mail surveys of attorneys and litigants about costs, time, satisfaction, and views of the fairness of the process; and
- Interviews in person with judges, court staff, and lawyers in each of the 20 districts.

We used CJRA advisory group reports, documents, and meeting minutes to assess the advisory group process and findings; we used the districts' plans and proposed local rule changes to assess what the district said it would do under CJRA; we used the dockets for a large sample of cases to help us understand what was actually done on cases and when (such as schedule setting, assignment to management tracks, or referral to ADR); we used court records to assess the basic characteristics of the cases and court actions, such as referral to ADR, that were not always on the court docket; we used the judicial surveys on our sample of cases to get judges' views on whether they had changed how they manage cases as a result of CJRA; we used extensive mail surveys of thousands of lawyers and litigants on our sample of cases to get their views on how the case was managed and information on litigation costs, satisfaction, and views of fairness; and we used extensive semi-structured interviews with judges, court staff, advisory group members, and lawyers to better understand both the implementation of CJRA and case management in the districts before and after CJRA.

In total, more than 10,000 cases were selected for intensive study in the main evaluation, half closed before CJRA and half filed in 1992-93 after the CJRA was passed. This current report focuses on the sample of 5222 cases filed in 1992-93 after the CJRA was



passed. For those 5222 cases, we received survey responses from 67 percent of the judges (3280), from 47 percent of the lawyers (4061 out of 9423 surveyed), and from 13 percent of the litigants (2264 out of 20272 surveyed). Because of the low litigant response rate, we were limited in our ability to analyze litigants' hours spent, satisfaction, and views of fairness.

### **Analytic Approach**

We use both descriptive tabulations and multivariate statistical techniques to analyze *time to disposition, costs, and participants' satisfaction and views of fairness.*

We analyze time to disposition, rather than delay, since the latter cannot be defined without reference to some currently unavailable standard of how long civil cases should take to resolve.

We present information on litigation cost in the main evaluation, measured in both monetary and work hour terms.<sup>7</sup> Our reports provide data on monetary costs to litigants, litigant hours spent, and lawyer work hours spent. However, we consider lawyer work hours to be the best available measure of how case management affects litigation costs because it has uniform meaning regardless of attorney fee structure<sup>8</sup> or geographic variations in attorney fee rates and can be used consistently for both in-house lawyers and outside counsel.<sup>9</sup> Consequently, in the statistical analyses we use lawyer work hours as our measure of costs. We present information on both total lawyer work hours and lawyer work hours on discovery, and those two measures are highly correlated. However, we think the total is a better measure than the lawyer hours spent on discovery because our interviews suggest that some types of discovery management may reduce discovery hours by shifting lawyer work to other types of activity (disclosure as a substitute for some discovery, or an

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<sup>7</sup> Our main CJRA evaluation included information on total judge work minutes on cases. We have not included the judge work minutes in this further analysis of discovery for two reasons. (1) the portion of judge work minutes specific to discovery could not be reliably identified within the total judge work minutes; and (2) more importantly, while most judges cooperated with the study and provided their work minutes on each case, some judges did not and this could lead to biased statistical results because we strongly suspect that the choice by judges to cooperate with the judge time study was correlated with the judge's attitude toward and use of case management.

<sup>8</sup> Under some fee structures, such as contingent fees, changes in lawyer work hours that may result from changes in court management are not necessarily reflected in the fees charged to clients.

<sup>9</sup> Lawyer work hours do not explicitly capture the "out of pocket" costs of litigation such as filing fees, travel, and investigator or expert witness fees, but those costs typically are less than 10 percent of the total litigation costs. Costs associated with lawyers work constitute the vast majority of total transaction costs.

alternative dispute resolution session as a substitute for some discovery, for examples.) In addition, lawyers may differ in whether or not they report a given type of work activity as discovery-related (interviewing experts in direct preparation for trial, for example.)

We note that we are measuring time and cost objectively by using time to disposition and lawyer work hours. Our main evaluation surveys, and some other research studies, also asked for lawyers' subjective opinions about whether time and cost were increased or decreased when a particular case management technique was used. It is important to note that the objective and subjective data do not always agree, and we believe that the objective data are more reliable.

Our assessment of satisfaction and views of fairness is subjective and drawn from the results of our surveys.<sup>10</sup>

In the main evaluation, we based our assessment of case management policies and procedures on data from general civil litigation cases<sup>11</sup> with issue joined.<sup>12</sup> We also analyzed the subset of these cases that took longer than nine months to disposition.

In this further evaluation of the CJRA data focusing on discovery management, we again focus on general civil litigation cases closed after issue is joined. We also focus exclusively on the post-CJRA portion of the data, those cases filed in 1992-93, because the CJRA made substantial changes in how discovery was managed in some districts. We also focus predominantly in our further analyses on the 1624 cases that took longer than nine months to disposition. About half the general civil cases close after nine months, but they consume about three fourths of all lawyer work hours, and 80 percent of lawyer work hours spent on discovery.

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<sup>10</sup>Satisfaction and views of fairness were measured by responses to the following questions: How satisfied were you with the court management and procedures for this case for your party or parties? How fair do you think the court management and procedures were for this case for your party or parties?

<sup>11</sup>In practice, federal district courts split the civil caseload into two categories—those types of cases that usually receive minimal or no management, and those general civil litigation cases to which the district's standard case management policies and procedures apply (and which are of primary concern for evaluation of CJRA case management principles and techniques). Minimal management is usually applied to prisoner cases (other than death penalty cases), administrative reviews of Social Security cases, bankruptcy appeals, foreclosure, forfeiture and penalty, and debt recovery cases.

<sup>12</sup>Issue is considered joined after the defendants have answered the complaint in accordance with F.R. Civ. P. Rule 12(a) or as mandated otherwise by the court (Administrative Office of the United States Courts, *Guide to Judiciary Policies and Procedures, Volume XI, Statistics Manual*, Chapter 5, p. 15, updated as of 1995)

In this further evaluation of discovery and its management, our methods of statistical analysis are the same as in the main evaluation, with three major exceptions: (1) we explicitly evaluate combinations of various management policies (such as early management used in combination with discovery plans and early scheduling of a trial date, versus early management used without discovery plans and without early scheduling of a trial date); (2) we explicitly and separately analyze the data for various categories of cases or lawyers (such as high complexity cases only, high stakes cases only, contingent fee lawyers only, or tort cases only); and (3) in addition to our analysis of total lawyer work hours, we also explicitly analyze lawyer work hours on discovery.

### **OUTLINE OF THIS REPORT**

This report has two dimensions, designed for different audiences. The main text is intended for policymakers and policy-users and focuses on descriptive information about discovery, and on discovery management policy evaluation. The extensive appendix, which focuses on the details of our statistical analyses behind the policy evaluation, is intended for those who want to know methodological and empirical details of how we reached our conclusions.

The discussion is organized as follows. In the remainder of Chapter One we provide more background and a framework for the discovery discussion in the rest of this report. In Chapter Two we provide descriptive information about discovery and other aspects of categories of cases defined by level of complexity, level of discovery difficulty, plaintiff or defendant side of the case, contingent or hourly fee lawyer, size of the law organization in which the lawyer worked, case stakes, tort or contract or other nature of suit categories, or the top 25% most costly cases among general civil litigation that has time to disposition over 270 days after filing. Chapter Three contains our evaluation of various discovery management policies, and Chapter Four summarizes our policy findings. The Appendix provides technical details of our statistical analyses.

### **A BRIEF HISTORY OF EMPIRICAL RESEARCH ON DISCOVERY AND ITS RELATIONSHIP TO LITIGATION COSTS AND DELAY**

Despite the widespread belief that discovery is to blame for much of the delay and costliness of civil case processing, there has been little empirical data available on the magnitude of discovery, patterns of use across case types, or direct or indirect costs associated with discovery or various different discovery management policies. Nor has there

been much effort in the past to measure the effect of adopting different discovery reforms or discovery management policies on time to disposition or costs.

In one of the most extensive previous studies, researchers at the Federal Judicial Center (FJC) selected 3000 civil cases terminated in 1975 from six federal district courts and examined the extent and pattern of discovery in those cases. The FJC researchers found substantial variation in discovery among cases. Half had no discovery at all; among the remainder, 20 percent averaged 1.7 requests per case; 60 percent averaged 5 requests per case and the remaining 20 percent averaged 17 requests per case. The FJC concluded that:

“[D]iscovery abuse, to the extent it exists, does not permeate the vast majority of federal filings. In half the filings, there is no discovery—abusive or otherwise. In the remaining half of the filings, abuse—to the extent that it exists—must be found in the quality of the discovery requests, not in the quantity, since fewer than 5 percent of the filings involved more than ten requests.” (emphasis in the original).<sup>13</sup>

The FJC found that the amount of discovery likely in a case could be predicted based on knowing “the subject matter of the case, the number of parties, the presence of counterclaims or cross claims, and, to a lesser extent, the amount in controversy....”<sup>14</sup> They also found significant differences across courts.

In the same study, the FJC also investigated the effects of limiting elapsed time for discovery on time to disposition and amount of discovery activity. They found that restricting the amount of time for discovery reduced the overall time to disposition, but actually increased the amount of discovery, perhaps because attorneys had less time to carefully consider their discovery options.

A subsequent empirical study of about 1600 cases in federal and state court, the Civil Litigation Research Project, also found that “. . .relatively little discovery occurs in the ordinary lawsuit. We found no evidence of discovery in over half our cases. Rarely did the records reveal more than five separate discovery events”<sup>15</sup> That same study found that on average that about 17 percent of lawyer time is devoted to discovery.

More recently, in a study of California’s Trial Court Delay Reduction Project, the National Center for State Courts found that courts that adopted procedures for managing

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<sup>13</sup> Paul Connolly, Edith Holleman and Michael Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery*, Federal Judicial Center, 1978, at 35.

<sup>14</sup> Paul Connolly, Edith Holleman and Michael Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery*, Federal Judicial Center, 1978, at iv

<sup>15</sup> Trubek, D M., A. Sarat, W. Felstiner, H. Kritzer, and J. Grossman, *The Costs of Ordinary Litigation*, UCLA L.R., Vol. 31, No. 1, October 1983, at p. 90

pretrial activities, including discovery, achieved significant reductions in case disposition times.<sup>16</sup> Courts that introduced early status conferences (at which various case activities were scheduled) achieved somewhat greater reductions in average case disposition times, compared to courts that used rule-based schedules (establishing and monitoring various check-points in a case's history).<sup>17</sup>

In the early 1990s, the National Center for State Courts conducted an empirical study of discovery in about 2000 court cases in 5 states. Their findings affirmed those of the earlier FJC and Civil Litigation Research Project studies. The NCSC found 42 percent of general civil litigation cases did not have recorded discovery, and that 37 percent of those with discovery had three or fewer pieces of discovery.<sup>18</sup>

Other empirical studies concerning discovery have measured subjective attitudes, rather than objective case data. A 1986 study of attorneys' attitudes in 12 federal districts that had adopted local rules limiting the number of interrogatories and requests for admissions found that a majority approved of these rules. Support for such limits did not vary by type of practice (size of firm, case specialization, plaintiff versus defendant) or by degree of litigation experience.<sup>19</sup> A study of federal and state judges conducted by Louis Harris and Associates in 1987 found that 45 percent of federal judges surveyed, and 34 percent of state judges, cited "abuse of the discovery process" as among the most serious causes of civil case delay in their courts.<sup>20</sup> One-third of the federal and state judges said that there were "a lot of problems" with the discovery process in their jurisdictions.<sup>21</sup> When asked what approaches might best solve these problems, federal judges called for changes in the informal practices of the bar and greater exercise of judicial discretion, rather than

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<sup>16</sup> Judicial Council of California, *Prompt and Fair Justice in the Trial Courts*, Vol. 1, Administrative Office of the Courts, 1991, at II-5.

<sup>17</sup> Judicial Council of California, *Prompt and Fair Justice in the Trial Courts*, Vol. 1, Administrative Office of the Courts, 1991, at II-29.

<sup>18</sup> Keilitz, S., R.A. Hanson, and H.W.K. Daley, *Is Civil Discovery in State Trial Courts Out of Control?*, State Court Journal, Spring 1993.

<sup>19</sup> John Shapard and Carroll Seron, *Attorneys' Views of Local Rules Limiting Interrogatories*, Washington, D.C., Federal Judicial Center, 1986 at v. Based on the attorneys' self-reports of their use of interrogatories in recent cases, the researchers also concluded that in most cases, activity was not actually constrained by the rules, both because the limitations were set high enough so as to not to effectively limit the average case and because a significant fraction of attorneys either ignored the rules or received formal waivers from the court.

<sup>20</sup> *Judges' Opinions On Procedural Issues*, New York, Louis Harris and Associates, 1987 at 37

<sup>21</sup> *Judges' Opinions On Procedural Issues*, New York, Louis Harris and Associates, 1987 at 39

further changes in the rules. State judges' opinions on solutions were divided among the three options (changing informal practices, greater use of judicial discretion, and rule changes).<sup>22</sup>

In 1997, the Federal Judicial Center conducted a major new survey of lawyers to gather additional information about discovery, and the results are forthcoming.

### A BRIEF HISTORY OF DISCOVERY REFORM

The modern history of discovery practice began with the adoption of the Federal Rules of Civil Procedure in 1938. A key element of the philosophy behind those Rules was "notice" pleading with facts of cases to be developed through discovery. The new Rules expanded the scope of discovery and relaxed prior limitations on the amount and timing of discovery.<sup>23</sup> Although the Rules are often cited as laying the basis for contemporary judicial control over the litigation process,<sup>24</sup> in practice they appear to have placed control over the discovery process predominantly in the attorneys' hands. Indeed, amendments in 1946 and 1970 further relaxed limitations on attorneys' discovery activities.<sup>25</sup>

By the mid-1970s, however, confidence in attorneys' abilities to efficiently manage discovery had begun to erode. After the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (convened by Chief Justice Warren Burger and known as the Pound Conference), and the issuance of a report on discovery abuse by an ABA Special Committee that was established as a follow-on to the Conference,<sup>26</sup> support mounted for increasing judicial control over discovery. When dissension within the bar diluted the force and scope of amendments to the Rules that were adopted in 1980, a second set of stronger amendments were adopted in 1983. The new amendments prohibited redundant discovery, required that discovery be proportional to the magnitude of the case,

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<sup>22</sup> *Judges' Opinions On Procedural Issues*, New York, Louis Harris and Associates, 1987 at 40

<sup>23</sup> Paul Connolly, Edith Holleman and Michael Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery*, Federal Judicial Center, 1978, at 9

<sup>24</sup> Paul Connolly, Edith Holleman and Michael Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery*, Federal Judicial Center, 1978, at 10.

<sup>25</sup> Paul Connolly, Edith Holleman and Michael Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery*, Federal Judicial Center, 1978. The 1970 amendments were intended in part to reduce judicial time spent on managing civil litigation. See Sherman Cohn, "Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules," 63 *Minn. L.R.* 253 (1979) at 254

<sup>26</sup> Edward Cavanagh, "The August 1, 1983 Amendments to the Federal Rules of Civil Procedures: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules," 30 *Villanova L.R.* 767 (1985) at 778

and mandated court sanctions for violation of the rules. They also explicitly provided for judicial discussion of discovery plans at pretrial conferences and for the judge's issuance of an order scheduling discovery and other pretrial events.<sup>27</sup> In the following years, many federal jurisdictions adopted local court rules limiting the amount and timing of discovery.

Notwithstanding these rule changes, concern about discovery abuse continued through the 1980s and contributed to the passage of the Civil Justice Reform Act of 1990 (CJRA). That act, a product of a Task Force set up by Senator Joseph Biden to consider options for reducing delay and costs associated with civil case processing,<sup>28</sup> required each federal district court to submit a plan for improving civil case management. The Act encouraged courts to consider changes in discovery, including limitations on timing and amount of discovery and special programs to assist attorneys in better planning discovery activities.

In December 1993, partially in response to the Civil Justice Reform Act, a number of changes to the Federal Rules of Civil Procedure were made. Those changes included a requirement that parties meet and prepare a proposed discovery plan before a scheduling conference is held or a scheduling order is due, a requirement for disclosure of certain basic relevant information without waiting for a discovery request, discretionary sanctions for Rule 11 violations rather than mandatory sanctions, and a limitation on the number of depositions and interrogatories. Districts were allowed to opt out of some of these changes, in part to enable them to continue their CJRA mandated cost and delay reduction plans unchanged

By the late 1970s, many state court systems were experimenting with limitations on discovery activity. In a survey conducted in 1981, RAND's Institute for Civil Justice found that 29 states and 23 of the nation's largest metropolitan trial courts had adopted one or more measures to expedite pretrial discovery, including. using mail and telephone to expedite pretrial motions processing; requiring attorneys to attempt to settle their discovery disputes before requesting judicial intervention; assigning parajudicial personnel to hear discovery motions, limiting the number of interrogatories; limiting the time allowed for

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<sup>27</sup> Edward Cavanagh, "The August 1, 1983 Amendments to the Federal Rules of Civil Procedures: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules," 30 *Villanova L R* 767 (1985), at 782-793.

<sup>28</sup> See *Justice for All. Reducing Costs and Delay in Civil Litigation, Report of the Brookings Task Force on Civil Justice Reform*, Washington, D.C., Brookings Institution, 1989

discovery; holding conferences to schedule discovery; and authorizing sanctions for frivolous discovery motions.<sup>29</sup>

For example, California, which had eliminated prior restrictions on discovery in 1957, reinstated some limitations in the Civil Discovery Act of 1986.<sup>30</sup> The Act restricts the number of special interrogatories to 35, the number of requests for admission to 35 and the number of depositions of any one witness to one. The act defines discovery abuse and authorizes sanctions, including monetary fines, for such abuse.<sup>31</sup> In addition, under the Trial Court Delay Reduction Act of 1986, some California courts experimented with schedules for case disposition that mandated completion of discovery by a specified number of days after case filing, and in other courts, discovery schedules tailored to the specifics of individual cases were set at judicial status conferences.<sup>32</sup>

### **OPTIONS FOR REFORM**

As a result of ongoing concern about discovery abuse, many federal and state courts now have in place some sort of limitations on the extent, timing or manner of discovery. Some federal district courts adopted new procedures for managing discovery as part of their required plans for reducing civil case delay and expense under the CJRA. In addition, the Judicial Conference Advisory Committee on the Federal Rules is currently reviewing proposals for additional modifications in the Federal Rules of Civil Procedure.

The major options for reform can be grouped into seven categories: (1) adopting standardized rules limiting the scope, amount or timing of discovery activity; (2) mandating early disclosure of key information; (3) imposing monetary or other sanctions for violation of court-enunciated practice standards, (4) assisting attorneys in more efficient management of discovery; (5) cost and fee shifting; (6) closer management of attorneys by clients; and (7) shifting responsibility for conducting discovery to judges, as is common in some European systems. Below we discuss each of these in turn.

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<sup>29</sup> Patricia Ebener, Jane Wilson-Adler, Molly Selvin and Michael Yesley, *Court Efforts to Reduce Pretrial Delay: A National Inventory*, Santa Monica, Ca., RAND, 1981 at 30

<sup>30</sup> James Kakalik, Molly Selvin and Nicholas Pace, *Averting Gridlock: Strategies for Reducing Civil Delay in the Los Angeles Superior Court*, Santa Monica, Ca., RAND, 1990, at 89

<sup>31</sup> *California Civil Procedure Code*, Sec's 2016-2036.

<sup>32</sup> Judicial Council of California, *Prompt and Fair Justice in the Trial Courts*, Vol. 1, Administrative Office of the Courts, 1991



### **Standardized Rules Limiting the Scope, Amount or Timing of Discovery**

As indicated by the earlier discussion, the most frequent response to concern about discovery abuse has been adoption of rules limiting the amount or timing of discovery activity. Limitations on timing appear to have the desired effect of reducing total time to disposition, but severe restrictions on the elapsed time for pretrial activities are frequently met with opposition from the bar.<sup>33</sup> Moreover, limitations on elapsed time for discovery do not necessarily reduce the magnitude of discovery activity and therefore may have little effect on discovery costs. Whether imposing limitations on the amount of discovery (e.g., number of interrogatories, number of requests for admission, number or length of depositions, or volume and nature of document requests) has the desired effect of limiting the overall magnitude of discovery activity is unclear. It may be that in order to satisfy attorney concerns about the need for extensive discovery in some cases, courts set these limits so high as to have little effect on most cases. There is also some evidence that attorneys can evade these standards with ease, either by simply ignoring them or by obtaining judicial waivers or by switching to some other formal or informal method of discovery. Numerical limitations also raise the question of how to define a single interrogatory, deposition, or other request.

Courts may have more success in implementing numerical and time limits when these are coordinated with differentiated case management plans. Incorporating numerical limits on discovery activity into differentiated case management plans may also permit courts to specify more modest amounts of activity for ordinary cases, while preserving higher limits for more complex cases.

A relatively new approach to limiting discovery activity is "phased discovery," in which attorneys, on their own, or with the court's assistance, develop plans for sequencing discovery.<sup>34</sup> Sequencing may be by subject matter, party, or type of evidence, and may be prescribed by a broadly applicable rule or on a case-by-case basis. Phased discovery may be

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<sup>33</sup> In its report to the Legislature on the Trial Court Delay Reduction Program, the Judicial Council noted: "Despite bar involvement in planning the programs in all counties and despite the support of a majority of lawyers for judicial control of the pace of litigation, there is substantial discontent among lawyers with the program's operation. Judicial Council of California, *Prompt and Fair Justice in the Trial Courts*, Vol. 1, Administrative Office of the Courts, 1991, at II-4.

<sup>34</sup> "Phased Discovery" is suggested in the *Manual for Complex Litigation (Third)* (1995) and was advocated for a broad range of civil cases by Judge Robert Peckham of the Northern District of California. See *Report of the Task Force on the Civil Justice Reform Act*, American Bar Association Litigation Section, July 1992 at 10-15 and *Justice for All Reducing Costs and Delay in Civil Litigation*, Report of the Brookings Task Force on Civil Justice Reform, Washington, D.C., Brookings Institution, 1989, at 20-21.

linked to specific case milestones—for example, attorneys may be permitted to conduct only a modest amount of discovery before an early neutral evaluation or an early status conference is conducted. The goal is to focus parties on those aspects of discovery that are most helpful to evaluating the case, as early in the litigation process as possible, thereby contributing to settlement before high litigation costs are incurred.<sup>35</sup>

The discussion above concerns attempting to control discovery without changing the general scope of allowable discovery. However, the scope of discovery itself is another major area for potential reform to limit whatever discovery problems may exist. As recently as 1970, the scope of discovery was expanded by rule change. Subsequent rule changes have not narrowed the general scope of discovery, but the American College of Trial Lawyers is currently recommending the amendment of discovery Rule 26(b)(1) to narrow the scope and breadth of civil discovery by changing the language from “...any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...” to new language “...any matter, not privileged which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party....”<sup>36</sup>

### **Mandatory Early Disclosure**

CJRA brought about substantial change in early disclosure of information without a formal discovery request. Only one district required it before CJRA;<sup>37</sup> after CJRA, all pilot and comparison districts in the RAND evaluation adopted one of five approaches providing either voluntary or mandatory exchange of information by lawyers, sometimes only for specified types of cases. Three pilot and two comparison districts adopted the voluntary exchange model, which encourages lawyers to cooperate in exchanging information. Three pilot districts and one comparison district followed a mandatory exchange model for a limited subset of cases and a voluntary model on other cases. Two pilot districts and one comparison district required lawyers to mandatorily disclose certain information, including anything bearing significantly on their sides' claims or defenses. Two other pilot districts

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<sup>35</sup> Some jurisdictions have implemented a form of phased discovery, by limiting the amount of discovery permitted prior to court-administered arbitration. See John Barkai and Gene Kassebaum, “The Impact of Discovery Limitations on Cost, Satisfaction and Pace in Court-Annexed Arbitration,” undated, at 3.

<sup>36</sup> Proposal presented to the Judicial Conference Advisory Committee on Civil Rules by the American College of Trial Lawyers, Irvine CA, at a January 16, 1997 Advisory Committee meeting (undated).

<sup>37</sup> At least one other district required attorneys to confer before the first pretrial conference to attempt to agree on a scheduling order.

and one other comparison district have a similar mandatory requirement, but they apply it to all information bearing significantly on both sides' claims or defenses.

After our sample cases were selected, four pilot districts switched from their initial early disclosure procedure to follow the December 1993 revised F.R.Civ.P. 26(a)(1), which requires the mandatory exchange of information relevant to disputed facts alleged with particularity in the pleadings, plus information on damages and insurance. Six comparison districts also are following the revised Rule 26(a)(1). The ten other pilot and comparison districts have decided to "opt out" and are not following the revised Rule 26(a)(1). Some districts opted out to retain their pilot program disclosure rules, some of which were more stringent in their disclosure requirements than the revised Rule 26(a)(1).

### **Sanctions**

Increasingly, proposals for restrictions on discovery are accompanied by calls for monetary or preclusionary sanctions against those who violate the standards. The 1983 amendments to the Federal Rules explicitly authorized sanctions, including attorney fees, for discovery abuse, as did California's Civil Discovery Act of 1986. Empirical research on sanctions suggests that courts and individual judges vary considerably in their use of sanctions.<sup>38</sup> But courts may be becoming more willing to impose sanctions as caseload pressure increases.

### **Providing Assistance with Discovery Planning**

Courts also are increasingly becoming involved in assisting attorneys in planning discovery. The 1983 amendments to Rule 16 provided for the inclusion of key discovery events in the judge's scheduling order to be issued after the pretrial conference. In federal courts, magistrate judges and special masters have assisted attorneys in managing discovery in complex litigation. Most federal district courts require that attorneys make a good faith effort to resolve discovery disputes before filing motions. And the 1993 federal Rules amendments required that the parties meet and prepare a proposed discovery plan before a scheduling conference is held or a scheduling order is due, although individual districts could exempt some or all types of cases from this requirement.

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<sup>38</sup> The Advisory Committee Notes to the 1983 Amendments to Rule 26 cite this research as a motivation for making judicial sanctioning authority explicit. But as late as 1988, the GAO found substantial variation in the use of sanctions. See *Federal Courts: Pretrial Management of Civil Cases Varied at Selected District Courts*, U.S. General Accounting Office, 1988, at 28-29.

One relatively new form of mechanism for assisting attorneys in developing discovery plans is mandatory early neutral evaluation (ENE). First adopted in the Northern District of California, ENE was conceived by the bench and bar at least in part to help attorneys identify the issues that are central to their disputes, so that they could focus their pretrial efforts on these issues. Under the Northern District's plan, an attorney volunteer (the "neutral") meets with the attorneys and their clients early in the litigation process to discuss the case. The neutral evaluator then delivers his or her assessment of the case to each side, along with advice on discovery planning. While ENE may facilitate settlement, its original objective was to help the attorneys manage discovery more efficiently.

It is important to note that court efforts to assist attorneys in developing more efficient discovery plans are not cost-free. Unless increased judicial management time directed towards the pretrial process translates into substantial savings at later pretrial or trial stages, the net effect on court budgets could be an increase in costs borne by taxpayers. If this were the case, public policymakers would have to decide whether these increased costs are justified by cost savings and other benefits to individual and corporate litigants. Alternatively, turning to attorney-volunteers to assist in discovery management, as is contemplated in most early neutral evaluation programs, imposes an additional burden on the bar

### **Cost and Fee Shifting**

Under the "American Rule," each side bears the costs of its own litigation, including both the costs of initiating discovery of information in its opponent's possession and the costs of responding to an opponent's requests for information. Under certain circumstances, for public policy reasons, legislatures have provided for "one-way" cost shifting, permitting prevailing plaintiffs to recover legal fees from defendants. Federal and state discovery rules have also provided for limited shifting of discovery costs, in cases where the court finds that a motion was frivolous or intended for an improper purpose, such as to unnecessarily delay the proceedings or harass the opposing party. Federal Rule 11 states that the court "may" impose sanctions on inappropriate behavior, by ordering the offending party to pay some or all of the reasonable expenses incurred by the other side as a result of this behavior, including attorney fees

Although some of the options outlined above have proved controversial, all involve modifications in existing court rules or procedures. Two other options for reform require more extensive rethinking of the civil litigation process—one, by rethinking and perhaps, restructuring, the lawyer-client relationship, the other, by redefining the role of the judge.

### **Closer Management of Attorneys by Parties**

In response to rising legal costs, many large corporations have begun restructuring their relationships with legal service providers. Eighty percent of Fortune 1000 corporations surveyed by Louis Harris and Associates said that they have brought more of their legal work in-house in recent years.<sup>39</sup> Bringing work in-house provides an opportunity for corporations to more closely examine the costs and benefits of litigation strategies, including discovery. Almost all of the corporate legal officers surveyed by Louis Harris (95 percent) said they involve in-house counsel in planning strategy on major matters, and 60 percent said that they require litigation budgets, including resources allocated for discovery, to be submitted for major work. Almost all of these corporations (98 percent) now require their outside counsel to submit detailed bills.<sup>40</sup> These changes in policies concerning corporate client-outside counsel, relationships have the potential to heighten corporate parties' attention to the costs (and benefits) of alternative discovery strategies. However, it may be more difficult for smaller corporations, with fewer resources for managing their legal services, to implement such policies.

Some critics of discovery allege that some attorneys engage in excessive discovery in order to run up their bills. Because corporate attorneys typically are paid on an hours and expenses basis, it is often said that they have an incentive to "keep their meters running." Some corporations are experimenting with alternative billings practices intended to change these incentives. For example, some corporate legal officers are requesting that outside counsel charge flat rates for certain cases or for certain litigation activities ("menu billing"). Others are agreeing to fees with contingency factors—sometimes called "premium" billing.<sup>41</sup> Because these alternative fee arrangements reduce dependence on hourly billing, they should reduce the incentives of attorneys to engage in discovery as a means of fee enhancement.

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<sup>39</sup> Deborah Hensler, "Talking to Each Other or Talking Past Each Other? Corporate Legal Officers' and Outside Counsels' Views on Strategies for Controlling Legal Costs," paper presented at the American Bar Association annual meeting, 1992, at 7.

<sup>40</sup> Deborah Hensler, "Talking to Each Other or Talking Past Each Other? Corporate Legal Officers' and Outside Counsels' Views on Strategies for Controlling Legal Costs," paper presented at the American Bar Association annual meeting, 1992, at 15.

<sup>41</sup> Deborah Hensler, "Talking to Each Other or Talking Past Each Other? Corporate Legal Officers' and Outside Counsels' Views on Strategies for Controlling Legal Costs," paper presented at the American Bar Association annual meeting, 1992, at 11-14.

### **Judicial Discovery**

The American civil litigation system relies on an adversarial process to investigate (“discover”) and present the facts that are relevant to resolving a dispute. Each side is assumed to have the incentives to bring out those facts that would support its case. In principle, if the parties have equal resources and equally skilled representatives, these incentives should assure that all of the relevant facts are presented to the fact-finder. By excluding the judge from the investigatory process, the American system also assures that final judgment on the case will be withheld until all of the appropriate facts have been developed. The increasing adoption of a “managerial judging” style, including increased involvement in managing discovery, has affected the judge’s role as a purely neutral umpire. But the American system continues to rely on the parties’ attorneys to develop the facts of the case.

Under European “inquisitorial” systems, the role of the judge in developing the facts of the case is far greater; indeed, the judge may be wholly responsible for deciding what issues are central to the dispute, at what stage of the process to hear these issues, and what evidence should be brought to bear. For example, under the German system, there is no sharp demarcation between pretrial proceedings and trial: the judge hears the issues in the order that he or she feels is most likely to assist in resolving the case. The parties’ representatives identify witnesses to appear before the judge, but apparently do not engage in any extensive pretrial questioning of these witnesses. Nor do they engage in any extensive investigation of the facts, beyond the information they obtain from their clients.<sup>42</sup>

Shifting the conduct of discovery to judges in the United States would require a radical re-thinking of the virtues of the adversarial process; it would also require a re-thinking of court organization. But as an alternative to patchwork reforms of discovery, that inexorably draw the judge deeper into the investigatory process, perhaps without sufficient evaluation of the larger consequences for civil case disposition, it may be appropriate to undertake such a systematic re-thinking.

### **SOME OBSTACLES TO REFORM**

One of the obstacles to effective discovery reform has been the failure of reformers to carefully identify the problem they are seeking to remedy and the sources of that problem. For example, is the problem that there is too much discovery overall, or too much in some

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<sup>42</sup> Albert Alschuler, “Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases,” 99 *Harv. L. R.* 1808 (1986) at 1840-1841.

specific types of cases? If it is the latter, in what types of cases is discovery problematic? Answering these questions is important because it is difficult to set overall limits on the quantity of discovery that are both effective for large numbers of cases and do not impair equity in particular sub-sets of cases.

Is the problem that discovery prolongs litigation, or that it costs too much? If both are of concern, which matters more? Answering this question is important, because some mechanisms for limiting the elapsed time for discovery may actually increase the amount of discovery.

With regard to costs, is the problem that, regardless of its merits, discovery costs too much, or that the costs are disproportionate to the merits in too many cases? Discovery might cost too much because lawyers' hourly fees are too high, because lawyers bill too many hours for discovery activities that could be done more efficiently in less time, or because lawyers engage in more discovery than is necessary. Court rules may affect the latter, but court rules alone will not reduce lawyer fees and lawyer hours.

Are the costs that are problematic the direct costs of the litigation (e.g. legal fees) or the indirect burdens on parties (e.g. employee time spent responding to discovery)? Or are these costs of equal concern? Limiting burdens on the parties may require very different strategies than are required to limit direct litigation costs.

Not only has there been insufficient attention to the nature of the problem that needs to be "fixed," there has also been insufficient attention to the source of the problems. Understanding the source of the problems is important because without such an understanding reformers run the risk that the "fixes" they choose will be ineffective. For example, if the absence of sanctions invites excessive discovery and judges have incentives not to impose sanctions, one cannot fix this problem simply by writing more rules about sanctions into the code. Instead one needs to invest in understanding why judges do not use the sanctioning power they already have. If attorneys engage in excessive discovery because they obtain lucrative fees from this practice, it might be more effective for clients to institute controls on fees—for example, through alternative fee arrangements—than to include new restrictions on the amount of discovery into the code.

Alternatively, if attorneys engage in overly-aggressive discovery because they believe that is what their clients expect of them, perhaps those clients need to be educated as to the relationship between their expectations of their counsel and their litigation costs. If the local legal culture sometimes includes the use of overly-aggressive discovery for strategic purposes of imposing costs and delay on opposing parties, which may sometimes drive inappropriate settlements or be a problem for poorer parties, perhaps the local judiciary

needs to become more actively involved in managing discovery and signaling displeasure with inappropriate discovery behavior by lawyers and parties.

#### **A WORD ABOUT THE FUTURE**

Although we do not know of any major empirical research on the correlation between the information technology explosion and discovery, it seems reasonable to assume that the character and magnitude of discovery is shaped in part by the availability of information technologies. All of us have observed the proliferation of paper and contacts that have flowed from the availability of paper-copiers, faxes, and electronic communication. New computer technologies also facilitate the storage and retrieval of information, which can now be accessed from multiple databases with a relatively few keystrokes. The implications for discovery are truly mind-boggling. At the same time, many courts, strapped for financial resources, are still struggling to move into the computer age. Any consideration of discovery reforms must include an assessment of how new information technologies are likely to affect lawyers, clients and the courts.



## 2. DESCRIPTION OF DISCOVERY COSTS AND OTHER INFORMATION FOR VARIOUS TYPES OF CASES

Discovery is a major factor influencing both the length and the cost of litigation.

Our main evaluation report contains information about general civil cases in the aggregate and about litigation costs measured in terms of total lawyer work hours, but there has been considerable interest expressed in having more detailed information about various types of cases and about how total lawyer work hours are broken down between discovery and other types of activities. This chapter addresses those interests.

The data come from our sample of cases filed in 1992-93 after the CJRA was enacted, and include closed general civil cases for which we had at least one lawyer providing information. We provide various types of information on each category of case, including time to disposition, lawyer satisfaction with judicial case management, lawyer views on the fairness of judicial case management, total lawyer work hours per litigant, percent of cases with zero discovery lawyer work hours, lawyer work hours on discovery per litigant, the fraction of total lawyer work hours devoted to discovery matters, and the number of discovery motions filed.

The various types of cases on which we provide information here are categorized separately by.

- Case closure point: before issue joined, after issue joined and closed in 270 days or less after filing, or after issue joined and closed over 270 days after filing
- Case complexity high, medium, or low (highest subjective rating by any lawyer or judge on the case)
- Discovery difficulty high medium, or low (highest subjective rating by any lawyer or judge on the case).
- Type of attorney represented plaintiff or defendant.
- Type of private attorney fee: hourly or contingent (other types of fee structures are not included here)
- Number of lawyers in firm or legal department of the organization: more than five, or less
- Monetary stakes over \$500,000 or less
- Nature of suit: tort, contract, or other
- Category of total lawyer work hours: bottom 75%, top 25%<sup>43</sup>, or top 10%<sup>44</sup>.

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<sup>43</sup> For general civil cases from the CJRA 1992-93 sample with issue joined, that closed with time to disposition over 270 days and had lawyer work hours reported, the top 25% had total lawyer work hours per litigant of more than 188 hours.

We present information on medians (half the cases have less than the median, and half have more than the median) as the best available measure of a "typical" case. We also present information on the average total lawyer work hours and the average discovery lawyer work hours as the best available measure of the expected cost of the average case. However, we caution that litigation in general is composed of many cases without great costs, and a small fraction of cases with very high costs. This high cost tail of the distribution of cases can contain a few really big cases that strongly affect the average, but not the median. Consequently, when comparing different types of cases the median is a more stable measure, and too much emphasis should not be placed on interpreting differences in the averages between subcategories of cases.

### **CASE CLOSURE POINT**

In Table 2.1 we present information by case closure point. Note that about a fourth of the general civil cases close before issue is joined, about another fourth close after issue is joined and within 270 days after filing, and nearly half close after issue is joined and more than 270 days after filing.

About three fourths of the cases that close before issue is joined have no lawyer work hours spent on discovery and 37 percent of those with issue joined that close within 270 days after filing have no lawyer work hours on discovery. However, only 15 percent of those that close at least 270 days after filing have no discovery costs. The median time lawyers spend on discovery per litigant for cases with issue joined and closed within 270 days after filing is only three hours, whereas the median is 20 hours for those cases that close more than 270 days after filing.

Overall, lawyer work hours per litigant on discovery are zero for 38 percent of general civil cases, and low for the majority of cases. Discovery is not a pervasive litigation cost problem for the majority of cases. The empirical data show that any problems that may exist with discovery are concentrated in a minority of the cases, and the evidence indicates that discovery costs can be very high in some cases. Subjective information from our interviews with lawyers also suggests that the median or typical case that is not "the problem" is the minority of the cases with high discovery costs that generates the anecdotal "parade of horrors" that dominates much of the debate over discovery rules and discovery case management.

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<sup>44</sup> For general civil cases from the CJRA 1992-93 sample with issue joined, that closed with time to disposition over 270 days and had lawyer work hours reported, the top 25% had total lawyer work hours per litigant of more than 450 hours.

The nearly half of the cases that close more than 270 days after filing consume about three quarters of all lawyer work time, and about 80 percent of all lawyer work time on discovery. Since we are most concerned with discovery management policies in this report, we shall focus the remainder of the report on these general civil cases that close at least 270 days after filing and consume the vast majority of lawyer work time on discovery.

**Table 2.1**  
**Information by Case Closure Point:**  
**1992-93 Sample, Closed General Civil Cases**  
**with Lawyer Work Hours Reported**

Variable	Case closure point		
	Before issue joined	After issue joined, in 270 days or less	After issue joined, over 270 days
Percent in category	28	27	45
Median days to disposition	122	171	463
% lawyers satisfied with management	65	72	73
% lawyers view management as fair	82	89	89
Median total lawyer work hours per litigant	20	35	80
Average total lawyer work hours per litigant	65	76	232
% with zero discovery work hours	72	37	15
Median lawyer work hours on discovery per litigant	0	3	20
Average lawyer work hours on discovery per litigant	13	21	83
Median percent discovery hours are of total lawyer work hours	0	14	25
Average number of discovery motions on case	0.1	0.3	1.0
% of total lawyer work hours on all cases	13	14	73
% of discovery lawyer work hours on all cases	8	12	80

Note. Percentages in rows may not add to 100 due to round off and missing data

**HOW LAWYERS SPEND THEIR TIME**

In Table 2.2 we present information on how lawyers spend their work hours on general civil cases that close at least 270 days after filing. The average lawyer work hours per litigant is 232 hours, of which an average of 36 percent or 83 hours is spent on discovery, including discovery motions. In Table 2.1 we saw that the median percent discovery hours are of total lawyer work hours is 25 percent. So, whether we consider average or median percentages, discovery is about one fourth to one third of total lawyer work hours per litigant. Discovery accounted for less than half the lawyer work hours in all the subsets of general civil cases that we examined.

**Table 2.2**  
**How Lawyers Spend their Work Hours:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days**  
**and with Lawyer Work Hours Reported**

Type of Work	Average lawyer work hours per litigant	Percent of total
Trials, including direct preparation for trial	26	11%
Alternative dispute resolution after filing	6	3%
Discovery after filing, including motions	83	36%
Motion practice, excluding discovery	36	16%
Other pretrial conferences or talks with judicial officer	7	3%
Other time worked AFTER filing federal case: on research, investigation, writing, talking with parties and lawyers outside court, or anything else related to the litigation	55	24%
All time worked BEFORE filing federal case, in preparation for filing case	15	7%
Total work hours per litigant	232	100%

Note: Lawyers were asked the following question after case closure: "Approximately how many of the total number of hours worked for your party or parties were spent on each of the activities listed below? Again do not include activity related to state court, any government administrative proceeding, or appellate litigation." Columns may not sum exactly due to rounding and missing data.

**CASE COMPLEXITY**

In Table 2.3 we present information on differences among cases that are of high, medium, or low complexity, based on the highest subjective complexity rating by any lawyer or the judge on the case. Note that high complexity cases consume about four times as many lawyer work hours as low complexity cases, but that the median percentage of the total lawyer work time that is devoted to discovery is about the same.

We conducted multivariate statistical analyses that included case complexity as a factor in predicting time to disposition, total lawyer work hours, lawyer work hours on discovery, lawyer satisfaction and lawyer views of fairness (see Appendix A). Higher complexity cases take significantly longer to close and require significantly more lawyer work hours than lower complexity cases, but there is not a significant difference in lawyer satisfaction or views on fairness of judicial case management for cases of different complexity. Overall case complexity was not a significant predictor of lawyer work hours on discovery, probably because the analysis included discovery difficulty as a highly significant factor in the prediction of lawyer work hours on discovery.

**Table 2.3**  
**Information by Category of Case Complexity:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days**  
**and with Lawyer Work Hours Reported**

Variable	Case complexity			Significant difference shown in multivariate analysis?
	High	Medium	Low	
Percent in category	23	61	16	
Median days to disposition	594	463	392	Yes
% lawyers satisfied with management	72	73	74	No
% lawyers view management as fair	86	89	91	No
Median total lawyer work hours per litigant	150	78	40	Yes
Average total lawyer work hours per litigant	432	201	62	
% with zero discovery work hours	12	15	18	
Median lawyer work hours on discovery per litigant	42	20	10	No
Average lawyer work hours on discovery per litigant	147	76	19	
Median percent discovery hours are of total lawyer work hours	28	25	27	
Average number of discovery motions on case	1.9	0.8	0.3	

Note Percentages in rows may not add to 100 due to round off and missing data



## **DISCOVERY DIFFICULTY**

In Table 2.4 we present information on differences among cases that are of high, medium, or low discovery difficulty, based on the highest subjective rating by any lawyer or the judge on the case.<sup>45</sup> Not surprisingly, high discovery difficulty cases consume about three times as many total lawyer work hours and five times as many lawyer work hours on discovery as low discovery difficulty cases consume. However, the median percentage of the total lawyer work time that is devoted to discovery on high discovery difficulty cases is still only 33 percent.

We conducted multivariate statistical analyses that included discovery difficulty as a factor in predicting time to disposition, total lawyer work hours, lawyer work hours on discovery, lawyer satisfaction and lawyer views of fairness (see Appendix A). Higher discovery difficulty cases have significantly higher lawyer work hours, both in total and on discovery, but there is not a significant difference in lawyer satisfaction or views on fairness of judicial case management for cases of different discovery difficulty. Discovery difficulty was not a significant predictor of time to disposition, after the analysis accounted for the other multiple factors that are significant in predicting time to disposition.

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<sup>45</sup> Lawyers and judges were asked "When this litigation began, how would you have rated this case in terms of ... difficulty of discovery...." It is possible that some people filling out the survey after the litigation was closed reported greater difficulty of discovery because they knew lawyer work hours were high, rather than their initial view when the litigation began.

**Table 2.4**  
**Information by Category of Discovery Difficulty:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days**  
**and with Lawyer Work Hours Reported**

Variable	Difficulty of discovery			Significant difference shown in multivariate analysis?
	High	Medium	Low	
Percent in category	19	53	28	
Median days to disposition	581	465	420	No
% lawyers satisfied with management	73	72	75	No
% lawyers view management as fair	86	89	90	No
Median total lawyer work hours per litigant	140	96	49	Yes
Average total lawyer work hours per litigant	503	215	74	
% with zero discovery work hours	8	12	24	
Median lawyer work hours on discovery per litigant	50	25	9	Yes
Average lawyer work hours on discovery per litigant	205	73	17	
Median percent discovery hours are of total lawyer work hours	33	27	20	
Average number of discovery motions on case	1.9	1.0	0.3	

Note Percentages in rows may not add to 100 due to round off and missing data

**PLAINTIFFS AND DEFENDANTS ATTORNEYS**

In Table 2.5 we present information on differences between plaintiffs and defendants attorneys. Plaintiffs attorneys reported spending a median of 100 total work hours per litigant, whereas defendants attorneys reported spending a median of 75 total lawyer work hours per litigant, and the difference is statistically significant. There is not a significant difference between plaintiffs and defendants attorneys on any of the other variables that we tested.

**HOURLY AND CONTINGENT FEE ATTORNEYS**

In Table 2.6 we present information on hourly and contingent fee attorneys (other types of fee structures are not included here because of the limited amount of data we had about them). We did not find a statistically significant difference between hourly and contingent fee lawyers in predicting any of the time to disposition, lawyer work hours, satisfaction, or fairness measures that we analyzed statistically.

**SIZE OF LAW FIRM OR LEGAL DEPARTMENT**

In Table 2.7 we present information on differences between attorneys based on the size of the law firm or legal department: more than five or less. Attorneys from larger firms work significantly more hours per litigant, in total and on discovery, than their counterparts from smaller firms, although the fraction of time they spend on discovery is about the same. In studying the data, we suspect there may be some systematic bias by litigants in favor of hiring larger firms to handle the more complex and more costly cases.

**Table 2.5**  
**Information by Type of Attorney:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days**  
**and with Lawyer Work Hours Reported**

Variable	Type of Attorney		Significant difference shown in multivariate analysis?
	Plaintiff	Defendant	
Percent in category	42	58	
Median days to disposition	459	471	
% lawyers satisfied with management	72	74	No
% lawyers view management as fair	88	89	No
Median total lawyer work hours per litigant	100	75	Yes
Average total lawyer work hours per litigant	271	204	
% with zero discovery work hours	13	16	
Median lawyer work hours on discovery per litigant	20	20	No
Average lawyer work hours on discovery per litigant	96	74	
Median percent discovery hours are of total lawyer work hours	25	29	
Average number of discovery motions on case	0.9	1.0	

Note Percentages in rows may not add to 100 due to round off and missing data

**Table 2.6**  
**Information by Type of Private Attorney Fee:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days**  
**and with Lawyer Work Hours Reported**

Variable	Type of Private Attorney Fee <sup>1</sup>		Significant difference shown in multivariate analysis?
	Hourly	Contingent	
Percent in category	56	18	
Median days to disposition	460	442	
% lawyers satisfied with management	72	73	No
% lawyers view management as fair	89	87	No
Median total lawyer work hours per litigant	83	95	No
Average total lawyer work hours per litigant	269	177	
% with zero discovery work hours	15	10	
Median lawyer work hours on discovery per litigant	21	20	No
Average lawyer work hours on discovery per litigant	107	46	
Median percent discovery hours are of total lawyer work hours	27	27	
Average number of discovery motions on case	1.0	0.9	

<sup>1</sup> Types of attorneys and fees not shown in the table include prepaid legal insurance attorneys, government attorneys who were an employee of a party, private attorneys who were full time employees of a party, attorneys with mixed fee arrangements and attorneys who charged no fee

**Table 2.7**  
**Information by Size of Firm or Legal Department:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days**  
**and with Lawyer Work Hours Reported**

Variable	Number of Lawyers in Firm or Legal Department		Significant difference shown in multivariate analysis?
	More than five	Five or less	
Percent in category	68	31	
Median days to disposition	460	473	
% lawyers satisfied with management	73	75	No
% lawyers view management as fair	89	89	No
Median total lawyer work hours per litigant	90	66	Yes
Average total lawyer work hours per litigant	275	137	
% with zero discovery work hours	14	17	
Median lawyer work hours on discovery per litigant	21	15	Yes
Average lawyer work hours on discovery per litigant	101	44	
Median percent discovery hours are of total lawyer work hours	26	25	
Average number of discovery motions on case	1.0	0.8	

Note. Percentages in rows may not add to 100 due to round off and missing data

### **SIZE OF MONETARY STAKES**

In Table 2.8 we present information based on the size of the monetary stakes, which we categorized into stakes over or under \$500,000 in the table. Our statistical analysis was conducted on the log of stakes, as described in Appendix A. We found that higher stakes are associated with significantly higher lawyer work hours and significantly longer time to disposition, but that stakes are not significantly related to satisfaction or fairness. Even for cases with stakes over \$500,000, the median percentage of lawyer work hours spent on discovery was only 30 percent.

### **NATURE OF SUIT**

In Table 2.9 we present information by the nature of suit, categorized as tort, contract, or other. We found no statistically significant difference between those three categories of cases on any of the time to disposition, lawyer work hours, satisfaction, or fairness measures. We believe that the tort and contract categories are too aggregated, with too heterogeneous a composition within each category, to be meaningful in studying lawyer work hours and time to disposition. Smaller, more narrowly defined categories should be studied, but we had too few cases in our sample to do subcategories within tort, contract and other types of cases in detail.

### **CASES WITH MOST LAWYER WORK HOURS**

Finally, in Table 2.10 we present information by category of total lawyer work hours: bottom 75%, top 25%, and top 10% of closed cases.<sup>46</sup> The top categories of the cases with the most lawyer work hours were obviously significantly more costly, but they did not have statistically significantly longer time to disposition after other variables such as complexity and stakes were factored into the multivariate analysis. The top 10% had a median of 950 total work hours per litigant, and a median percentage of lawyer work hours spent on discovery of 36 percent. These top categories of the most costly cases in terms of lawyer work hours also had significantly lower lawyer satisfaction with the judicial case management and a significantly lower percentage of the lawyers who felt the judicial case management was fair.

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<sup>46</sup> About 8 percent of our sample of cases remained open at the conclusion of our data collection. They are not included in this analysis.

**Table 2.8**  
**Information by Size of Monetary Stakes:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days**  
**and with Lawyer Work Hours Reported**

Variable	Monetary stakes		Significant difference shown in multivariate analysis?
	Over \$500,000	\$500,000 or less, greater than zero	
Percent in category	28	61	
Median days to disposition	537	447	Yes
% lawyers satisfied with management	68	77	No
% lawyers view management as fair	89	90	No
Median total lawyer work hours per litigant	172	68	Yes
Average total lawyer work hours per litigant	483	126	
% with zero discovery work hours	9	14	
Median lawyer work hours on discovery per litigant	48	17	Yes
Average lawyer work hours on discovery per litigant	190	36	
Median percent discovery hours are of total lawyer work hours	30	25	
Average number of discovery motions on case	1.5	0.8	

Note Percentages in rows may not add to 100 due to round off and missing data



**Table 2.9**  
**Information by Nature of Suit:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days**  
**and with Lawyer Work Hours Reported**

Variable	Nature of suit			Significant difference shown in multivariate analysis?
	Tort	Contract	Other	
Percent in category	26	24	50	
Median days to disposition	477	430	477	No
% lawyers satisfied with management	76	73	71	No
% lawyers view management as fair	91	88	88	No
Median total lawyer work hours per litigant	80	100	70	No
Average total lawyer work hours per litigant	147	312	239	
% with zero discovery work hours	7	15	18	
Median lawyer work hours on discovery per litigant	25	25	17	No
Average lawyer work hours on discovery per litigant	48	104	92	
Median percent discovery hours are of total lawyer work hours	30	25	25	
Average number of discovery motions on case	1.0	1.0	0.9	

Note Percentages in rows may not add to 100 due to round off and missing data

**Table 2.10**  
**Information by Category of Total Lawyer Work Hours:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days**  
**and with Lawyer Work Hours Reported**

Variable	Category of total lawyer work hours			Significant difference shown in multivariate analysis?
	Bottom 75%	Top 25%	Top 10%	
Percent in category	75	25	10	
Median days to disposition	442	578	618	No
% lawyers satisfied with management	76	64	57	Yes
% lawyers view management as fair	90	83	75	Yes
Median total lawyer work hours per litigant	55	375	950	Yes
Average total lawyer work hours per litigant	66	730	1452	
% with zero discovery work hours	17	6	4	
Median lawyer work hours on discovery per litigant	12	100	300	Yes
Average lawyer work hours on discovery per litigant	19	280	601	
Median percent discovery hours are of total lawyer work hours	25	33	36	
Average number of discovery motions on case	0.6	2.0	2.8	

Note Percentages in rows will not add to 100 due to round off, missing data, and inclusion of top 10% within numbers shown for top 25%.

### 3. EVALUATION OF VARIOUS DISCOVERY MANAGEMENT POLICIES

#### INTRODUCTION

Discovery management policies include the CJRA principles of early and ongoing judicial control of pretrial processes such as discovery, requiring lawyers to jointly prepare a discovery -- case management plan early in the case, exchanging information early without formal discovery, requiring good-faith efforts to resolve discovery disputes before filing motions, and limiting interrogatories and other forms of discovery.<sup>47</sup>

To conduct this further evaluation of discovery management policies, discovery management policy information was obtained at the district level from court documents, local rules, and interviews with judges and clerks in each of the 20 study districts. In addition, discovery management information was obtained at the case level from over 5000 court dockets and from lawyer surveys for cases filed in 1992-93 after the CJRA was passed. For each case, we learned when the judge started managing the case, if a trial schedule had been set, if a discovery schedule had been set, and if so when and how much time was allowed between the date the schedule was set and the date of discovery cutoff. From the dockets, we also learned if any discovery motions had been filed. However, details of discovery management at the case level, such as limitations on depositions or requirements for sequencing of discovery, are usually not recorded on the docket and so were not available. We also surveyed the lawyers on each case to learn how much time they worked on the case and how much of that work time was devoted to discovery, to learn if early disclosure of information was made without a formal discovery request, and to learn if good faith efforts had been made to resolve discovery disputes before a motion was filed.

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<sup>47</sup>For details of each district's CJRA plan and its implementation, see *Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts*, RAND, MR-801-ICJ, by James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana, 1996

The remaining five sections of this chapter contain our evaluation of the following five types of discovery management policies:

- Early case management and discovery planning,
- Early disclosure,
- Good Faith Efforts in Resolving Discovery Disputes,
- Limiting interrogatories, and
- Shortening discovery cutoff time.

Due to lack of sufficient data, we could not evaluate policies limiting the number or length of depositions, limiting document discovery, or dealing with issues of privilege. We also had insufficient data to evaluate methods lawyers use to manage discovery outside the court's purview.

For details of our multivariate statistical analyses, refer to Appendix A.

## **EARLY CASE MANAGEMENT AND DISCOVERY PLANNING**

All of the 20 study courts' CJRA plans accepted the principle of early and ongoing judicial control of the pretrial process. However, case management styles varied considerably between districts and between judges in a given district.

Four of the ten pilot districts required that counsel jointly present a discovery -- case management plan at the initial pretrial conference, and nine of the other pilot and comparison districts later adopted this management technique after our sample cases were selected when the December 1993 federal rules changes were made.

In our statistical analyses, we defined early judicial case management as any schedule, conference, status report, joint plan, or referral to ADR within 180 days of case filing. This definition gives time for nearly all cases to have service and answer or other appearance of the defendants (which legally can take up to six months), so issue is joined, and it is appropriate to begin management if the judge wants to do so. We also explored alternative definitions of "early" using time periods other than six months, with results similar to those reported here.

### **Lawyer Work Hours**

In our main evaluation report, we estimated a statistically significant increase in total lawyer work hours from early management. There were no consistent statistically significant differences for any of the components of early management considered separately.

Our main evaluation report showed that attorneys *shown on the docket* to have filed status reports or joint discovery -- case management plans before day 180 in the life of the case did not have significantly different work hours than attorneys on cases with other forms of early management. On the other hand, we found that attorneys from districts with a policy that required early status reports or joint plans did report statistically significantly fewer work hours than attorneys from other districts.<sup>48</sup>

We explored this difference in our findings between case level and district level data in some depth in our further analysis of judicial discovery management policies, and learned that the case level data are not reliable because of major differences in docketing practices between districts that require plans or status reports. The dockets that say a discovery plan was submitted are generally accurate, but the dockets that are silent on the subject of a discovery plan can mean either no plan was submitted, or a plan was submitted to the court but that fact was not separately shown on the docket. The case level information on whether or not a discovery plan had been submitted was dropped from this further study because the docketing practices regarding the submission of those plans or reports was found to vary markedly between districts, making that case-level variable undesirable for statistical analyses across districts

In our further analysis of judicial discovery management policies, we find that early management is associated with significantly increased total lawyer work hours if the district does not require discovery -- case management plans. However, early management is not associated with significantly increased total lawyer work hours if the district requires discovery -- case management plans. This lends strong support for the continuation of a requirement of discovery -- case management planning. That is, it appears that doing early management without planning increases lawyer work hours, but early management coupled with planning does not increase lawyer work hours.

[To be inserted here in final report: estimates of differences between not managing early and managing early with and without discovery planning.]

Our interviews suggested reasons why early management may increase lawyer work hours. Lawyers need to respond to a court's management--for example, talking to the litigant and to the other lawyers in advance of a conference with the judge, traveling, and spending time waiting at the courthouse, meeting with the judge, and updating the file after the conference. In addition, once judicial case management has begun, a discovery cutoff

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<sup>48</sup> This result holds when we use either the intra-district correlation-adjusted or unadjusted standard errors.

date has usually been established, and attorneys may feel an obligation to begin discovery. Doing so could shorten time to disposition, but it may also increase lawyer work hours on cases that were about to settle when the judge began early management. The CJRA data indicate that cases that are managed early have a higher likelihood of having lawyer hours spent on discovery.

However, when a district requires discovery – case management plans, the increase in lawyer work hours associated with early management appears to be offset by benefits associated with the required planning, and the net effect is no significant increase in lawyer work hours. There are at least two plausible explanations for this outcome. First, the planning itself may produce the benefit. The requirement that the lawyers jointly meet and prepare a discovery – case management plan for submission to the court may result in more efficient litigation with less lawyer work hours. Another plausible explanation is that the judges in districts that require plans may also manage cases differently and better (in ways that we did not measure) than judges in districts that do not require plans.

When we looked at various subsets of cases, we found no strong evidence that the effects of early management and discovery planning were systematically concentrated on certain types of cases based on level of complexity, level of discovery difficulty, plaintiff or defendant side of the case, contingent or hourly fee lawyer, size of the law organization in which the lawyer worked, case stakes, tort or contract or other nature of suit categories, or the top 25% most costly cases among general civil litigation that has time to disposition over 270 days after filing.<sup>49</sup>

In addition to the further analysis that we did on total lawyer work hours, we also analyzed lawyer work hours on discovery. The policy implications and findings of statistical significance emerging from our analysis of lawyer work hours on discovery are very similar to those from our analysis of total lawyer work hours

### **Time to Disposition**

In our main evaluation report, using only cases with time to disposition over 270 days, we found that early management predicted significantly shorter time to disposition. We explored the component procedures of early management separately in our main evaluation report, and fit a separate model for each component. This model includes both a flag for early management as well as a flag for the particular early management procedure. For example, to explore the specific effect of setting a trial schedule prior to the 180th day of

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<sup>49</sup> These cases had total lawyer work hours per litigant of more than 188 hours

the case, we fit a model that includes our early management flag and a flag that is 1 if the case received a trial schedule before day 180 and 0 otherwise. The estimated coefficient for the trial schedule flag estimates the difference between cases that receive early management that includes setting the trial schedule and those that receive early management but do not include setting the trial schedule early. Using this approach we found that cases where a trial schedule was set before day 180 had statistically significantly shorter time to disposition than did cases receiving other types of early management. We found no statistically significant differences for conferences or mandatory arbitration, and we had mixed results for schedules in general and status reports or joint discovery—case management plans. Hence we concluded that there was not strong evidence that this joint discovery—case management plan policy was an important predictor of time to disposition.

In our further analysis of judicial discovery management policies, we again find a statistically significant reduction in time to disposition is associated with early management without setting a trial schedule early, and a significantly larger reduction is associated with early management that includes setting a trial schedule early. In our further analysis we considered those two early management and trial scheduling policies used both with and without a discovery plan requirement, and the results were statistically significant. There was little difference in time to disposition with or without a discovery plan if a trial was scheduled early, but cases closed earlier if discovery planning took place in the absence of an early trial schedule <sup>50</sup> Thus, our further analysis suggests that the requirement of a discovery – case management plan is beneficial in reducing time to disposition, especially if a trial schedule is not set early. And we indicated above that the use of discovery plans appears to have beneficial effects in controlling lawyer work time.

[To be inserted here in final report: estimates of differences between not managing early and managing early with and without discovery planning.]

Our statistical analysis of subsets of cases does not lead to any suggestions for focusing these management policies only on certain types of cases. Our statistical results are consistent for most subsets of cases analyzed, although the top 25% most costly cases appear to especially benefit from the early setting of a trial schedule (early management of those top 25% of the costly cases without a trial date scheduled was not associated with significantly reduced time to disposition) And cases that are high in complexity, high in

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<sup>50</sup> If we use the standard errors adjusted for intra-district correlation as discussed in Appendix A, then early management without an early scheduling of a trial and without a discovery plan does not significantly reduce time to disposition (coefficient =  $-0.062$ ,  $p=0.169$  for cases that close over 270 days after filing).

discovery difficulty, or high in stakes appear to especially benefit from the use of discovery – case management plans.

### **Attorney Satisfaction**

In our main evaluation report, we found no statistically significant effects on attorney satisfaction for early case management in our model with cases closed over 270 days after filing. Furthermore we found no statistically significant differences in attorney satisfaction for cases receiving any of the components of early management (such as requiring a status report or discovery – case management plan or an early setting of a trial date) compared to cases not receiving the component.

In our further analysis of judicial discovery management policies, we again find no statistically significant effect on lawyer satisfaction from early management, setting a trial schedule early in the case, and requiring a discovery plan. We considered those three policies used in various combinations and did not find any significant difference in satisfaction, although as noted previously, some of those policies do significantly affect time to disposition and lawyer work hours.

Our statistical analysis of subsets of cases does not lead to any suggestions for focusing these management policies on certain types of cases. Our statistical results are consistent for nearly all subsets of cases analyzed, including the top 25% most costly cases.

### **Attorney Views on Fairness**

We find no statistically significant effects for any of the policy variables on attorney views on fairness.

### **Information by Type of Early Management and Discovery Plan Policy**

Table 3.1 presents information on time to disposition, lawyer work hours, satisfaction, and views on fairness for cases that were and were not subject to an early management and joint discovery – case management planning. The numbers in the table, which reflect actual survey responses from the sample cases, generally corroborate the results of the statistical analysis. However, we caution that the districts and the cases from those districts differ on factors other than the policy on early disclosure. Our multivariate analyses adjust for those other factors, and the bivariate Table 3.1 does not



Table 3.1

**Information by Type of Early Management and Discovery Plan Policy:  
1992-93 Sample, General Civil Cases with Issue Joined,  
Closed with Time to Disposition Over 270 Days,  
and with Lawyer Work Hours Reported**

Variable	Type of early management and discovery plan policy					Significant difference for policy shown in multivariate analysis?
	Early manage, with early trial set, with mandatory plan policy	Early manage, with early trial set, without mandatory plan policy	Early manage, without early trial set, with mandatory plan policy	Early manage, without early trial set, without mandatory plan policy	Not early manage	
Median days to disposition	448	398	465	480	525	Significantly faster
% lawyers satisfied with management	75	69	71	73	75	Not a significant difference
% lawyers view management as fair	88	89	85	88	90	Not a significant difference
Median total lawyer work hours per litigant	80	100	75	95	60	Significantly more hours if no planning
% with zero discovery work hours	3	8	13	15	22	
Median lawyer work hours on discovery per litigant	20	30	15	25	10	Significantly more hours if no planning
Median percent discovery hours are of total lawyer work hours	31	30	25	29	20	25

Note: Percentages in rows may not add to 100 due to round off and missing data

## EARLY DISCLOSURE

CJRA brought about substantial change in early disclosure among our study districts. Only one district required it before CJRA,<sup>51</sup> after CJRA, all pilot and comparison districts have adopted one of five approaches providing either voluntary or mandatory exchange of information by lawyers, sometimes only for specified types of cases. Three pilot and two comparison districts adopted the voluntary exchange model, which encourages lawyers to cooperate in exchanging information. Three pilot districts and one comparison district followed a mandatory exchange model for a limited subset of cases and a voluntary model on other cases. Two pilot districts and one comparison district required lawyers to mandatorily disclose certain information, including anything bearing significantly on their sides' claims or defenses. Two other pilot districts and one other comparison district have a similar mandatory requirement, but they apply it to all information bearing significantly on both sides' claims or defenses.

The December 1993 revised F.R.Civ.P. 26(a)(1), which requires the mandatory exchange of information relevant to disputed facts alleged with particularity in the pleadings plus information on damages and insurance, was implemented after our sample of cases was selected, and hence can not be evaluated with our CJRA data. After our sample cases were selected, four pilot districts switched from their initial early disclosure procedure, and six comparison districts decided to follow the revised Rule 26(a)(1). The ten other pilot and comparison districts decided to "opt out" and are not following the revised Rule 26(a)(1). Some districts opted out to retain their pilot program disclosure rules, some of which were more stringent in their disclosure requirements than the revised Rule 26(a)(1)

RAND's lawyer surveys indicate that when early disclosure was made for cases in the 1992-93 sample, it was "full disclosure" 57 percent of the time, and "pro forma" disclosure 43 percent of the time. For general civil cases with issue joined, lawyers report more disclosure when it is mandatory (60 percent of the cases in mandatory disclosure districts, versus 45 percent in voluntary disclosure districts and 40 percent in districts with no disclosure policy). Part of the problem with a mandatory early disclosure requirement is compliance; lawyers report that when disclosure is done on a mandatory basis, it is full disclosure for 50 percent of the cases and pro forma disclosure for the other half of the cases.

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<sup>51</sup>At least one other district required attorneys to confer before the first pretrial conference to attempt to agree on a scheduling order

When one party does not comply with mandatory early disclosure, the other side's lawyer may ignore the problem, make a formal discovery request, or file a motion requesting the court to force compliance. According to our analysis of dockets on over 5,000 cases, and according to judges we have interviewed in pilot and comparison districts that implemented their plans in December 1991, such compliance motions are extremely rare. Despite the dire warnings of critics of early mandatory disclosure, we did not find any explosion of ancillary litigation and motion practice related to disclosure in any of the pilot or comparison districts using mandatory disclosure.

### **Lawyer Work Hours**

In our main evaluation report, we found no statistically significant difference in lawyer work hours between cases where the attorneys reported disclosure of relevant information and cases where there was no early disclosure. We also found that attorneys representing cases in districts with a *mandatory disclosure policy of any type* had work hours that were not statistically significantly different from hours worked by attorneys in other districts. We also found that a district policy encouraging voluntary early disclosure had no statistically significant effect on attorney work hours. We found small and not statistically significant differences in work hours between lawyers on cases from districts with a voluntary early disclosure policy compared to lawyers from districts with no general policy on early disclosure.<sup>52</sup>

In our current analysis of judicial discovery management policies, we again find that mandatory early disclosure requirements are not associated with significantly reduced lawyer work hours. Some people suggested that if we had looked at subsets of cases, such as those that were more or less complex or had more or less difficulty with discovery, we might have found a subset of cases for which this policy was effective. We have explored many different subsets of cases, including subsets based on stakes, complexity, and discovery difficulty. We found no strong evidence that a policy of early mandatory disclosure reduced lawyer work time on any of the subsets of cases examined.

However, attorneys who voluntarily choose to do early disclosure, in districts where such disclosure is voluntary, have significantly lower work hours. It may be that lower work hours among voluntary disclosing attorneys reflects a type of "choice or selection bias", i.e., attorneys on cases for which they voluntarily choose to disclose may be less contentious

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<sup>52</sup> Coefficient=0.236, p=0.129 for cases closed over 270 days after filing.

**Table A.12**  
**Model for Attorney Views on Fairness:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days**

Variable	Coefficient	T-Statistic	P-Value
Constant	3.938	3.252	0.001
<b>Policy Variables</b>			
Early management, with early setting of trial date, and with mandatory planning policy	-0.274	-0.605	0.544
Early management, with early setting of trial date, and without mandatory planning policy	-0.256	-0.717	0.473
Early management, without early setting of trial date, and with mandatory planning policy	-0.238	-0.439	0.660
Early management, without early setting of trial date, and without mandatory planning policy	-0.204	-0.689	0.490
Early mandatory disclosure policy, and disclosure was made on this case	0.239	0.706	0.480
Early mandatory disclosure policy, and disclosure was not made on this case	0.521	1.302	0.192
No early mandatory disclosure policy, and disclosure was made on this case	0.439	1.667	0.095
Litigants at settlement conf. (district %)	0.008	0.361	0.718
Limits on interrogatories (district)	0.310	1.033	0.301
Days to discovery cutoff (district median)	0.005	1.313	0.189
Continuances (district %)	0.008	0.775	0.438
Magistrate judge activity (district mean)	-0.227	-0.515	0.606
<b>Control Variables</b>			
Any motion on case	-1.066	-2.112	0.034
Discovery motion on case	-0.137	-0.586	0.557
Case complexity (high)	0.374	0.847	0.396
Case complexity (moderate)	0.257	0.702	0.482
Discovery difficulty (high)	-0.237	-0.528	0.596
Discovery difficulty (moderate)	-0.248	-0.682	0.494
Difficulty in relations (high)	-1.511	-5.039	0.000
Difficulty in relations (moderate)	-0.368	-1.181	0.237
Zero or missing stakes on case	0.051	0.159	0.873
Maximum stakes on case (log)	-0.001	-0.022	0.981
Missing dispute began after filing	-0.429	-1.470	0.141
Dispute began after filing date	0.800	2.719	0.006
Nonmonetary stakes on case	-0.278	-1.271	0.203
Total filings per FTE judicial officer	-0.005	-2.365	0.018

N=1,443

Just as we did for time to disposition and lawyer work hours models, we again added the following discovery related control variables because of their hypothetical importance in predicting the outcome variables of interest when discovery policies are varied.

- Discovery difficulty (high or moderate), and
- Difficulty in relations between the parties and/or lawyers (high or moderate).

### **Model for Attorney Views on Fairness**

Table A.12 gives the results of our model for attorney views on fairness using the entire sample of general civil cases closed after issue was joined and more than 270 days after filing, for our 1992–93 sample of filings. Since overall about 90 percent of attorneys report that they viewed the case management as fair on general civil cases with issue joined, and since none of the policy variables used in the overall model shown in Table A.12 are statistically significant, we chose not to apply the model to subsets of cases. Interpretations of the results for the discovery management policy variables in the model are provided in Section 3 of this report. The significance of the discovery-related policy variables was the same whether we used the unadjusted standard errors or adjusted the standard errors for intra-district correlation

After controlling for policy variables, we find that the presence of a motion, a dispute that began for a party after the filing date, a high difficulty of relations between the lawyers and/or parties, and total filings per FTE judicial officer are statistically significant predictors of reported views on fairness. Of these only the “dispute began after filing date” variable predicts a greater probability of viewing management as fair. Each of the other significant control variables predict a decreased probability of viewing management as fair

policy effects. However, because we have relatively few open cases we expect any bias to be small. Hence we feel it better to run our analysis on a set of comparable data than to mix measures from open and closed cases.

Not only are we missing data from the small fraction of the cases that are still open, but we are missing data from the approximately 50 percent of nonresponding attorneys on closed cases. Because nonrespondents and respondents who skipped our fairness item (approximately 10 percent of the respondents) provide no data on this outcome, these attorneys are also excluded from our analysis. We use nonresponse weights to offset possible bias introduced by nonresponse.

### **Control and Policy Variables**

We used analogous methods to study views on the fairness of case management as we did in our study of satisfaction with case management. We explored the effects of specific case management policies and procedures by measuring their effect on the responses of attorneys from cases that received the management procedure compared to the responses of attorneys from other cases. We included attorney, case, and district level characteristics as control variables in our model so as to control for variation due to factors other than case management

The control and policy variables considered in our fairness models are the same variables considered in all our previously discussed models.

In our main evaluation report, our model selection procedure identified the following as important control variables before accounting for the effects of policy variables.

- Any motion,
- Discovery motion,
- Case complexity (high or moderate),
- Maximum stakes,
- Dispute began after filing date,
- Nonmonetary stakes, and
- Total filings per FTE judicial officer.

We also include a flag for missing or zero stakes and a flag for missing data for when the dispute started for this attorney's party or parties.

## **ANALYSIS OF ATTORNEY VIEWS ON FAIRNESS**

In this section we discuss the effects of court management policies and procedures on attorney views on fairness for general civil cases with issue joined. Attorney views on fairness serve as a measure of perceived justice in the federal courts.

We measured views on fairness as a dichotomous (0–1) outcome variable. Either the lawyer responded that the management was somewhat fair or very fair (outcome=1) or the lawyer viewed the management as somewhat unfair or very unfair (outcome=0). We measured attorneys' views on fairness using Item 22 from our Attorney Questionnaire. The attorneys were asked how fair they thought the "court management and procedures" were for their cases for their parties. The survey item provided the attorney with four response categories: (1) very fair; (2) somewhat fair; (3) somewhat unfair; and (4) very unfair. Because we did not feel that we could clearly interpret differences between a response of very fair or somewhat fair (or very unfair and somewhat unfair), we dichotomized the response into fair (very or somewhat) and unfair (very or somewhat). Overall we found that about 90 percent of attorneys report that they viewed the case management as fair on general civil cases with issue joined.

### **Multivariate Logistic Regression Analysis on Attorney Level Data**

To explore the effects of policy and control variables on views on fairness, we fit multivariate logistic regression models using attorney level data. As discussed above for attorney satisfaction modeling, multivariate logistic regression is the analog of linear regression for models of data with dichotomous outcomes. Also, the use of attorney level data allows us to control for attorney-level characteristics and improves the precision of our estimates of the effects of policy on views on fairness.

### **Open Cases and Missing Data**

About 8.5 percent of the cases in our 1992–93 sample of general litigation cases remained open at the end of our data collection. For these cases we cannot obtain a measure of fairness that is comparable to our measure from closed cases. For this reason we do not include data from such cases in our analysis of views on fairness. Excluding open cases could lead to bias in our resulting estimates of

Table A.11  
 Model for Attorney Satisfaction: Subsets of 1992-93 Sample,  
 General Civil Cases with Issue Joined, Closed with Time to Disposition Over 270 Days

Data subset used in model	Number of data records used	Percent satisfied	Early manage, with early trial set, with mand plan		Early manage, without early trial set, without mand. plan		Mand. disclose. policy, and disclose. was made		Mand. disclose. policy, and disclose. was not made		Limits on interrog. (district % median)	Days to discovery cutoff (district median)						
			73 - 022(.934) - 339(.125)	72 - 245(.639) - 063(.875)	73 183(.637) - 681(.019)	74 - 828(.225) 403(.539)	73 159(.800) 248(.586)	72 - 276(.481) - 449(.156)	75 140(.811) - 858(.095)	72 - 193(.656) 129(.698)			74 112(.767) - 691(.019)	72 065(.867) - 518(.081)	73 215(.742) 361(.510)	73 - 026(.942) - 656(.015)	75 - 419(.377) 161(.699)	68 020(.964) - 592(.154)
Total	1473																	
Case complexity: high	362																	
Case complexity: medium	874																	
Case complexity: low	237																	
Discovery difficulty: high	307																	
Discovery difficulty: medium	781																	
Discovery difficulty: low	384																	
Plaintiff attorney	599																	
Defense attorney	874																	
Hourly fee	850																	
Contingent fee	274																	
Firm size > 5	1006																	
Firm size <= 5	451																	
Stakes >\$500,000	426																	
Stakes <=\$500,000	884																	
Nature of suit: tort	374																	
Nature of suit: contract	349																	
Nature of suit: other	750																	
Top 25% most costly cases	265																	

Note: Numbers shown in columns under model variables are "coefficient (p-value)". Bold type highlights those significant at p-value <= .050 level.



Table A.10

**Model for Attorney Satisfaction:  
1992-93 Sample, General Civil Cases with Issue Joined,  
Closed with Time to Disposition Over 270 Days**

Variable	Coefficient	T-Statistic	P-Value
Constant	1.991	3.196	0.001
<b>Policy Variables</b>			
Early management, with early setting of trial date, and with mandatory planning policy	-0.022	-0.081	0.934
Early management, with early setting of trial date, and without mandatory planning policy	-0.339	-1.532	0.125
Early management, without early setting of trial date, and with mandatory planning policy	-0.319	-0.963	0.335
Early management, without early setting of trial date, and without mandatory planning policy	-0.248	-1.399	0.161
Early mandatory disclosure policy, and disclosure was made on this case	-0.086	-0.401	0.687
Early mandatory disclosure policy, and disclosure was not made on this case	-0.412	-1.577	0.114
No early mandatory disclosure policy, and disclosure was made on this case	0.564	3.435	0.000
Litigants at settlement conf. (district %)	-0.015	-1.060	0.288
Limits on interrogatories (district)	0.574	3.115	0.001
Days to discovery cutoff (district median)	0.003	1.244	0.213
Continuances (district %)	-0.006	-0.851	0.394
Magistrate judge activity (district mean)	0.936	3.069	0.002
<b>Control Variables</b>			
Nature of suit (tort)	0.299	1.733	0.083
Nature of suit (contract)	0.157	0.934	0.350
Five or more motions	-0.254	-1.595	0.110
Any pro se litigant	0.865	2.532	0.011
Discovery difficulty (high)	0.268	1.167	0.243
Discovery difficulty (moderate)	0.008	0.049	0.960
Difficulty in relations (high)	-0.600	-3.071	0.002
Difficulty in relations (moderate)	-0.074	-0.433	0.657
Dispositive motions (district percent)	-0.010	-1.285	0.198
Total filings per FTE judicial officer	-0.004	-3.217	0.001
N=1,473			

in Section 3 of this report. The significance of the discovery-related policy variables was the same whether we used the unadjusted standard errors or adjusted the standard errors for intra-district correlation.

The following control variables remained statistically significant after including our policy variables in the model:

- Any pro se litigant,
- Difficulty in relations between the parties and/or lawyers (high), and
- Total filings per FTE judicial officer.

We find that districts with a high number of filings per FTE judicial officer tend to have lower reported satisfaction than do other districts.

Table A.11 summarizes the results for discovery management policy variables when that same model is applied to subsets of the cases based on level of complexity, level of discovery difficulty, plaintiff or defendant side of the case, contingent or hourly fee lawyer, size of the law organization in which the lawyer worked, case stakes, tort or contract or other nature of suit categories, and the top 25% most costly cases. Interpretations of the results for policy variables in these models are provided in Section 3 of this report.

problematic and we use nonresponse weights to offset the possible biasing effects of nonresponse.

### **Control and Policy Variables**

Our study of satisfaction with case management used methods analogous to those used in our studies of time to disposition and lawyer work hours. We explored the effects of specific case management policies and procedures by comparing the responses of attorneys from cases that were managed using a particular policy or procedure to the responses of attorneys from other cases. We used attorney, case, and district variables in the analyses to control for variation other than case management. The control and policy variables considered in our satisfaction models are the same variables considered for time to disposition and lawyer work hours.

In our main evaluation report, our model selection procedure identified the following as important control variables before accounting for the effects of policy variables.

- Nature of suit category (tort, contract),
- Five or more motions,
- Any pro se litigants,
- Percentage of cases within district with dispositive motions, and
- Total filings per FTE judicial officer

Just as we did for time to disposition and lawyer work hours models, we again added the following discovery related control variables because of their hypothetical importance in predicting the outcome variables of interest when discovery policies are varied.

- Discovery difficulty (high or moderate), and
- Difficulty in relations between the parties and/or lawyers (high or moderate).

### **Models for Attorney Satisfaction**

Table A.10 gives the results of our model for attorney satisfaction using the entire sample of general civil cases closed after issue was joined and more than 270 days after filing, for our 1992–93 sample of filings. Interpretations of the results for the discovery management policy variables in the model are provided

outcomes. The results from using all five outcomes were qualitatively very similar to our models with a dichotomous outcome and thus we report only the results from the latter models.

### **Multivariate Logistic Regression Analysis on Attorney-Level Data**

To estimate the effects of case management policies and procedures on attorney satisfaction, we used multivariate logistic regression models fit to attorney-level data. That is, we used data with one record per each responding attorney from our sample of general civil litigation cases with issue joined. As with lawyer work hours, using attorney-level data allowed us to control for possible attorney characteristics that could affect satisfaction and help explain the variability in the responses, yielding more precise estimates of policy effects. Using only case- or district-level data would not allow for such exact lawyer control variables and would provide less appealing estimates of the policy effects.

Because we modeled satisfaction as dichotomous response (1 or 0, where 1 is satisfied and 0 is not), it would have been inappropriate to use linear regression models, such as the models used for time to disposition and lawyer work hours, to model satisfaction. The appropriate model is a logistic regression model. Logistic regression models are analogous to linear regression models, but they account for the dichotomous nature of the outcome being studied.

The coefficients from our logistic regression model have the following interpretation. The coefficient represents the log odds-ratio between cases with a policy and cases without, or the log odds-ratio of a single unit change for a predictor (e.g., a change of one day in the median days to discovery cutoff).

The odds are the ratio of the probability of attorney reporting satisfaction to the probability of attorney reporting dissatisfaction. The odds-ratio is the ratio of the odds for a case with a policy to the odds of a case without a policy. The odds are a standard measure of the relative probability. If the odds are 10-to-1 then an attorney on a case with the given set of characteristics is 10 times more likely to be satisfied than dissatisfied with management. The odds ratio tells us how much of an increase (or decrease) in the odds is associated with a given policy. An odds-ratio of one implies that the policy has no effect; an odds-ratio of greater than one implies that the policy increases the odds (and the probability of satisfaction), and an odds-ratio of less than one implies that the policy decreases

the odds (and the probability of satisfaction). We will interpret an odds-ratio that is close to one as having a small effect. Odds-ratios between 1.5 and 3 (or 2/3 and 1/3) we will consider moderate, and those greater than 3 (or less than 1/3) we will consider large.

The log odds-ratio is the natural logarithm of the odds-ratio. A log odds-ratio of 0 corresponds to an odds-ratio of one and implies no effect. Log odds-ratios around zero will be considered small. We will consider log odds-ratios in the range of about 0.41 to 1.10 (–0.41 to –1.10) as moderate and log odds-ratios of greater than 1.10 (less than –1.10) as large. We report the log odds-ratio in our tables and the odds-ratio can be recovered by exponentiating the reported coefficient.<sup>73</sup>

### **Open Cases and Missing Data**

As discussed above for time to disposition, about 8.5 percent of the general civil cases in our 1992–93 sample remained open at the conclusion of our data collection. From these cases we cannot obtain a measure of lawyer satisfaction that is comparable to our measure from closed cases. An open case has not, necessarily, received the full array of management procedures that it will receive before closure. For example, if the case is headed for trial, then any intermediate measures of satisfaction will not include the lawyers views on satisfaction with the trial. On the other hand, attorney responses from closed cases will reflect their assessment of all management policies and procedures applied to the case. For this reason we do not include data from open cases in our sample when fitting our satisfaction models. This places some limitations on interpreting our models, but it does provide us with a comparable measure for all sample cases being analyzed.

Because we are using attorney responses for this analysis, we are again missing reported satisfaction from about half the surveyed attorneys because the attorney did not respond to our survey. However, over 90 percent of responding attorneys provided us with their views on satisfaction. Missing data could be

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<sup>73</sup>See Hosmer, D W., and S. Lemeshow, *Applied Logistics Regression*, John Wiley & Sons, New York, 1989 for a full discussion on the log odds-ratio.

Table A.9  
 Model for Lawyer Work Hours on Discovery when Greater than Zero: Subsets of 1992-93 Sample,  
 General Civil Cases with Issue Joined, Closed with Time to Disposition Over 270 Days

Data subset used in model	Number of records used	Median lawyer work hours on discovery per litigant	Early manage, with trial set, with mand plan		Early manage, without early trial set, without mand. plan		Mand. disclose. policy, and disclose.		Mand. disclose. policy, and disclose. was not made (district %)		Days to discovery cutoff (district median)
			Early manage, with trial set, with mand plan	Early manage, without early trial set, without mand. plan	Early manage, with trial set, with mand plan	Early manage, without early trial set, without mand. plan	Mand. disclose. policy, and disclose.	Mand. disclose. policy, and disclose. was not made (district %)	Mand. disclose. policy, and disclose. was made (district %)		
Total	907	20	-.040(.791)	.377(.001)	-.101(.570)	.473(.000)	-.164(.158)	-.182(.171)	-.351(.000)	-.273(.011)	.003(.035)
Case complexity high	226	42	258(.411)	.465(.055)	.243(.498)	.467(.076)	-.570(.023)	-.182(.496)	-.846(.003)	-.071(.808)	.003(.212)
Case complexity medium	544	20	161(.406)	.334(.024)	-.160(.497)	.605(.001)	-.047(.758)	-.218(.206)	-.358(.002)	-.491(.000)	.002(.129)
Case complexity low	137	10	188(.570)	.360(.122)	-.403(.306)	.016(.941)	-.182(.467)	-.168(.567)	-.148(.507)	.220(.336)	-.002(.555)
Discovery difficulty high	196	50	426(.223)	.458(.083)	.007(.985)	.583(.022)	-.407(.134)	.277(.262)	-.743(.000)	-.760(.013)	.006(.024)
Discovery difficulty medium	491	25	016(.937)	.326(.045)	-.081(.728)	.475(.001)	-.159(.321)	-.211(.263)	-.462(.000)	-.270(.054)	.001(.561)
Discovery difficulty low	219	9	125(.659)	.220(.299)	-.434(.206)	.381(.015)	-.073(.718)	-.386(.139)	.019(.920)	-.074(.717)	-.001(.696)
Plaintiff attorney	390	20	343(.137)	.435(.014)	.037(.862)	.640(.000)	-.238(.163)	-.423(.044)	-.475(.000)	-.031(.838)	.004(.039)
Defense attorney	517	20	351(.065)	.292(.046)	-.156(.573)	.350(.007)	-.039(.800)	.022(.897)	-.255(.037)	-.421(.002)	.001(.352)
Hourly fee	510	21	047(.823)	.492(.001)	-.108(.661)	.659(.000)	-.096(.545)	.073(.669)	-.390(.002)	-.423(.002)	.004(.020)
Contingent fee	182	20	092(.776)	-.003(.993)	-.166(.595)	.154(.447)	-.131(.562)	.178(.529)	-.182(.298)	.046(.837)	-.001(.594)
Firm size > 5	624	21	207(.271)	.284(.042)	-.511(.012)	.370(.003)	-.241(.082)	-.156(.312)	-.320(.003)	-.217(.082)	.001(.449)
Firm size <=5	271	15	306(.197)	.615(.004)	.635(.042)	.812(.000)	-.100(.635)	-.235(.380)	-.561(.001)	-.289(.200)	.007(.011)
Stakes >\$500,000	272	48	396(.201)	.076(.771)	-.404(.219)	.077(.759)	-.136(.575)	.098(.745)	-.322(.138)	-.120(.502)	.006(.011)
Stakes <=\$500,000	564	17	258(.154)	.229(.094)	-.337(.105)	.485(.000)	-.022(.871)	-.198(.191)	-.347(.001)	-.225(.077)	.001(.374)
Nature of suit tort	249	25	395(.192)	.428(.036)	-.263(.371)	.374(.043)	-.183(.372)	-.212(.317)	-.108(.529)	-.286(.187)	-.001(.543)
Nature of suit contract	217	25	332(.394)	.053(.804)	-.251(.507)	.197(.362)	.285(.170)	.226(.471)	-.588(.001)	-.609(.007)	.003(.236)
Nature of suit: other	441	17	187(.351)	.349(.046)	212(.402)	.562(.000)	-.338(.046)	-.247(.170)	-.271(.046)	-.028(.856)	.004(.051)
Top 25% most costly cases	221	100	152(.533)	-.030(.872)	.142(.619)	.006(.969)	-.133(.397)	.030(.884)	-.272(.018)	-.012(.930)	.003(.108)

Note. Numbers shown in columns under model variables are "coefficient (p-value)" Bold type highlights those significant at p-value <= .050 level.

## **ANALYSIS OF ATTORNEY SATISFACTION**

It is important to understand whether discovery case management policies and procedures affect the participants' perceived satisfaction with case management and their sense of fairness or justice. Policies and procedures that have little effect on objective outcomes such as time to disposition or lawyer work hours might substantially improve subjective outcomes such as perceived satisfaction and sense of fairness. Hence one might wish to use these policies even if they do not affect litigation time and costs. Conversely, a procedure that reduces time to disposition or litigation costs might have such adverse effects on perceptions of fairness and satisfaction that one might not want to use the procedure.

To investigate such issues, we explore the effects of management policies and procedures on attorneys' satisfaction with case management and their opinions on the fairness of case management. As the professionals who have repeated contacts with the court system, and who guide disputing parties through the system, attorneys' views are important. And attorneys are in a good position to see any beneficial or adverse effects of changes in case management.

It also would be useful to determine the effects of policy on litigant satisfaction and views on fairness. However, because of the low response rate to our litigant survey as discussed in Appendix B of our main evaluation report, our litigant data cannot be assumed to provide accurate unbiased statistical estimates. We prefer to be cautious and believe that our litigant survey data should not be used for inferential statistical analyses.

We measured attorney satisfaction using Item 21 from our Attorney Questionnaire which is shown in Appendix J of our main evaluation report. The attorneys were asked to report their satisfaction with the "court management and procedures for this case" for their party or parties. The survey item gave the attorney five response categories: (1) very satisfied; (2) somewhat satisfied; (3) neutral, (4) somewhat dissatisfied, and (5) very dissatisfied. Because we did not feel we could clearly interpret differences between the very satisfied and the somewhat satisfied attorneys we dichotomized the responses into reported satisfied (very or somewhat) or not reported satisfied (neutral or somewhat or very dissatisfied). To ensure ourselves that we did not lose too much information by using only the dichotomous outcome we ran some models using all five

Table A.7  
 Model for Lawyer Work Hours: Subsets of 1992-93 Sample,  
 General Civil Cases with Issue Joined, Closed with Time to Disposition Over 270 Days

Data subset used in model	Number of data records used	Median lawyer work hours per litigant	Early manage, with early trial set, with mand. plan		Early manage, without early trial set, without mand. plan		Mand. disclose. policy, and disclose. was made		Limits on interrog. (district %)		Days to discovery cutoff (district median)
			Early manage, with early trial set, with mand. plan	Early manage, without early trial set, without mand. plan	Mand. disclose. policy, and disclose. was made	Mand. disclose. policy, and disclose. was made	disclose. was made	disclose. was made	disclose. was made	disclose. was made	
Total	1122	80	<b>-0.16(.889)</b>	<b>301(.002)</b>	<b>0.06(.966)</b>	<b>349(.000)</b>	<b>0.87(.374)</b>	<b>-0.06(.954)</b>	<b>-0.176(.015)</b>	<b>-190(.038)</b>	<b>0.003(.001)</b>
Case complexity: high	269	150	.166(.499)	.411(.055)	.433(.087)	.363(.056)	-.190(.388)	.055(.825)	-.483(.003)	-.080(.741)	.005(.025)
Case complexity: medium	680	78	-.003(.986)	.225(.077)	-.025(.897)	.438(.000)	.204(.112)	-.081(.535)	-.126(.157)	-.304(.009)	.003(.020)
Case complexity: low	173	40	-.196(.452)	.227(.249)	-.389(.103)	.056(.743)	.046(.834)	.267(.231)	-.149(.437)	.114(.564)	.000(.973)
Discovery difficulty: high	224	140	-.549(.057)	.314(.167)	.058(.822)	.344(.090)	-.057(.812)	.002(.992)	-.597(.000)	-.286(.411)	.004(.041)
Discovery difficulty: medium	599	96	.184(.254)	.279(.043)	.031(.878)	.403(.000)	.087(.512)	-.096(.531)	-.268(.006)	-.181(.122)	.003(.033)
Discovery difficulty: low	298	49	.048(.792)	.190(.265)	-.042(.893)	.191(.101)	.096(.570)	.064(.736)	.212(.116)	-.032(.823)	.002(.216)
Plaintiff attorney	470	100	.216(.244)	.416(.004)	.040(.832)	.517(.000)	-.017(.911)	-.135(.426)	-.215(.043)	-.002(.990)	.003(.101)
Defense attorney	652	75	-.248(.097)	.202(.109)	-.030(.881)	.245(.011)	.155(.206)	.088(.491)	-.149(.115)	-.285(.011)	.004(.002)
Hourly fee	639	83	-.098(.526)	.241(.057)	-.180(.377)	.380(.000)	.040(.757)	.015(.912)	-.286(.003)	-.223(.047)	.005(.000)
Contingent fee	205	95	-.255(.313)	.009(.960)	-.333(.138)	.181(.287)	.083(.685)	.430(.054)	-.038(.769)	-.260(.175)	-.000(.930)
Firm size > 5	764	90	-.165(.333)	.153(.212)	-.243(.161)	.277(.004)	-.035(.773)	-.062(.600)	-.234(.011)	-.107(.330)	.002(.039)
Firm size <=5	345	66	.074(.635)	.502(.002)	.327(.169)	.453(.000)	.327(.047)	.127(.514)	-.186(.120)	-.315(.057)	.005(.005)
Stakes >\$500,000	314	172	-.334(.162)	.218(.343)	.143(.580)	.247(.218)	-.062(.765)	.171(.456)	-.600(.001)	-.179(.355)	.006(.002)
Stakes <=\$500,000	692	68	-.132(.366)	.167(.144)	-.230(.157)	.352(.000)	.254(.037)	.017(.892)	-.092(.279)	-.217(.060)	.003(.014)
Nature of suit: tort	277	80	-.264(.254)	.212(.187)	-.231(.258)	.085(.541)	-.041(.811)	-.119(.539)	-.029(.821)	.042(.800)	.001(.402)
Nature of suit: contract	270	100	-.239(.388)	.218(.239)	-.233(.497)	.342(.049)	.310(.076)	.299(.189)	-.377(.014)	-.422(.033)	.001(.625)
Nature of suit: other	575	70	.187(.244)	.218(.147)	.135(.528)	.368(.001)	-.063(.649)	.003(.982)	-.127(.243)	-.069(.571)	.005(.000)
Top 25% most costly cases	276	375	-.016(.938)	-.053(.683)	.110(.571)	.118(.311)	.125(.327)	.176(.303)	-.163(.077)	-.154(.182)	.001(.484)

Note: Numbers shown in columns under model variables are "coefficient (p-value)". **Bold type** highlights those significant at p-value <= .050 level.



Table A.8

**Model for Lawyer Work Hours on Discovery when Greater than Zero:  
1992-93 Sample, General Civil Cases with Issue Joined,  
Closed with Time to Disposition Over 270 Days**

Variable	Coefficient	T-Statistic	P-Value
Constant	0.067	0.150	0.880
Policy Variables			
Early management, with early setting of trial date, and with mandatory planning policy	-0.040	-0.265	0.791
Early management, with early setting of trial date, and without mandatory planning policy	0.377	3.301	0.001
Early management, without early setting of trial date, and with mandatory planning policy	-0.101	-0.568	0.570
Early management, without early setting of trial date, and without mandatory planning policy	0.473	4.561	0.000
Early mandatory disclosure policy, and disclosure was made on this case	-0.164	-1.411	0.158
Early mandatory disclosure policy, and disclosure was not made on this case	-0.182	-1.370	0.171
No early mandatory disclosure policy, and disclosure was made on this case	-0.351	-3.871	0.000
Litigants at settlement conf. (district %)	0.003	0.334	0.738
Limits on interrogatories (district)	-0.273	-2.532	0.011
Days to discovery cutoff (district median)	0.003	2.108	0.035
Continuances (district %)	-0.006	-1.597	0.110
Magistrate judge activity (district mean)	0.078	0.461	0.645
Control Variables			
Number of litigants (square root)	-1.066	-11.679	0.000
Case type has high avg judicial work	0.186	2.245	0.025
Diversity jurisdiction	0.099	1.057	0.290
Discovery motion	0.599	6.900	0.000
Any motion	0.154	1.198	0.231
Any government party	-0.203	-1.947	0.052
Any litigant without an attorney	-0.231	-1.989	0.047
Any pro se litigant	-0.322	-1.745	0.081
Case complexity (high)	0.176	1.145	0.252
Case complexity (moderate)	0.021	0.194	0.846
Discovery difficulty (high)	0.720	4.887	0.000
Discovery difficulty (moderate)	0.409	4.090	0.000
Difficulty in relations (high)	0.024	0.221	0.825
Difficulty in relations (moderate)	-0.021	-0.253	0.801
Zero stakes	-0.190	-1.148	0.251
Maximum stakes (log)	0.271	8.791	0.000
Missing fee	-0.401	-2.365	0.018
Contingent fee	-0.208	-1.742	0.082
Government attorney	-0.371	-2.335	0.020
Missing percent practice federal	0.364	1.163	0.245
Percent practice federal	0.007	4.879	0.000
Missing firm size	0.216	1.056	0.291
Firm size (square root)	0.025	2.452	0.014
Defense attorney	-0.031	-0.318	0.750
State case	-0.324	-3.366	0.001

N=907

unadjusted standard errors or adjusted the standard errors for intra-district correlation.

The following control variables remained statistically significant after including our policy variables in the model:

- Number of parties,
- Case type has high average judicial work,
- Discovery motion,
- Any litigant without an attorney
- Government attorney
- Discovery difficulty (high or moderate),
- Maximum stakes,
- Percent practice federal,
- Firm size, and
- State case

While both complexity of the case and discovery difficulty are significant for predicting total lawyer work hours, when predicting discovery work hours the discovery difficulty variable has a much larger and significant coefficient while overall case complexity is not significant.

Table A.9 summarizes the results for discovery management policy variables when that same model is applied to subsets of the cases based on level of complexity, level of discovery difficulty, plaintiff or defendant side of the case, contingent or hourly fee lawyer, size of the law organization in which the lawyer worked, case stakes, tort or contract or other nature of suit categories, and the top 25% most costly cases in terms of discovery among general civil litigation that has time to disposition over 270 days after filing <sup>72</sup> Interpretations of the results for policy variables in these models are provided in Section 3 of this report.

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<sup>72</sup> These cases had lawyer discovery work hours per litigant of 69 or more hours.

**Table A.6**  
**Model for Lawyer Work Hours:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days**

Variable	Coefficient	T-Statistic	P-Value
Constant	1.386	3.788	0.000
Policy Variables			
Early management, with early setting of trial date, and with mandatory planning policy	-0.016	-0.140	0.889
Early management, with early setting of trial date, and without mandatory planning policy	0.301	3.096	0.002
Early management, without early setting of trial date, and with mandatory planning policy	0.006	0.042	0.966
Early management, without early setting of trial date, and without mandatory planning policy	0.349	4.481	0.000
Early mandatory disclosure policy, and disclosure was made on this case	0.087	0.890	0.374
Early mandatory disclosure policy, and disclosure was not made on this case	-0.006	-0.058	0.954
No early mandatory disclosure policy, and disclosure was made on this case	-0.176	-2.438	0.015
Litigants at settlement conf. (district %)	0.006	0.901	0.368
Limits on interrogatories (district)	-0.190	-2.077	0.038
Days to discovery cutoff (district median)	0.003	3.227	0.001
Continuances (district %)	-0.007	-2.475	0.013
Magistrate judge activity (district mean)	-0.045	-0.324	0.746
Control Variables			
Number of litigants (square root)	-0.972	-13.999	0.000
Case type has high avg judicial work	0.120	1.734	0.083
Diversity jurisdiction	0.136	1.779	0.075
Discovery motion	0.506	7.186	0.000
Any motion	0.196	1.922	0.055
Any government party	-0.145	-1.688	0.091
Any litigant without an attorney	-0.208	-2.246	0.025
Any pro se litigant	-0.199	-1.300	0.194
Case complexity (high)	0.457	3.633	0.000
Case complexity (moderate)	0.241	2.738	0.006
Discovery difficulty (high)	0.373	3.218	0.001
Discovery difficulty (moderate)	0.205	2.672	0.008
Difficulty in relations (high)	0.138	1.633	0.102
Difficulty in relations (moderate)	0.092	1.300	0.194
Zero stakes	-0.279	-2.650	0.008
Maximum stakes (log)	0.234	9.516	0.000
Missing fee	-0.321	-2.175	0.030
Contingent fee	-0.097	-0.900	0.368
Government attorney	-0.417	-3.047	0.002
Missing percent practice federal	0.350	0.827	0.408
Percent practice federal	0.006	4.646	0.000
Missing firm size	-0.068	-0.181	0.856
Firm size (square root)	0.045	6.183	0.000
Defense attorney	-0.230	-2.640	0.008
State case	-0.250	-3.367	0.001

N=1,122

- Government attorney,
- Percent practice federal,
- Firm size,
- Defense attorney, and
- Number of parties.

In this further analysis of discovery management, we added the following discovery related control variables because of their hypothetical importance in predicting the outcome variables of interest when discovery policies are varied. These two variables were considered to be subsumed under the overall case complexity variable in the main evaluation report, but our further analysis revealed them to be potentially significant in their own right even when they are included in the same model with the overall case complexity variable.

- Discovery difficulty (high or moderate), and
- Difficulty in relations between the parties and/or lawyers (high or moderate).

In our main evaluation report, we also found that some types of fee structure interacted with some of the other important predictors of lawyer work hours such as stakes and complexity, but those interactions variables were not statistically significant when policy variables were added to the model. We have dropped those interactions from the set of control variables used in this further analysis of discovery case management, in order to maintain model parsimony by reducing the number of variables in the model as we explore smaller subsets of the sample. Two of those subsets explored are contingent fee lawyers and hourly fee lawyers, so that we could directly explore the effects of policy on those two different types of fee arrangements.

### **Models for Lawyer Work Hours**

Table A 6 gives the results of our model for total lawyer work hours using the entire sample of general civil cases closed after issue was joined and more than 270 days after filing, for our 1992-93 sample of filings. Interpretations of the results for the discovery management policy variables in the model are provided in Section 3 of this report. The significance of the discovery-related policy variables was the same whether we used the unadjusted standard errors or adjusted the standard errors for intra-district correlation.

The following control variables remained statistically significant after including our policy variables in the model:

- Number of parties,
- Discovery motion,
- Any litigant without an attorney
- Government attorney
- Case complexity (high or moderate),
- Discovery difficulty (high or moderate),
- Maximum stakes,
- Percent practice federal,
- Firm size,
- Defense attorney, and
- State case

Higher stakes, complexity, and discovery difficulty are all significant predictors of higher lawyer work hours. There appear to be some economies of scale, i e., lawyer work hours per litigant decrease as the number of litigants increases. Similarly, cases a related case in state court lead to fewer work hours. Also in our data we find that defense attorneys and government attorneys report fewer work hours per litigant than do other attorneys.

Table A.7 summarizes the results for discovery management policy variables when that same model is applied to subsets of the cases based on level of complexity, level of discovery difficulty, plaintiff or defendant side of the case, contingent or hourly fee lawyer, size of the law organization in which the lawyer worked, case stakes, tort or contract or other nature of suit categories, and the top 25% most costly cases among general civil litigation that has time to disposition over 270 days after filing.<sup>71</sup> Interpretations of the results for policy variables in these models are provided in Section 3 of this report.

Table A.8 gives the results of our model for lawyer work hours on discovery. Interpretations of the results for the discovery management policy variables in the model are provided in Section 3 of this report. The significance of the discovery-related policy variables was the same whether we used the

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<sup>71</sup> These cases had total lawyer work hours per litigant of more than 188 hours.

relationship (fee structure) that cannot be considered characteristics of the case as a whole.

Even though time to disposition and work hours are moderately correlated, we did not include time to disposition as a control variable in our model for lawyer work hours. As we demonstrated above, many of our policy variables are correlated with time to disposition. Had we included time to disposition in our model of lawyer work hours, then we would not fully capture the effects of case management policy on work hours. With time to disposition in the model, indirect effects, such as the effect of policy on time to disposition that results in effects on lawyer work hours, would not be captured in our model. We decided to estimate the "total effect" (both the indirect effect through time to disposition and the direct effect) of case management policy on lawyer work hours and did not include time to disposition in our model.

We explored the same policy variables in our models of lawyer work time as we did in our analysis of time to disposition. These policy variables represent the important policies and procedures endorsed by the CJRA and are appropriate for use with all our outcomes.

Table A.5

**Additional Control Variables Used for Modeling Lawyer Work Hours**

<b>Attorney Level Variables</b>	<b>Description</b>
Tenure	Years practicing law
Percent practice federal	Percentage of practice devoted to federal district court litigation in past five years
Firm size	Square root of the number of lawyers in law office or legal department
Contingent fee	Primary fee arrangement was a contingent fee; 1 if contingent fee, 0 otherwise
Government attorney	Attorney was a government attorney; 1 if yes, 0 otherwise
Defense attorney	Attorney represented a defendant; 1 if yes, 0 otherwise
Number of parties	Square root of the number of parties represented by the attorney in the dispute

In the main evaluation report, our model selection procedure identified the following as important control variables before accounting for the effects of policy variables

- No mention of class action on the case docket,<sup>70</sup>
- Average judicial work level (high),
- Jurisdiction (diversity)
- Discovery motion,
- Any motion,
- Related state case,
- Any government parties,
- Any litigant without an attorney,
- Any pro se litigants,
- Case complexity (high or moderate),
- Maximum stakes,
- Contingent fee,

<sup>70</sup> Because there were so few class action cases in our sample and we were analyzing subsets of the cases that often had no class actions in the subset, we dropped this variable from the list of those used as controls.

Some attorneys represented multiple clients on the same case, and we found that work hours grew as a function of the number of litigants the attorney represented. Hence we modeled attorney work hours per party represented. We explored both total work hours by the lawyer and hours per party represented by the lawyer and found qualitatively similar results. However, we had the best fitting model (no obvious residual lack-of-fit) when we used hours per party represented and included the square root of the number of parties represented as a predictor variable to allow for economies of scale.

We include lawyer work hours for attorneys with all types, no matter how they are paid (e.g., contingent fee, hourly fee, government attorney, and in-house private organization attorney).<sup>69</sup>

Our sample distribution of lawyer work hours per party represented was highly skewed, and it is not appropriate to model highly skewed data using additive linear regression models. Using exploratory analyses we determined that by using the natural log of lawyer work hours per party represented we removed the skew from our data and could fit linear additive models without obvious lack-of-fit. It is important to note that no attorneys should report zero hours spent on a case so we could use the natural log transformation on all data without worrying about transforming zero. When modeling work hours spent on discovery, we used only lawyers with positive time spent on discovery; the percentage reporting zero discovery work time is detailed in Section 2 of this report for various subsets of cases and lawyers

In the remainder of this section we will refer to the natural log of lawyer work hours per party represented as lawyer work hours.

### **Open Cases and Missing Data**

As discussed above for time to disposition, 8.5 percent of our cases from our 1992–93 general civil litigation sample remained open at the end of our study. Although we had lawyer responses from a fraction of these open cases, we do not feel that we should use data from these open cases in exploring the effects of

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<sup>69</sup>Even if an in-house or government attorney does not “bill” for services, there is still a cost to the litigant incurred for salary, fringe benefits, and overhead and hence the hours worked by those attorneys on litigation are not “free” over the long term, even if some attorneys may currently have slack time.



policy on lawyer work hours. The partial data provided by these open cases would not be comparable to complete data on closed cases because work hours tend to be unevenly spent with a potentially major portion of work time coming near settlement or trial. Also, few of the attorney respondents from open cases provided data on work hours. Thus, our models are fit only to data from respondents from closed cases. This is likely to introduce some bias into our estimated coefficients, but because we are dealing with only 8.5 percent open cases, we expect this bias to be limited.

Because lawyer work hours were reported by lawyer survey responses, we do not have data for all attorneys in the sample. About 50 percent of attorneys did not respond to our survey. Of responding attorneys, about 75 to 80 percent provided data on lawyer work hours. Attorneys without reported work hours were excluded from our sample for the purposes of fitting these models. We used nonresponse weights in our analysis to offset the effects of differential nonresponse, as discussed in Appendix B of our main evaluation report. However, missing information is problematic and could introduce some bias into our estimates of policy effects.

### **Control and Policy Variables**

Our methodology for modeling the effects of policy and procedures on lawyer work hours are analogous to those that we use for analyzing time to disposition. We again considered both control variables and policy variables. Control variables consisted of case, district, and attorney characteristics that could explain differences in work hours and policy variables measured the district and case level management policies and procedures. We added some attorney characteristics to the list of control variables used for time to disposition. The policy variables used in our analysis of work hours are the same as those used for modeling time to disposition.

In our search for control variables we considered all the case- and district-level controls that we explored in our models for time to disposition (see Table A.1 for details). We also considered additional attorney-level characteristics that we expected may help explain variation in work hours. The additional control variables we considered are given in Table A.5. The variables are particular characteristics of the attorney (years in practice) or the attorney-client

Table A.4  
 Model for Time to Disposition: Subsets of 1992-93 Sample,  
 General Civil Cases with Issue Joined, with Time to Disposition Over 270 Days

Data subset used in model	Number of data records used	Median time to disposition (days)	Early manage, with early trial set, with mand plan		Early manage, without early trial set, without mand. plan		Mand. disclose. policy, and disclose. was not made		Mand. disclose. policy, and disclose. was made		Limits on interrog. (district %)	Days to discovery cutoff (district median)
			mand plan	without mand	without mand. plan	without mand. plan	disclose. was not made	disclose. was made	disclose. was made	disclose. was made		
Total	1624	463	<b>.234(.000)</b>	<b>-.257(.000)</b>	<b>-.188(.000)</b>	<b>-.061(.042)</b>	<b>-.045(.258)</b>	<b>-.040(.285)</b>	<b>-.037(.194)</b>	<b>-.068(.034)</b>	<b>.002(.000)</b>	
Case complexity high	264	594	<b>.395(.006)</b>	<b>-.326(.001)</b>	<b>-.588(.000)</b>	<b>-.116(.214)</b>	<b>-.051(.650)</b>	<b>-.010(.928)</b>	<b>-.036(.674)</b>	<b>-.004(.970)</b>	<b>.002(.119)</b>	
Case complexity medium	783	463	<b>.177(.003)</b>	<b>-.277(.000)</b>	<b>-.116(.077)</b>	<b>-.100(.012)</b>	<b>-.012(.808)</b>	<b>-.062(.230)</b>	<b>-.051(.138)</b>	<b>-.074(.056)</b>	<b>.002(.000)</b>	
Case complexity low	315	392	<b>-.175(.080)</b>	<b>-.289(.001)</b>	<b>-.269(.044)</b>	<b>-.032(.643)</b>	<b>-.091(.276)</b>	<b>-.041(.609)</b>	<b>-.022(.741)</b>	<b>-.070(.334)</b>	<b>-.002(.014)</b>	
Discovery difficulty high	231	581	<b>.642(.000)</b>	<b>-.268(.014)</b>	<b>-.291(.077)</b>	<b>-.073(.502)</b>	<b>.012(.927)</b>	<b>-.165(.278)</b>	<b>-.026(.787)</b>	<b>-.070(.669)</b>	<b>.000(.778)</b>	
Discovery difficulty medium	678	465	<b>.230(.000)</b>	<b>-.319(.000)</b>	<b>-.256(.000)</b>	<b>-.068(.114)</b>	<b>-.059(.257)</b>	<b>-.034(.525)</b>	<b>-.053(.152)</b>	<b>-.073(.082)</b>	<b>.003(.000)</b>	
Discovery difficulty low	431	420	<b>.012(.891)</b>	<b>-.254(.001)</b>	<b>-.089(.388)</b>	<b>-.106(.044)</b>	<b>-.038(.576)</b>	<b>.002(.998)</b>	<b>-.030(.581)</b>	<b>-.017(.758)</b>	<b>.001(.369)</b>	
Stakes >\$500,000	318	459	<b>.331(.001)</b>	<b>-.145(.073)</b>	<b>-.254(.052)</b>	<b>-.061(.354)</b>	<b>.129(.123)</b>	<b>.167(.020)</b>	<b>.059(.344)</b>	<b>-.155(.023)</b>	<b>.003(.003)</b>	
Stakes <=\$500,000	719	471	<b>.192(.002)</b>	<b>-.350(.000)</b>	<b>-.285(.000)</b>	<b>-.091(.024)</b>	<b>-.050(.313)</b>	<b>-.079(.187)</b>	<b>-.095(.019)</b>	<b>.021(.612)</b>	<b>.003(.000)</b>	
Nature of suit: tort	380	477	<b>.327(.000)</b>	<b>-.377(.000)</b>	<b>-.295(.015)</b>	<b>-.154(.003)</b>	<b>-.137(.046)</b>	<b>-.058(.339)</b>	<b>-.052(.328)</b>	<b>-.058(.344)</b>	<b>.002(.001)</b>	
Nature of suit: contract	350	430	<b>.049(.614)</b>	<b>-.251(.001)</b>	<b>-.126(.314)</b>	<b>.027(.733)</b>	<b>-.082(.388)</b>	<b>-.158(.070)</b>	<b>-.102(.095)</b>	<b>-.073(.332)</b>	<b>.002(.089)</b>	
Nature of suit: other	893	477	<b>.268(.000)</b>	<b>-.214(.000)</b>	<b>-.180(.008)</b>	<b>-.051(.200)</b>	<b>-.010(.846)</b>	<b>-.014(.794)</b>	<b>.006(.886)</b>	<b>-.067(.118)</b>	<b>.002(.001)</b>	
Top 25% most costly cases	233	578	<b>.195(.050)</b>	<b>-.193(.021)</b>	<b>-.240(.115)</b>	<b>-.037(.600)</b>	<b>-.015(.857)</b>	<b>.137(.133)</b>	<b>-.071(.279)</b>	<b>.023(.757)</b>	<b>.002(.039)</b>	

Note: Numbers shown in columns under model variables are "coefficient (p-value)". **Bold type highlights those significant at p-value <= .050 level.**

## **ANALYSIS OF LAWYER WORK HOURS**

Lawyer work hours are our most informative measure of litigation costs, since they do not need adjustment for interdistrict differences in the hourly fees and lawyers' salaries paid, and since they are not confounded by differences in the fee arrangement. For example, contingent fee percentages are not immediately responsive to differences in judicial management of discovery, but hours worked by the lawyers may change as a result of such judicial management.

In this section we discuss our analyses of total lawyer work hours on general civil litigation cases with issue joined that close over 270 days after filing, and the effects of judicial discovery management policies on those hours.

We also provide information on our analyses of lawyer work hours spent on discovery.

### **Multivariate Regression Models on Attorney-Level Data**

To estimate the effects of policy on lawyer work hours, we used multivariate regression models fit to attorney-level data. That is, we used data with one record per each responding attorney from our sample of general litigation cases with issue joined. Work hours can differ among lawyers within cases and we use attorney-level characteristics to explain some of this variability in our model

Our model is analogous to the time to disposition model presented above in this appendix, except that we now have responses from attorneys within cases.

Since lawyers may represent more than one litigant on a case, and since some litigants may have more than one lawyer working on the case, it is necessary to sort out the method of handling these multiple relationships before describing the analysis

For each litigant on a case, we initially surveyed only one attorney and asked that one attorney for the number of hours "worked by you and ALL attorneys for your party or parties on this case". If the first attorney could not supply information for all attorneys for their party or parties, then we surveyed a second attorney. If we ended up surveying more than one attorney for a party, then we combined the two work hour responses into one total work hours variable before analysis. If we had only partial lawyer work hours for a party, then we did not include them because we knew they were incomplete.

Table A.4 summarizes the results for discovery management policy variables when that same model is applied to subsets of the cases based on level of complexity, level of discovery difficulty, plaintiff or defendant side of the case, contingent or hourly fee lawyer, size of the law organization in which the lawyer worked, case stakes, tort or contract or other nature of suit categories, and the top 25% most costly cases among general civil litigation that has time to disposition over 270 days after filing<sup>68</sup>. Interpretations of the results for policy variables in these models are provided in Section 3 of this report.

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<sup>68</sup> These cases had total lawyer work hours per litigant of more than 188 hours.

**Table A.3**  
**Model for Time to Disposition:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**with Time to Disposition Over 270 Days**

Variable	Coefficient	T-Statistic	P-Value
Constant	4.098	30.251	0.000
<b>Policy Variables</b>			
Early management, with early setting of trial date, and with mandatory planning policy	-0.234	-5.174	0.000
Early management, with early setting of trial date, and without mandatory planning policy	-0.257	-6.992	0.000
Early management, without early setting of trial date, and with mandatory planning policy	-0.188	-3.461	0.000
Early management, without early setting of trial date, and without mandatory planning policy	-0.061	-2.026	0.042
Early mandatory disclosure policy, and disclosure was made on this case	-0.045	-1.129	0.258
Early mandatory disclosure policy, and disclosure was not made on this case	-0.040	-1.067	0.285
No early mandatory disclosure policy, and disclosure was made on this case	-0.037	-1.297	0.194
Litigants at settlement conf. (district %)	-0.009	-4.010	0.000
Limits on interrogatories (district)	-0.068	-2.117	0.034
Days to discovery cutoff (district median)	0.002	5.002	0.000
Continuances (district %)	-0.002	-1.720	0.085
Magistrate judge activity (district mean)	0.211	4.204	0.000
<b>Control Variables</b>			
Class action certified	0.267	2.284	0.022
Case type has moderate avg. judicial work	-0.031	-1.093	0.274
Bankruptcy mention	0.241	2.948	0.003
Removed case	-0.001	-0.026	0.978
Nature of suit (tort)	-0.017	-0.572	0.567
Nature of suit (contract)	-0.049	-1.333	0.182
Any government parties	0.053	1.912	0.055
Discovery motion	0.139	5.193	0.000
Any motion	0.101	2.593	0.009
Number of lawyers (square root)	0.043	0.969	0.332
Discovery difficulty (high)	0.100	1.878	0.060
Discovery difficulty (moderate)	0.023	0.731	0.464
Discovery difficulty (missing)	0.077	1.037	0.299
Difficulty in relations (high)	-0.028	-0.778	0.436
Difficulty in relations (moderate)	-0.009	-0.331	0.740
Difficulty in relations (missing)	0.105	1.534	0.124
Case complexity (high)	0.131	2.649	0.008
Case complexity (moderate)	0.001	0.037	0.970
Zero stakes	-0.064	-1.142	0.253
Maximum stakes (log)	0.034	4.163	0.000
N=1,624			

policy modeling, we did explicitly use the following seven variables that represent interactions among the discovery-related case management policy variables:

- Early management, with early setting of trial date, and with mandatory planning policy;
- Early management, with early setting of trial date, and without mandatory planning policy;
- Early management, without early setting of trial date, and with mandatory planning policy;
- Early management, without early setting of trial date, and without mandatory planning policy;
- Early mandatory disclosure policy, and disclosure was made on this case;
- Early mandatory disclosure policy, and disclosure was not made on this case; and
- No early mandatory disclosure policy, and disclosure was made on this case.

### **Models for Time to Disposition**

Table A.3 gives the results of our model for time to disposition using the entire sample of general civil cases closed after issue was joined and more than 270 days after filing, for our 1992–93 sample of filings. Interpretations of the results for the discovery management policy variables in the model are provided in Section 3 of this report. The significance of the discovery-related policy variables was the same whether we used the unadjusted standard errors or adjusted the standard errors for intra-district correlation, with two exceptions which are discussed in Section 3.

The following control variables remained statistically significant after including our policy variables in the model. Each of these predictors is positively correlated with time to disposition.

- Class action certification,
- Bankruptcy mention,
- Discovery motions,
- Any motions,
- Case complexity (high), and
- Maximum stakes.

We selected these policy variables because they explicitly represent the principles and techniques that were mentioned in CJRA (for example, a district policy of mandatory disclosure), or serve as measures of the policies and procedures mentioned in the Act (for example the particular forms of early judicial case management that we explored). Each variable is well measured using our various sources of data. Also each variable pertains to a particular, well formed hypothesis about the effect of policies and procedures on time to disposition. We did not pick these variables after exploratory analyses. Rather we chose each policy variable because it pertained to a particular policy or procedure of interest that had been hypothesized as a predictor of time to disposition (and other outcomes).

We were limited in our choice of predictors to those variables that could be identified via the docket analysis, via explicitly known district policies, or via information on variables that could be obtained from the attorney surveys and judge surveys in the 1992-93 sample.

We were further limited because we had only 20 districts and some procedures were not widely implemented across the districts, for example, a district policy limiting the number or length of depositions.

For some procedures, we used district averages (or medians) to measure the effects of the typical use of procedures in the district, thereby avoiding selection bias that would occur at the case level. For example, we used the district median days to discovery cutoff to measure the effects of discovery cutoff. We do not use the case-level measure because we expect that for individual cases discovery cutoff will be tailored to the needs of the case. After reviewing the cases, a judge will assign a discovery cutoff that he or she feels is appropriate for the needs of the case. Difficult cases may receive more discovery time and take longer to settle; straightforward cases may receive less discovery time and require less time to settle. However, this difference in time to disposition may be more a characteristic of the case than the management. By using the district median, we hoped to average across the case characteristics that may influence the specific discovery cutoff and identify districts that typically choose shorter or longer cutoff times regardless of case characteristics.

In our main evaluation report, we did not consider explicitly model interactions among the policy variables. In this further discovery management

**Table A.2**  
**Policy Variables Used in Modeling Time to Disposition**

Variable	Description
<b>Case-Level Variables</b>	
Early management on case	Judicial case management (set schedule, hold conference, refer to ADR, require status report or joint plan) before the 180th day after filing, as reported in docket, 1 if received early management, 0 otherwise
Early schedule on case	Provided a discovery, trial or other schedule before the 180th day after filing, as reported in the docket, 1 if schedule, 0 otherwise.
Early setting of trial schedule on case	Provide a trial schedule before the 180th day after filing as reported in the docket, 1 if schedule, 0 otherwise.
Early conference on case	Held a conference (status, scheduling, case management, or Rule 16) before the 180th day after filing, as reported in the docket; 1 if held, 0 otherwise.
Early ADR referral on case	Case referred to arbitration, mediation, or neutral evaluation before the 180th day after filing, as reported in the docket; 1 if referred, 0 otherwise.
Management level	Intensity of case management as reported by the attorney; 1 if high, 0 otherwise (for case level analyses this is the highest level reported by any attorney).
Early disclosure of information (shown as "disclosure on case" in statistical model tables)	Parties made an early disclosure of relevant information without formal discovery request as reported by attorney; 1 if yes for at least one attorney, 0 otherwise
Good faith effort to resolve discovery dispute before filing motion	Lawyer report of whether good faith effort was made to resolve dispute before filing discovery motion; 1 if yes for at least one attorney, 0 otherwise
<b>District-Level Variables</b>	
Cases managed (district percent)	Percent of cases in a district that receive a schedule, a conference, file a status report or plan, or are referred to ADR
Cases with trial schedule set early (district percent)	Percent of cases in a district that receive a trial schedule before the 180th day after filing
Early disclosure district policy	District policy on early disclosure For 1991, 1 if district has mandatory early disclosure without formal discovery request for any cases, 0 otherwise For 1992-93, 1 if district has mandatory disclosure for general civil litigation, 0 otherwise
Joint plan district policy	District policy on whether attorneys must prepare a joint discovery or case management plan early in the case; 1 if yes, 0 otherwise
Litigants at settlement conference (district percent)	Percent of cases in a district with litigants present at settlement conferences in person or available on the telephone (as reported by the attorney)
Limits on interrogatories (district)	District policy on limitations on interrogatories, 1 if the district has a policy limiting them, 0 otherwise
Days to discovery cutoff (district median)	Median days to discovery cutoff for cases with cutoff in a district
Continuances (district percent)	Percentage of cases in a district that have a continuance, of those cases that have a schedule set
Magistrate judge activity (district mean)	Number of civil proceedings performed by magistrate judges per civil termination in the district (e.g., motions, conferences, hearings); the square root of the number was used in the model
Judicial Control Over Trial (District percent firm)	Percentage of trials in a district that had firm active judicial control, of those cases for which lawyers reported judicial control of trial was either firm or minimal

Note we also considered information from the dockets about whether a joint discovery-case management plan or status report had been submitted That variable was dropped from this further study because the docketing practices regarding the submission of those plans or reports was found to vary markedly between districts, making that case-level variable undesirable for statistical analyses across districts



from missing controls using the remaining predictors in our model. We used imputed values because the lower response rate on open cases created a possibility of bias from including missing data flags. Sensitivity analyses run using only cases without missing data confirmed that our results are robust to this choice and that any bias is small.

In the main evaluation report, our model selection procedure identified the following as important control variables, without accounting for the effects of policy variables:

- Class action certification,
- Average judicial work level (moderate),
- Bankruptcy mention,
- Removed,
- Nature of suit category (tort, contract),
- Any government parties,
- Discovery motions,
- Any motions,
- Number of lawyers,
- Case complexity (high or moderate), and
- Maximum stakes.

In this further analysis of discovery management, we added the following discovery related control variables because of their *a priori* expected importance in predicting the outcome variables of interest when discovery policies are varied. These two variables were considered to be subsumed under the overall case complexity variable in the main evaluation report, but our further analysis revealed them to be potentially significant in their own right even when they are included in the same model with the overall case complexity variable.

- Discovery difficulty (high or moderate), and
- Difficulty in relations between the parties and/or lawyers (high or moderate)

### **Policy Variables**

Table A.2 lists the policy variables we explored in our models for time to disposition.

As shown in Table A.1, our control variables included subjective case-level predictors, such as stakes and complexity as determined by the attorneys or judges. The controls also included objective measures such as the jurisdiction, nature of suit, and presence of a bankruptcy mentioned in the docket. We included variables such as number of litigants, number of attorneys, and the presence of motions as additional measures of case complexity. We used a careful docket analysis to identify each of these measures. Our docket analysis also provided us with class action status. We included the four case-level motion variables (Any Dispositive Motions, Any Discovery Motions, Any Motions, and Five or More Motions) as control variables, even though these variables might be influenced to some degree by management policies. We reviewed these motion variables extensively and determined that motions were largely independent of case management. However, to the extent that motions may be influenced by policy, the inclusion of these controls could introduce some bias. On the other hand, motions were one of our better predictors of case complexity and were important for improving the precision of our estimated effects, and any small bias introduced may be offset by this increase in precision.

Attorney responses (augmented by litigant and judge responses) supplied us with case complexity, stakes (value of monetary, presence of nonmonetary), presence of related cases, fee arrangements, timing of litigant involvement (before filing, after filing), presence of related state cases, and the presence of administrative proceedings. We derived the remaining variables from the Federal Courts Integrated Database (IDB).

Several of the candidate control variables that we explored were highly correlated. These included the various measures related to motions (any motions in case, dispositive, discovery, or five or more motions) and the number of litigants and attorneys. To prevent problems of multi-collinearity we selected the best predictor of time to disposition from each group and included these in our models. The four motions variables naturally split into two subgroups (many motions and discovery motions were in one group) and one predictor from each group was included.

Because we used attorney survey responses to generate some of our control variables and because we had less than perfect attorney response, we were missing control variables for some cases. In the 1992–93 data, we imputed values

Table A.1 (continued)

Variable	Description
Related case	Attorney or litigant responded that additional time or money was spent on the case because of its effects on other cases; 1 if at least one attorney or litigant said yes, 0 otherwise.
State case	Also was state case concerning the same dispute; 1 if at least one attorney or litigant responded that there was a state case, 0 otherwise
Administrative proceeding	Also was a federal or state administrative proceeding prior to filing the case, 1 if at least one attorney or litigant said yes, 0 otherwise.
Any contingent fee attorney	Any attorney working for a contingent fee, 1 if at least one attorney or litigant said yes, 0 otherwise
Any hourly fee attorney	Any attorney working for an hourly fee; 1 if yes, 0 otherwise.
Case complexity	Highest level of case complexity as reported by any lawyer or judge; 1 is high complex, 2 is medium complex, 3 is low complex.
Difficulty of discovery	Highest level of difficulty of discovery as reported by any lawyer or judge; 1 is high difficulty, 2 is medium difficulty, 3 is low difficulty.
Difficulty in relations	Highest level of difficulty of relations between the parties and/or lawyers, as reported by any lawyer or judge; 1 is high difficulty, 2 is medium difficulty, 3 is low difficulty
Dispute began after filing date	For at least one party the attorney responded that the date the dispute began was after the filing date; 1 if yes, 0 otherwise.
Old dispute	For at least one party the attorney responded that the dispute began more than a year before the filing date, 1 if yes, 0 otherwise
<b>District-Level Variables</b>	
Judges	Number of full-time equivalent judges, including senior judges, in the district
Judicial officers	Number of full-time equivalent judicial officers, including judges, senior judges, and magistrate judges in the district
Civil filings	Annual Civil filings per FTE judicial officer
Criminal filings	Annual Criminal filings per FTE judicial officer
Total filings	Annual Civil plus Criminal filings per FTE judicial officer
Offices	Number of geographically different offices in the district
Days to answer	Median days to answer for all cases in the district
Percent dispositive motions	Percent of cases in the district with a dispositive motion filed on the docket
Percent discovery motions	Percent of cases in the district with a discovery motion filed on the docket
Percent any motions	Percent of cases in the district with at least one motion on the docket, other than attorney appearance-related motions
Percent five or more motions	Percent of cases in the district with five or more motions on the docket
Number of motions	Median number of motions per case for all cases in the district

**Table A.1**  
**Control Variables Used for Modeling Time to Disposition**

Variable	Description
<b>Case-Level Variables</b>	
Class action certification	Class action information from the docket; 0 is no mention of class action, 1 is alleged, 2 is denied, 3 is certified class action
Nature of suit category	Nature of suit in broad categories; 1 is tort, 2 is contract, 3 is prisoner, 4 is other.
Average judicial work time category (shown as "case type has xxxxx average judicial work" in statistical model tables)	Average judicial work time category for case type; 1 is high, 2 is moderate, 3 is low (See App. A).
Jurisdiction	Jurisdiction in federal court; 1 is US plaintiff, 2 is US defendant, 3 is federal question, 4 is diversity.
Bankruptcy mention	Bankruptcy mentioned in docket for other than bankruptcy nature of suit cases; 1 if there is a mention, 0 otherwise.
Removed case from state court	Case was removed from state court; 1 if removed, 0 otherwise.
Any government parties	Any government (local, state or federal) litigant in the case; 1 is government parties, 0 otherwise. Available only in 1992-93 data.
Any private organizations	Any private organization litigant in the case; 1 is at least one litigant is a private organization, 0 otherwise.
Any pro se litigants	Any pro se litigant on the case, 1 is at least one pro se litigant, 0 otherwise
Any litigant without an attorney	Any litigant without attorney listed in the docket, 1 is at least one litigant without an attorney (not pro se), 0 otherwise
Any dispositive motion	Any dispositive motion filed on the docket; 1 if there is a motion, 0 otherwise
Discovery motion	Any discovery motion filed on the docket, 1 if there is a motion, 0 otherwise
Any motions	Any motions filed on the docket (discovery, dispositive, other, except for those related to appearance of attorney), 1 if there is at least one motion, 0 otherwise
Five or more motions	Presence of five or more motions filed on the docket, except appearance of attorney; 1 if there is at least five motions, 0 otherwise
Number of lawyers	Number of attorneys involved on the case, counting no more than one per litigant, square root was used in model
Number of litigants	Number of litigants on the case; square root was used in the model
Maximum stakes (if zero, shown "zero stakes" in statistical model tables)	Natural log of the maximum stakes (best likely or worst likely outcome) reported by any attorney or litigant on the case
Nonmonetary stakes	Case involved nonmonetary stakes; 1 if at least one attorney or litigant said case involved nonmonetary stakes; 0 otherwise.

general civil litigation cases with issue joined. We included the open cases in our time to disposition analyses; however, the presence of open cases required that we use methods other than Ordinary Least Squares (OLS) regression. In particular, we used a censored regression approach that estimated the parameters using an iterative approach. At the first iteration, the parameters were estimated using only the closed cases. Using these estimates, we predicted the time to disposition for open cases. Now, using these predictions and the data from the closed cases, we re-estimated the model parameters. The new estimates provided new predictions, and the procedure was repeated until convergence.

Time to disposition is a highly skewed variable. To avoid the bias and other problems associated with skewed data, we used a transformation of time to disposition. We explored various possible transformations in our preliminary analyses and determined that the fourth root transformation proved best—i.e., had the most symmetric, normal residual errors.

### Control Variables

Many characteristics of cases, other than case management policies and procedures applied to them, affect the time to disposition. We need to control for such case characteristics when we estimate the effects of policy. Otherwise case differences that are not controlled for might be partially reflected in policy variable coefficients. This might lead us to make inaccurate conclusions about the effect of policy. This might occur if the distribution of a control variable differs between those cases that receive a particular management practice and those that do not.

Our multivariate analysis accounted for these control variables by including them in our model so that our regression coefficients represent the effects of policy after controlling for the case and district characteristics represented by the control variables. However, we had many control variables to consider and needed to select the best subset of these variables so as to ensure that we controlled for confounding factors without saturating our model with uninformative predictors. Table A.1 lists the complete set of control variables we explored for our models of time to disposition. We also considered many other variables related to the variables shown in the table and selected the ones that appeared substantively best for exploration in our models.

## **ANALYSIS OF TIME TO DISPOSITION**

Time to disposition is defined as the number of days between the first filing of the case and the final disposition of the case in federal district court. If a case reopens in the same district after disposition, the time to disposition is the time from the first opening to the last closing. Time to disposition is known for all closed cases and is measured uniformly across all districts.

### **Multivariate Regression Models on Case-Level Data**

To estimate the effects of case management policies and procedures, we used multivariate regression models fit to case level data where time to disposition was our outcome and the policy and control variables were our predictors. Multivariate regression allows us to estimate the unique effects of each policy variable while controlling for the effect of the other policy and control variables.<sup>67</sup>

### **Open Cases**

Although we followed our 1992–93 sample of cases for over three years, there remained a small percentage of open cases (8.5 percent) in our sample of

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<sup>67</sup> As discussed in detail in Appendix D of our main evaluation report, one possible shortcoming of this approach is that the standard error estimator is derived under the assumption of the independence of cases. Most likely there is unexplained heterogeneity among districts and this results in correlation among the residual errors from cases within a district. The estimator can be adjusted to allow for correlation among cases within a district by using an alternative estimator for the variance matrix of the outcomes (e.g. time to disposition). This estimator is again commonly referred to as the Huber correction or a “robust” estimator of standard error because it is appropriate even if the model is misspecified.

The precision of this correlation-adjusted standard error estimator is determined by the number of districts. With only 20 districts, our estimate is relatively imprecise. Thus, we expect that the unadjusted standard errors (unadjusted for intra-district correlation) will tend to underestimate the standard error of our coefficients, and we also expect that correlation-adjusted estimates might be rather imprecise and lead to variable test statistics. As a compromise, we provide the unadjusted standard errors in the tables given below. However, we note when the significance of our variables changes when we use the correlation adjusted standard errors. For case-level predictors, the bias will tend to be small and the unadjusted standard errors will probably be most appropriate. For district-level variables, the bias could be larger, and more attention should be paid to the adjusted standard errors, even though these could be imprecise.

Issue is considered joined after the defendants have answered the complaint in accordance with F.R.Civ.P. Rule 12(a) or as mandated otherwise by the court <sup>66</sup> Cases that are not joined usually do not receive judicial case management, and judicial discovery management policies and procedures are not relevant to them.

As indicated in Section 2, we focused our analyses on cases that close at least 270 days after filing because about 80 percent of all lawyer work hours spent on discovery are devoted to cases that last at least that long. Another reason for focusing on these cases that last at least 270 days is that this focus eliminates the statistical problem of endogeneity. In non-statistical terms, if we were to include cases that close in less than 270 days and before judges have the opportunity to apply discovery management policies, then the comparison of the outcomes for cases that are subject to discovery management with cases that are not managed would be distorted. In fact, if a case closed very early, before it could be managed, then that case provides little information about the effect of management.

We chose the 270 day cutoff because we defined early management as occurring within the first 180 days and wanted a window between the periods to avoid over-interpreting transitional effects following management. We found in a sensitivity analysis, in which we varied the 270 day period, that our main results were robust with respect to the 270 day cutoff period, and hence we report the findings using these data.

We focused our further analyses of discovery on the post-CJRA sample of cases filed in 1992-93 because those cases had a much richer set of discovery management policies in some districts, such as mandatory early disclosure and mandatory discovery planning.

In the next four major sections of this appendix, we provide the details of our analyses of the effects of discovery management policies and procedures on the four primary outcomes.

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<sup>66</sup>Administrative Office of the United States Courts (1995), Chapter 5, p.

### **Control and Policy Variables**

In modeling the effects of case management policies and procedures on the four primary outcomes, we considered two types of predictor variables: control variables and policy variables.

Control variables consist of case and district characteristics that could explain differences in case length. For example, we considered case complexity and stakes as controls in our models. District characteristics thought to possibly affect our primary outcomes included the number of civil and criminal filings per judicial officer in the district. A more complete listing of control variables that we considered is presented later in this appendix.

Policy variables refer to those variables that measure the district case management policies and the particular case level management procedures applied to each case. For example, we included variables for whether or not a case received early management (before the 180th day after filing) and whether or not the district enacted a mandatory early disclosure policy.

### **Modeling Effects on General Civil Cases with Issue Joined**

As discussed in Section 2, after reviewing the discovery data and the case management policies and procedures, we concluded that the effects of those policies and procedures could be best estimated using data from general civil litigation cases with issue joined that close at least 270 days after case filing.<sup>65</sup>

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<sup>65</sup>In practice, federal district courts split the civil caseload into two categories—those types of cases that usually receive minimal or no management, and those general civil litigation cases to which the district's standard case management policies and procedures apply. Minimal management categories of cases are not subject to the scheduling order requirements of Rule 16 of the Federal Rules of Civil Procedure, for example. The definition of minimal management cases varies from district to district based on local rules and local practice, but minimal management is usually applied to prisoner cases, administrative reviews of Social Security cases, bankruptcy appeals, foreclosure, forfeiture and penalty, and debt recovery cases. For consistency among districts in our analysis, we use a uniform definition of minimal management categories of cases that includes the six categories listed above.

Our primary analyses do not include minimal management types of cases because in practice almost none of these cases are managed using the discovery management policies and procedures that apply to general civil litigation, and hence they could not inform our evaluation of discovery policies and procedures.



## APPENDIX A: DETAILS OF STATISTICAL ANALYSES

### INTRODUCTION

Our main descriptive and statistical evaluation of how the CJRA case management principles affected cost, time to disposition, and participants' satisfaction and views on fairness are presented in a RAND Institute for Civil Justice report entitled *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, MR-802-ICJ, by James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana, 1996 (hereinafter called "main evaluation report")

Appendixes to that main evaluation report provide extensive details on the case sample selection design and weighting (App. A), surveys conducted and nonresponse weighting (App. B), statistical analysis of time to disposition (App. D), statistical analysis of lawyer work hours (App. E), analysis of satisfaction (App. F), analysis of views on fairness (App. G), and the survey questionnaires (App. I through K).

Because this report's analyses are further statistical analyses that begin where that main report ended and explore discovery management policy variables in more depth, this appendix repeats only enough information from the main report to permit understanding the definitions of the variables used in the main report, and those new variables added to the analyses in this report. Readers are referred to the above noted appendixes in that main evaluation report if more details are desired than those presented below

Our evaluation of discovery management policies focuses on estimating their effects on four primary outcomes: (1) time to disposition; (2) total lawyer work hours (and the subset of total lawyer hours devoted to discovery); (3) attorney satisfaction with the case management; and (4) attorney perceptions of fairness of the case management.

control variables. Despite the fact that we have more and better data than have been available to previous studies, and we have been as careful as possible in constructing our many models, one must still interpret the results carefully.

We believe that we have provided a reasonable estimate of the effects of policy for the cases, judges, and districts we observed in our data. It is much more difficult to determine the effect of the policy if implemented on different cases or by different judges in the same or different districts.

Judges who choose to implement policies and management procedures often do so at their discretion. These judges may differ from other judges in their basic approach to case management or because of personality. These differences between judges could affect the implementation of policy, and this could change the policy's effect. For example, if enthusiastic managerial judges currently set trial schedules early and also work hard on settlement and this leads to early closure, then having less enthusiastic non-managerial judges setting trial schedules early may not have the same effect that we observed.

Similarly, districts that choose to implement policies and procedures do so because of the characteristics of the district and the judicial officers. Because policies were not assigned to cases at random in our data, we cannot fully untangle the relationship between district characteristics and the use of policies. Hence, it is hard to determine exactly how the policies will affect time to disposition or lawyer work hours if implemented on a wider scale.

We stress that statistical models do not show cause and effect. Causation must be interpreted in light of understanding how the underlying civil justice system that generated the data operates

Given our understanding of how the civil justice system operates, we believe that the policies we identified as important predictors of shorter time to disposition or lower lawyer work hours are likely to reduce time and work hours if implemented, but that our estimated effect should be treated as an upper bound to the effects that would occur if the policies were implemented in all districts by all judges for all cases.

We stress that there is a difference between adopting a policy at the district level, and implementation in practice at the case level. For policy to have an effect on time to disposition or lawyer work hours, it must not just be adopted "on paper," but it must also be implemented in practice at the case level. Using our attorney-level data, we have estimated the effect conditional on a policy or procedure actually being implemented.

### **FINDINGS ON GOOD FAITH EFFORTS TO RESOLVE DISCOVERY DISPUTES**

Our multivariate statistical analysis found no significant relationship between any of the variables studied and reported good faith effort to resolve discovery disputes before filing a motion.

### **FINDINGS ON LIMITING INTERROGATORIES**

Our multivariate statistical analysis supports the policy of limiting interrogatories as a means of significantly limiting lawyer work hours and thereby reducing the costs of litigation. There is no statistical evidence that interrogatory limitations hurt, and they appear to help significantly for several subsets of cases.

### **FINDINGS ON SHORTENING DISCOVERY CUTOFF TIME**

Our multivariate statistical analysis supports the policy of shorter times to discovery cutoff as means of significantly limiting lawyer work hours and thereby reducing the costs of litigation, and as a means of reducing the time to case disposition. When we looked at subsets of cases, these significant decreases in lawyer work hours and time to disposition occur for most subsets, with some exceptions such as low complexity and low discovery difficulty cases (which are unlikely to require as much time for discovery as more complex or more difficult cases.)

[To be inserted here in final report: estimates of differences between managing with shorter and longer discovery cutoff times.]

### **INTERPRETING EFFECTS AND GENERALIZING TO OTHER CASES, JUDGES, AND DISTRICTS**

Although these predicted effects discussed in this report serve as a useful gauge of our statistical model estimates, they might present the temptation to interpret them as the exact size of a causal effect. That is, one might incorrectly treat these estimates as if expanding the use of a particular case management procedure will reduce time to disposition or lawyer work hours a certain amount for each and every new case that receives the management. This almost assuredly will not happen in exactly the same way.

There are reasons why our observed effect might not generalize in exactly the same way to other cases, judges, or districts

One reason is that the cases in our data that receive the policies might be different from those that do not receive the policies in some way not accurately measured by our

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disclosure has improved the operation of pretrial discovery, if at all. The vast majority of respondents have had little experience with mandatory disclosure ”

RAND's lawyer surveys indicate that when early disclosure was made for cases in the 1992-93 sample, it was "full disclosure" 57 percent of the time, and "pro forma" disclosure 43 percent of the time. For general civil cases with issue joined, lawyers report more disclosure when it is mandatory (60 percent of the cases in mandatory disclosure districts, versus 45 percent in voluntary disclosure districts and 40 percent in districts with no disclosure policy). Part of the problem with a mandatory early disclosure requirement is compliance; lawyers report that when disclosure is done on a mandatory basis, it is full disclosure for 50 percent of the cases and pro forma disclosure for the remaining half of the cases.

Findings from a recent survey of about 1,000 attorneys by the American Bar Association's Litigation Section were similar to ours: "Analysis of the survey results suggests that Rule 26(a)(1) disclosure has not had a significant impact on federal civil litigation. To the extent that it has had any measurable effects, most are negative. The survey provided no evidence that, at the one year mark, disclosure had reduced discovery costs or delays. Nor do the responses suggest that disclosure has reduced conflict between adversaries during the discovery process. Consequently, during its first year of implementation, disclosure has not resulted in the systemic improvements for which its proponents had hoped"<sup>63-64</sup>

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<sup>63</sup>Blaner et al. (1996), p. 1

<sup>64</sup>The PA(E) advisory group also conducted a survey of about 4,000 lawyers regarding the early mandatory disclosure procedures in that district, with results that were very similar to ours. This district's procedures stay discovery until both sides have completed mandatory disclosure of information likely to "bear significantly on the claims and defenses," plus other items such as names of individuals with information and any insurance. Of the 1,000 plus attorneys responding, over 60 percent felt that some rule mandating self-executing disclosure should remain in effect. Judges were 85 percent in favor of such disclosure. When asked about compliance, over 90 percent of lawyers said they themselves had complied more than minimally, and that over two-thirds of their opponents had complied more than minimally (Landis et al., 1996).

The NY(E) advisory group also surveyed lawyers regarding early mandatory disclosure for cases filed after the plan was adopted (Wesely et al., 1994, pp. 5-6.) Their annual report indicated: "Survey results at this stage are neither a ringing endorsement, nor a condemnation, of mandatory disclosure. About half the respondents said that mandatory disclosure improved pretrial discovery, and about half said that there was no change. A majority also said that mandatory disclosure had made either no contribution or a slight contribution to easing the problems of undue cost and unnecessary delay. On the other hand, an overwhelming majority said that mandatory disclosure had no negative effects on pretrial discovery." "A majority (55 percent) would make mandatory disclosure a permanent part of the local rules, and an additional 23 percent would make mandatory disclosure a permanent part of the local rules if modifications were made." "It appears from these data that the parade of horrors predicted by some critics of mandatory disclosure has not come to pass. On the other hand, it is not clear the extent to which mandatory

prepare a discovery – case management plan for submission to the court may result in more efficient litigation with less lawyer work hours. Another plausible explanation is that the judges in districts that require plans may also manage cases differently and better (in ways that we did not measure) than judges in districts that do not require plans.

When we looked at various subsets of cases, we found no strong evidence that the effects of early management and discovery planning were systematically concentrated on certain types of cases based on level of complexity, level of discovery difficulty, plaintiff or defendant side of the case, contingent or hourly fee lawyer, size of the law organization in which the lawyer worked, case stakes, tort or contract or other nature of suit categories, or the top 25% most costly cases among general civil litigation that has time to disposition over 270 days after filing.

We find no statistically significant effect on lawyer satisfaction or views on fairness from early management, setting a trial schedule early in the case, and requiring a discovery plan

#### **FINDINGS ON EARLY DISCLOSURE**

Our multivariate statistical analysis does not support the policy of mandatory early disclosure as a means of significantly limiting lawyer work hours and thereby reducing the costs of litigation, or as a means of reducing time to disposition.

Mandatory early disclosure was not associated with significantly reduced lawyer work hours or time to disposition. Some people suggested that if we had looked at subsets of cases, such as those that were more or less complex or had more or less difficulty with discovery, we might have found a subset of cases for which this policy was effective. We have now explored many different subsets of cases, including subsets based on stakes, complexity, and discovery difficulty. We found no strong evidence that a policy of early mandatory disclosure reduced lawyer work time or time to disposition on any of the subsets of cases examined. However, attorneys who voluntarily choose to do early disclosure, in districts where such disclosure is voluntary, have significantly lower work hours. It may be that lower work hours among voluntary disclosing attorneys reflects a type of “choice or selection bias”, i.e., attorneys on cases for which they voluntarily choose to disclose may be less contentious attorneys or may be on less contentious cases and hence spend fewer total work hours on the case, but not necessarily because of the early disclosure. If the early disclosure is effective in reducing lawyer work time, then we would have expected to see some evidence of the effect on mandatory disclosure cases, not just on cases with voluntary disclosure.

Our statistical analysis of subsets of cases does not lead to any suggestions for focusing these management policies only on certain types of cases. Our statistical results are consistent for most subsets of cases analyzed, although the top 25% most costly cases<sup>62</sup> appear to especially benefit from the early setting of a trial schedule (early management of those top 25% of the costly cases without a trial date scheduled did not significantly reduce their time to disposition). And cases that are high in complexity, high in discovery difficulty, or high in stakes appear to especially benefit from the use of discovery – case management plans.

In our analysis of judicial discovery management policies, we find that early management is associated with significantly higher total lawyer work hours if the district does not require discovery – case management plans. However, early management is not associated with significantly higher total lawyer work hours if the district requires discovery – case management plans, and this lends strong support for the continuation of a requirement of discovery – case management planning. That is, it appears that doing early management without planning increases lawyer work hours, but early management coupled with planning does not increase lawyer work hours.

[To be inserted here in final report: estimates of differences between not managing early and managing early with and without discovery planning.]

Our interviews suggested reasons why early management may increase lawyer work hours. Lawyers need to respond to a court's management--for example, talking to the litigant and to the other lawyers in advance of a conference with the judge, traveling, and spending time waiting at the courthouse, meeting with the judge, and updating the file after the conference. In addition, once judicial case management has begun, a discovery cutoff date has usually been established, and attorneys may feel an obligation to begin discovery. Doing so could shorten time to disposition, but it may also increase lawyer work hours on cases that were about to settle when the judge began early management. The CJRA data indicate that cases that are managed early have a higher likelihood of having lawyer hours spent on discovery

However, when a district requires discovery – case management plans, the increase in lawyer work hours associated with early management appears to be offset by benefits associated with the required planning, and the net effect is no significant increase in lawyer work hours. There are at least two plausible explanations for this outcome. First, the planning itself may produce the benefit. The requirement that the lawyers jointly meet and

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<sup>62</sup> These cases had total lawyer work hours per litigant of more than 188 hours

#### 4. POLICY FINDINGS

When judges were asked their opinions about discovery management on the cases in our 1992–93 sample, the vast majority responded that such management was generally desirable (96 percent in favor of setting discovery limits; 89 percent in favor of requiring early disclosure; and 98 percent in favor of good-faith efforts before filing discovery motions).

When lawyers were asked their opinions on discovery management on those same cases, a majority responded that such management was generally desirable (86 percent in favor of setting discovery limits; 71 percent in favor of requiring early disclosure; and 96 percent in favor of good-faith efforts before filing discovery motions).

Given that judges and lawyers are generally favorably inclined toward judicial management of discovery, and given that discovery is often cited in anecdotes as being a problem leading to excessive cost and delay, we analyzed the efficacy of various discovery management policies in reducing lawyer work hours and time to disposition.

#### FINDINGS ON EARLY CASE MANAGEMENT AND DISCOVERY PLANNING

Our multivariate statistical analysis supports the policy of early management and early scheduling of a trial date as a means of reducing time to disposition. Our current analysis also supports the requirement of discovery – case management plans as a means of reducing the time to disposition, limiting lawyer work hours, and thereby limiting the costs of litigation in cases that are managed early.

Early management without setting a trial schedule early predicts a statistically significant reduction in time to disposition, and early management that includes setting a trial schedule early predicts a significantly larger reduction. We considered those two early management and trial scheduling policies used both with and without a discovery plan requirement, and the results were statistically significant. There was little difference in time to disposition with or without a discovery plan if a trial was scheduled early, but cases closed significantly earlier if discovery planning took place in the absence of an early trial schedule. Thus, our analysis suggests that the requirement of a discovery – case management plan is beneficial in reducing time to disposition, especially if a trial schedule is not set early.

[To be inserted here in final report. estimates of differences between not managing early and managing early with and without discovery planning ]

do early disclosure, in districts where such disclosure is voluntary, are significantly more satisfied. Since most districts had a voluntary disclosure policy at the time of the study, this explains the overall finding in our main evaluation report that disclosing attorneys were more satisfied. It may be that greater satisfaction among voluntary disclosing attorneys reflects a type of "choice or selection bias", i.e., attorneys on cases for which they voluntarily choose to disclose may be less contentious attorneys or may be on less contentious cases and hence more satisfied, but not necessarily because of the early disclosure.

Districts with policies of limiting interrogatories again had attorneys who were significantly more satisfied, but the district median time to discovery cutoff still did not significantly affect attorney satisfaction even when subsets of cases were analyzed.

Details of our statistical analysis of attorney satisfaction with judicial case management are presented in Appendix A.

#### **SUMMARY OF EFFECTS ON ATTORNEY VIEWS ON FAIRNESS**

In our main evaluation report, we found no consistent statistically significant effects of judicial case management on attorney views on fairness.

In our current analysis of judicial discovery management policies, we find no statistically significant effects for any of the policy variables on attorney views on fairness.

A very high percentage of attorneys report that case management is fair, about 90 percent. There is little variability in our data and it is not surprising that we do not find statistically significant effects of judicial case management on attorney views on fairness.

Details of our statistical analysis of attorney views on fairness are presented in Appendix A.



discovery planning took place in the absence of an early trial schedule. Thus, our analysis suggests that the requirement of a discovery – case management plan is beneficial in reducing time to disposition, especially if a trial schedule is not set early.

Our statistical analysis of subsets of cases does not lead to any suggestions for focusing these management policies only on certain types of cases. Our statistical results are consistent for most subsets of cases analyzed, although the top 25% most costly cases appear to especially benefit from the early setting of a trial schedule (early management of those top 25% of the costly cases without a trial date scheduled did not significantly reduce their time to disposition). And cases that are high in complexity, high in discovery difficulty, or high in stakes appear to especially benefit from the use of discovery – case management plans.

Early mandatory disclosure again was not statistically significant, and limiting interrogatories was not consistently significant in predicting reduced time to disposition.

Details of our statistical analysis of time to disposition are presented in Appendix A.

### **SUMMARY OF EFFECTS ON ATTORNEY SATISFACTION**

In our main evaluation report, we found that the policies that had the greatest effects on time to disposition and lawyer work hours—i.e., early management, median days to discovery cutoff, and setting a trial schedule early in the case—had no statistically significant effect on lawyer satisfaction. Attorneys with cases where early disclosure occurs report significantly greater satisfaction. However, attorneys from districts with a policy of requiring mandatory early disclosure were significantly less likely to report satisfaction with case management. Districts with policies of limiting interrogatories had attorneys who were significantly more satisfied, but the district median time to discovery cutoff did not significantly affect attorney satisfaction.

In our current analysis of judicial discovery management policies, we again find no statistically significant effect on lawyer satisfaction from early management, setting a trial schedule early in the case, and requiring a discovery plan. We considered those three policies used in various combinations and did not find any significant difference in satisfaction, although as noted previously, some of those policies do significantly affect time to disposition and lawyer work hours.

Our current analysis of early disclosure found that attorneys in districts with a mandatory disclosure policy were less satisfied, but their level of satisfaction is not significantly different from the level of satisfaction for attorneys who do not do early disclosure in voluntary disclosure districts. However, attorneys who voluntarily choose to

less contentious cases and hence spend fewer total work hours on the case, but not necessarily because of the early disclosure.

We find a significant reduction in total lawyer work hours in districts with interrogatory limitations. Looking at subsets of cases, the significant reductions appeared for hourly fee attorneys, defense attorneys, contract cases, and medium complexity cases. These findings support the policy of limiting interrogatories as a means of limiting lawyer work hours because there is no statistical evidence that interrogatory limitations hurt, and they may help for several subsets of cases.

In our current analysis of judicial discovery management policies, we again find that reported total lawyer work hours significantly increase as the number of district median days to discovery cutoff gets larger. When we looked at subsets of cases, this significant increase occurs for most subsets, with some exceptions such as low complexity and low discovery difficulty cases (which are unlikely to require as much time for discovery as more complex or more difficult cases.)

In addition to the further analysis that we did on total lawyer work hours, we also analyzed lawyer work hours on discovery. The policy implications and findings of statistical significance emerging from our analysis of lawyer work hours on discovery are very similar to those from our analysis of total lawyer work hours.

Details of our statistical analysis of total lawyer work hours and lawyer work hours on discovery are presented in Appendix A.

## **SUMMARY OF EFFECTS ON TIME TO DISPOSITION**

In our main evaluation report, we found four policies that showed consistent statistically significant effects on time to disposition: (1) early judicial management; (2) setting the trial schedule early; (3) reducing discovery cutoff (median days to discovery cutoff in a district), and (4) having litigants at or available on the telephone for settlement conferences. Other policies and procedures we studied were either not statistically significant or not consistently significant.

In our current analysis of judicial discovery management policies, we again find a statistically significant reduction in time to disposition from early management without setting a trial schedule early, and a significantly larger reduction from early management that includes setting a trial schedule early. We considered those two early management and trial scheduling policies used both with and without a discovery plan requirement, and the results were statistically significant. There was little difference in time to disposition with or without a discovery plan if a trial was scheduled early, but cases closed earlier if

## **SUMMARY OF EFFECTS ON LAWYER WORK HOURS**

In our main evaluation report, our analyses for total lawyer work hours show that cases with early management tend to require greater work hours and cases from districts with shorter median discovery cutoff tend to require fewer hours. There were no other clearly consistent policy variable effects on lawyer work hours per party represented. Thus, of all the policy variables we investigated as possible predictors of reduced lawyer work hours, only judicial management of discovery seemed to produce the desired effect.

We found that several attorney and case characteristics were important predictors of lawyer work hours. These control variables tended to be far better at explaining variance in lawyer work hours than did the policy variables. For example, of the total variance explained by our model, about 95 percent was explained by the control variables. This means that lawyer work hours seem to be driven primarily by factors other than case management policy. Case stakes and case complexity are the most important predictors of lawyer work hours, and these two case characteristics alone explained about half of the variance in our models. In contrast, of the total variance in our time to disposition models, only about half was explained by the control variables and the other half was explained by the policy variables.

In our current analysis of judicial discovery management policies, we find that early management is associated with significantly increased total lawyer work hours if the district does not require discovery – case management plans. However, early management is not associated with significantly increased total lawyer work hours if the district requires discovery – case management plans. This lends strong support for the continuation of a requirement of discovery – case management planning. That is, it appears that doing early management without planning increases lawyer work hours, but early management coupled with planning does not increase lawyer work hours.

In our current analysis, we again find that mandatory early disclosure requirements are not associated with significantly reduced lawyer work hours. We have explored many different subsets of cases, including subsets based on stakes, complexity, and discovery difficulty. We found no strong evidence that a policy of early mandatory disclosure reduced lawyer work time on any of the subsets of cases examined. However, attorneys who voluntarily choose to do early disclosure, in districts where such disclosure is voluntary, have significantly lower work hours. It may be that lower work hours among voluntary disclosing attorneys reflects a type of “choice or selection bias”, i.e., attorneys on cases for which they voluntarily choose to disclose may be less contentious attorneys or may be on

**Table 3.4**  
**Information by Shorter and Longer Time to Discovery Cutoff:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days,**  
**and with Lawyer Work Hours Reported**

Variable	Category of district		
	Districts with shorter median time to discovery cutoff	Districts with longer median time to discovery cutoff	Significant difference for policy shown in multivariate analysis?
Median days to discovery cutoff in 10 districts	83-177	178-217	
Median days to disposition	455	473	Shorter cutoff is significantly faster
% lawyers satisfied with management	68	78	Not a significant difference
% lawyers view management as fair	87	90	Not a significant difference
Median total lawyer work hours per litigant	83	75	Shorter cutoff is significantly lower (not able to see in this bivariate table)
% with zero discovery work hours	14	15	
Median lawyer work hours on discovery per litigant	25	16	Shorter cutoff is significantly lower (not able to see in this bivariate table)
Median percent discovery hours are of total lawyer work hours	28	25	

Note Days to discovery cutoff in district means days from first schedule to first discovery cutoff, without consideration of continuances Percentages in rows may not add to 100 due to round off and missing data

[To be inserted here in final report: estimates of differences between managing with shorter and longer discovery cutoff times.]

### **Attorney Satisfaction**

In our main evaluation report, we found no statistically significant relationship between the district median days to discovery cutoff and attorney satisfaction.

In our current analysis of judicial discovery management policies, we again find no statistically significant relationship between the district median days to discovery cutoff and attorney satisfaction.

### **Attorney Views on Fairness**

We find no statistically significant effects for any of the policy variables on attorney views on fairness.

### **Information on Discovery Cutoff Time Policy**

Table 3.4 presents information on time to disposition, lawyer work hours, satisfaction, and views on fairness for cases from districts with shorter and longer times from discovery scheduling to cutoff. "Shorter" means the cases in the ten study districts with the shortest median discovery time to cutoff. The numbers in the table, which reflect actual survey responses from the sample cases, generally corroborate the results of the statistical analysis. However, one is not able to see the reduction in lawyer work hours predicted by a policy of shorter time to discovery cutoff in the bivariate tables, because the districts and the cases from those districts differ on factors other than the median time to discovery cutoff. Our multivariate analyses adjust for those other factors, and the bivariate Table 3.4 does not.

## **SHORTENING DISCOVERY CUTOFF TIME**

Discovery clearly was subject to more management in 1992–93 after CJRA was passed. In addition to the new mandatory early disclosure requirements in some districts, the median district times to discovery cutoff were shortened in some districts. For example, in 1991 the fastest and slowest districts' median days from schedule to discovery cutoff were 100 and 274 days, respectively, for all general civil cases closed after issue was joined. In 1992–93, these medians had fallen to 83 and 217 days, respectively.

### **Lawyer Work Hours**

In our main evaluation report, we found that reported lawyer work hours significantly decrease as the district median days from the setting of a discovery schedule to the discovery cutoff date gets shorter.

In our current analysis of judicial discovery management policies, we again find that reported total lawyer work hours significantly decrease as the number of district median days to discovery cutoff gets smaller. When we looked at subsets of cases, this significant decrease occurs for most subsets, with some exceptions such as low complexity and low discovery difficulty cases (which are unlikely to require as much time for discovery as more complex or more difficult cases.)

[To be inserted here in final report: estimates of differences between managing with shorter and longer discovery cutoff times.]

In addition to the further analysis that we did on total lawyer work hours, we also analyzed lawyer work hours on discovery. The policy implications and findings of statistical significance emerging from our analysis of lawyer work hours on discovery are very similar to those from our analysis of total lawyer work hours

### **Time to Disposition**

In our main evaluation report, we found that the district's median days to discovery cutoff is a statistically significant predictor of time to disposition; shorter cutoff predicts shorter time to disposition.<sup>61</sup>

In our current analysis of judicial discovery management policies, we again find that the district's median days to discovery cutoff is a statistically significant predictor of time to disposition. In our analysis of subsets of cases, we find that reducing time to discovery cutoff significantly reduces time to disposition on most subsets of cases analyzed.

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<sup>61</sup> The statistical significance holds even if we use adjusted standard errors.

**Table 3.3**  
**Information by Interrogatory Limit Policy:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days,**  
**and with Lawyer Work Hours Reported**

Variable	Type of interrogatory limitation policy		
	District policy to limit interrogatories	No interrogatory limit policy	Significant difference for policy shown in multivariate analysis?
Median days to disposition	468	455	Not a significant difference
% lawyers satisfied with management	74	68	Significantly higher
% lawyers view management as fair	89	88	Not a significant difference
Median total lawyer work hours per litigant	80	66	Significantly lower (not able to see in this bivariate table)
% with zero discovery work hours	14	19	
Median lawyer work hours on discovery per litigant	20	15	Significantly lower (not able to see in this bivariate table)
Median percent discovery hours are of total lawyer work hours	26	25	

Note: Percentages in rows may not add to 100 due to round off and missing data

correlation as discussed in Appendix A.<sup>60</sup> Analyses on subsets of cases also showed no significant effects for nearly all subsets. Consequently, we again conclude that our data provide almost no evidence of an effect of district policies of limiting interrogatories on time to disposition.

### **Attorney Satisfaction**

In our main evaluation report, we found no statistically significant effect for a district policy limiting interrogatories for all cases with issue joined. On the other hand, in our analysis of cases closed over 270 days after filing, attorneys from districts with a policy of limiting interrogatories report being significantly more satisfied with case management.

In our current analysis of judicial discovery management policies, we again find that districts with a policy of limiting interrogatories have attorneys who report significantly higher satisfaction. This finding also is true for most subsets of cases analyzed, and there is no indication of a significant negative effect for any subset of cases.

### **Attorney Views on Fairness**

We find no statistically significant effects for any of the policy variables on attorney views on fairness

### **Information by Interrogatory Limitation Policy**

Table 3.3 presents information on time to disposition, lawyer work hours, satisfaction, and views on fairness for cases that were and were not subject to a district policy of limiting the number of interrogatories. The numbers in the table, which reflect actual survey responses from the sample cases, generally corroborate the results of the statistical analysis. However, one is not able to see the reduction in lawyer work hours predicted by a policy of limiting interrogatories in the bivariate tables, because the districts and the cases from those districts differ on factors other than the limitation on interrogatories. Our multivariate analyses adjust for those other factors, and the bivariate Table 3.3 does not

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<sup>60</sup> Coefficient = - 0.068, p=0.386 for cases that close over 270 days after filing.



## **LIMITING INTERROGATORIES**

Before CJRA, most districts left court control of the volume of discovery to the judge in each case; CJRA had little effect on this arrangement. Before CJRA, most pilot and comparison districts had a local rule that limited the number of interrogatories and requests for admission, but none limited the number of depositions and only one limited the time per deposition. After CJRA, one pilot and one comparison district adopted a new limit on deposition length, and two comparison districts adopted new limits on the number of depositions. Given the small number of districts who had a policy limiting depositions, we have insufficient data to evaluate that policy. Hence this section focuses on limits on interrogatories.

### **Lawyer Work Hours**

In our main evaluation report, a district policy on limiting interrogatories predicted fewer lawyer work hours; however, this difference was not statistically significant.

In our current and more detailed analysis of judicial discovery management policies, we found a significant reduction in total lawyer work hours in districts with interrogatory limitations. Looking at subsets of cases, the significant reductions appeared for hourly fee attorneys, defense attorneys, contract cases, and medium complexity cases. These findings support the policy of limiting interrogatories as a means of limiting lawyer work hours because there is no statistical evidence that interrogatory limitations hurt, and they may help for several subsets of cases.

In addition to the further analysis that we did on total lawyer work hours, we also analyzed lawyer work hours on discovery. The policy implications and findings of statistical significance emerging from our analysis of lawyer work hours on discovery are very similar to those from our analysis of total lawyer work hours

### **Time to Disposition**

In our main evaluation report, we found that a district policy on limiting interrogatories was not a statistically significant predictor of shorter time to disposition for cases closed over 270 days after filing. Thus we concluded that our data provided almost no evidence of an effect of district policies of limiting interrogatories on time to disposition.

In our current analysis of judicial discovery management policies, we found a significant reduction in time to disposition using unadjusted standard errors, but there was not a significant reduction when we use the standard errors adjusted for intra-district

## **GOOD FAITH EFFORTS IN RESOLVING DISCOVERY DISPUTES**

All but one district in the study had rules governing this before CJRA; these have been continued or strengthened.

### **Lawyer Work Hours**

In our main evaluation report, we explored the effects of good faith efforts in resolving discovery disputes before filing motions using only cases with at least one motion. We found no statistically significant effects of good faith efforts on work hours among attorneys from these cases.<sup>57</sup> It could be that by restricting our attention to only cases with motions we miss the helpful effect of good faith effort on avoiding motions; however, the positive effects we observe (i.e., good faith effort increases work hours, but not significantly) do not suggest any reduction in work hours from good faith motions.

We did not do any further investigation of this policy in this report.

### **Time to Disposition**

In our main evaluation report, we found no evidence of significant effects on time to disposition from good faith efforts to resolve discovery disputes before filing motions. Looking at cases with at least one discovery motion, we found no statistically significant difference between cases where the attorney reported good faith efforts and other cases.<sup>58</sup>

We did not do any further investigation of this policy in this report.

### **Attorney Satisfaction**

In our main evaluation report, we explored the effects of good faith efforts in resolving discovery disputes using only cases with at least one motion. We found that case-level reported good faith effort in resolving discovery disputes had no statistically significant effects on lawyer satisfaction.

### **Attorney Views on Fairness**

We estimated the effects of good faith efforts in resolving discovery disputes using a subsample of cases that had at least one discovery motion in our main evaluation report. Using this sample there was no statistically significant effect for cases with one or more discovery motions.<sup>59</sup>

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<sup>57</sup> Coefficient = 0.27, p=0.06 for cases closed over 270 days after filing

<sup>58</sup> Coefficient = -0.01, p=0.81 for cases closed over 270 days after filing

<sup>59</sup> Coefficient = 0.45, p=0.23 for cases that had time to disposition over 270 days.

**Table 3.2**  
**Information by Early Disclosure Policy:**  
**1992-93 Sample, General Civil Cases with Issue Joined,**  
**Closed with Time to Disposition Over 270 Days,**  
**and with Lawyer Work Hours Reported**

Variable	Type of early disclosure policy				Significant difference for policy shown in multivariate analysis?
	Mandatory disclosure policy, and disclosure was made	Mandatory disclosure policy, and disclosure was not made	No mandatory disclosure policy, and disclosure was made	No mandatory disclosure policy, and disclosure was not made	
Median days to disposition	447	477	455	482	Not a significant difference
% lawyers satisfied with management	71	63	81	70	Not a significant difference if mandatory, but significantly more satisfied if voluntarily disclose
% lawyers view management as fair	87	88	93	85	Not a significant difference
Median total lawyer work hours per litigant	100	75	73	80	Not a significant difference if mandatory, but significantly less if voluntarily disclose
% with zero discovery work hours	10	15	16	16	
Median lawyer work hours on discovery per litigant	28	19	15	23	Not a significant difference if mandatory, but significantly less if voluntarily disclose
Median percent discovery hours are of total lawyer work hours	29	25	25	27	
% of disclosures that were full rather than pro forma	50		57		

Note. Percentages in rows may not add to 100 due to round off and missing data

districts and the cases from those districts differ on factors other than the policy on early disclosure. Our multivariate analyses adjust for those other factors, and the bivariate Table 3.2 does not

### **Attorney Satisfaction**

In our main evaluation report, we found a district policy of mandatory early disclosure corresponded to statistically significantly lower attorney satisfaction. However, for cases in which the attorneys report the actual early disclosure of information, they also report significantly higher satisfaction than attorneys from other cases.

A district policy of voluntary early disclosure is associated with fewer satisfied attorneys, but our estimated effects are small and not statistically significant.<sup>56</sup> Our model compared attorney responses from districts with a policy of voluntary early disclosure to the responses from attorneys from districts with no general policy on early disclosure.

In our current analysis of judicial discovery management policies, we again find that attorneys from districts with a mandatory disclosure policy are less satisfied, but their level of satisfaction is not significantly different from the level of satisfaction for attorneys who do not do early disclosure in voluntary disclosure districts. However, attorneys who voluntarily choose to do early disclosure, in districts where such disclosure is voluntary, are significantly more satisfied. Since most districts had a voluntary disclosure policy at the time of the study, this explains the overall finding in our main evaluation report that disclosing attorneys were more satisfied. It may be that greater satisfaction among voluntary disclosing attorneys reflects a type of "choice or selection bias", i.e., attorneys on cases for which they voluntarily choose to disclose may be less contentious attorneys or may be on less contentious cases and hence more satisfied, but not necessarily because of the early disclosure.

Our statistical analysis of subsets of cases does not lead to any suggestions for focusing these management policies on certain types of cases. Our statistical results are consistent for most subsets of cases analyzed, including the top 25% most costly cases.

### **Attorney Views on Fairness**

We find no statistically significant effects for any of the policy variables on attorney views on fairness.

### **Information by Early Disclosure Policy**

Table 3.2 presents information on time to disposition, lawyer work hours, satisfaction, and views on fairness for cases that were and were not subject to an early disclosure policy. The numbers in the table, which reflect actual survey responses from the sample cases, generally corroborate the results of the statistical analysis. However, we caution that the

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<sup>56</sup> Coefficient = -0.070, p=0.835 for cases that close over 270 days after filing.

attorneys or may be on less contentious cases and hence spend fewer total work hours on the case, but not necessarily because of the early disclosure.

In addition to the further analysis that we did on total lawyer work hours, we also analyzed lawyer work hours on discovery. The policy implications and findings of statistical significance emerging from our analysis of lawyer work hours on discovery are very similar to those from our analysis of total lawyer work hours.

### **Time to Disposition**

In our main evaluation report, we found no statistically significant difference in time to disposition between cases from districts that have a policy of mandatory disclosure and those that do not. Furthermore, in separate model runs we found that cases from districts with a policy of mandatory disclosure of information bearing on both sides of the case did not differ significantly in terms of time to disposition from other cases.<sup>53</sup> Also, we found that cases where the attorneys reported an early disclosure of relevant information were not statistically significantly different than other cases in terms of time to disposition.<sup>54</sup> We also found that a district policy encouraging voluntary early disclosure had no statistically significant effect on time to disposition. Cases from districts with a voluntary early disclosure policy were compared to cases from districts with no general policy on early disclosure.<sup>55</sup>

In our current analysis of judicial discovery management policies, we again find that early disclosure requirements are not associated with significantly reduced time to disposition. Since some people suggested that if we had looked at subsets of cases, such as those that were more or less complex or had more or less difficulty with discovery, we might have found a subset of cases for which this policy was effective. We have explored many different subsets of cases, including subsets based on stakes, complexity, and discovery difficulty. We found no strong evidence that a policy of early mandatory disclosure shortened time to disposition on any of the subsets of cases examined.

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<sup>53</sup> Coefficient =0.04, p=0.37 for cases closing over 270 days after filing.

<sup>54</sup> We imputed the missing values of our early disclosure variable and found our result was not sensitive to the particular imputed values.

<sup>55</sup> Coefficient =0.045, p=0.416 for cases closed over 270 days after filing. Some districts had policies on early disclosure for a limited number of cases. We considered these districts to have no general policy of early disclosure and included them in our comparison group for studying the effects of voluntary and mandatory early disclosure.