

*File Copy*  
DISCOVERY SYMPOSIUM

BOSTON COLLEGE SCHOOL OF LAW  
SEPTEMBER 4-5, 1997

**AGENDA**  
**CONFERENCE ON DISCOVERY**  
**ADVISORY COMMITTEE ON THE CIVIL RULES**  
**July 14, 1997**

[Note: This agenda is correct as of the date indicated. It is likely that some minor adjustments will be made. A few individuals may be added to panels, for example.]

Thursday, Sept. 4, 1997

9:00-9:45: **Historical Background of Federal Rules' Approach to Discovery:** This paper would examine the treatment of information disclosure before the adoption of the Federal Rules and the reasons why the framers of those rules concluded that a new regime should be substituted, including consideration of their misgivings about the new regime. It would also include some reflection on the movement towards national uniformity implicit in the adoption of the Rules Enabling Act and some consideration of the impact of the changes in discovery during the first decade or so after their adoption.

Presenter: Professor Stephen Subrin (Northeastern)

**BREAK**

10:00-12:00: **Lawyers's Panel on Document Discovery:** This panel will address the concerns that have repeatedly been voiced about document production. Some likely areas of consideration include:

Burdens, and reasons therefor, of assembling documents for production

Burdens, and reasons therefor, of reviewing documents to be produced

Effect, if any, of Rules 26(a)(1) and 26(f) on document production

Effect of protective orders in facilitating or impeding document discovery

Importance of court-imposed document preservation

Problems of excessive production

Problems of failure to produce clearly pertinent materials

Problems of nonreview of documents by parties seeking production

Panelists:

Allen Black  
George Davidson  
Joseph Garrison  
Arthur Greenfield  
Richard Manetta  
Chilton Varner  
Bill Wagner

Moderator: Professor Geoffrey Hazard (University of Pennsylvania)

12:00-1:00: Lunch (no organized activity)

1:00-1:30: **Report of results of FJC survey:** The Federal Judicial Center has performed a survey of recently-closed cases from across the country and will report its results.

Presenter: Thomas Willging (FJC)

1:30-2:00: **Report of Rand data on discovery:** Drawing on the data it developed in its study of the operation of the Civil Justice Reform Act, Rand has prepared a report on discovery activity.

Presenter: James Kakalik (Rand)

2:00-3:00: **Commentary on empirical data on discovery reform:** This would include not only the official commentators (thought to have about 20 minutes each) but also inquiry and comment from the floor.

Commentator: Professor Linda Mullenix (University of Texas)

Commentator: Bryant Garth (American Bar Res. Foundation)

3:00-5:15: **Lawyers' Panel on Uniformity and Disclosure:** This panel should focus on the various types of disclosure prescribed in Rule 26(a) under the 1993 amendments as well as the proliferation of local variations about these and other matters adopted in 1993 such as the moratorium on formal discovery (Rule 26(d)), the meet-and-confer session designed to develop a discovery plan (Rule 26(f) and the numerical limits on discovery events. Topics include:

Real extent of burden caused by local differences, and whether it is limited to certain types of rule provisions

Actual experiences of difficulties and/or advantages of Rule 26(a)(1) initial disclosure (e.g., does it facilitate more focused document production?)

Possible revisions of the Rule 26(a)(1) initial disclosure scheme; should it be made mandatory nationwide?

Values and drawbacks of requiring attorney conference to plan discovery (Rule 26(f)) and imposing moratorium on formal discovery pending that conference (Rule 26(d))

Functioning of expert disclosure pursuant to Rule 26(a)(2), and whether it has caused any serious problems

Possible arguments that local variation is desirable because it permits conformity to practice in state court (turning the shift to the Rules Enabling Act from the Conformity Act on its head)

Comparison of the significance of differences between districts and the significance of differences between individual judges

**Panelists:**

Patricia Benassi  
Elizabeth Cabraser  
Harvey Kaplan  
Robert Klein  
Hugh Plunckett  
Dan Webb  
Richard Willard

**Moderator:** Professor Arthur Miller (Harvard) or Professor Geoffrey Hazard (University of Pennsylvania)

5:15: Adjourn

6:45: Cocktail Hour (at Brookline Country Club)

7:30 Dinner (at Brookline Country Club)

Friday, Sept. 5, 1997

9:00-9:45: **The Advisory Committee's History of Discovery Containment:** This will be an academic-type presentation reviewing the Committee's efforts since 1970 to contain the discovery genie it released in 1938 without killing it. A principal goal will be to create a sense of *deja vu*, albeit not to indicate that there is any *res judicata* in the area of rulemaking. Few (if any) members of the Committee were deeply involved in the development of these earlier reforms.

Presenter: Professor Richard Marcus (Hastings)

10:00-12:00: **Proposals for Reform:** This will be the occasion for probing the bar groups reform ideas and reactions to possible reform proposals. Ideally, there will be something in writing from these groups that can be circulated in advance and summarized at the outset, perhaps by the moderator. Then representatives of the bar groups can address the various proposals under direction from the moderator (and hopefully also with some inquiries from the members of the Advisory Committee). The groups will designate their own representatives. The groups are:

ABA Section of Litigation  
American College of Trial Lawyers  
American Trial Lawyers Association  
Defense Research Institute  
Trial Lawyers for Public Justice  
Product Liability Advisory Council

Moderator: Professor Stephen Burbank (University of Pennsylvania)

12:00-1:00: Lunch (no organized activity)

1:00-2:45: **Lawyers' Panel on Reform Proposals:** This panel (like the two on Thursday) is intended to consist of "unaligned" lawyers (in the sense that they are not representatives of bar groups). The objective is to flesh out whether they agree or disagree with the ideas voiced before lunch.

Panelists:

William Bar  
Stuart Gerson  
Patricia Hynes  
William Jentes

Philip Lacovara  
Peter Langrock  
Alan Morrison  
Jerold Solovy  
Stephen Sussman

Moderator: Professor Arthur Miller (Harvard)

2:45-3:45: **Open mike session:** This hour is intended to permit others to express views on these topics to the Committee during the meeting. Of course, written reactions are also invited, but this hour should be of particular use to those invited guests who are not on panels and who wish to make some comments.

4:00-5:00: **"Alumni" panel on discovery reform:** This panel is intended to include a variety of people (many of them judges) who have past experience in discovery reform efforts to offer their views and advice for the Committee. The membership of this panel is presently being formulated.

Moderator: Honorable Edward Becker (3<sup>rd</sup>. Circuit)

5:00: Adjourn



**Participants in September Conference  
July 15, 1997**

The following list contains information on participants for the Discovery Conference being held by the Advisory Committee on the Civil Rules on Sept. 4-5, 1997, at Boston College. As the date of the event approaches, further names may be added.

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Benassi & Benassi

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Fine, Kaplan & Black

Professor Stephen Burbank  
University of Pennsylvania Law School

Elizabeth Cabraser  
Lieff, Cabraser, Heimann & Bernstein

Professor Paul Carrington  
Duke Law School

George Davidson  
Hughes, Hubbard & Reed

Joseph Garrison  
Garrison, Phelan, Levin-Epstein & Penzel

Bryant Garth  
Director  
American Bar Foundation



Stuart Gerson  
Epstein, Becker & Green

Mark H. Gitenstein  
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Arthur Greenfield  
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Professor Geoffrey Hazard  
University of Pennsylvania Law School

Deborah Hensler  
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Wharton, Levin, Ehrmantraut, Klein & Nash

Philip Lacovara  
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Peter F. Langrock

Richard Manetta  
Ford Motor Company

Professor Arthur Miller  
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Alan Morrison  
Public Citizen Litigation Group

Professor Linda Mullenix  
University of Texas Law School

Honorable Thomas Phillips  
Supreme Court of Texas

Hugh V. Plunkett, III  
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Jerold Solovy  
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Northeastern University Law School

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Wagner, Vaughan & McLaughlin

Dan K. Webb  
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Richard K. Willard  
Steptoe & Johnson

Thomas Willging  
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MEMORANDUM

To: Participants in Discovery Conference  
From: Rick Marcus, Special Reporter, Discovery Subcommittee  
Date: June 2, 1997  
Re: Possible ideas for rule amendments

The purpose of this memorandum is to identify a number of ideas for changing the discovery rules that might be the focus for amendment proposals by the Advisory Committee. Since the Advisory Committee decided to undertake a comprehensive review of the discovery rules, it has received a number of ideas for modifying Rules 26-37. Initially, various ideas were explored in a memorandum prepared by Reporter Ed Cooper for the Advisory Committee's October, 1996, meeting. A copy of that memorandum is attached hereto. Since that time, the Discovery Subcommittee held a mini-conference on discovery in San Francisco in January, 1997 (memorialized in a Feb. 6, 1997, memorandum I prepared that is attached hereto), and its members attended the Conference on the CJRA experience held by the American Bar Association in Tuscaloosa, Ala., in March, 1997. Beyond those conferences, the Committee has received suggestions for reform from individual judges and lawyers. In addition, the Federal Judicial Center has undertaken a survey of practitioners nationwide, and the results of this survey will be presented at the September Conference.

The purpose of the Advisory Committee's Discovery Conference at Boston College on Sept. 4-5 is to receive and begin an evaluation of ideas for reform as a predicate to making initial decisions about specific proposals at a later meeting. *Neither that Advisory Committee nor its Discovery Subcommittee has yet voted on (or even discussed in any detail) any proposal, and this listing therefore bears no such imprimatur.* Moreover, this listing is in no sense exclusive, as one objective of the Conference is to develop ideas, whether or not they have already been suggested. Nonetheless, because the focus of the Committee must shortly narrow it seems important to identify those ideas that appear to warrant attention before the Conference because they have gained currency in prior discussions involving Subcommittee members. Getting reactions from the bar to these ideas is among the objectives of the Conference.

Accordingly, the following listing is organized into what is hopefully a coherent arrangement. The sequence is not intended to suggest a hierarchy. On occasion references will be made to sources for additional information about specific possible amendments. Of course, participants at the Conference are invited to propose ideas not included on this list, and the Advisory Committee may eventually conclude that other ideas should be pursued. Nevertheless, it would be helpful if participants came to the Conference prepared to offer reactions to some of the following ideas for changing the rules.

1. *Narrowing the scope of discovery as defined in Rule 26:*

Rule 26 currently defines the scope of permissible discovery very broadly, and this broad scope is applied to all discovery tools. The American College of Trial Lawyers has proposed that this broad definition be narrowed to permit discovery only of material "relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party." The Advisory Committee circulated such a proposal for amendment to Rule 26 in 1978, but subsequently withdrew that proposal. References: Proposal of American College of Trial Lawyers (attached); Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 623-28 (1978).

2. *Reducing the burden of document discovery:* Although document production is an important source of evidence, it is also reported often to involve very great burdens on the producing party without corresponding advantages in production of useful information. Cases involving "one-way discovery," in which one party has voluminous materials and the other side has little or none, may present particularly vexing problems. Various methods of reducing this burden might be attempted:

(a) *Narrowing the scope of discovery for purposes of document requests:* Should a general narrowing of the scope of discovery not seem justified (see item 1 above) a significant reduction in unnecessary document production might result from narrowing the scope of discovery in Rule 34.

(b) *Guarding against inadvertent waiver of privileges:* One burdensome aspect of document production for the producing party is the need to cull all privileged documents from materials that will be made available in order to avoid arguments that production waived the privilege. A rule might be devised to insulate the producing party against waiver. Reference: Manual for Complex Litigation (Third) § 21.431.

(c) *Requiring advance judicial approval for document production:* Before 1970, parties seeking document production had to obtain a court order in advance. Such advance approval could again be required, perhaps only for document discovery beyond certain specified and basic documents.

(d) *Possible expense shifting to party seeking production:* Rule 45(c)(2)(B) provides for an order protecting a nonparty from whom documents are sought by subpoena against "significant expense resulting from the inspection or copying demanded." Former Rule 26(f), regarding the discovery conference, mentioned that "the allocation of expenses" might be considered at such a conference. In addition, Rule 26(b)(2)(iii) directs the court to protect a party against discovery when "the burden or expense of the proposed discovery outweighs its likely benefit," and Rule 26(c) authorizes a protective order to guard against "undue burden or expense." Despite this array of provisions, Rule 34

might be amended to provide specifically that the court could shift the cost of responding to a production request to the party seeking production, perhaps after initial production of basic documents.

(e) *Certification that all discovered documents were reviewed:* From the perspective of the producing party, one galling prospect is that, after the documents are delivered, the party who demanded production doesn't even bother to read them. A possible antidote would be requiring that party's lawyer to certify that the documents were reviewed. If so, it would seem prudent to insist also that the producing party certify that only requested materials were provided.

(f) *Document preservation:* In tandem with, or in addition to, limitations on document discovery, Rule 26 or Rule 34 could be amended to limit destruction of potentially discoverable materials. Reference: Manual for Complex Litigation (Third) § 21.442.

(g) *Pattern document discovery depending on case type:* Standard protocols of discovery could be devised for different types of cases (e.g., Title VII, securities fraud, ERISA, products liability) that specify the documents usually to be produced, and requests for additional material then would be subject to court approval and/or some scheme of expense shifting.

3. *Presumptive time limit for depositions:* Overlong depositions could be curtailed by setting a cap on their duration. The 1991 proposed amendments included a limitation of six hours per deposition. See Proposed Rule 30(d)(1), Proposed Amendments to the Federal Rules of Civil Procedure, 137 F.R.D. 53, 111 (1991). This limitation was not included in the final amendment package adopted in 1993. Either the 1991 proposal could be revived, or a similar one developed. Such a limitation might, for example, be combined with amendments to Rules 30 and 32 providing that objections except on grounds of privilege are not allowed and are not waived, thereby saving the time expended on such objections as to matters of form.

4. *National uniformity of discovery provisions:* National uniformity has long been a goal of the Federal Rules of Civil Procedure, but the 1993 amendments explicitly authorized districts to "opt out" of certain new provisions. The Federal Judicial Center has monitored the practices in different districts, and it may fairly be said that there is wide variation. Rule 26 could be amended to delete these authorizations for districts to "opt out" by local rule. Some observers have even suggested that the rules could also be amended to go beyond Rule 83 (which requires that local rules be consistent with national rules) affirmatively to limit or forbid adoption of local rules regarding discovery. If such a step were



taken, uniformity itself (in the form of a limitation in the discovery rules on local rulemaking) might be an ingredient in the national rules. Reference: Stienstra, Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rules of Civil Procedure 26 (attached hereto).

5. *Specifics of uniform rules:* Such uniformity would presumably require agreement about what the national rule should be on a number of topics:

(a) *Initial disclosure:* Rule 26(a)(1) has been the subject of much discussion. One option is to rescind Rule 26(a)(1) altogether, either as a failed experiment or as too controversial to impose as part of a uniform national scheme. Otherwise, the features of such disclosure would have to be adopted for all courts and would therefore have to be prescribed. Various issues including the retention of the particularity limitation adopted in 1993, the requirement that only a listing of responsive documents need be provided (as opposed to copies), and permission for the parties to stipulate out of the disclosure requirement could all be altered.

(b) *Attorney conference and discovery plan:* The Rule 26(f) conference would either have to be required in some format or abandoned. In this connection, it is worth considering whether disclosure (if retained) should be directed to occur before the conference (in order to ensure that the conference will focus productively on the issues raised) or if disclosure should itself be an issue for discussion at the conference, and therefore occur afterwards. It has been suggested, for instance, that disclosure is necessary to make the conference effective. On the other hand, the conference might be necessary to focus disclosure. (See also item 9 below.)

(c) *Discovery moratorium:* The Rule 26(d) discovery moratorium pending the Rule 26(f) conference was designed to ensure that the discovery plan would not be eclipsed by events occurring before the conference is held. Should the conference be retained, an independent question arises about whether the moratorium is necessary, or when it should be held inapplicable.

(d) *Numerical limitations:* Presently districts can adopt local rules regarding numerical limitations on various discovery devices. Were that permission withdrawn, any numerical limitations applied by rule would have to be in the national rules.

6. *Case tracking, standardized discovery, and treating "complex" cases differently:* In the alternative to the above ideas, or in addition to them, the rules could mandate one or more "standard" tracks for discovery including rather strict

numerical or scope limitations for various discovery devices. These might be keyed to the type of claim asserted. A rule could further provide that in "complex" cases additional discovery would be allowed under case-specific guidance of the court. This would entail defining "complex" cases and devising the presumptive numerical or scope limitations for "standard" track discovery.

7. *Limited initial discovery followed by settlement conference:* After limited initial discovery or disclosure, and before more expansive and expensive discovery, the parties could be directed to participate in a settlement conference. Reference: Peckham, A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution, 37 Rutgers L. Rev. 253 (1985).

8. *Standardized, brief, period for formal discovery:* The only "win/win" strategy identified by the Rand study was to limit the duration of discovery. To do so by rule would involve setting a presumptive duration (120 days?) for formal discovery. If adopted, such a scheme might be accompanied by rule provisions like present Rule 26(d) deferring commencement of formal discovery until after disclosure and/or a conference to devise a discovery plan, perhaps including also approval of such a plan by the court.

9. *Imposing a duty on counsel to cooperate in discovery without judicial involvement:* Rather than emphasizing judicial involvement, the rules could be amended to fortify the Rule 26(f) discovery plan and disclosure obligations so as to make this regime entirely self-policing in most cases. Paul Carrington, a former Reporter of the Advisory Committee, has outlined a general approach to accomplishing this objective. Reference: Carrington, Renovating Discovery (attached).

10. *Firm trial date:* Were it possible by rule, requiring that a trial date be set within a certain number of days from filing of the complaint, and adopting a presumptive time to trial, perhaps coupled with a standardized time limitation on discovery, would seem to comply with the Rand prescription for reducing delay without raising costs. (Note that this seems to fall more under the mantle of Rule 16 than the discovery rules; in that connection, one could propose moving the "disclosure" requirements now found in Rule 26(a)(3) into Rule 16 as part of final pretrial preparation. It might also implicate shortening the 120 day time for service of the complaint in Rule 4(m).)

11. *Enhanced cost-shifting in connection with discovery disputes:* Since 1970, Rule 37(a)(4) and Rule 37(b) have directed the court to impose costs on the losing party in discovery disputes in many instances. It is unclear, however, whether this cost-shifting has occurred routinely in most districts. In any

event, it might be preferable to enhance cost-shifting in order to remove the incentive lawyers might otherwise have to engage in discovery misconduct. This could be done by including all costs resulting (as opposed to the costs of making the discovery motion). In addition, it seems that the substantial justification provision of Rule 37(a)(4) has been interpreted to permit cost-shifting only when the losing party has no reasonable basis for its position, and that provision could be changed or eliminated to broaden the occasions for cost-shifting.

12. *Additional improvements or refinements in discovery rules:* Besides the foregoing changes, other amendments of a technical variety might be adopted to clarify the rules. I have prepared a separate memorandum listing some of these technical changes. In addition, experiences of individual judges or in individual districts suggest possible changes. For example, 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, and that in one district the duration of depositions is initially tied to the amount in controversy in the case. It is likely that other proposals will be forwarded to the Advisory Committee as it proceeds with its discovery project. Reference: Marcus memorandum dated June 2, 1997, on possible technical amendments to discovery rules (attached).

\* \* \* \* \*

As emphasized at the outset, the Advisory Committee's study of possible discovery amendments is just beginning, and new ideas are being solicited. Accordingly, the omission of an idea from the above list does not reflect a judgment on that suggestion or an indication that it would not be considered. In the same vein, the inclusion of an idea on the foregoing list in no sense means that the Committee will proceed to incorporate it into any proposed amendments.

**Attachments:**

Cooper Memorandum for October, 1996, Advisory Committee meeting

Marcus Memorandum on Jan. 16, 1997, mini-conference

Proposal of American College of Trial Lawyers (Item 1)

Stienstra, Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Response to Selected Amendments to Federal Rule of Civil Procedure 26 (Item 4)

Carrington, Renovating Discovery (Item 7)

SEPT. CONFERENCE

7

POSSIBLE AMENDMENTS

Marcus memorandum regarding possible technical changes (Item  
11)



**COOPER MEMORANDUM FOR OCTOBER, 1996,  
ADVISORY COMMITTEE MEETING**

## Rule 26: The Scope of Discovery

Discovery has been on the Advisory Committee docket constantly for three decades. The first stage of response was the 1970 amendments, which continued a process of expanding discovery. Responses since 1970, beginning with the 1980 amendments, have sought to gain greater control over the discovery process without limiting the general scope of discovery. Now it is proposed that the Committee once again consider serious proposals to narrow the scope of discovery that were first advanced twenty years ago.

The case is strong for embarking now on the necessarily long process of fundamental inquiry into the scope of discovery. Aching persuasive complaints continue to be made about the misuse, overuse, and abuse of discovery. Repeated inquiry will be required so long as many lawyers and clients believe the discovery system needs repair, whatever the fact may be. There is good reason, moreover, for beginning another round of inquiry now. The time for reporting on experience with local plans under the Civil Justice Reform Act has arrived. Local experiments with disclosure and discovery will be one of the central subjects of the report. The information gleaned from these experiments may provide a strong foundation for reform. More likely, it will help provide a foundation for better-planned empirical research. Whatever the level of information provided, it is important to face the information with a coherent set of questions about the need and the possible means of reform.

The observations that follow are not a rigorous agenda for study. They are more nearly reflections prompted by reading through the immensely useful "Material on Civil Rule 26(b) Scope of Discovery" prepared by the American College of Trial Lawyers Federal Rules of Civil Procedure Committee for the April, 1996 meeting. Occasional references are made to the materials, identifying them by the tab each item lies behind.

*Preliminary Reminder on Discovery*

The federal system that combines "notice" pleading with sweeping discovery seems to many a natural entitlement. The system places much of the responsibility for pretrial communication on discovery, as supplemented by the new Rule 26(f) meeting of the parties and Rule 16 pretrial conference procedures. The 1993 amendments, moreover, added the provision in Rule 11(b)(3) that approves pleading of specifically identified "allegations and other factual contentions" that "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Litigants who feel that they generally function at an information disadvantage as compared to their adversaries believe that this system is essential to support proof of meritorious claims. Product-liability plaintiffs, for example, and plaintiffs advancing claims under many contemporary regulatory schemes, often would be helpless if they were required to begin by pleading detailed information about the alleged wrongs. As noted below, many litigants continue to believe that discovery does not yield all the information they rightfully should have.

These strong feelings about the scope of discovery no doubt account for the fact that efforts to reduce the problems have focused on the procedure of discovery, not the scope. The question is whether still further changes in discovery procedure may provide effective relief, or whether it is time to restrict the scope of discovery.

*Other Sources of Dissatisfaction*

There are several sources of dissatisfaction with the scope of discovery that are seldom expressed openly. They should be considered nonetheless. If it should be found that much of the dissatisfaction arises from sources outside procedural rules, the case for amending the discovery rules would be weakened.



One cause for dissatisfaction is displeasure with the substantive rules enforced with the aid of discovery. The belief that the law is wrong naturally leads to resistance to discovery rules that help to uncover violations. Closely related to this feeling is a belief that remedies should be provided only for open and easily proved violations. If there is no more than the level of good-faith suspicion required by Rule 11, on this view, it is better for society that obscure and well-buried wrongs lie undisturbed. These views do not seem a promising foundation for discovery reform.

Another cause for dissatisfaction is the scope of trial evidence. Complex substantive rules have been matched by permitting complex methods of proof. The quest for information that may lead to discovery of evidence admissible under the wide-open rules that govern some trials can be indeed searching. So long as we want to have and enforce such complex rules, by way of trials on evidence that may seem to pass human understanding, these concerns also provide little basis for discovery reform. The alternative to complex trials based on overwhelming discovery may be complex trials based on overwhelmingly incomplete and misleading information.

It is important to bear these concerns in mind, and to seek to identify related concerns, in considering limits on discovery. The question is whether discovery yields benefits that justify the costs, and whether most of the benefits can be got at significantly less cost. It would be difficult — although not impossible — to justify restrictions on discovery on the ground that discovery is too effective a means of enforcing substantive rights.

#### *The Rule 26(b)(1) Proposal*

The proposal advanced again by the American College Federal Rules Committee is a modification of a proposal first advanced by an ABA Committee in 1977. The modification reflects the form adopted by the Advisory Committee when it adopted the proposal and

published it for comment in 1978. The Advisory Committee retracted the proposal in the materials that became the 1980 discovery amendments. The proposal was not forgotten. It was most recently circulated to the Advisory Committee in a November, 1990 memorandum. That it has not been adopted after repeated consideration is not ground for invoking principles of finality. The decision to try lesser measures first — including the not-so-modest disclosure rules that emerged from the deliberations that were under way in 1990 — does not foreclose reconsideration if the lesser measures have not proved as effective as hoped.

The proposal is easily stated. Rule 26(b)(1) should be amended by deleting reliance on "the subject matter involved in the pending litigation" as the measure of discovery:

(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.]

The American College Federal Rules Committee also suggests that much mischief has resulted from the addition in 1946 of the final sentence, which allows discovery of information reasonably calculated to lead to the discovery of admissible evidence.

The original ABA proposal actually advanced two means of narrowing the scope of discovery. In addition to deleting the "subject matter" test, it sought to add the limit that discoverable matters be "relevant to the \* \* \* issues raised by the \* \* \* claims or defenses \* \* \* of any party." The Advisory Committee dropped the "issues" limit, fearing that a new "issues" limit would "invite unnecessary litigation over the significance of the change."

This proposal reflects the belief that the scope of discovery has been allowed to expand too far, and that narrowing the scope will provide substantial relief from unnecessary discovery burdens. It must be examined from many perspectives, even accepting the debatable assumption that some further change should be made in discovery practice. Two perspectives are intrinsic to this proposal: has the "subject matter" term played a substantial role in the expansion of discovery? and how would litigants and courts respond to deletion of the term? The other perspectives cumulate in a single question: what alternatives should be considered?

Justice Powell's opinion in *Oppenheimer Fund v. Sanders*, 1978, 437 U.S. 340, 350-353, is frequently cited in the ACTL materials for the proposition that a broad meaning is attributed to Rule 26(b)(1)'s "relevant to the subject matter" test. This reliance is somewhat surprising. The underlying question went to the means by which plaintiffs in a class action could achieve access to information identifying class members. The court of appeals ruled that the information was available by way of discovery, and that the discovery rules controlled the allocation of costs for compiling the information. The Supreme Court disagreed, ruling that access to the information should be controlled by Rule 23(d). "The critical point is that the information is sought to facilitate the sending of notice rather than to define or clarify issues in the case." The Court did say next that the "relevant to the subject matter" phrase

has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. \* \* \* Consistently 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. \* \* \* Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

From this point, the Court went on to note that discovery can be denied as to claims or defenses that have been stricken, or as to

events before the limitations period that are not otherwise relevant. Turning to the names and addresses of class members, the Court ruled that this information "cannot be forced into the concept of 'relevancy' \* \* \* The difficulty is that respondents do not seek this information for any bearing that it might have on issues in the case." They sought the information to enable them to send class notice, a matter outside Rule 26(b)(1).

This language could easily be read to adopt even the ABA-proposed limit to "issues," and to show that even an issues limit will not significantly change the scope of discovery.

Perhaps more importantly, the Court's language reflects the function that long has been assigned to discovery. Discovery is designed not only to support or refute issues defined in the pleadings, but to continue the process of refining the issues framed by the pleadings, discarding some of these issues, and adding new issues. In practice, discovery sweeps beyond the claims or defenses framed by the pleadings. It will take a very clear signal to change this ingrained custom.

Quite apart from the language of a particular opinion, the most important task is to identify and to articulate clearly any change to be made in the scope of discovery. The more indeterminate the language change in the rule, the more important it will be to rely on the less certain path of Committee Note and other pronouncements. Simply striking "subject matter" from the rule without any explanation would do very little. A clear statement that the Committee believes that discovery has gone too far in some cases and needs to be restricted would do little more. Better guidance is needed to effect a fundamental shift. Nor is it likely to be better to add a mere reference to the "issues raised by the claims or defenses of any party." A claim or defense can "raise" issues that are not identified in the pleadings; indeed, it is easy to understand a "claim" or "defense" to include anything that will allow a party to prevail on the merits.

A potentially more effective approach would be to limit discovery to matters relevant to the issues framed by the pleadings. Since notice pleading often does not identify issues with much clarity, thorough pursuit of this alternative would require a complete reworking of notice pleading as well as discovery. If the time has not come for such drastic measures, a more modest approach could attempt to build on the approach taken to Rule 26(a)(1)(A) and (B) disclosure. Troubled by the frequent comments that disclosure could not be managed in light of the open-ended complaints often encouraged by notice pleading, the Advisory Committee worked out the test that limits the disclosure requirement to material "relevant to disputed facts alleged with particularity in the pleadings." The Committee hoped that this limit not only would provide manageable guidelines, particularly with the support of the Rule 26(f) meeting of the parties, but also would encourage more helpful pleading. Although Rule 26(a)(1) has not been in operation long enough — or widely enough — to yield much useful information on how it will come to work, there may be enough experience to help shape a parallel approach to the general scope of discovery.

The proposal to cure the ills of modern discovery practice by amending the scope of discovery defined in Rule 26(b)(1) must overcome these formidable difficulties. It would be relatively easy to draft a truly revolutionary change in direction. Although many years of experience would be required to work through the unintended consequences that would follow, such consequences are the price of dramatic procedural reform. It is much more difficult to draft and implement more modest restrictions. That difficulty may account for the focus of past reforms on the procedures of discovery, not the scope. And that difficulty warrants exploration of alternatives that do not address the basic scope of discovery.

#### *Party-Controlled Discovery*

Whether benign or malign, the guiding genius of modern

discovery has been reliance on party control. In some ways, the most fundamental challenge of discovery reform lies in this procedural fact. Whatever scope may be assigned to discovery by Rule 26(b)(1), the system will work only as well as the subjective good faith and objective skills of the parties allow. We do not have, and are not likely to find, judicial resources to control more than the more obvious excesses. Judicial resources will not be found to cure the inadequacies. Judges cannot, in our system, take over control of any system of discovery that bears any resemblance to the present system. The most pressing question of discovery reform is whether any system resembling present practice can be made to work.

The prospect that party-controlled discovery remains feasible is supported by at least two sources of information. The first arises from empirical studies going back twenty years and more. These studies found that there is no discovery at all in a significant number of cases, that discovery is reasonably proportioned to the needs of most cases, and that serious issues of discovery misuse arise in only a small fraction of all cases. The earlier study was directed by Professor Maurice Rosenberg for the Columbia University Project for Effective Justice, a Field Survey of Federal Pretrial Discovery - Report to the Advisory Committee on Rules of Civil Procedure (February, 1965). A more recent project is reported as Connolly, Holleman & Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery (Federal Judicial Center 1978). The other source of information is the familiar anecdotal source. The testimony and comments during the period that led to the 1993 discovery amendments suggested that discovery is not a serious problem in most cases, but that it can be a very serious problem in some cases. Time and again, the comments and testimony suggested that the best cure is not in rule reform but in judicial control. Give us a judge who becomes familiar with a case early and takes control, they said, and we have a workable system now. One of the most important questions is whether the time has come to attempt to test this anecdotal

information by another rigorous study. Many changes have been made in the discovery rules since the FJC study. Unless the RAND report on CJRA experience proves remarkably informative, another FJC study may be a central ingredient in any new wave of reform.

One obvious set of questions for a new study would be whether excessive discovery can be correlated with easily identified characteristics of litigation. Common invariables include the subject-matter, amount in controversy, number of parties, part of the country, and similarity of federal practice to state practice. Experience with "tracking" systems that respond to these and other variables would be a central part of this inquiry.

One of the more elusive questions that might be pursued in a new study would ask about the sources of whatever excessive discovery might be found. "Misuse" may be thought of as arising from inept use of the discovery tools. It can arise from lack of experience, the ease of relying on standardized discovery practices without thinking about the needs of each specific case, or the phenomenon of "litigators" who have little if any experience with the actual needs of trial. There may be other sources as well. "Over use" may be thought of as discovery out of proportion to the reasonable needs of the case. It may be client-directed. It too may result from lawyer ineptitude. Or it may be caused by hourly-billing greed, or possibly by fear of malpractice exposure. "Abuse" may be thought of as deliberate pursuit of discovery to inflict delay and burden on an adversary, or even inquiry made for the purpose of acquiring information for nonlitigating purposes. Abuse too may be client-directed, and indeed it may be wondered whether "scorched-earth" discovery often combines the wishes of clients with the practices of lawyers who are retained in hopes of maximizing the potential use of discovery to harass and oppress. We should know more than we do about the sociology and psychology of discovery, and if possible we should know about it for different areas of the country.

Pessimists may fear that study will reveal that the working

ethic of the adversary system has declined to a point that precludes continuing reliance<sup>↑</sup> on party-directed discovery. There is continuing reason to hope, however, that the basic framework remains sound. And it seems certain that reform cannot yet assume to abandon the premise of party control. The question will come back to choice between doing nothing, attempting to revise the basic scope of discovery, and seeking to devise yet different means of making discovery work well without changing the basic scope.

### *Under-Discovery*

Before turning to alternative means of control, it must be recalled that excessive use is not the only discovery problem. Drawing from work by then-Professor Brazil, the comments of the United States Chamber of Commerce on the proposals that led to the 1993 discovery amendments suggest that "litigants still believe that they have not obtained the information they need to properly try their cases." (ACTL tab 10, p. 3.) It is possible that the tools and scope of discovery are too limited, not too broad. Instead, the problem — if it exists — may be that existing tools are not used effectively.

Another possibility is that discovery demands are not met in good faith. Whether clients or lawyers are responsible, there may be outright suppression of requested information. Perhaps more likely, poorly framed demands may be construed in self-serving ways to "justify" responses that omit the most useful information. And anecdotes continue to abound about the waves of document responses that do provide the critical documents but manipulate the context to obscure them as much as possible.

Even in reasonable good faith, another explanation for under-discovery may be that clients simply do not try hard enough. Thorough compliance can prove costly in direct terms. The indirect costs of distraction from life- and business-as-usual are often more important, even if less noticed by some lawyers.



Still another explanation may be that desired information does not in fact exist. It is easy for a partisan to believe that full and honest responses by an adversary would readily prove the justness of the cause. Subjective suspicions do not of themselves establish suppression.

It seems fair to assume that discovery does not always yield all of the useful information that exists to be disclosed. That inevitable assumption does not show how often it falls short, nor by how far. It is not even a particularly useful argument against narrowing the scope of discovery or imposing other limits. But it may provide a useful point for evaluating new proposals. If discovery does not now yield all useful information, how much more would be lost if new limits were imposed? It would be a triumph to design a system that inflicts lower costs but yields almost as much useful information as the present system. Success may be found in systems that yield closer balances between costs saved and information lost. But attention must be paid to the information lost as well as the costs saved.

#### *Alternative Proposals*

A number of alternative proposals have been advanced. Most of them could be combined with revision of the Rule 26(b)(1) scope provision. Some go directly to the (b)(1) provision. Several of these alternatives are gathered here, in no particular order.

Different Rules for Documents. In placing the scope of discovery on the Committee agenda, it was suggested that document discovery seems to be a principal source of discovery problems. The 1993 discovery amendments established presumptive limits for the numbers of depositions and interrogatories, but did nothing to affect the frequency or extent of Rule 34 demands. It has been suggested that parallel changes might be made to Rule 34, limiting the number of documents that may be demanded or limiting the total number of "pages" that must be produced. This suggestion seems unworkable. The demanding party has no way of knowing how many documents are

involved with a particular request, no way of knowing the number of pages involved, and no way of relying on the producing party to select the most important materials to fill whatever limits might be set.

A more cogent suggestion is that the scope of document discovery should be distinguished from the general Rule 26(b)(1) scope of discovery by other means. The distinction could be incorporated in Rule 26(b)(1), in Rule 34, or both. Any of the limits that have been proposed for 26(b)(1) could be adopted for Rule 34 alone. Or the procedure for Rule 34 production could be changed. History provides interesting lessons. In 1938, the "relevant to the subject matter" standard of Rule 26(b) applied to depositions. Rule 34 provided for production of "designated documents \* \* \* which constitute or contain evidence material to any matter involved in the action." Rule 34 further provided for production only on motion showing "good cause." Rule 26(b) was amended in 1946, and Rule 34 was amended at the same time to incorporate the "scope of examination permitted by Rule 26(b)." In 1970, Rule 34 was further amended to delete the motion and good cause requirements. The motion and good cause requirement could be restored. This step might not impose great burdens on the courts. "Meet and confer" preconditions and Rule 26(g) sanctions could reduce actual resort to motions considerably. The effect of adding a motion requirement would be to change the balance of discovery bargaining more than to force actual motions.

Another suggestion, aimed at ensuring compliance rather than reducing burdens, is that increased obligations be placed on counsel to ensure and to certify that clients have in fact produced all the documents demanded.

Tracking. Tracking cases for discovery according to simplified criteria has been practiced in various forms in many courts. There is a persisting strain of thought that a single system of discovery cannot work properly for all cases in federal courts, however large or small, however simple or complex, however important or

unimportant beyond the immediate parties, however different in other dimensions. Local plans adopted under the CJRA will provide evidence on some of the actual experience. This experience should be studied with care.

State Facts That Define Relevance. Another suggestion is that a party demanding discovery should be required to state the facts that make the requested information relevant to the action. Careful drafting would be needed to achieve workable measures of what constitutes a "fact" for this purpose, and of what establishes "relevance" if the result is to restrict present discovery practices. One obvious model would be to require gradually stricter standards of pleading as discovery progresses, whether or not the discovery-demand documents were formally characterized as pleadings. If strict demands are exacted early in an action, the result could be a substantial change in the present system that relies on discovery to facilitate actions filed on the basis of imprecise information.

Direct Relevance. One proposal is that the scope of discovery be limited to facts that are "directly relevant" to the litigation. This proposal might be coupled with deletion of the provision that permits discovery of information that "appears reasonably calculated to lead to the discovery of admissible evidence." It is not clear who would administer this limit, or how. If primary reliance is to be placed on the responding party, there might be a particularly sharp reduction in the information supplied by responses to Rule 33 interrogatories and Rule 34 requests to produce.

Disclosure. After another two or three years of experience with disclosure and Rule 26(f) meetings, it may be appropriate to consider changes in the balance between disclosure and discovery. Initial disclosure requirements could be expanded. The option in Rule 26(a)(1)(B) to "describe" documents could be deleted, requiring production as part of the disclosure. With or without these changes in disclosure, success with disclosure and Rule 26(f)

meetings might justify some reduction in the scope of discovery.

Expense Allocation. Many means could be devised to reallocate the costs of complying with discovery demands. Former Rule 26(f), added in 1980, provided a discovery conference procedure that the Advisory Committee did not contemplate would be used "routinely." One of the provisions buried in the description of the order to be entered after the conference was that other matters could be determined, "including the allocation of expenses." There was no elaboration of this cryptic phrase in the Committee Note. The proposals that led to the 1993 discovery amendments advised abolition of the Rule 26(f) discovery conference because it had been seldom used and to little effect. The substitution of the meeting of the parties provision now in Rule 26(f) came as part of the continuing development of the disclosure provisions. The bemusing provision for an allocation of expenses might be revived as a more pointed power. A more specific provision might be modeled on Rule 45(c)(2)(B), which provides that an order to compel production of documents "shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection or copying demanded." A Rule 34 analogue to this provision could be drafted with little difficulty.

Provisions that shift the costs of discovery compliance are calculated to work systematically in favor of parties who typically have more information about the subjects of litigation, and against parties who typically have less information. Individuals suing governments or business entities are most likely to suffer the consequences. It does not seem likely that the time has come to adopt a rule requiring that the demanding party bear the expenses of interparty discovery, nor even that the expenses be divided equally. It may be possible to develop more subtle and nuanced approaches, but the task will be formidable.

Increasing Party Responsibility. The present system provides two direct approaches to responsible discovery practice. Rule 26(g) applies to "[e]very discovery request, response, or objection." It

requires the attorney — or a party who has no attorney — to certify that the discovery move is not based on an improper purpose, and that it is "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." Rule 26(b)(2) provides that the court shall limit the frequency or extent of use of discovery methods in circumstances that seem to encompass virtually all potential misuses.

This two-pronged approach to maintaining balance in discovery has not satisfied the critics. Neither assigning initial responsibility to the parties nor giving direct backup responsibility to the courts seems to have been fully effective. There may be some means of increasing the responsibility of the parties to implement directly the many laudable phrases of balance and containment set out in Rule 26(b)(2). This possibility raises all of the questions that surround the attempt to combine cooperative party discovery with adversary party settlement and trial.

One means of reallocating responsibility would be to adopt a presumptively narrow test of discoverability, subject to expansion. There is a vague parallel in the presumptive limits established in 1993 for the numbers of depositions and interrogatories. But this approach would cut deeper, and would cut far deeper if the presumptive limits were narrow. The hope might be that the parties could work out sensible discovery programs without need for frequent court orders, and that Rule 26(f) meetings would be more productive if more important.

Deposition Time Limits. The discovery rule proposals published for comment in August, 1991 included a proposed Rule 30(d)(1) that might be reconsidered for adoption:

- (1) Unless otherwise authorized by the court or agreed to by the parties, actual examination of the deponent on the record shall be limited to six hours. Additional time

shall be allowed by the court, if needed for a fair examination of the deponent and consistent with the principles stated in Rule 26(b)(2), or if the deponent or another party has impeded or delayed the examination. If the court finds such an impediment, delay, or other conduct that frustrates the fair examination of the deponent, it may impose upon the person responsible therefor an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

The Note contemplates that the six-hour limit applies to examination by all parties: "Experience in courts that have imposed such limits by local rule or order demonstrates that, when a deponent is to be examined by more than one party, counsel can usually agree on an equitable allocation of the time permitted."

Defer Discovery Pending Motions. Taking a page from the 1995 Securities Litigation Reform Act, a general provision could be adopted to regulate discovery while Rule 12(b) motions are pending. Discovery would not be suspended completely -- at a minimum, many Rule 12(b) motions turn on fact disputes that may require discovery. And provision must be made for preserving discovery opportunities that may vanish. Some provision must be made for cases in which discovery relevant to the motion also bears on the merits -- disputes about transaction-based personal jurisdiction are the most obvious example. The effects on motion practice also must be considered.

Nondiscovery Alternatives. Rule 29 provides that the parties may "modify \* \* \* procedures governing or limitations placed upon discovery." The limits of this provision are not clear. Parties concerned about modification of a stipulated protective order, for example, might attempt to stipulate additional protections by making an exchange of information entirely outside the formal discovery system. Rule 29 might be modified to encourage agreements that provide for information exchanges that are not formally governed by Rules 26 through 37. The incentive to create workable cooperative systems might be sufficient to overcome the disincentives that commonly arise when the parties have unequal

access to information outside discovery.

*A Cautionary Postscript*

Several Advisory Committee members attended the March, 1995 Conference on the Federal Rules of Civil Procedure co-sponsored by The Southwestern Legal Foundation and The Southern Methodist University School of Law. The Conference focused on discovery and class actions. The Reporter, Professor Geoffrey C. Hazard, Jr., submitted a summary that included the following remarks about discovery:

Civil claims are an integral part of law enforcement in this country. Many civil actions, particularly those where discovery is burdensome, are in effect "private attorney general" suits. Liberal discovery is an integral part of effective enforcement, as evidenced by the free range traditionally accorded the grand jury and afforded to administrative agencies in modern government. Hence, the scope of discovery determines the scope of effective law enforcement in many fields regulated by law.

Comprehensive limitation of discovery thus implicates major social issues, particularly rights of individuals as against organizations public and private. It is doubtful that comprehensive limitation of discovery would be politically acceptable. It is also doubtful that such limitation would be socially desirable in the long run. Law enforcement through civil justice is burdensome and expensive, but the alternatives would be much reduced enforcement or enforcement through public bureaucracies.

An acceptable approach to excess in discovery requires two principal measures. One is to develop much better knowledge about discovery abuse. There is reason to think that abuse occurs only in a small percentage of cases and that abuse occurs disproportionately in "big" cases. However, much more systematic investigation is required to gauge the contours of this and other judicial administration problems.

The second measure is to revise the present discovery rules to permit better control of discovery, particularly in the types of cases where abuse exists or is perceived to exist.

The impact of discovery on settlement also needs to be

reckoned. Complaints about the burdens of discovery frequently include the statement that large institutional litigants are compelled by the costs of discovery to settle nuisance claims that would be easily defeated, or not be brought at all, in a less expensive system. A variation of this complaint is that even in reasonably based actions, overbroad discovery may be used deliberately as a tool to coerce settlement. These arguments certainly seem to counsel reduction of discovery. Discovery, however, also may be important in fostering settlement for good reasons. A major obstacle to settlement arises from differing estimates of probable outcomes on the merits. Discovery can bring the parties' estimates together and promote settlement. Reduction of discovery may lead to fewer desirable settlements as well as fewer coerced settlements.

The long history of attempts to contain discovery shows that the stakes are great and the task is difficult. "Tinkering changes" are not likely to do much good. Careful work, spread over several years, will be required to support more fundamental but more useful improvements.





**MARCUS MEMORANDUM ON**  
**JANUARY 16, 1997, MINI-CONFERENCE**

MEMORANDUM

To: Discovery Subcommittee, Civil Rules Committee  
From: Rick Marcus, Special Reporter  
CC: Judge Niemeyer, Ed Cooper, Tom Willging  
Date: Feb. 6, 1997  
Re: January 16 events and next steps

The purpose of this memorandum is to provide a mixture of minutes and a reaction with regard to both the January 16 morning meeting of the Discovery Subcommittee and the afternoon session (which might be called a mini-conference on the current state of discovery and prospects for improvements via rule changes). Even though it involves inverting the actual order of events, the memorandum reviews the afternoon's activities first and then addresses the business of the morning session.

Essentially the afternoon session provided an opportunity for Subcommittee members to hear the views of an array of capable and experienced litigators. These lawyers were not selected as a representative sampling of the federal bar. To the contrary, the goal was to invite outstanding and very experienced litigators. Although several of them are affiliated with organizations such as the Section of Litigation of the American Bar Association, the American College of Trial Lawyers, and the American Trial Lawyers Association, they usually spoke for themselves.

Under these circumstances, it seemed that the most useful method of memorializing the event would be to review the tape recording and organize the comments in a way that suggests directions for the Subcommittee's future efforts. Should any members of the Subcommittee wish copies of the tape recordings, those can be provided. (Copies have already been provided to Tom Willging of the Federal Judicial Center.) Despite the lack of scientific sampling, both the diversity of views on some subjects and the apparent unanimity on others provide a foundation for the Subcommittee to begin its further work. In the future this memorandum might afford a useful introduction to the Subcommittee's work for other members of the Advisory Committee.

The following roadmap may assist in orientation to the sections of the memorandum:

Organization and background of the mini-conference--pp. 2-4

Rand Study results--pp. 4-8

Lawyers' opinions:

What's good and bad about discovery--pp. 8-13

Possible solutions to these problems--pp. 13-17

Attorneys' priorities in discovery reform--pp. 17-19

Paul Carrington's recap--pp. 19-20

Business meeting of Discovery Subcommittee--pp. 20-21

The next steps--pp. 21-24

Attachments:

Invitation letter to mini-conference (referenced on p. 2)

FJC time line for empirical research (referenced on p. 21)

Marcus Nov. 20 memo regarding possible issues for September Conference (referenced on p. 23)

ORGANIZATION AND BACKGROUND OF MINI-CONFERENCE

Some background on the objective of the afternoon event seems in order. The thrust was summarized in the invitation letter, a copy of which is attached to this memorandum. The letter also identifies the participants, who will be referred to frequently below, although some changes were necessary. Elizabeth Cabraser was unable to attend, for example, and her partner James Finberg appeared in her stead.

As was done at the beginning of the conference, it is useful to set the stage for the lawyers' input. Although discovery got generally good reviews through about 1970 as a method for avoiding trial by surprise and promoting sensible settlements, it has been pilloried regularly for a quarter century. Nonetheless, various empirical studies of discovery have not revealed such widespread problems as the level of complaint would suggest should be found. Hence Panel I focused on what's good and bad about discovery.

Things have not stood still since 1970. On three occasions the Advisory Committee has proposed, and the Supreme Court has adopted, changes to the rules designed to improve the situation. In 1980 the discovery conference was introduced and Rule 34 was amended to require that documents be produced either according to the requests or as kept in the producing party's files. In 1983, more aggressive changes were made. The sentence formerly in Rule 26(a) that seemed to invite unlimited discovery was deleted and the proportionality principle was written into the rule. In addition, a certification requirement in connection with discovery was added to parallel the changes made that year in Rule 11. Finally, in 1993 more extensive changes yet were made. Initial disclosure and routine expert witness disclosure were added to Rule 26(a), and the Rule 26(f) meet and confer

requirement was added. In addition, numerical limitations were placed on depositions and interrogatories and Rule 30 was rewritten to circumscribe attorney behavior during depositions. Finally, Rule 37 was amended to require that lawyers try to negotiate their discovery differences before moving to compel.

Although the number of rule changes actually made has been considerable, it is also important to remember that others have been formally proposed and withdrawn. Thus, in 1978 the Advisory Committee formally proposed narrowing the scope of discovery (as now re-proposed by the American College of Trial Lawyers) but this idea was withdrawn in 1979. The 1980 discovery conference proved such a failure that the 1991 package of proposed amendments recommended deleting it altogether. Meanwhile, the Advisory Committee voted in early 1993 to retract the 1991 proposal for initial disclosure, and then disinterred it with a narrower focus (disputed facts alleged with particularity) coupled with the Rule 26(f) conference, something of a lineal descendent of the lamented discovery conference introduced in 1980. This record of "false starts" provides reason for caution. Against this background, Panel II addressed possibilities for further change that would improve matters.

As a closing link to the past, it is worthwhile to recall the comments of Judge Mansfield (chair of the Advisory Committee) about the Committee's 1979 decision to abandon the proposal to narrow the scope of discovery. As Ed Cooper has noted, there is surely no preclusive force to that decision, but the explanation has a notably contemporary air (85 F.R.D. at 541):

Comments received in response to the Preliminary Draft were generally opposed to any change in Rule 26(b)(1). Many believe that the present rule is working well. A number disputed the assumption that there was general abuse of discovery. Others believe that abuse is limited to big or complex cases, which represent a small percentage of all litigation and can be better managed through use of the Manual for Complex Litigation, which is specially designed to deal with discovery in such cases. It was thought that a change in language would lead to endless disputes and uncertainty about the meaning of the terms "issues" and "claims or defenses." It was objected that discovery could not be restricted to issues because one of the purposes of discovery was to determine issues (e.g., in wrongful death, product liability and medical malpractice suits). Many commentators feared that if discovery were restricted to issues or claims or defenses there would be a return to detailed pleading or a resort to "shotgun" pleading, with multitudes of issues, claims and defenses, leading to an increase in discovery motions without any reduction in discovery. Some suggested that the better way of avoiding

abuse of discovery would be to increase judicial supervision from the outset, fixing limits on the time and extent of discovery to be permitted according to the needs of each case.

#### RAND STUDY RESULTS

To acquaint participants with the latest empirical information on federal litigation innovations, Jim Kakalik of the Rand Corporation provided an overview of the Rand study of the CJRA pilot districts, with particular emphasis on discovery.

Rand compiled what Kakalik called the "largest and most comprehensive database ever done on the federal courts." It focused on the ten pilot districts designated in the Act, and ten comparison districts. These twenty districts included the four largest in the nation (two pilot, two comparison) and others of all other sizes. Statistical tests showed that the two groups of districts were comparable overall. Together, they include about one-third of all district judges in the nation and receive about one-third of all civil filings in the nation. From these districts, Rand gathered information on a sample of 12,000 civil cases. Half of these closed before the CJRA plans went into effect, and half afterwards. Rand also surveyed some 20,000 attorneys and 40,000 litigants concerning these cases. It even had judges filling out time sheets to record their activities in connection with the cases.

Using a multivariant statistical analysis method to estimate the relation between techniques of judicial management and measurable outcomes, Rand undertook to accomplish three things. First, it described the actual procedures in each of the 20 districts before and after the CJRA was implemented. Second, it evaluated the procedures used in terms of effects on (1) time to disposition, (2) costs to parties, counsel and the legal system, and (3) participant satisfaction. Third, it was expected to make proposals on the basis of its findings.

As an overview, the study showed that CJRA did not cause major changes in operation of the districts studied. Many districts concluded that their existing practices conformed to the CJRA, and therefore that they did not need to do anything differently. Most districts made no large changes, and even in the pilot districts 85% of the judges said that they made no major changes. Moreover, there was no statistically significant difference between the pilot and comparison districts in terms of time to disposition, cost of litigation or perceptions of fairness. At this sort of macro level, then, the Rand study offers few insights for the Subcommittee's work.

Focusing on particular areas does provide insights, some of

them counterintuitive.

### Early judicial management

First, Rand studied the effects of early judicial management, which it defined as judicial involvement within six months of filing. This judicial activity did have two significant effects. First, it reduced time to disposition. If it did not involve setting a trial date, early management nevertheless reduced time to disposition by about 10%, and if it involved setting a trial date it reduced time to disposition an additional 10%.

The second effect was financial; these gains in speed came at a price. As Kakalik put it, the study debunked the myth that time and costs are linked inextricably in the sense that reducing time to disposition also will reduce costs. To the contrary, early judicial management resulted in increased costs of \$3,000 (or 35 hours of lawyer work) per litigant. This was a net increase in overall costs of the litigation, not merely the acceleration of costs that would have been incurred anyway, and it reached the level of statistical significance. Not only did the lawyers do the same work in fewer days, but they did work they would otherwise not have done. In particular, management itself calls for lawyer effort, and discovery cutoffs mean that discovery must be begun and performed in cases in which it might otherwise not occur because the cases would settle. (Keep this in mind in relation to shortening the period allowed for discovery, discussed below.)

### Discovery controls

Early discovery cutoff: Kakalik described reducing the time allowed for discovery as a win/win proposition. It reduced the time to disposition by about 10% and reduced the cost of litigation by about 20% without leading to any change in satisfaction. (This seems somewhat at tension with the idea noted above that judicial management results in possibly avoidable discovery costs because parties are forced to embark on discovery due to discovery cutoff dates.) All districts studied reduced the median time for discovery, but the districts that had the highest medians before CJRA reduced their time for discovery by more than the districts that began with a shorter time for discovery. The districts that had been fastest cut about half a month and the ones that had been slowest cut about two months. Kakalik saw these diminishing returns as indicating that there was "less room to move" in the faster districts, but the Rand study did not provide a basis for concluding what might be the irreducible minimum time for completion of discovery.

Other discovery management techniques did not appear to have

a statistically significant impact. Limitations on number of interrogatories had no effect because they were "easily circumvented." Limitations on the duration of depositions were not implemented in enough districts to permit Rand to draw conclusions. Requiring the parties as well as counsel to sign discovery papers and other documents regarding postponement of litigation was not adopted in any of the studied districts.

Case differentiation for discovery: Grouping cases for assignment to differing discovery tracks similarly did not prove an important method of reducing costs or delay. The difficulty seems to be that assigning cases to tracks doesn't work on the basis of objective data that can be gleaned from the civil cover sheet at the time of filing. Rand concluded that such factors as the nature of the litigation, the number of litigants or the number of attorneys did not provide a useful indicator whether a case should be assigned to a certain track. Kakalik's conclusion was that to track effectively it is necessary to have input from the attorneys and for the judge to make a subjective assessment of the individual case.

Disclosure: Rand similarly was unable to reach any conclusion about disclosure's effects, and did not find evidence supporting the views of either the advocates or the opponents of disclosure. There was no explosion of satellite litigation, as feared by some, but there was no statistically significant effect on time or cost either. The data studied by Rand qualify these conclusions, however. Thus, it put together its sample in mid-1993, before Rule 26(a)(1) went into effect, and the Rand data accordingly do not evaluate the operation of that rule. (Kakalik noted, however, that the ABA did a survey of the first year's experience with 26(a)(1), and that the ABA survey's conclusions were "consistent" with those reached by Rand.)

Focusing on the effect of CJRA, Rand found that the Act had only a moderate effect on prevalence of disclosure in actual cases. The survey showed that, even before CJRA, some 40% of respondents had exchanged information without formal discovery. In the six districts that adopted voluntary disclosure, that figure rose to 45%. In the six districts that adopted mandatory disclosure, it rose to 60%. But was this real or pro forma? Respondents said that 43% was pro forma and 57% was real. Either way, there was no statistically significant effect Rand could find on cost or duration of litigation.

The satisfaction returns were more favorable to disclosure, however. Overall, attorneys really don't like a blanket policy, particularly one that requires disclosure of harmful information. But the attitudes of those who had participated in disclosure seemed markedly different. With regard to cases in which there was disclosure, 89% of the judges and 71% of the lawyers favored



requiring it in that kind of case. Kakalik had no explanation for this high level of support despite the absence of a statistically significant indication that disclosure results in savings of time or money.

#### ADR

ADR had no major effect on time to completion, cost of litigation or satisfaction. Once litigation began, reference to ADR was neither a panacea nor a terrible development. The only notable effect was that it increased the likelihood of a non-zero outcome, as fewer cases referred to ADR were dismissed by plaintiffs or decided against them. The participants liked the ADR programs, however, and thought that they should be continued, even though there was no statistically significant improvement in litigant satisfaction.

#### Rand recommendations

At the policy level, Rand concluded that judicial management does little to reduce costs, with only the discovery cutoff having positive effects by the measures employed. Case management explained only about 5% of the variation in attorney work, with complexity and stakes of litigation accounting for the rest. It did, however, have a substantial effect on time to disposition, where about 50% of observed savings were due to management.

Given those conclusions, the Rand report proposes a tripartite package: (1) early judicial management, (2) early setting of trial date, and (3) reducing the time to the discovery cutoff. The cost savings from shortening the time for discovery should offset the cost increases due to early judicial management and thus accelerate the disposition of litigation at no net cost increase. Rand will be briefing the Attorney General and members of Congress on its report at the end of January, and it looks toward the reconvening in February of the Brookings Task Force that originated the proposals included in Sen. Biden's first CJRA legislation.

#### Rand assist on empirical examination of discovery

Although Rand's study did develop information described above bearing on discovery innovation, its database could provide a lot more information. Kakalik closed with a description of the kinds of additional information that could be obtained:

We really do have a lot of information on discovery that we haven't analyzed fully yet. I've got information on the number of discovery motions, how many hours each lawyer spent working on discovery. I've already said we know how

much time was allowed for discovery. We have the judges' and the lawyers' opinions of the complexity of the case with respect to discovery. We know whether early disclosure took place and whether it was pro forma or not. We know whether or not the judge or the magistrate judge on the case spent any significant time managing discovery. We know whether a discovery plan was submitted. We could look at, but we have not yet done in detail, things like looking at the cost of discovery or the time for discovery, or the effect of disclosure, and how that varies by the type of case or the type of lawyer, plaintiff's versus defendant's, small firm-large firm, hourly, contingent, government lawyer. There are all sorts of things that we didn't have time to do-- complexity of the case, the variation of discovery by the stakes of the case. We would be happy to try and assist the Committee and the FJC in any way we can in targeting things specifically to your needs.

#### LAWYERS' OPINIONS

The heart of the mini-conference consisted of the two lawyer panels, and the opinions they expressed can be organized in roughly the same categories as the panel topics--current conditions of discovery and measures for improvement. Since the group was not representative it is difficult to specify the importance of agreement among those present, but it did seem that on several topics they agreed. On others, however, there was clear disagreement. Efforts will be made to portray both the areas of agreement and those of disagreement.

#### What's good and bad about discovery today

Awareness of judges: To begin with an area of seemingly unanimous agreement among the lawyers, it became apparent they believe district judges are not aware of the costs of discovery. This ignorance stems from their structural isolation from the trenches of discovery activity, and in the second panel prompted the panelists to suggest that the judges present simply could not, from their own experience, appreciate the realities of contemporary discovery in federal litigation.

Conditions are generally satisfactory: Another seemingly widespread view was that, although not perfect, discovery in federal court is not a pervasively horrible thing needing radical change. Thus, a number of lawyers said that, for most cases, the current rules work just fine. As Barbara Caulfield put it, "The rules are fine, but managing is the problem." An undercurrent seemed to be that for these lawyers, with their extraordinary cases (see discussion of complex cases below), this general equanimity is inapplicable. But despite the years of carping about discovery, it appeared that our participants did not think

that difficulties are so widespread as to justify dramatic measures.

Several discovery tools cause no significant problems:  
Elaborating on the previous point, our participants appeared to believe that several discovery tools cause no problems whatsoever. At the end of the first panel discussion, Tom Rowe invited all present to comment on whether there is any problem with Rule 35 physical or mental examinations, and the participants saw no difficulties with those. Similarly, there was no indication of problems with Rule 36 requests for admissions. Interrogatories came in for some criticism, but mainly in conjunction with document searches required to answer questions that seek identification of all documents relating to the subjects on which the interrogatories focus.

Positive values of discovery: The first panel was asked to discuss what is good and bad about contemporary discovery. Its moderator Mel Goldman introduced the panel by noting that he had "never thought about what's good about discovery." Although when he started practicing there were still lawyers who had lived in the era without discovery, he had always simply assumed its presence and therefore not reflected on its positive features.

Contrary to a stereotypical notion that those in the defense posture would see no positive value to discovery, our participants who represent defendants supported having it. Sheila Birnbaum said that both sides need discovery in every civil case because they could not evaluate the case without discovery. In the products liability cases she handles, the defendant needs a "basic packet of information," and such basic discovery is "essential." Bruce Vanyo, who usually represents defendants in securities fraud suits, said that as a defendant's attorney he would prefer that there be no discovery. In the interests of justice, however, he acknowledged that this would be inappropriate because there is a "crying need" for access to information. Peter Ostroff reported that discovery has succeeded in accomplishing its principal objectives--it avoids ambush and promotes settlement.

On the more focused question whether discovery refines or simplifies cases there was less unanimity. John True reported that it both focuses cases and eliminates issues. He explained that discovery can show that claims he believed would have merit do not, but also that it reveals new grounds for relief that can be raised by amendment. John Kobayashi said that in his experience discovery helps to frame the issues only if it is focused, probably depending on control by the judge. Mel Goldman reported that in complex cases it does refine issues but does not narrow them.

Civility: Despite the recurrent outcries about civility, our panelists did not list this as a major problem, at least with regard to discovery. Bruce Vanyo even said that since he began practicing over 20 years ago civility has seemingly improved. He did note that this experience may be due to the fact that his practice is specialized so that the same lawyers have to deal with one another regularly. Bob Heim reported that in his experience depositions are rarely obstreperous.

Problems of incentive: The incentive structure played a role in the behavior of lawyers and litigants during discovery. Mel Goldman, for example, reported that when large entities confront one another in litigation there will usually be cooperation. Others said that, where both sides could initiate wearying discovery, the deterrent effect of that capability tended to minimize abuses.

These "nuclear deterrence" situations were contrasted with what Bruce Vanyo called "one way" discovery cases. In the securities fraud suits he handles, his clients have large amounts of material the plaintiff wants, while the plaintiff is likely to have little or nothing the defense wants through discovery. In his view, his corporate clients are accountable for their expenditures through discovery but it seems to him that the opposing party is not. Sheila Birnbaum similarly has found that in product liability cases there is only a limited amount of discovery she will want from plaintiffs while they may have a voracious appetite for the large funds of information her clients possess.

Plaintiffs' lawyers dissented. John True reacted that "my client does not understand discovery, but my budget does." Gershon Smoger similarly urged that "a contingency fee attorney wants to limit his time" in the case.

(These counterarguments are not necessarily meeting one another. From the defense perspective, the problem is that it is often relatively inexpensive for the plaintiff to inaugurate a discovery effort that results in considerable cost for the defendant. But defense counsel suspect that plaintiffs may not even look at the discovery materials they obtain at such cost to the defense. From the plaintiff's perspective the goal is to maximize the returns of their own effort. If pursuit of that goal involves considerable effort on the defense side but nets plaintiff lawyers little in return, it may not be important to them so long as they don't have to expend a lot of energy surveying what they get from the defendant to verify that it is not useful.)

Overbroad discovery was not thought often to be designed to bludgeon the opposing party: There was little enthusiasm among

our participants for the view that overbroad document discovery was undertaken for the purpose of clubbing the adversary (as opposed to litigation preparation), particularly with regard to discovery by plaintiffs. Although he deplored the amount of time and money his clients have to pour into discovery, Bruce Vanyo concluded that plaintiffs do not undertake such efforts to harass but rather because they are transfixed by the notion that they should get "perfect discovery." Sheila Birnbaum agreed with Vanyo that plaintiff attorneys are not doing broad discovery to harass, but rather to find a needle in a haystack. The defense view, then, seemed that plaintiffs want every rock turned over because they hope a hot doc can be found underneath one of them.

John Kecker, however, has seen efforts to bludgeon by both sides in depositions. Plaintiffs, for example, know that if they can tie up the CEO in deposition for five days they will get a favorable settlement. Defendants, for their part, may tell their lawyers to wear the plaintiff out by "working him over" in deposition. On the latter point, Bob Heim differed, saying that he could not remember a case where a defendant has wanted to beat up on a plaintiff in that way. He added that he also believes that plaintiffs do not set out to beat up on defendant witnesses or to make document discovery burdensome for the sake of burden. John True, who usually represents plaintiffs, reported that intentionally burdensome discovery occurs in a "significant minority" of the cases handled by his office.

Failure to reveal damaging information: This related concern was not much featured by our participants. John True said that in his practice such concerns do exist in another "significant minority" of his office's cases. John Kobayashi believes that perjured testimony occurs with some frequency in small cases, and related that the capacity to alter messages sent by email potentially introduces a whole new arena of lying into litigation. John Kecker noted that it almost always happens that additional documents appear late in the case, and Gershon Smoger said that he has never been in a case where some important document did not surface right at the end. Despite these views, it appeared that our participants did not feel that there was a major problem, and Sheila Birnbaum said that she thinks that lawyers do not purposefully fail to produce documents they know are relevant because the consequences are too bad.

Complex cases are different: A generally-accepted theme among our participants was that "simple" or "ordinary" cases do not present problems in discovery, but "complex" cases do. Jeffrey Axelrad, for example, said that the big case needs "its own set of rules."

The problem, however, was to decide which cases should be included in this category. As noted above, Rand found that

objective factors identifiable from the cover sheet could not do the job. Our participants generally agreed, while urging nevertheless that the cases can be segregated. At one point John Kobayashi described a "smaller" case as one involving less than ten witnesses and three experts, but he said that his view of complex cases mirrors Justice Stewart's view of pornography in *Jacobellis v. Ohio* ("I know it when I see it."). Sheila Birnbaum suggested that class actions and MDL cases should be included from the product liability category. It is more difficult, however, to decide whether individual litigation should be deemed complex, but that would be true if the case were a test case, the first of many that would be brought. (Implicit in this is the idea that products liability cases are not per se complex.) Bruce Vanyo cautioned that there are cases that would qualify as complex on many grounds but that do not involve big discovery. For him the pertinent complexity should be defined in terms of the parties' expectations regarding volume of discovery.

First prime problem area--the burden of document discovery:

Many of our participants fervently emphasized the burden of responding to document discovery as a primary problem for them and their clients. Bruce Vanyo said that the volume of documents processed through litigation constitutes the greatest problem for him. Barbara Caulfield pointed out that the cost of reviewing documents before production can be measured in person-years, and yet that it is essential since producing a privileged document can be fatal to the case (and to the lawyer). Sheila Birnbaum reported that in her experience plaintiffs want every document, but that after the ardors of production are completed the plaintiffs' lawyers don't even read most of the documents.

In large measure, of course, the question is one of whose ox is gored. Without denying that there may often be a considerable burden involved in collecting and readying documents for production, other participants emphasized the critical importance of documents. Peter Ostroff pointed out that in litigation documents are at the center because they don't change or forget. Gershon Smoger called them the "guts of the case." Moreover, they may be important even if they are not smoking guns. Mari Mayeda emphasized that in employment discrimination cases plaintiff's lawyer needs to gain substantial knowledge of the corporate structure via documents. John True agreed that from his perspective it is not just a question of smoking guns, but rather that he needs to gain information about how other employees have been treated to show a pattern supporting the plaintiff's claim.

Second prime problem area--overlong depositions: Resonating with even more participants was the problem of overlong depositions. Bob Heim reported that the main difficulty with depositions is that they are just too long. John Kecker has found

that many people seem to think that you have to take a deposition all day, and that the entire morning can be wasted "clearing the throat" with introductory questions about whether the witness understands how a deposition works, etc. This experience was not universal; Tommy Wells said that he has rarely been to a deposition that took longer than six hours. And it seemed that many of our participants viewed these problems as less pressing than the burden of document production.

Third prime problem area--disuniformity: Except for cautions about unduly curtailing creativity of innovative judges, nobody had a good thing to say about local latitude. John Kobayashi said that uniformity is a "total myth," and that he cannot tell his clients they will get the same treatment in federal courts in different places. Sheila Birnbaum reported that it leads to forum shopping, including influencing the decision whether to remove. Jeffrey Axelrad said that the Department of Justice finds the lack of uniformity "terrible," particularly because "you can't talk to one judge about what another judge has done because they are living in different systems. There is no constraint on judges based on overall rules." But it was not clear that the district-to-district divergence constituted the greatest source of unhappiness. Jim Kakalik said Rand found that differences within a district were more criticized than those between districts.

#### Possible solutions to these problems

Our participants commented on or proposed a variety of solutions to these problems. This memorandum begins with their reactions to recent amendments and proceeds to other ideas. It might be said that the basic thrust of the proposals was summed up by participant Mel Goldman--"to match up the input with the output." This sounds a lot like the proportionality principle added to Rule 26 in 1983; indeed, it sums up this Committee's basic objective since the late 1970s. Of course the major burden of input often falls on clients like Goldman's--large organizations and corporations--but it is not clear that this input is reflected in the value of the output for the parties seeking discovery. The obvious problem is to preserve the valuable output while reducing the cost.

Rule 26(f) conferences: Rand found that such meetings made no difference in terms of cost or delay. As Judge Rosenthal noted, this finding boggles common sense. Several participants endorsed the conferences. Barbara Caulfield said that they were excellent, but acknowledged that the conference is unlikely to work if the other side won't go along because people won't want to bother the judge with their wrangles. Bob Heim said that "We find that it works. In 90% of the situations it gets worked out. Then on the others they give it to the judge." John Kobayashi

characterized the conference as "the best provision from the 1993 amendments," and "the only way to deal with a complex case." He attributed Rand's results to the ignorance of attorneys who treated the conferences in a perfunctory fashion.

Disclosure: Like the bar generally, our participants did not agree about disclosure. Barbara Caulfield (who is from San Francisco, where a strong version of mandatory disclosure has been in force since July 1, 1992) said she favors it even though it is painful for her large organizational clients. John True (who was a prime architect of the CJRA case management project in San Francisco that included disclosure) agreed that it is painful for the plaintiff as well but worth the effort. Jim Finberg advocated having disclosure sooner and making it more extensive by requiring production of documents. Sheila Birnbaum, on the other hand, said that it was "the worst thing you guys ever did," at least in complex cases. She pointed out that she is currently involved in a case where she can't even figure out what product the plaintiff is complaining about, and cannot fathom how she is supposed to do disclosure. John Kobayashi similarly said that Rule 26(a)(1) won't work in complex cases even though it can work in simpler litigation.

Rule 30(d) limitations on deposition behavior: Our participants were not unanimous on the effectiveness of the effort to regulate behavior during depositions. John Kobayashi said that the prohibition on speaking objections is not much followed. Bob Heim, on the other hand, reported that the limitation on instructions not to answer has been followed, but feared that it has limited the ability of lawyers to curtail overlong depositions. The general reaction was that the change was a good idea but not a major improvement.

Narrowing the overall scope of discovery: Bob Campbell presented the American College of Trial Lawyers' proposal that the 1978 proposal to narrow the scope of discovery finally be adopted. Probably because this had been much discussed elsewhere, there was little discussion by our participants. One member of the ACTL present (Bob Heim) endorsed the idea, while another (Jim Hunt) said he disagreed.

Reducing the burdens of document discovery: Despite the recurrent objection to the burden of document discovery, no clear solutions to these problems emerged. There seems to be no solution to the burden created by the need to review documents for privilege since the rules regarding waiver are largely beyond the purview of this Committee. The Manual for Complex Litigation (Second) did recommend consideration of a stipulated order that production not cause a waiver, but this solution is of dubious effectiveness, as noted in the Manual (Third) § 21.434 at n.137. Narrowing the scope of discovery for document production alone



might raise the risk of making depositions longer, Gershon Smoger pointed out, because depositions about documents not yet produced are likely to take more time.

Barbara Caulfield proposed that a way be found to cause the document production and deposition discovery to dovetail by deferring massive document production until after some deposition discovery. Tommy Wells endorsed a deposition of the custodian of documents to provide a basis for more precise document requests. Barbara Caulfield pointed up the difficulties presented by the practice of saying that a deposition must be taken continuously, suggesting that it would be more effective to allow an early partial deposition. (This seems somewhat at tension with the 1993 amendment to Rule 30 providing that the same witness's deposition cannot be taken a second time without stipulation or court order.) Gershon Smoger endorsed the two-part deposition idea to take the pressure off the plaintiff to finish everything at one fell swoop. (Ultimately, this proposal seems geared more to discovery management in individual cases than to rule changes.)

Narrow, perhaps pattern, initial discovery, followed by discretionary further discovery: The most frequently suggested approach to limiting document discovery was to devise a limited list of production requirements and leave the onus on the party who wants more to justify. Bob Heim suggested that, at the second step, the party from whom more documents are sought could make a showing of the cost of responding, allowing the court to decide whether to require production in light of that cost, and authorizing the court to direct that some portion of the cost be paid by the party seeking discovery. This might serve to reduce the core problem, which is the volume of documents and the onerous task of reviewing them.

The challenge is to devise the basic discovery package. Many participants felt that they could design such a package for litigation in their area. Bruce Vanyo guessed that in many specialty areas one could work up lists of what should usually be produced, feeling that such a list could be devised for securities litigation. Sheila Birnbaum described the sorts of topics needed in the basic discovery for a products liability action. Jim Finberg indicated the sorts of things that should be included for employment discrimination actions, suggesting as well that the employer should produce the material in electronic format. John Kobayashi suggested that one could break out appropriate lists for a variety of types of litigation, such as securities, ERISA, and hostile work atmosphere claims.

Other participants disagreed about such pattern solutions to discovery. Mel Goldman emphasized that in his experience standardized discovery packages are not helpful without active

judicial management. Bob Heim mentioned that he is not a fan of special rules for different types of cases. (Besides presenting the difficulty of picking the pigeonholes and deciding which one is right for a given case, this orientation cuts further into the "transsubstantive" orientation of the Federal Rules, a topic of much academic debate in recent years.)

Coupling limited initial discovery with a settlement conference: Somewhat different was the proposal to employ limited discovery as a predicate for a serious, judicially-assisted, effort at settlement, initially suggested by Barbara Caulfield. Both Sheila Birnbaum and Gershon Smoger endorsed the concept. (The idea resembles a proposal for a case management strategy--not a rule change--about a decade ago by the late Robert Peckham, Chief Judge of the N.D. Cal. See Peckham, A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution, 37 Rutgers L. Rev. 253 (1985).)

Deposition time limit: Garnering more widespread support was imposing a presumptive time limit to depositions. Gershon Smoger asserted that "any fact witness can be done in six hours," and added that from the plaintiff's perspective a similar presumptive limit would be good for expert witnesses. John Kecker said that 90% of the useful information presently obtained in depositions comes out in 10% of the time. James Kakalik pointed out that at least one district (E.D.Wis.) had adopted such a local rule. It was also noted that in the N.D. Cal. many judges place time limits on trial to curtail the tendency of lawyers to go on and on, with good results. (A time limitation on depositions was included in the package of proposed amendments circulated in 1991, but omitted from the amendments adopted in 1993.)

There were words of caution, however. The time problem presented by document review could be considerable. If the questioner presents the witness with a document, the witness will have to read it, using up time. It was suggested that a list of the documents to be used be supplied in advance. Not only would this tend to reduce the surprise value of the documents (something not felt to be important by all), it also might not work. As John Kecker pointed out, the questioner would have to designate too many documents because he or she wouldn't be sure what really would be important. Even more generally, as Peter Ostroff pointed out, the amount of preparation time needed for a six-hour deposition might be very considerable compared to a longer one.

Worse yet, the time limit might provide an incentive for bad conduct to use up the clock. One solution would be to adopt the practice of the District of Arizona that all objections except on

grounds of privilege are reserved (perhaps by amendment to Rule 30 or 32). Another would be to direct that time spent on colloquy not be counted, although that would create the need for somebody to be time-keeper (perhaps unavoidable to any such proposal). John Kobayashi illustrated the problem of extraneous activity with a case in which he said his office concluded that only 15% to 20% of the space in deposition transcripts was devoted to information being obtained from the witnesses. Thus, even this relatively simple and previously circulated proposal revealed difficulties.

Increased "adult supervision": A recurrent theme was the need for judicial oversight of the discovery process to limit misbehavior in individual cases. Peter Ostroff suggested that the availability of such supervision varies considerably from place to place. Jim Finberg urged that it need not constitute a large burden for the judiciary, citing the example of Judge Lynch in the N.D.Cal., who says that he is available by telephone to counsel with regard to discovery disagreements. Finberg said that the fact the judge was available affected behavior, and that nobody really wanted to precipitate an impasse that led to contacting the judge. But nevertheless there is a significant issue of judicial resources. (In addition, this orientation is somewhat at tension with the 1993 amendment to Rule 37, which calls for a conference of counsel before discovery motions are made.)

Firm trial date: Also mentioned in the motherhood and apple pie category was providing for early and firm trial dates. Both John True and Sheila Birnbaum endorsed the customary view that a trial date prompts serious attention to the case, but also that it has to be real. Otherwise a trial date that is continued merely leads to waste trial preparation. John Kobayashi reported that in some western states cases are really getting to trial 165 days after filing.

No more rules: As noted at the outset, there was no enthusiasm for pervasive rule changes. Indeed, many of the proposals might best be characterized more as discovery management strategies or objectives than rule changes. At least one participant, Peter Ostroff, explicitly called for leaving the rules alone. In his view, "you can't legislate common sense. If attorneys can't deal that way, we need more adult supervision. If the issue is one of common sense, it doesn't need a rule." You need a decider to resolve these things, not a rule." Similarly, Jim Hunt asserted that existing procedures can deal with the problems of document production.

#### Attorneys' highest priorities in discovery reform

As the panels ended, Judge Levi asked each invited lawyer

present to identify the one change in the rules he or she would most like to see the Committee make:

John Keker: Time limit on depositions.

Peter Ostroff: No rule changes. Simplify the rules and make it easier to get before the judge.

Bob Heim: Introduce narrowed presumptive discovery into Rule 26 or 34 with further discovery subject to review by the judge, who should have the power to shift the cost of that discovery to the party who wants the discovery.

Jim Finberg: Strengthen initial disclosure by requiring actual production of documents and imposing an early deadline.

Bob Campbell: Revise the scope of discovery in Rule 26.

Jim Hunt: Presumptive time limitation on depositions.

Sheila Birnbaum: In complex cases, arrange for staged discovery beginning with core document production by both sides, followed by a settlement conference and, if that fails, a more specific demand for documents.

Loren Kieve: Adopt the Rocket Docket practices of the E.D. Va. with firm trial dates, even if that means flying judges in from elsewhere. Also, the ACTL proposal regarding the scope of discovery is important to send a message to the profession.

John Kobayashi: Segregate the complex cases at the early stages based on party election, and emphasize a series of Rule 26(f) conferences in those cases.

Jeffrey Axelrad: A uniform framework in every district, including overriding CJRA plans with different rules.

Gershon Smoger: Agreed with firm trial date and with presumptive time limit on depositions. Divergence within district more important than between districts. Disagrees with change in scope of discovery. Also feels it's too soon to say whether the 1993 amendments have worked.

Mari Mayeda: Firm trial date would be great. Avoid undue reliance on cost-benefit approaches. Many cases in federal court involve claims based on constitutional rights, not for money per se, and cost-benefit analyses are unwieldy for such cases.

Amitai Schwartz: Uniformity and predictability are very important, and presently too much manipulation of the rules is possible. Also, the 1993 amendments are too new for further

change.

Tommy Wells: Abolish local rules.

Barbara Caulfield: Limit time on depositions, providing that objections are preserved and colloquy eliminated. Also, don't curtail local innovation too much; it has produced much gain and many insights.

John True: Make initial disclosure work by forbidding opt-outs.

Paul Carrington's Recap:

Paul Carrington, who was the Reporter to the Advisory Committee when the 1993 amendments were drafted and adopted, offered his reactions to the discussion. He was not surprised that Rand found little statistically detectable result from the CJRA activities, but noted that one must approach such analysis with an appreciation that there are ineffable aspects to discovery. Specifically, discovery speaks for our expectations that the law will be enforced, and curtailing it may erode that expectation. Putting aside recent news stories about Texaco, document production may be an reason for the assumption that people should conform to the law because otherwise they will be caught. Thus, although discovery is a problem, one should be careful not to blow it out of proportion.

Turning to the 1993 amendments, he cautioned that they were done on the run under the impact of the CJRA. This explains the local option provisions in particular, because they were prompted by the reality that many districts had adopted variant packages pursuant to the CJRA. Thus, the Committee was "putting the sidewalks where the people were walking." The 1993 Committee did this with "great remorse," and Carrington believes that all local rules regarding discovery should be abolished because any national rule would be better than 94 different rules.

Turning to the other discovery problems raised during the afternoon, Carrington agreed that adult supervision would be good, but cautioned that it is a resource problem we simply don't have a solution for. Document production, however, is a central problem very much worthy of attention. But there could be difficulties trying to narrow the scope of discovery there. For example, if the seeming cause of an accident is a broken pin in a brake system, how does one make an initial judgment about what might have caused that pin to break and limit document discovery to that scope? Certainly the pre-1970 need to go to court and make a showing of good cause to obtain documents cannot be reinstalled.

Carrington was pleased with the apparently good reception among the participants of the Rule 26(f) conference, which might provide a device to focus the judge on the areas needing adult supervision. Disclosure, he suggested, served in part to make the Rule 26(f) conference work because one needs to know something about a case to fashion a meaningfully specific discovery plan.

#### BUSINESS MEETING OF DISCOVERY SUBCOMMITTEE

The foregoing description of the afternoon meeting frames many of the issues covered in the morning business meeting of the subcommittee. All Subcommittee members attended except Carol Hansen Posegate, whose trip was delayed by bad weather. Also in attendance were Judge Niemeyer, Chair of the Advisory Committee, Ed Cooper, Reporter of the Advisory Committee, Rick Marcus, Special Reporter of the Subcommittee, Peter McCabe, Secretary of the Committee on Rules of Practice and Procedure, John Rabiej, Chief of the Rules Committee Support Office, and Al Cortese as an observer.

As explained by Judge Levi, the meeting served more as an introductory opportunity for the Subcommittee members to exchange ideas than an occasion to complete a specific agenda.

Judge Niemeyer reviewed the Rand findings and outlined how he hopes the work of the Subcommittee would unfold. In the first week of September, there will be a conference at Boston College that will serve as an informational meeting for the entire Advisory Committee. The Subcommittee would be in charge of setting up this conference. At this time there should be a "smorgasbord" of proposals for reform, and one of the objectives will be to determine the attitudes of the bar toward these ideas. Toward that end, it would be desirable to have presentations from the bar groups reflecting their positions on both the need for changes in the rules and the changes they endorse. Then the entire committee would meet again in October and select about a half dozen of the proposals for the Subcommittee to work up. From that point, the Subcommittee would basically be restricted to those proposals that received the tentative endorsement of the entire Committee.

Against this background, there was a substantial discussion of the pressures and needs of contemporary discovery. Concern was expressed about the level of energy invested in discovery and the risk that document production efforts fill up warehouses but do not necessarily advance the ball in litigation. There was also discussion of the need to consider law office economics and the role they play in fostering discovery that may go beyond the needs of the case.

There was also discussion of the work of the Judicial Conference's Court Administration and Case Management Committee. The focus of that committee on similar or overlapping subject matter was agreed to be a problem, and it appeared that liaison activities were under way although not fully formalized.

Finally, Tom Willging gave a detailed report on the FJC's contemplated empirical work in support of the Subcommittee's efforts. He circulated a time line (copy attached) for the survey being contemplated. He also reported that he and Pat Lumbard of the FJC had met with focus groups of district judges at the FJC's 1996 Seminar on Civil Procedure for Federal Judges in Tempe in December to canvass them about possible changes in discovery. In addition to the afternoon session on Jan. 16, he contemplated two lawyer focus groups in Washington toward the end of January or the beginning of February.

Using the information gained from these sources, the FJC was planning to develop a sample of closed civil cases and survey the lawyers who handled them. An initial draft of a survey instrument had already been prepared and shared with the Subcommittee's reporter, but further work was expected to refine the survey. Basically it had three categories of questions. The first asked for detailed information about discovery and related activity in the case that was included in the sample. The second asked the responding lawyer to provide a reaction to possible discovery reforms and to opine on how those changes in the rules would have affected the case had they been in place. Finally the survey would seek demographic information about the lawyers. It was also planned to survey judges about possible changes in the rules.

One difficulty Willging had encountered was choosing the proposed rule changes to include in the survey of opinions about possible changes. As of this time, a wide variety of possibilities had been mentioned, and including them all would not be workable. Willging suggested that Subcommittee members try individually to rank order a number of possible changes he suggested some time shortly after the Jan. 16 meeting and mini-conference. There was discussion of this problem, and it was tentatively concluded that including questions about possible rule changes in the survey to be sent out this Spring seemed premature since both the Advisory Committee's preferences among various types of reform and the specifics of proposals remained indistinct. In short, the survey of lawyers regarding proposed changes and the survey of judges should be postponed, with the current survey limited to information about the cases included in the sample.

THE NEXT STEPS

Now that the Jan. 16 mini-conference has been completed, the following steps seem to be in order over the next two months. Perhaps we could meet by telephone conference call over the next few weeks to cover some of these points:

(1) Outreach effort: In the near future, it is hoped that a press release will be put out regarding the commencement of work by the Subcommittee. Judge Niemeyer circulated a draft release during December for commentary. Other methods of obtaining input in the near future merit consideration. An announcement in The Third Branch seems an obvious possibility. Another came up by coincidence shortly after Jan. 16 because a law professor posted a question about the 1993 amendments on the Civil Procedure List, an internet sounding board for law professors interested in civil procedure. I was able to respond to this posting with an invitation to any readers to send along suggestions. That posting brought a telephone call from a law professor at Thomas Cooley Law School in Michigan, who reported that the Judges' Journal is putting out a symposium issue on discovery geared toward state court judges, and this professor hoped to use the news of the Subcommittee's plans to urge the editors there to put the symposium in their next issue. That issue might include some specific reference to the work of the Subcommittee. Within the bounds of propriety, other such efforts might be undertaken.

(2) Empirical work: The groundwork for the FJC survey continues. I have had an initial telephone conference with Tom Willging on his initial draft survey instrument and refinements. Given the views expressed during the Jan. 16 mini-conference, it seems desirable to try to include questions that will show whether document production was burdensome in the cases included in the sample, and whether any deposition went over six hours. It will also be important to make a final decision about whether to include questions about possible rule changes in the initial FJC survey of lawyers concerning cases included in its sample. On Jan. 16 the tentative conclusion was to leave those questions out because there is such difficulty presently determining what the proposals might be, but that would preclude questions about how possible rule changes might have affected the cases included in the sample. Perhaps as an alternative it would be useful to ask respondents to say whether certain types of discovery activities (e.g., document review) present serious problems in their practice.

Beyond the survey, the discussions of Jan. 16 suggest other methods of gathering information. First and foremost, as suggested by Jim Kakalik's invitation during the mini-conference, mining the Rand data appears likely to yield abundant valuable information. It appears that the entire database should become available to the FJC in the near future, and making maximum use



of that information should be a priority. Depending on the detail and quality of the information, it might even affect the contour of the FJC's own survey. It would seem unproductive to replicate the Rand inquiries, although perhaps justified because such a survey would focus on practice after the 1993 amendments, which the Rand survey evidently did not.

In addition, comments made on the afternoon of Jan. 16 suggest at least a couple of other research ideas. First, districts like the E.D. Wis. that have a six-hour limit on depositions could be the focus of a survey to see how that limit works. Does it really seem to save time? Are the obstruction and other problems our participants feared showing up? Rand did not attempt to answer these questions. Second, the states that have a very short time to limit to trial (mentioned by John Kobayashi) might be the focus of research to determine both whether and how that technique works.

(3) Beginning work on the September conference: A number of actions should be taken in the relatively near future to move forward on the September conference. These include:

(a) Narrowing topics for presentations: In my Nov. 20 memo I provided a very tentative outline of possible topic areas for an academic conference. As mentioned on the morning of Jan. 16, the academic cast of these ideas may not entirely fit with the very pragmatic objectives of the Subcommittee's work. On the other hand, I noted that one of the lawyer participants suggested an inquiry akin to one of the proposed topics--Mel Goldman introduced the question whether discovery is a good thing by invoking a contrast to arbitration, and the discovery habits of parties in that arena. I had thought that might be a fruitful comparison to explore. I attach a copy of the Nov. 20 memo with the suggestion that it would be desirable to begin sorting through those topics relatively soon. As this winnowing is done, we may also be able to begin roughing out our ideal program.

(b) Identify possible academic participants: As the ideal topic list begins to coalesce, it will be important to focus on specific people to address these topics. In some ways a conference in early September is ideal for academics, who don't have to teach during the Summer. But they need lead time, and often get booked up. It is often possible to contact people before an exact topic is known. I note that several good candidates are scheduled to speak at the ABA Conference in Tuscaloosa in March, so firming up the list of invitees might await that event.

A related logistical consideration, however, is to determine what we want from these people. If they are to present papers, we would probably want drafts by Aug. 15 or thereabouts.

Moreover, it is common to plan to publish all the papers as a symposium, but I don't know if any arrangements have been made for that. Often the host educational institution gets the benefit and burden of putting out the symposium issue.

(c) Press for participation by bar groups: This activity resembles the previous one because the goal is to ensure that the people you want can and do come. But the practical difficulties here are quite different because the bar groups seem to move at such a glacial pace. Are there things that can be done soon to improve the participation and contribution of these groups? (I note that during the Jan. 17 hearing on Rule 23 amendments one witness said that the ABA was even now unlikely to reach the point of taking a position on that proposed amendment. How do we get the ABA, or some of its constituent parts, to take positions on discovery by Sept.?) It occurs to me that other groups might well be solicited. Given the integral role magistrate judges play in discovery in many places, should we seek participation by their organization? Should an overture be made to the pertinent organization of state court judges? Would the Judicature Society be a useful participant?



**PROPOSAL OF AMERICAN COLLEGE OF TRIAL  
LAWYERS (ITEM 1)**

# American College of Trial Lawyers

National Headquarters  
8001 Irvine Center Drive, Suite 960  
Irvine, California 92618

Committee Chair  
for Federal Rules of  
Civil Procedure

Please direct reply  
to: R.S. Campbell, Jr.  
Telephone: 801-537-5555  
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The American College of Trial Lawyers and its Committee on the Federal Rules of Civil Procedure propose that the Advisory Committee recommend the amendment of discovery Rule 26(b)(1) to narrow the scope and breadth of civil discovery as follows:

## Rule 26

(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.

## FACTORS SUPPORTING THE AMERICAN COLLEGE PROPOSAL

1. The fundamental problem resulting in the high and inefficient cost of litigation is discovery, particularly document production.
2. The American College proposal would substantially refine and impact the scope of discovery, including document production.
3. Prior positions of the American College and the American Bar Association have supported this proposal.
  - (i) American Bar Special Committee for the Study of Discovery Abuse, 92 F.R.D. 149, 157 (1977).
  - (ii) American College of Trial Lawyers Board of Regents endorsed the American Bar Special Committee proposal, March 1, 1978.
  - (iii) Justice Powell, joined by Justices Rhenquist and Stewart, quoted Griffin Bell, a Fellow of the American College, in a dissent from a denial of certiorari in ACF Industries, Inc. v. E.E.O.C., 439 U.S. at 1081-88:

"It has been my experience as a judge [U.S. Court of Appeals, 5th Cir.], practicing lawyer and now as Attorney General that the scope of discovery is far too broad and that excessive discovery has significantly contributed to the delays, complexity and high cost of civil litigation in the federal courts."

Letter of Judge Bell to Judicial Conference, dated 27 June, 1978.
  - (iv) Justice Powell also cited to the position of the American College of Trial Lawyers in ACF Industries. 439 U.S. at 1087.
  - (v) Second Report, dated November 1980, of the Special Committee on Discovery Abuse of the Section of Litigation, American Bar Association:

"The Committee remains convinced that the scope of discovery must be redefined if excessive discovery is to be deterred. By striking the 'subject matter' phrase, subdivision (b)(1) will direct discovery to matters relevant to the 'claims and defenses' of the parties." 92 F.R.D. 137, 142 (1980).

4. Committee on Discovery of the New York State Bar Association Section on Commercial and Federal Litigation concluded in a 1989 Report on Discovery that the "subject matter relevancy standard" is "too broad," "too vague," "too costly" and that sanctions simply do not work.
5. April 1995 – Because of the continuing interest of the Advisory Committee to examine ways to cut litigation costs and discovery time, Committee Chair, Honorable Patrick E. Higginbotham requested that the American College Federal Rules of Civil Procedure Committee look further at Rule 26(b) as a means of "tightening the scope and sweep of discovery."
6. January 1997 – The resulting proposed amendment has the unanimous support of the 29-member American College Federal Rules of Civil Procedure Committee and the Board of Regents of the College.

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October 11, 1995

The Honorable Patrick E. Higginbotham  
Chair, Advisory Committee on Civil Rules  
13 E-1 United States Courthouse  
1100 Commerce Street  
Dallas, TX 75242

**Re: Rule 26(b)(1) - Scope of Discovery**

Dear Judge Higginbotham:

Having been advised by our liaison to your committee, Bob Campbell of Salt Lake City, of your interest in our views on the merits of restricting the basic scope of discovery, the Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers considered the matter at length at our September 21, 1995 meeting in San Antonio.

Preliminarily, and in the hope that they will be useful to you, I enclose:

1. A chronology with 8 tabbed enclosures which I prepared for use by our Committee; and
2. Committee member Chuck Harvey's September 21, 1995 memorandum (8 pages).

All present at our September 21 meeting were in favor of deleting the phrase "subject matter involved in the pending action, whether it related to the" so as to limit the scope of discovery to unprivileged matter "relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party." This is basically the suggestion made by the ABA Litigation Section's Special Committee for the Study of Discovery Abuse in October in 1977 and again in November of 1980, as well as contained in the Advisory Committee's proposed draft of March, 1978 before it was revised in February of 1979 and by the New York State Bar Association in its report of 1989. [Actually, the New York Bar proposal would have added "the issues raised by" phrase after "relevant to the" and before "claim or defense" language - see Tab 5 of the chronology at 127 F.R.D. 634.]

After much discussion, it was the consensus of our committee that:

1. Deletion of the "subject matter" phrase will in fact reduce unwarranted discovery;

FENNEMORE CRAIC

The Honorable Patrick E. Higginbotham

October 11, 1995

Page 2

2. The 1946 amendment adding the "appears reasonably calculated to lead to the discovery of admissible evidence" phrase has itself been the cause of much mischief, especially when combined with liberal judicial construction of 26(b), e.g., Hickman v. Taylor, 329 U.S. 495 (1947) and Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (noting that "relevant to the subject matter" encompasses "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case");
3. Abuses in document discovery are more serious than experienced in depositions or interrogatories (much as noted by Mr. Lacovara in his January 17, 1992 letter to the Standing Committee - Tab 7);
4. The above mentioned liberal construction of the subject matter test has led many judges to throw up their hands and simply allow the discovery thereby countering and rendering useless the piecemeal efforts to attack the problem such as the Rule 26(f) conference provision added in 1980 and a sentence (now 26(b)(2)) regarding limitations added in 1983);
5. The Advisory Committee should be informed that we favor the limitation in the scope of discovery but that we are not now suggesting more precise language changes as that is the office of the reporter in the first instance; and
6. Rather than submit this very meaningful proposed amendment now, the Advisory Committee may well want to incorporate it into whatever overall changes are made in Rule 26 once the reports required of the Judicial Conference and Rand Corporation are filed in December of 1996.

As always, our Committee appreciates that opportunity of providing our views to you and we look forward to working with you on this rule change which many of us believe could be the most significant discovery reform in many years.

Very truly yours,

  
Kenneth J. Sherk

KJS/cp  
Enclosures

cc: Ed Cooper (w/enc.)  
Members of the ACTL Federal Rules of Civil Procedure Committee (w/o enc.)

MEMORANDUM

To: ACTL Federal Rules Committee  
From: Charles Harvey  
Re: Scope of Discovery Under Rule 26 (b)  
Date: September 21, 1995

ISSUE:

Whether the ACTL Federal Rules Committee should recommend to the Advisory Committee a reexamination of the scope of discovery defined in Rule 26 (b).

OVERVIEW:

In response to criticism of the Federal Rules' perceived contribution to discovery abuse, the Advisory Committee in 1990-92 considered many proposals to amend the discovery rules. Proponents of discovery reform frequently urged amendment of Rule 26 (b)'s expansive definition of the scope of discovery:

**(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 a 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.

Rule 34 expressly incorporates Rule 26 (b)'s definition of the scope of discovery. Pointing to such

discovery abuses as fishing expeditions, massive document productions, unfocused depositions and interrogatories, the proponents of amendments argued that the scope of discovery allowed by Rule 26 (b) was unnecessarily broad, caused wasteful effort on marginally relevant issues or meritless claims, and influenced the results of cases by producing settlements motivated by the desire to avoid the expense of discovery. They also argued that the courts rarely invoked the controls available in Rule 26.

Those proposing to leave Rule 26 as it is argued that the broad scope of discovery permitted the enforcement of substantive law (e.g., employment discrimination, securities fraud, products liability) and that more focused amendments in other areas would empower the courts to control abuses. In addition, there was strong momentum in favor of an automatic disclosure approach to discovery reform.

Ultimately, the Advisory Committee decided not to amend Rule 26 (b)'s definition of the scope of discovery. The Supreme Court adopted the now familiar 1993 amendments requiring scheduled disclosures and permitting districts by local rule to limit the amount of discovery. Judge Patrick E. Higginbotham, the present Chair of the Advisory Committee, has recently inquired whether it is desirable to reexamine the scope of discovery under Rule 26 (b).

#### BACKGROUND:

The expansive definition of the scope of discovery did not always apply to all discovery devices. Indeed, before the adoption of the rules in 1938, the Advisory Committee had recommended that the scope of document discovery be as broad as that permitted for depositions, a proposal that was rejected in favor of a "material evidence" standard. As promulgated, the original Rule 26 applied only to depositions, permitting the deponent to be "examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party...." Document production under the

original Rule 34 was available only on a showing of good cause and, if permitted, limited to "any designated documents, ...not privileged, which constitute or contain evidence material to any matter involved in the action...." Following promulgation of the rules in 1938, upon the required showing of good cause some courts limited discovery of documents to evidence admissible at trial while others permitted a wider scope, although still more limited than the scope of Rule 26. *Compare Marzo v. Moore-McCormack Lines, Inc.*, 7 F.R.D. 378, 380 (E.D.N.Y. 1945) and *Condry v. Buckeye S.S. Co.*, 4 F.R.D. 310, 311 (W.D.Pa. 1945) ("documents [must] constitute or contain evidence material to the matters involved in the suit") with *Hickman v. Taylor*, 153 F.2d 212, 216, 218-19 (3d Cir. 1945) *aff'd* 326 U.S. 495 (1947) (documents shown to be "the source of other information which would be admissible at trial").

In 1946, the scope of discovery was expanded. Rule 26 (b), still applicable to depositions, was amended to add a sentence that deposition testimony was not objectionable on the ground of inadmissibility at trial "if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 34 was amended to permit discovery of documents, still upon a showing of good cause, "which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b)...." The purpose of the amendment was to make the scope of discovery under Rule 34 coextensive with that of Rule 26.

The discovery rules were extensively amended in 1970 to expand discovery further. The present definition of the scope of discovery in Rule 26 (b) was adopted and made applicable to all discovery devices. The requirement of "good cause" was dropped in Rule 34 and the permissible scope of requests was changed from documents that "constitute or contain evidence relating to any of the matters" within the scope of Rule 26 (b) to those that "constitute or contain matters" within that scope.

Eight years after the 1970 amendments, the Supreme Court stated that the "relevant to the subject

matter involved in the pending action” standard of Rule 26 (b) encompassed “any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). At the same time, increasingly frequent criticisms of the scope of discovery permitted by the rules were being advanced. The ABA Section of Litigation created a “Special Committee for the Study of Discovery Abuse,” which recommended in 1977 limiting the scope to “the issues raised by the claims and defenses of any party.” The Advisory Committee itself considered amending Rule 26 (b) to allow discovery regarding unprivileged matter “relevant to the claim or defense” of a party but dropped the proposal in its next draft. Compare *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 77 F.R.D. 613, 623-24 (1978) with *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323, 330-32 (1979). The 1980 amendments added the discovery conference requirement to Rule 26 (f) but left Rule 26 (b) unchanged. The Committee recognized “widespread criticism of abuse of discovery” but adopted the discovery conference approach in the belief that “abuse can best be prevented by intervention by the court as soon as abuse is threatened.” *Advisory Committee Note of 1980 to Amended Rule 26 (f)*. Although amendments of Rules 26, 33, 34, and 37 were adopted by the Supreme Court, three members of the Court believed that more fundamental change was necessary. See *Amendments to Rules*, 85 F.R.D. 521 (1979).

The Committee confronted the problem again in the 1983 amendments. Stating that “[e]xcessive discovery and evasion or resistance to reasonable discovery requests pose significant problems,” the Advisory Committee recommended, and the Court adopted, a second paragraph in Rule 26 (b) (1), which the Committee described as an effort “to deal with the problem of over-discovery.” *Advisory Committee Note of 1983 to Amended Rule 26 (b) (1)*. The paragraph added read as follows:

The frequency or extent of use of the discovery methods set forth

in subdivision (a) 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 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 court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

The amendment sought "greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." *Id.*

As the Committee considered disclosure proposals that ultimately were adopted in the 1993 amendments, it was urged to amend Rule 26 (b) by limiting the scope of discovery. Groups such as the Commercial and Federal Litigation Section of the New York State Bar Association, the United States Chamber of Commerce, and the Product Liability Advisory Council urged that the failure to narrow the scope of discovery would ignore a fundamental cause of the abuse the disclosure proposals sought to remedy. The 1993 amendments, however, retained the existing scope but produced sweeping changes to subdivision (a) by providing scheduled disclosures.

#### FUTURE ISSUES:

It is likely that the Advisory Committee will have to reexamine the scope of discovery at some point in the future as discovery reform continues to progress. The question is whether the Advisory Committee continues on its historical course of tightening the process or takes a new tack by narrowing the scope of presumptively permissible discovery.

The critics of the present rule, including the ABA's Section of Litigation and organizations of corporate litigants, have consistently urged that the scope of discovery be

narrowed. The Advisory Committee has attempted to deal with the problem of discovery abuse by tighter judicial controls on the process of the inquiry rather than limiting the presumptively permissible scope of the inquiry. Explaining the 1980 amendments, the Committee took the position in its Notes that discovery abuse was not so widespread as to require a change in the scope applicable to all cases; by the time of the Notes to the 1983 amendments, the Committee stated that excessive discovery and evasion of reasonable requests "pose significant problems." Perceived discovery abuse fueled the mandatory disclosure proposals that produced the 1993 amendments. Given congressional involvement in the form of the Civil Justice Reform Act and proposals such as the pending products liability legislation, it seems likely that the scope of discovery will be a subject of examination, especially if the 1993 amendments do not appear to produce the benefits promised.

At the same time, there will be resistance to narrowing the scope of discovery. The broad latitude of Rule 26 (b) is perceived by some, particularly among the academic community and the plaintiffs' bar in personal injury, employment, and securities law, as the cornerstone of the enforcement of the law through private civil litigation. Indeed, Judge Higginbotham recently organized a Conference on the Federal Rules of Civil Procedure that involved several prominent scholars and lawyers. Professor Geoffrey Hazard served as Reporter and wrote the following observations in the Reporter's Summary:

Civil claims are an integral part of law enforcement in this country. Many civil actions, particularly those where discovery is burdensome, are in effect "private attorney general" suits. Liberal discovery is an integral part of effective enforcement, as evidenced by the free range traditionally accorded the grand jury and afforded to administrative agencies in modern government. Hence, the scope of discovery determines the scope of effective law enforcement in many fields regulated by law.



Comprehensive limitation of discovery thus implicates major social issues, particularly rights of individuals as against organizations public and private. It is doubtful that comprehensive limitation of discovery would be politically acceptable. It is also doubtful that such limitation would be socially desirable in the long run. Law enforcement through civil justice is burdensome and expensive, but the alternatives would be much reduced enforcement or enforcement through public bureaucracies.

*Report, Conference on the Federal Rules of Civil Procedure at 3* (Southwestern Law Foundation, March, 1995). Professor Hazard went on to report that discovery reform should concentrate on gaining better empirical knowledge of discovery abuse and to revise present discovery rules with the goal of controlling the process.

Limiting the scope of discovery rather than refining control of the process would represent a significant departure from the course the Advisory Committee has steered since 1980.

#### RECOMMENDATION:

I recommend that we respond to Judge Higginbotham that the Advisory Committee should reexamine the scope of discovery prescribed by Rule 26 (b). First, the critics of Rule 26 (b) (1) raise a legitimate issue whether the scope of discovery is so broad that it is itself a source of discovery abuse. Indeed, the interpretation of the courts expands the reach of the already broad language of the rule itself. It seems reasonable for there to be a reexamination of the rule in the light of the developed case law and the experience of the last several years.

Second, efforts to control the process by limiting the use of discovery devices, requiring conferences or scheduling disclosures do not remedy abuses arising from the scope of the pretrial inquiry presumptively permitted by the rule. As a practical matter, a party seeking to limit the

scope of the pretrial inquiry has a considerable burden to persuade the court that the inquiry is beyond even the wide latitude prescribed by the rule and the cases.

Third, respecting the role of broad discovery in the enforcement of civil law, there appears to be room to address abuses caused by discovery on tangential issues or fishing expeditions while preserving the legitimate privilege of litigants to gain access to evidence in the possession of others. For example, narrowing Rule 26 (b)'s scope but permitting broader inquiry on motion is a proposal that seems consistent with the 1993 amendments and could be adapted to accommodate the legitimate interests of the requesting and responding parties.

Fourth, Congress got directly involved in the civil justice system through the Civil Justice Reform Act. The Act was motivated, in part, by perceived problems arising from the cost and delay of responding to discovery in civil litigation. The result was that the district committees were addressing discovery abuse and creating district plans under the Act, while the Advisory Committee was formulating its own response to discovery abuse through amendments to the Federal Rules. Many districts have opted out of the core of the 1993 amendments in order to implement their district plans by local rule. This process has contributed to precisely the type of localized practice that the Federal Rules sought to correct in 1938. The Judicial Branch should be able to demonstrate that it is actively addressing these issues through its committee structure or risk yielding control of its own processes to the Legislative Branch.



**STIENSTRA, IMPLEMENTATION OF DISCLOSURE IN  
UNITED STATES DISTRICT COURTS, WITH SPECIFIC  
ATTENTION TO COURTS' RESPONSE TO SELECTED  
AMENDMENTS TO FEDERAL RULE OF CIVIL  
PROCEDURE 26 (ITEM 4)**

**Implementation of Disclosure in United States District Courts,  
With Specific Attention to Courts' Responses to Selected  
Amendments to Federal Rule of Civil Procedure 26**

**Donna Stienstra  
Research Division  
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**March 28, 1997  
(Update of March 22, 1996 Report)**

## **Implementation of Disclosure in United States District Courts**

This report is an update to the March 22, 1996 report on the federal district courts' responses to the 1993 amendments to Federal Rule of Civil Procedure 26. The heart of this report, as in last year's report (and the March 1994 and 1995 reports), is the attached table, which is based on the courts' local rules, general orders, and CJRA plans and which describes for each court which of five key provisions of Rule 26 are in effect.

The four sections below briefly describe the background to this report; summarize the amendments to Rule 26; note how the attached table may be read; and identify some patterns in the courts' responses to amended Rule 26.

### **Background to this Report**

On December 1, 1993, amendments to the Federal Rules of Civil Procedure went into effect. Among these, amendments to Rule 26 provide for three types of self-executing disclosure: initial disclosure; expert disclosure; and pretrial disclosure. The amended rule also provides for deferral of formal discovery until parties have met to discuss and plan discovery and to make or arrange for the exchange of disclosures.

The proposed amendments to Rule 26 generated substantial controversy and an effort, ultimately unsuccessful, to persuade Congress to remove the proposed changes from the rule. The rule itself permits each court by local rule or order to exempt all cases or categories of cases from some of the rule's requirements and also permits parties to stipulate out of some of the requirements.

Since the effective date of the amendments, interest has been high in the courts' responses to amended Rule 26. How many have "opted out" of the rule's requirements, as the practice has come to be known? To answer this question, on March 1, 1994, the Federal Judicial Center distributed a report summarizing the courts' responses to Rule 26. In March of each year since then the Center has canvassed the courts and prepared an update of its Rule 26 report. This fourth report provides information current as of March 28, 1997.

## Description of Selected Amendments to Federal Rule of Civil Procedure 26

This report describes the district courts' responses to selected subsections of Fed. R. Civ. P. 26, specifically 26(a)(1)-(3), 26(d), and 26(f). These subsections are summarized below.

**Rule 26(a)(1), Initial Disclosure.** Except as otherwise stipulated or as directed by order or local rule, a party must provide, without awaiting a discovery request, the following information at or within ten days of the Rule 26(f) meeting of counsel:

- name, address, and telephone number of all persons likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, with identification of the subjects of the information;
- a copy or description by category and location of all documents, data compilations, and tangible things in the party's possession, custody, or control that are relevant to disputed facts alleged with particularity in the pleadings;
- computation of damages claimed, with supporting documentation to be available for copying or inspection; and
- insurance policies that may satisfy the judgment, to be available for inspection or copying.

**Rule 26(a)(2), Expert Disclosure.** Parties must disclose the identity of persons who may testify as experts at trial [(a)(2)(A)] and, except as otherwise stipulated or as directed by the court, must provide a written report prepared and signed by the expert [(a)(2)(B)] containing:

- a complete statement of all opinions to be expressed by the expert and the basis and reasons for them;
- the data or other information considered by the expert in forming the opinions;
- exhibits to be used to summarize or support the opinions;
- qualifications of the expert;
- compensation to be paid the expert; and
- a list of cases in which the expert has testified, as an expert, at trial or by deposition in the last four years.

These disclosures must be made at the times and in the sequence directed by the court. In the absence of other directions by the court, disclosure of experts must be made at least 90 days before the case is to be ready for trial or within 30 days of another party's disclosure on the same subject matter when intended only to contradict or rebut that disclosure [(a)(2)(C)]. Note that Rule 26(a)(2) does not include a general opt-out provision and permits exemption from the expert's report only if stipulated by the parties or directed by the court.

**Rule 26(a)(3), Pretrial Disclosure.** In addition to the disclosures required above, a party must provide the following information about the evidence it may present at trial other than solely for impeachment purposes:

- name, address, and telephone number of each witness, separately identifying those the party expects to call and those it may call if necessary;
- list of witnesses whose testimony is expected to be presented by deposition and, if the deposition was not taken stenographically, a transcript of the pertinent portions; and
- an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those the party expects to offer and those it may offer if necessary.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within fourteen days of this disclosure, certain objections [specified in the rule] must be made and if not made, excepting objections under Fed. Rules of Evid. 402 and 403, are waived unless excused by the court for good cause shown. Note that Rule 26(a)(3) does not include an opt-out provision but provides only that the court may alter the timing for pretrial disclosures.

**Rule 26(d), Timing and Sequencing of Discovery.** The first sentence of Rule 26(d) states that, except when authorized under the federal rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by Rule 26(f). The remainder of the rule is unchanged—formal discovery may proceed as under the old rule.

• **Rule 26(f), Meeting of Counsel and Written Discovery Plan.** Except in actions exempted by local rule or when otherwise ordered, parties must meet at least fourteen days before a Rule 16(b) scheduling conference is held or a scheduling order is due to:

- discuss the nature and basis of their claims and defenses and the possibility of settlement;
- make or arrange to make the disclosures required by Rule 26(a)(1); and
- develop a written discovery plan, which must be submitted to the court within 10 days after the meeting. (The rule specifies the type of “views and proposals” that should be included in the discovery plan.)

**Using the Attached Table to Understand the Courts’ Responses to F.R.Civ.P. 26  
and the Courts’ Requirements Concerning Disclosure**

The attached district-by-district table shows which subsections of Rule 26 are in effect in each district and which are not. The information in the table, which is current as of March 28, 1997, is derived primarily from orders, notices, and local rules adopted by the courts. Where a court has not formalized its response to the rule in writing, the clerks of court provided the necessary information. Each court has reviewed the attached table.<sup>1</sup>



For districts that decided not to implement one or more of the requirements of Rule 26(a), (d), and (f), I examined the CJRA plan<sup>2</sup> and local rules to see whether either of these had requirements similar to the federal rule. A number of courts, for example, included disclosure provisions in CJRA plans adopted before the federal rules were amended. Some of these courts were reluctant, when the amended federal rules went into effect, to change requirements already established in their districts. Others who adopted CJRA plans late in 1993 anticipated promulgation of the federal rule amendments and addressed these expected changes in their plans. Thus, for courts opting out of one or more of the federal rule requirements covered by this table, I have tried to indicate whether a similar requirement exists in local rules or CJRA plans. Without this information, it is easy to underestimate the number of courts with disclosure requirements.

Short summaries of technical information such as rules can do violence to the nuances of that information. This table is no different. It provides only limited information, for example, about the types of cases or information subject to disclosure requirements. It also does not reveal the extent to which individual judges require disclosure. In using the table, please read the footnotes carefully, as they provide important definitions and cautions regarding the information in the table. In general, the table is best used as an overview of the courts' responses to amended Rule 26 and their disclosure requirements. Users who need to know specific requirements—for example, attorneys handling cases in federal court—should not rely on the table or cite it as legal authority.

Users should also note that for at least a dozen districts the local rule or other source for information about Rule 26 has changed since the 1996 report (even though the content of the rule may not have changed). In response to a Judicial Conference directive to renumber local rules in accord with the federal rules, a number of courts have either incorporated general orders into local rules or have renumbered their discovery rules.<sup>3</sup> Additional courts will be doing so in the upcoming months.

### **A Summary Description of the Courts' Responses to Amended F.R.Civ.P. 26 and of the Courts' Disclosure Requirements**

While the attached district-by-district table provides detailed information about the courts' responses to Fed. R. Civ. P. 26, Table 1 (next page) provides a numerical summary of those responses.<sup>4</sup> Table 1 shows that Rule 26(a)(1), which requires initial disclosure, has been implemented by fewer districts than have the other sections of Rule 26. Altogether, just over half the districts have implemented 26(a)(1). Compared to a year ago, this is an overall increase of two districts, the result of three districts deciding to opt into the rule and one district deciding to reverse its initial decision to opt in.<sup>5</sup>

Of the forty-five districts that have not implemented the rule, four require initial disclosure through local rules, orders, or the CJRA plan, one requires disclosure in a specified set of case types, and eighteen specifically give individual judges authority to

require initial disclosure. In only twenty-two courts, then, are all cases routinely exempt from any rules—federal or local—requiring initial disclosure. The table also shows that seven courts have implemented Rule 26(a)(1) with a significant revision. Typically the revision excludes either the requirement to disclose adverse material or the requirement to submit a computation of damages.

**Table 1**  
**Number of Courts in Which Specified Subsections of Federal Rule of Civil Procedure 26 Are or Are Not in Effect**

Nature of Court's Response	Rule 26(a)(1)	Rule 26(a)(2)	Rule 26(a)(3)	Rule 26(d)	Rule 26(f)
In effect	49	80	78	58	67
In effect with a significant revision	7	4	1	1	2
Not in effect	45	12	18	35	27
But substantially provided for by CJRA plan or local rule	4	3	0	1	2
But the judge may order in the specific case	18	5	5	5	6
But is in effect for limited case types	1	0	0	1	1

Although Rule 26 does not include provisions for opting out of expert disclosure, 26(a)(2), and pretrial disclosure, 26(a)(3), Table 1 shows that about a fifth of the districts have interpreted the federal rule that way. Still, the great majority require expert and pretrial disclosure—80 and 78 courts, respectively, an increase of two courts in both categories since March 1996. Of the

courts adopting expert disclosure, four have made a significant revision in their implementation of the rule; the most common revision is to exempt parties from submitting the experts' signed report.

Over two-thirds of the districts have implemented Rule 26(f), which requires parties to meet and confer to prepare a discovery plan. Of the third that have not implemented this subsection, six permit individual judges to order it in the specific case. Fewer courts—but still substantially more than half—require parties to postpone discovery until they have held the 26(f) meeting. As with the other sections of the rule, during the past year there has been a slight change in the number of courts implementing the Rule 26(f) meeting—a net increase of two, which reflects the decisions of three courts to implement 26(f) and the decision of another to reverse its earlier implementation of the rule. The count for Rule 26(d) has stayed the same, although behind that number is one court that has newly implemented Rule 26(d) and another that has decided to reverse its earlier decision to adopt the rule.

In general, Table 1 suggests that classifying courts as “opting in” and “opting out” of Rule 26’s requirements over-simplifies their responses to the amended rule and may understate the extent to which parties will encounter disclosure requirements in federal courts. Rule 26(a)(1), for example, has been implemented in only half the districts, but those who practice in federal district court may encounter initial disclosure requirements in an additional twenty-three districts either upon order of the judge or through other local provisions for disclosure.

Focusing again on Rule 26(a)(1), we see from Table 2 (below) that six of the fourteen largest districts have implemented this subsection of the rule. Two additional courts require initial disclosure by local rule or the CJRA plan. Another five have declined to adopt initial disclosure requirements but authorize individual judges to order it in specific cases, while one has declined altogether to implement any initial disclosure requirements.

Table 2

**Implementation of Federal Rule of Civil Procedure 26(a)(1) in the Fourteen Largest District Courts\***

Court has implemented F.R.Civ.P. 26(a)(1)	6
Local rule or CJRA plan requires initial disclosure	2
26(a)(1) is not in effect unless ordered by judge	5
26(a)(1) is not in effect	1

\* Courts with twelve or more judgeships

In sum, compared to a year ago, the number of courts requiring initial disclosure has increased slightly, with no change in the number of large courts requiring initial disclosure. While the small overall increase obscures a slightly larger degree of change, as several courts have opted into the rule and a few who had previously opted in have opted out, in essence the courts' responses to Rule 26 have been stable for the past two years. This settling down of Rule 26 is further reflected in the additional half dozen districts that have during the past year moved their disclosure decisions from general orders to local rules, suggesting they do not view their positions as temporary or experimental. If two years of small increases are a reliable predictor, we may expect—absent a change in the federal rule—to see only incremental change over the next year.

<sup>1</sup> If citators remain, however, they are mine alone.

<sup>2</sup> The Civil Justice Reform Act of 1990 (28 U.S.C. §§ 471-482) requires each federal district court to adopt a cost and delay reduction plan by December 1, 1993. All districts have adopted a CJRA plan.

<sup>3</sup> See Report of the Proceedings of the Judicial Conference of the United States, March 12, 1996, Washington, DC, p. 34.

<sup>4</sup> Note that in a few instances a court's status is ambiguous; where this occurs, the court is not included in the tally for Table 1 and the numbers therefore do not add to ninety-four in every column. Note, too, that considerable judgment must be used in classifying some courts; others might assign specific courts to classifications different from mine.

<sup>5</sup> An increase of two districts was seen between 1995 and 1996, as well, a period during which several courts opted into the federal rule and one or two reversed earlier decisions to opt in. Looking back over the four years since the federal rule was amended, we see that within a few months of the rule's promulgation, roughly a third of the courts had implemented Rule 26, a third had opted out, and a third had not made a final decision. A year later, when the March 1995 report was issued, implementation of Rule 26(a)(1) had increased to nearly half the courts requiring disclosure either through full implementation of the federal rule or through similar requirements in local rules or CJRA plans. As noted, since March 1995, the increase has been more incremental.

**Implementation Of Disclosure In United States District Courts,  
With Specific Attention To Courts' Responses To Selected  
Amendments To Federal Rule Of Civil Procedure 26<sup>1</sup>**

**March 28, 1997 Update to March 22, 1996 Report**

<b>1</b> District	<b>2</b> Rule/Order <sup>2</sup>	<b>3</b> Initial Disclosure Rule 26(a)(1)	<b>4</b> Expert Disclosure Rule 26(a)(2)	<b>5</b> Pretrial Disclosure Rule 26(a)(3)	<b>6</b> Other Disclosure Requirements <sup>3</sup>	<b>7</b> Discovery Deferment Rule 26(d)	<b>8</b> Confer & Prepare Discovery Plan Rule 26(f)	<b>9</b> Other Requirements <sup>3</sup>
AL-M	Uniform Scheduling Order 6/96 <sup>4</sup>	In effect.	In effect. <sup>5</sup>	In effect.		In effect.	In effect.	
AL-N	Local Rule 26.1 12/94	In effect, except as to documents. Obligation is to make available supporting documents.	In effect.	In effect.		In effect, except Rule 34 requests are allowable after appearance of defendant.	In effect.	
AL-S <sup>6</sup>	Standing Order 3/2/94	In effect.	In effect.	In effect.		In effect.	In effect.	
AK	Local Rule 26.2	In effect.	In effect.	In effect.		In effect.	In effect.	
AZ	As reported by the court, 3/97	In effect.	In effect.	In effect.		In effect.	In effect.	

1 District	2 Rule/Order	3 Initial Disclosure Rule 26(a)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
AR-E	General Order 42 2/22/94	Not in effect <sup>7</sup> unless ordered by the judge in the specific case or agreed to by the parties.	Not in effect unless ordered by the judge in the specific case or agreed to by the parties.	Not in effect unless ordered by the judge in the specific case or agreed to by the parties.		Not in effect.	Not in effect.	
AR-W	General Order 25 2/2/94	Not in effect unless ordered by the judge in the specific case.	Not in effect unless ordered by the judge in the specific case.	Not in effect unless ordered by the judge in the specific case.		Not in effect.	Not in effect.	
CA-C	Local Rules 6.1, 6.2, 9.4 6	In effect, except document dis- closure is limited to those that tend to support the dis- closing party's position. <sup>8</sup>	In effect.	Not in effect.		Not in effect.	In effect.	
CA-E	Local Rule 253 12/19/94	Not in effect.	26(a)(2)(A)&(C) are in effect. 26(a)(2)(B) is not in effect.	Not in effect.	Local rule permits the judge to order initial disclosure in the specific case.	Not in effect.	Not in effect.	

1	2	3	4	5	6	7	8	9
District	Rule/Order	Initial Disclosure Rule 26(a)(1)	Expert Disclosure Rule 26(a)(2)	Pretrial Disclosure Rule 26(a)(3)	Other Disclosure Requirements <sup>3</sup>	Discovery Deferment Rule 26(d)	Confer & Prepare Discovery Plan Rule 26(f)	Other Requirements <sup>3</sup>
CA-N	Local Rules 16 and 26 9/1/95	In effect, except documents, not lists, must be produced and document disclosure is limited to those that tend to support the disclosing party's position.	In effect.	Local rule requires pretrial disclosure similar to federal rule.		In effect.	In effect.	
CA-S	Local Rule 26.1 1/17/95	Not in effect, except by specific court order.	Not in effect, except by specific court order.	Not in effect, except by specific court order.	CJRA Plan requires initial disclosure similar to federal rule and some expert and pretrial disclosure.	Not in effect, except by specific court order.	Not in effect, except by specific court order.	
CO	Local Rule 26.1 4/15/94	In effect.	In effect.	In effect.		In effect.	In effect.	
CT	Local Rules 37 and 38 6/1/95	Not in effect.	In effect.	In effect.	CJRA Plan encourages voluntary exchange of information.	In effect.	In effect.	
DE	Local Rules 5.4 and 16.2 1/1/95	In effect.	In effect.	In effect.		In effect.	In effect.	

District	Rule/Order	Initial Disclosure Rule 26(n)(1)	Expert Disclosure Rule 26(a)(2)	Pretrial Disclosure Rule 26(a)(3)	Other Disclosure Requirements <sup>3</sup>	Discovery Deferment Rule 26(d)	Confer & Prepare Discovery Plan Rule 26(f)	Other Requirements <sup>3</sup>
DC	Executive Order 12/10/93 Local Rules 206, 207, and 209 3/1/94	In effect, except for cases on the complex track.	In effect.	In effect.		In effect.	In effect.	
FL-M	Order 12/15/93 Local Rule 3.05 2/1/94	In effect for standard (track 2) cases, except that (a)(1)(A)&(B) are mandatory only if ordered by the court or stipulated by the parties. Judge may order disclosure in any specific case.	In effect for standard (track 2) cases and not in other cases unless ordered by the judge.	In effect for standard (track 2) cases and not in other cases unless ordered by the judge.		In effect for standard (track 2) cases and not in other cases unless ordered by the judge.	In effect for standard (track 2) cases and not in other cases unless ordered by the judge.	
FL-N	Local Rule 26.1 4/1/95 Court's standard Initial Scheduling Order	In effect.	In effect.	In effect.		In effect.	In effect.	



District	2 Rule/Order	3 Initial Disclosure Rule 26(a)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
FLS	Administrative Order 94-51 10/12/94 Local Rules 16.1 and 26.1 12/1/94	Not in effect, except as ordered by the judge in the specific case or stipulated by the parties and approved by the judge.	Not in effect, except as ordered by the judge in the specific case or stipulated by the parties and approved by the judge.	Not in effect, except as ordered by the judge in the specific case or stipulated by the parties and approved by the judge.	Local rule requires parties to disclose specified information about experts to be called at trial and their expected testimony.	Not in effect, except as ordered by the judge in the specific case or stipulated by the parties and approved by the judge.	In effect.	
GA-M	Local Rule 15 4/1/96	Not in effect.	Not in effect.	Not in effect.	Local rule requires mandatory interrogatories.	In effect.	In effect.	
GA-N	Local Rules 16.1 to 16.4, 26.1, 26.3 4/1/97	In effect.	In effect.	Court uses its more comprehensive uniform pretrial order.		Unless the parties agree to begin earlier, local rule defers formal discovery until 30 days after issue is joined.	In effect.	
GA-S	Local Rules 26.1 and 26.3 9/1/94	Not in effect.	In effect.	In effect.	Local rule requires mandatory interrogatories that encompass some of the requirements of 26(a)(1).	Appears to be mooted by non-implementation of 26(f).	Not in effect.	

1	2	3	4	5	6	7	8	9
District	Rule/Order	Initial Disclosure Rule 26(a)(1)	Expert Disclosure Rule 26(a)(2)	Pretrial Disclosure Rule 26(a)(3)	Other Disclosure Requirements <sup>3</sup>	Discovery Deferment Rule 26(d)	Confer & Prepare Discovery Plan Rule 26(f)	Other Requirements <sup>3</sup>
GU	As reported by the court, 3/97	In effect	In effect.	In effect.		In effect.	In effect.	
HI	Local Rule 230-1 2/15/95	Not in effect, but local rule permits the judge to order certain disclosures in the specific case.	In effect.	In effect.		In effect.	In effect.	
ID	Local Rule 26.2 7/1/94	In effect.	In effect.	In effect.		In effect.	In effect.	
IL-C <sup>9</sup>	Local Rule 26.2 3/1/96	In effect.	In effect.	In effect.		In effect.	In effect.	
IL-N	General Order 3/9/95 Local Rule 5.00 3/20/95	26(a)(1) is not in effect except as ordered by the judge in the specific case.	In effect.	In effect.	In cases exempt from 26(a)(1) disclosures, insurance agreements may be sought under F.R.Civ.P. 34.	In effect.	Local rule requires a conference but no written plan unless ordered by the judge.	In cases exempt from holding the 26(f) meeting, parties may seek discovery after the first scheduling conference.
IL-S	Local Rules 11 and 12 3/24/94	In effect, except for 26(a)(1)(C).	In effect.	In effect.		In effect.	In effect.	

1 District	2 Rule/Order	3 Initial Disclosure Rule 26(n)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
IN-N	As reported by the court, 3/97	In effect.	In effect.	In effect.	The CJRA Plan describes the different forms of disclosure required by each judge.	In effect.	In effect.	The CJRA Plan describes the different forms of disclosure required by each judge.
IN-S	Local Rules 16 I and 26.3 2/10/95	Not in effect.	In effect. Local rules instruct parties to consider in their case management plan whether 26(a)(2)(B) should be varied by parties' stipulation.	In effect.		Not in effect.	Not in effect.	
IA-N	Local Rule 16 7/1/94	Not in effect.	26(a)(2)(A) is in effect but is controlled by the Rule 16(b) scheduling order and the Rule 26(f) discovery plan. 26(a)(2)(B) & (C) are not in effect.	In effect except for 26(a)(3)(i) and (ii).		Not in effect.	In effect, except for references to 26(a)(1) disclosures.	

1	2	3	4	5	6	7	8	9
District	Rule/Order	Initial Disclosure Rule 26(a)(1)	Expert Disclosure Rule 26(a)(2)	Pretrial Disclosure Rule 26(a)(3)	Other Disclosure Requirements <sup>3</sup>	Discovery Deferment Rule 26(d)	Confer & Prepare Discovery Plan Rule 26(f)	Other Requirements <sup>3</sup>
IA-S	Local Rule 16 7/1/94	Not in effect.	26(a)(2)(A) is in effect but is controlled by the Rule 16(b) scheduling order and the Rule 26(f) discovery plan. 26(a)(2)(B) & (C) are not in effect.	In effect except for 26(a)(3)(i) and (ii).		Not in effect.	In effect, except for references to 26(a)(1) disclosures.	
KS	Standing Order 94-1, 1/28/94  Standing Order 94-8, 6/16/94  Local Rule 26.3	In effect.	In effect.	In effect.		In effect.	In effect.	
KY-E	General Order 1/9/95	In effect.	In effect.	In effect.		In effect.	In effect.	
KY-W	General Order 2/1/94	In effect.	In effect.	In effect.		In effect.	In effect.	

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1 District	2 Rule/Order	3 Initial Disclosure Rule 26(a)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
L.A.-E	Local Rule 26.1 to 26.8 4/15/97	Not in effect unless ordered by the judge in the specific case.	In effect. The scope and timing of disclosures are directed by the court pursuant to the CJRA Plan.	In effect. The scope and timing of disclosures are directed by the court pursuant to the CJRA Plan.		In effect.	In effect, except that parties may agree in writing to hold the meeting by phone or argue in writing not to hold meeting.	
L.A.-M	Local Rule 26.1 to 26.8 4/15/97	Not in effect unless ordered by the judge in the specific case.	In effect. The scope and timing of disclosures are directed by the court pursuant to the CJRA Plan.	In effect. The scope and timing of disclosures are directed by the court pursuant to the CJRA Plan.		In effect.	In effect.	
L.A.-W	Local Rule 26.1 to 26.8 4/15/97	Not in effect unless ordered by the judge in the specific case or stipulated by the parties.	In effect.	In effect.		In effect.	In effect.	
ME	Local Rule 26(d) 3/1/97	Not in effect.	Not in effect.	Not in effect.	Disclosures are made as required by the local rules and by the scheduling order in each case.	Appears to be mooted by non-implementation of 26(f).	Not in effect.	

1 District	2 Rule/Order	3 Initial Disclosure Rule 26(a)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
MD	Local Rules 104.4, 104.10, and 106.2 7/1/94	Not in effect, except for a limited number of case types.	In effect.	In effect.		The first sentence of Rule 26(d) is not in effect, except in cases designated by the judge as complex.	Not in effect, except in cases designated by the judge as complex.	
MA	Local Rules 16.1 to 16.5 and 26.1 to 26.6 1/2/95	In effect unless ordered otherwise by the judge.	In effect.	In effect.		Not in effect. By local rule, parties may not seek discovery until the 26(a)(1) disclosures have been made unless otherwise ordered by the judge.	In effect.	
MI-E	Local Rule 26.3 12/5/94	Not in effect unless ordered otherwise by the judge in the particular case.	In effect.	In effect.		In effect.	In effect.	
MI-W	Administrative Order 93-125 12/17/93	Not in effect, except as required by the judge in the specific case.	In effect, as directed by the case management order in the specific case.	In effect, as directed by the case management order in the specific case.		Not in effect.	In effect, but the meeting takes place as directed by the court's order setting the Rule 16 conference.	

1 District	2 Rule/Order	3 Initial Disclosure Rule 26(a)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
MN-10	As reported by the court, 3/97	In effect, subject to application by the judge in the specific case.	In effect, subject to application by the judge in the specific case.	In effect, subject to application by the judge in the specific case.		In effect, subject to application by the judge in the specific case.	In effect, subject to application by the judge in the specific case.	
MS-N	Uniform CJRA Plan Effective 1/1/94, Amended 7/1/96	In effect.	In effect.	In effect.		In effect.	In effect.	
MS-S	Uniform CJRA Plan Effective 1/1/94, Amended 7/1/96	In effect.	In effect.	In effect.		In effect.	In effect.	
MO-E	Local Rule 3.01 1/1/96	In effect.	In effect.	In effect.		In effect, except local rule permits service of interrogatories and requests for production or inspection after entry of appearance.	In effect.	
MO-W	Order 94-15 7/1/94 Local Rule 15 7/1/94	In effect.	In effect.	In effect.		In effect.	In effect.	

1 District	2 Rule/Order	3 Initial Disclosure Rule 26(a)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
MT	Standing Order 5 1/25/94  Rule 200-5 3/31/92 ↓	In effect.	In effect.	In effect.		In effect.	In effect.	
NE	Order 12/30/93	In effect.	In effect.	In effect.		In effect.	In effect.	
NV	Local Rule 26-1 6/1/95	Portions in effect (26(a)(1)(A), (B), and (D)). <sup>11</sup> Documents, not lists, must be produced and document disclosure is limited to those that tend to support the disclosing party's position.	In effect.	In effect.		Not in effect.	In effect.	
NH	Local Rule 26.1 1/1/96 ↓	Not in effect, unless the court orders otherwise.	In effect.	In effect.		In effect.	In effect.	



1 District	2 Rule/Order	3 Initial Disclosure Rule 26(a)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
NJ12	Order 1/13/94 General Rule 15.B.1-2 1/13/94	In effect.	In effect.	In effect.		In effect.	In effect.	
NM	Local Rule 26.3 1/1/96	In effect.	In effect, except a treating physician need not prepare a report.	In effect.		In effect.	In effect.	
NY-E	Local Rule 26.4 4/15/97	CJRA Plan with broader mandatory disclosure takes precedence over federal rule.	CJRA Plan takes precedence over federal rule.	CJRA Plan takes precedence over federal rule.	CJRA Plan requires initial and expert disclosure similar to the federal rule (excepting 26(a)(1)(C)).	Not in effect.	In effect.	
NY-N	General Order 40 12/14/93 Uniform Pretrial Scheduling Order Amended 10/95	Not in effect.	In effect.	Not in effect.	CJRA Plan requires voluntary exchange of information.	In effect.	In effect.	
NY-S	Local Rule 49 4/3/95	Not in effect.	In effect.	In effect.		Not in effect.	Not in effect.	

1 District	2 Rule/Order	3 Initial Disclosure Rule 26(a)(1)	4 Expert Disclosure Rule 26(n)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
NY-W	Local Rule 26 12/1/94	Not in effect unless ordered by the judge in the specific case.	In effect unless ordered otherwise by the judge in the specific case.	In effect unless ordered otherwise by the judge in the specific case.		Discovery may not commence until issue is joined unless otherwise stipulated by the parties or ordered by the judge in the specific case.	Not in effect unless ordered otherwise by the judge in the specific case.	
NC-E13	Local Rule 23.07 12/31/94	Not in effect.	In effect.	In effect.		Not in effect.	In effect.	
NC-M	Order, 12/9/93 Local Rules 203 and 207 2/1/95	Not in effect.	In effect.	In effect.		In effect.	In effect.	
NC-W	As reported by the court, 3/97	In effect.	In effect.	In effect.		In effect.	In effect.	
ND	Local Rule 26 1/23/95	In effect.	In effect.	In effect.		In effect.	In effect.	
NMI	Local Rule 26 1/1/97	In effect.	In effect.	In effect.		In effect.	In effect.	

1 District	2 Rule/Order	3 Initial Disclosure Rule 26(n)(1)	4 Expert Disclosure Rule 26(n)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
OH-N	As reported by the court, 3/97	In effect.	In effect.	In effect.		In effect.	In effect.	
OH-S	General Order 93-3, 12/1/93 Local Rules 26.3, 26.4, and 26.5 12/1/93	Not in effect unless ordered by the judge or agreed to by the parties in the specific case.	In effect.	In effect.		Not in effect.	Not in effect unless ordered by the judge in the specific case.	
OK-E	Local Rules 26.1, 26.2, and 26.3 10/1/96	26(n)(1)(D) is in effect. 26(n)(1)(A)-(C) are not in effect.	Not in effect.	In effect.	CJRA Plan requires disclosure of factual and legal basis for the claim.	Not in effect.	In effect.	
OK-N	Local Rules 26.1, 26.2, and 26.3 12/1/93	26(n)(1)(D) is in effect. 26(n)(1)(A)-(C) are not in effect. Disclosure may be required by the judge on a case-by-case basis.	In effect.	In effect.	CJRA Plan encourages voluntary disclosure.	Not in effect.	In effect.	

1 District	2 Rule/Order	3 Initial Disclosure Rule 26(a)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
OK-W	Local Rules 16.1, 26.1, and 26.2 3/1/96	Not in effect.	In effect.	In effect.	Local rule, in lieu of 26(a)(1), requires disclosure of documents and insurance agreements; experts and their expected testimony; and witnesses whose testimony bears significantly on claims and defenses.	Not in effect.	Not in effect.	Counsel are required by local rule to submit a report prior to the case management conference. Topics for the report are stated in the local rules.
OR	Order 94-7 3/15/94  Local Rules 205-1, 230-1, and 235-3 1/1/95	Not in effect unless otherwise ordered by the judge in the specific case.	In effect.	In effect.		Not in effect unless otherwise ordered by the judge in the specific case.	Not in effect unless otherwise ordered by the judge in the specific case.	
PA-E	Standing Order 12/1/93  *	Not in effect.	In effect.	In effect.	CJRA Plan requires initial disclosure similar to federal rule, excepting 26(a)(C).	Not in effect.	Not in effect.	CJRA Plan requires deferment of discovery until initial disclosure is made, except by leave of court or agreement of the parties.
PA-M	As reported by the court, 3/97	In effect.	In effect.	In effect.		In effect.	In effect.	

1	2	3	4	5	6	7	8	9
District	Rule/Order	Initial Disclosure Rule 26(a)(1)	Expert Disclosure Rule 26(a)(2)	Pretrial Disclosure Rule 26(a)(3)	Other Disclosure Requirements <sup>3</sup>	Discovery Deferment Rule 26(d)	Confer & Prepare Discovery Plan Rule 26(f)	Other Requirements <sup>3</sup>
PA-W	Order of Court 4/2/10/93 Local Rule 16.1	Not in effect.	In effect.	In effect. <sup>14</sup>		Not in effect.	Not in effect.	
PR	Notice 94-21 7/8/94 Local Rule 311.16 6/16/94	Not in effect.	Not in effect.	Not in effect.		Appears to be mooted by non-implementation of 26(f).	Not in effect.	
RI	General Order 5/9/94	Not in effect.	Not in effect.	Not in effect.		Not in effect.	Not in effect only insofar as it relates to 26(a)(1).	
SC	Local Rules 103, 16 01, and 26.01 <i>et seq.</i>	Replaced by Local Civil Rules 26.01-26.08.	Replaced by Local Civil Rule 26.09.	In effect, as modified by Local Civil Rule 26.11.	Local Civil Rules 26.01 <i>et seq.</i> , which are similar to F.R.Civ.P. 26(a)(1)-(2), require parties to complete standard interrogatories.	Not in effect.	Not in effect.	
SD	Standing Order 12/30/93	In effect.	In effect.	In effect.		In effect.	In effect.	
TN-E	Local Rule 26.1 3/1/94	In effect.	In effect.	In effect.		In effect.	In effect.	

1 District	2 Rule/Order	3 Initial Disclosure Rule 26(a)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
TN-M	Administrative Order 132-6 12/1/93 Local Rule 9, 3/1/94	Not in effect.	In effect.	In effect.	CJRA Plan permits the judge to order initial disclosure in the specific case.	The individual judge may order in the specific case.	The individual judge may order in the specific case.	
TN-W15	Administrative Order 94-2 2/7/94	In effect.	In effect.	In effect.		In effect.	In effect.	
TX-E	Notice re: 12/1/93 Amendments to F R Civ P. 2/1/94	In effect. CJRA Plan controls where there is a conflict with the federal rules.	In effect. CJRA Plan controls where there is a conflict with the federal rules.	In effect. CJRA Plan controls where there is a conflict with the federal rules.	CJRA Plan requires initial, expert, and pretrial disclosure similar to the federal rule.	In effect. CJRA Plan controls where there is a conflict with the federal rules.	In effect. CJRA Plan controls where there is a conflict with the federal rules.	
TX-N	Special Order 2-12 12/20/93 Local Rule 6.2 5/8/96	Not in effect unless the presiding judge otherwise directs or the parties otherwise stipulate.	Application of the rule is at the discretion of each judge.	Application of the rule is at the discretion of each judge.	CJRA Plan encourages voluntary exchange of information.	Application of the rule is at the discretion of each judge.	Application of the rule is at the discretion of each judge.	

1 District	2 Rule/Order	3 Initial Disclosure Rule 26(a)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
TX-S	Order for Conference and Instructions Under Rule 26(f) Federal Rules of Civil Procedure	In effect.	In effect.	In effect.		In effect.	In effect.	
TX-W	Local Rule 6-V 16(e) 1/14/94	Not in effect.	Not in effect.	Not in effect.	Local rule requires early disclosure of all potential witnesses, a written summary of experts' proposed testimony, and a list of proposed trial exhibits.	Not in effect.	Not in effect.	
UT	Order of the Court 1/9/96	In effect.	In effect.	In effect.		In effect.	In effect.	
VT	Local Rule 26.1 4/15/97	Not in effect.	In effect.	In effect.		In effect.	In effect.	
VI	Local Rules 16.1(c), 26.2(c), 26.3(a), 26.3(b), and 26.3(c) 2/8/96	In effect, except 26(n)(1)(C).	In effect.	In effect.		Not in effect.	Not in effect.	

1 District	2 Rule/Order	3 Initial Disclosure Rule 26(a)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
VA-E	Local Rule 26 1/1/97	Not in effect.	In effect.	In effect.		Not in effect.	Not in effect.	
VA-W	General Order 6/13/96	Not in effect.	In effect.	In effect.		Appears to be mooted by non-implementation of 26(f).	Not in effect.	
WA-E	General Order 81-A 10/12/94 Local Rule 26.1 and 26.2 9/1/96	In effect.	In effect.	In effect.		In effect.	In effect.	
WA-W	Order 94-27 9/30/94 Local Civil Rule CR 16 9/30/94	Not in effect.	26(a)(2)(A) & (C) are in effect. 26(a)(2)(B) is not in effect, but the individual judge may order it in the specific case.	In effect.	Local rule requires counsel to prepare a statement of experts' opinions, the information relied on, and their qualifications and compensation.	Not in effect.	Not in effect.	
WV-N	Articles 2 and 3 of Local Rules of Civil Procedure 3/1/96	In effect.	In effect.	In effect.		Not specifically addressed in local rules.	In effect.	



1 District	2 Rule/Order	3 Initial Disclosure Rule 26(n)(1)	4 Expert Disclosure Rule 26(a)(2)	5 Pretrial Disclosure Rule 26(a)(3)	6 Other Disclosure Requirements <sup>3</sup>	7 Discovery Deferment Rule 26(d)	8 Confer & Prepare Discovery Plan Rule 26(f)	9 Other Requirements <sup>3</sup>
WV-S	Local Rule 301 9/1/94	In effect.	In effect.	In effect.		In effect.	In effect.	
WI-E	Order 1/7/94	Not in effect.	Not in effect.	Not in effect.	Local rules require expert disclosure and mandatory interrogatories. CJRA Plan requires disclosure of the substance of experts' testimony.	Not in effect.	Not in effect.	
WI-W	General Order 12/6/93	In effect.	In effect.	In effect.		In effect.	In effect.	
WY	Local Rule 26 11/30/96  Local Rule 16.1 and 16.2 11/30/96	In effect.	In effect, except deposition testimony may be submitted in lieu of written report.	In effect.		Not in effect.	Not in effect.	

1 The information in the table, which is current through March 28, 1997, is derived from orders and notices issued by the courts in anticipation of or subsequent to the December 1, 1993, federal rule amendments; from local rules; from CJRA plans; and from clerks of court or other court staff. See the introduction to these tables for a fuller discussion of the sources. The table should not be cited as legal authority or substituted for a careful examination of federal rules or local rules, orders, and Civil Justice Reform Act plans. I appreciate the invaluable help of Melissa Pecherski, my research assistant, in preparing this update. And I am very grateful to the clerks of the district courts for being responsive as always, yet a fourth time, to my requests for information and review.

- 2 THE ELEMENT CHANGES TO THE RULE SINCE THE 1770 VERSION IS IN THIS COLUMN, AND FURTHER CHANGE MAY BE EXPECTED. IN RESPONSE TO A JUDICIAL CONFERENCE DIRECTIVE TO RENUMBER LOCAL
- 3 rules in accord with the federal rules, a number of courts have incorporated general orders on disclosure into their local rules and/or have renumbered their discovery rules. (See Report of the Proceedings of the Judicial Conference of the United States, March 12, 1996, Washington, DC, p. 34.) Additional courts will be doing so in the upcoming
- 4 months
- 5 Columns 6 and 9 identify local rule or CJRA plan requirements that may apply in courts that have elected to exempt cases from some or all of the disclosure provisions of
- 6 Rule 26(a), (d), or (f). Some of these courts have requirements similar to the federal rule, while others require much more limited disclosure or require none but permit judges
- 7 to order it in the specific case. Where the entry says "similar to the federal rule", the local rule may be similar to an early version of the federal rule ("bears significantly on")
- 8 or to the final version ("alleged with particularity"). Though similar, the local rule may differ in its particulars—e.g., the timing of disclosure—but in general "similar"
- 9 signifies that the court embraces the idea of self-executing disclosure and requires it in some form.
- 10 Within the next three months the court will issue new local rules, which will incorporate the disclosure requirements of the uniform scheduling order.
- 11 "In effect" means that cases filed in these courts are subject to the requirements of the federal rule. Where the federal rule is in effect, the court may nonetheless use local
- 12 rules or orders to alter the effect of the federal rule—e.g., by exempting such case types as habeas corpus, social security, and bankruptcy; setting different time frames for
- 13 disclosure; or permitting individual judges to opt out. Local rules or orders may also establish an effective date later than December 1, 1993 and may specify whether the
- 14 federal rules apply only to newly filed cases or also to pending cases. Two significant alterations—not requiring documents adverse to one's case and not requiring damage
- 15 computations—are noted in the table. Some courts' orders in response to the federal rule are explicit only in stating which provisions are *rejected*. When the order does not
- 16 specifically reject a provision, we assume it is in effect.
- 17 The court hopes to revise its local rules to incorporate the standing order, without changes, into the rules.
- 18 "Not in effect" means that cases filed in these courts are exempt from the requirements of the federal rule subdivision identified at the head of the columns. In many courts,
- 19 however, individual judges may require parties to follow the federal rule requirements, or local rules or CJRA plans may provide for some type of disclosure (see columns 6
- 20 and 9)
- 21 The standard used for disclosing witnesses and documents is those that support or rebut, respectively, "material allegations of the pleading" made by oneself or one's
- 22 opponent, rather than the federal rule's "relevant to disputed facts alleged with particularity in the pleadings."
- 23 Parties may not agree to opt out of the requirements of F.R.Civ.P. 26.
- 24 Proposed local rules adopting F.R.Civ.P. 26 are under consideration, but as a practical matter the federal rule is applied to most cases.
- 25 The standard used for witnesses is those likely to have knowledge of "material facts," rather than the federal rule's "relevant to disputed facts alleged with particularity."
- 26 As a result of the district's renumbering of its local rules, General Rule 15.B.1-2 will become Local Civil Rule 26.1 in the near future.
- 27 The court may change Local Rule 23.07 to clarify that F.R.Civ.P. 26(d) is not in effect.
- 28 Local Rule 16.1 states that failure to disclose the substance of evidence proposed to be offered at trial will result in the exclusion of that evidence at trial unless the parties
- 29 agree otherwise or the judge orders otherwise (except evidence used for impeachment).
- 30 The court has decided not to exempt itself from Rule 26. Now pending is an administrative order rescinding Administrative Order 94-2, which had deferred a final decision on
- 31 the matter.



**CARRINGTON, RENOVATING DISCOVERY (ITEM 7)**

## RENOVATING DISCOVERY

Paul D. Carrington\*

Draft of May 27, 1997

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\* Chadwick Professor of Law, Duke University. Reporter, Advisory Committee on Civil Rules of the Judicial Conference of the United States, 1985-92. Ed Cooper, John Frank, Rick Marcus, Tom Metzloff, and Tom Rowe made helpful suggestions. In a previous draft, this paper was presented to a conference held at the University of Alabama School of Law by the American Bar Association on the Implementation of the Civil Justice Reform Act of 1990. Brooks Giles helped with the references.

I have been invited by those who planned of this symposium to suggest revisions of the discovery provisions (Rules 26-37) of the Federal Rules of Civil Procedure. Those rules were last amended in 1993<sup>1</sup> on recommendations made during my term as Reporter to the Civil Rules Committee. The 1993 revisions were intended to be a temporary accommodation of local plans being promulgated under the Civil Justice Reform Act of 1990.<sup>2</sup> Reconsideration of those rules is now timely, and ought be informed by the 1997 Report of the Institute for Civil Justice<sup>3</sup> on the operation of those plans.

### A TIME FOR FOR CALM

The late Maurice Rosenberg<sup>4</sup> was fond of saying that there are two kinds of empirical studies of law, those that confirm the hunches of lawyers and those lawyers perceive to be false. The CJR Report is of the former sort. It confirms many intuitive hunches of those who have most thoughtfully observed the process in recent years, and is consistent with other empirical studies of discovery done by various persons and institutions over the three decades<sup>5</sup> since the first such carefully conceived studies were completed by Rosenberg three decades or so ago.<sup>6</sup>

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<sup>1</sup> See Amendments to the Federal Rules of Civil Procedure (Apr. 22, 1993), reprinted in 146 F. R. D. 401 (1993).

<sup>2</sup> Civil Justice Reform Act of 1990, 28 U. S. C. §§471-482 (1994).

<sup>3</sup> JAMES S. KAKALIK ET AL, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1997).

<sup>4</sup> Medina Professor of Law, Columbia University (1919-1995).

<sup>5</sup> JOSEPH EBERSOLE AND BARLOW BURKE, DISCOVERY PROBLEMS IN CIVIL CASES (1980); PAUL R. CONNALLY ET AL, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978); see also DANIEL SEGAL, SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT (1978).

<sup>6</sup> COLUMBIA UNIVERSITY PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY, REPORT TO THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE (1968);

The first thing to be said about the ICJ Report is that it supplies no basis for general retrenchment on the right of federal civil litigants to discover evidence bearing on disputes to which they are parties. The Civil Justice Reform Act might have been taken to imply the contrary. The Report of the concurrent Competitiveness Commission<sup>7</sup> also reflected a certain impulse in that direction. And certainly it is easy to find shrill rhetoric about the cost of federal litigation,<sup>8</sup> and even forecasts that the sky will fall if something dramatic is not done.<sup>9</sup> Such rhetoric has been heard since the time of Hammurabi.<sup>10</sup> There was no empirical evidence, and there is none now, that the cost of discovery is a general problem for the broad spectrum of federal litigants or that it has significant malign consequences for the public interest.

That is an important message. Illuminating the background of CJRA and the ICJ Report in this respect is the work of Marc Galanter,<sup>11</sup> who has persuasively demonstrated that the alleged "Litigation Explosion" to which CJRA purported to respond did not exist. Much of the hooplah about litigation costs may be traceable to those whose real complaint is that they or their clients are

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MAURICE ROSENBERG, CHANGES AHEAD IN FEDERAL PRETRIAL DISCOVERY, 45 F. R. D. 479 (1969); see also MAURICE ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964).

<sup>7</sup> PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991).

<sup>8</sup> See for example Remarks of Vice President Quayle at the American Business Conference, Oct. 1, 1991, Fed. News. Serv.; PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 4 (1988); President Bush, remarks at Labor Day Picnic, Waukesha, WI, Sept. 7, 1992, Fed. News Serv.; Jack Anderson, "U.S. Has Become Nation of Lawsuits," Washington Post, Jan. 25, 1985 at B-8; Robert F. Dee, "Blood Bath," 10 ENTERPRISE 2 (March/April 1986).

<sup>9</sup> Id.

<sup>10</sup> Learned Hand, *Lecture to the Association of the Bar of the City of New York, The Deficiencies of Trials to Reach the Heart of the Matter*, in LECTURES ON LEGAL TOPICS 89 (1926).

<sup>11</sup> Marc S. Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

exposed to liabilities that they would prefer to avoid.<sup>12</sup> Theirs is a disguised outcry for tort reform. That outcry has, unfortunately, often taken the form of a campaign of disinformation based on anecdote and hyperbole. The celebrated hot coffee case<sup>13</sup> is a recent and dramatic example of a chronic problem of media misreportage feeding public cynicism about judicial as well as other public institutions. Some of the disinformation has been directed at discovery.

There may be merit, let it be said, in some proposals for substantive law reform intersecting with discovery. For example, there is at least some merit in eliminating the occasion for expensive document searches in product liability cases.<sup>14</sup> It is in the public interest that corporate officers have discussions of risks unfettered by the threat of liability imposed on the basis of intramural discussions. Tort liability, I do not doubt, is a useful incentive to manufacturers to make prudent decisions about the risks to users of their products. But it may be counterproductive to that purpose to impose or increase liability on the basis of communications between officers of manufacturing firms discussing such risks candidly. Neither liability or damages ought be framed in such a way that candid internal discussion has substantial adverse consequences for the firm. For that reason, the law of product liability should perhaps be reformed to make the manufacturer's subjective state of mind irrelevant. Such a reform would materially reduce the cost of discovery in products liability cases, for there would be no point in searches

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<sup>12</sup> But see William H. Rehnquist, *1995 Year-End Report on the Federal Judiciary*, 19 AM. J. TRIAL ADVOC. 491, 495-99 (1993); William H. Rehnquist, *Seen in A Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 2-5 (1991); Letter of Transmittal, 446 U. S. 995, 998 (1980) (Powell J., dissenting).

<sup>13</sup> Dan Shaw, *Coffee, Tea or Ouch?*, New York Times, October 12, 1994 at C1; Andrea Gerlin, *A Matter of Degree*, Wall Street Journal, September 1, 1994 at A1.

<sup>14</sup> Litigation against both tobacco manufacturers and breast implant manufacturers has entailed an intense search for correspondence between executives manifesting knowledge of dangers not disclosed to the public.



through storehouses of documents looking for the proverbial smoking gun that is nothing more than an expression of concern about apparent hazards.

It is, on the other hand, contrary to the public interest to allow manufacturers' legitimate concern for the consequences of socially counterproductive document searches to drive a reform of discovery practice that in most of its applications has benign consequences. We ought keep clearly in mind that discovery is the American alternative to the administrative state. We have by means of Rules 26-37 and their analogues in state law, privatized a great deal of our law enforcement, especially in such fields as antitrust and trade regulation, consumer protection, securities regulation, civil rights, and intellectual property. Private litigants do in America much of what is in other industrial states done by public officers working within an administrative bureaucracy.<sup>15</sup> Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some of hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.

The superiority of private litigation over the administrative process was recognized in the years following 1938, when modern discovery was introduced. At least since the time of Andrew Jackson,<sup>16</sup> many and sometimes most Americans had been skeptical about the ability of

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<sup>15</sup> I made this point more elaborately in Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L. J. 929, 933-44 (1996).

<sup>16</sup> Jackson's most famous utterance was his bank veto message of 1832: "It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. . . . [W]hen the laws undertake to add to [their] natural and just advantages artificial distinctions, to grant titles, gratuities and exclusive privileges, to make the rich richer and the potent more powerful, the humbler members of society - the farmers, mechanics, and laborers - who have neither the time nor the means of

bureaucratic government to protect the individual interests of ordinary citizens from predations by those with greater wealth and economic power. That skepticism was repressed during the Progressive era and by the New Deal when most of our federal bureaucracies were created. But it was confirmed a thousand times in the first half of this century that regulatory agencies tend to be co-opted by those whom they regulate.<sup>17</sup>

Since 1950, we have acted on the belief that if individuals of modest standing and resources are to be secure protection from predation by those possessing the means of exploitation, private civil litigation is the best means available to them. Congress and state legislatures have therefore been disinclined to create new regulatory bureaucracies and have generally expressed regulatory purposes by imposing civil liability on predatory conduct they mean to deter. Legislators and their constituents have known that, however numerous their many deficiencies, the private bar and the jury cannot be bribed, intimidated, or socialized by the incentives of status and class association, and are more likely than bureaucracies to enforce the rights of individuals without fear or favor.<sup>18</sup> Discovery has been an essential instrument in that shift from bureaucratic to private regulation. Cutting deeply into discovery would not only impair private enforcement, but would create a demand for more bureaucratic protections.

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securing like favors to themselves, have a right to complain of the injustice of their government. There are not necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and as heaven does its rain, shower its favours alike on the high and the low, the rich and the poor, it would be an unqualified blessing." 2 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 590 (J. D. Richardson comp., 1908).

<sup>17</sup> JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, S. REP. NO. 26, 86TH CONG., 2D SESS. (1960).

<sup>18</sup> WILLIAM O. DOUGLAS, WE THE JUDGES 389 (1956): "[The jury] is one governmental agency that has no ambition."

## THE CASE AGAINST LOCALISM

The second important point to be made in response to the ICJ Report is that the sun should set, not only upon the Civil Justice Reform Act,<sup>19</sup> but also on the local plans, and on any other existing local rules or standing orders bearing on the subject of discovery. While the ICJ study was not designed to measure the effects of local differences in discovery rules, its data tends to confirm a high level of dissatisfaction with localism in discovery rules.<sup>20</sup> The loose survey conducted by the ABA Section on Litigation speaks strongly to this same issue.<sup>21</sup>

The data accord with common sense. The costs of localism in discovery practice are apparent. Local discovery plans and rules, including standing orders or, as they are sometimes called, local local rules, create clutter impeding the efforts of lawyers, and sometimes even judges, to know what their rights, powers, and duties might be.<sup>22</sup> They add complexity, and thereby add to the investment of lawyer time required to move cases. They are especially a burden to lawyers and litigants who appear episodically in court, or in more than one district court, and they confer an inappropriate benefit on local repeat players. In some cases, it may be necessary for litigants to retain local counsel merely to secure guidance through the maze of local discovery rules.

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<sup>19</sup> 28 U. S. C. §471, Note §105(c)(2)(C).

<sup>20</sup> KAKALIK, *supra* note 2.

<sup>21</sup> \*\* Section of Litigation, American Bar Association, -1996 Study

<sup>22</sup> *Disunionism*, note 15 at 944-52; COMMITTEE ON THE JUDICIARY, RULES ENABLING ACT OF 1988, H. R. REP. NO. 422, 99TH CONG., 1ST SESS. 14-16 (1985).

There are, on the other hand, few if any redeeming benefits of localism in federal discovery rules. There are no differences among the districts to warrant differences in discovery practice to reflect local conditions. Whatever differences may exist in the professional cultures of different districts, there are none that bear any rational connection to the present law of discovery. While judges in many districts may feel that they can improve on the national rules, and some of them doubtless could, the added complexity and unevenness resulting from local efforts to improve on the rules, and the risk that local rules will prove in some cases inferior to national rules and prejudicial to non-local litigants clearly and substantially outweigh any benefit to be secured by local autonomy. Whatever the national rules may be, therefore, they will be superior to the localized product; one size does fit one district as well as the next.

It is not a consideration favoring localism that individual judges need discretion in the administration of pretrial litigation. Of course they need to fit the national rules to particular cases coming before them, and there has been since 1938 ample authority for the exercise of that kind of case-directed discretion by individual judges.<sup>23</sup> Local rules do not amplify that discretion, but purport to limit it, and limit it in exotic ways. Useful discretion is employed case by case, not district by district or even by exegesis on the controlling law by individual judges.

Neither is it a consideration that we need local experimentation. We ought embrace the wisdom of Justice Brandeis favoring legal experiments<sup>24</sup> and apply it to local districts willing to conduct useful experiments in the administration of the law. But such experiments are useful only if they are designed and conducted under controlled circumstances permitting empirical

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<sup>23</sup> Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L. J. 281, 305-07 (1989).

<sup>24</sup> Dissenting in *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932).

examination of the results.<sup>25</sup> There are no local discovery rules are not experiments in any useful sense.

What I have said about localism is hardly news. It was the position of the Congress of the United States in 1988 when it enacted legislation to constrain the local rulemaking power.<sup>26</sup> The Judicial Conference in response to Congressional concern established the Local Rules Project<sup>27</sup> resulting in the reconsideration and elimination of many local rules and in the promulgation of revised Rule 83 in 1995.<sup>28</sup> Among the local rules that were not consistent with the national rules were scores bearing on discovery. After enactment of the 1988 revision of the Rules Enabling Act, all such rules were forbidden by Congress and it was a task for the Civil Rules Committee to help make that clear to district judges. The most common kind of local rule invalidated by the 1988 law were standard restrictions on the number of interrogatories a party could serve except by leave of court;<sup>29</sup> almost every district had such a rule, and after 1988, all of them were invalid.

The 1990 Act was a puzzling but momentary reversal of direction by Congress. While directing the district courts to establish local plans, it did not explicitly or by necessary implication repeal the 1988 proscription on deviant local rules, and hence did not authorize a local plan to violate a national rule.<sup>30</sup> Thus, the 1993 revision of the discovery rules authorizing local variations was put forward by the Civil Rules Committee of that time in the belief that authority for local

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<sup>25</sup> This is what is envisioned by the present Rule 83.

<sup>26</sup> Act of Nov. 19, 1988 102 Stat. 4648, 28 U. S. C. §§2072-74 (1994).

<sup>27</sup> The Judicial Conference of the United States authorized the Standing Committee on Rules of Practice and Procedure to undertake the Local Rules Project in 1986.

<sup>28</sup> F. R. Civ. P. 83.

<sup>29</sup> DANIEL R. COQUILLETTE, ET AL, REPORT OF THE LOCAL RULES PROJECT 95-99 (1988).

<sup>30</sup> *Disunionism*, note 15, at 952-965.

rules was needed if discovery variations were to be legitimately included in local plans promulgated under the 1990 Act. There was never any thought that localism was desirable for its own sake. Indeed, the Civil Rules Committee continued to strive in the direction of national uniformity. This was evidenced by the revision of Rule 83 to make it conform to the Rules Enabling Act as modified in 1988. That revision of Rule 83, promulgated by the Court in 1995, supersedes the Civil Justice Reform Act,<sup>31</sup> so that if there was any question about the possibility that the Civil Justice Reform Act authorized local rules in violation of national rules, that doubt is now clearly resolved: district courts are bound by the national rules and are not empowered to make rules (whether or not denoted as plans) that are in any respect inconsistent with the national rules.

This being so, the first task of those "implementing" CJRA is to put humpty-dumpty back on the wall and re-establish national rules guiding the conduct of civil cases in all United States District Courts. The local option provisions should be eliminated.

### THE FUTURE OF JUDICIAL CASE MANAGEMENT

The third point to be made on the basis of the ICJ Report is a little more surprising. It is that district courts have overdone case management, and should forebear that practice in most cases.

As Judith Resnik points out elsewhere in this issue, judicial case management is a misnomer; it is more accurately denoted as judicial management of lawyers.<sup>32</sup> Few would contend

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<sup>31</sup> "All laws in conflict with such rules shall be no further force or effect after such rules have taken effect." 28 U. S. C. §2072(b). For a recent instance of supersession, see *Henderson v. United States*, 116 S. Ct. 1638 (1996).

<sup>32</sup> \*\* in this issue of *Alabama L Rev*

for a return to the adversary tradition as it was known prior to the advent of discovery.<sup>33</sup> It was implicit in the 1938 rules that the role of the advocate was modified to impose a limited duty of cooperation in the investigation of facts in dispute.<sup>34</sup> Such a duty was not novel, but had been long known to equity practice.<sup>35</sup> Nevertheless, the breadth of the discovery rules substantially enlarged the duty of counsel as an officer of the court to cooperate.

Of course, there have always been clients who preferred lawyers who neglected public duty to protect their private interest, and the lawyers for such clients have powerful incentives to neglect their duties. That is especially likely to be so for lawyers representing parties asserting groundless claims or defenses. By enlarging their professional duty, the 1938 Rules enlarged the pressures on such counsel to misuse the process. There seemed to have been as a result a gradual erosion of the conduct of lawyers engaged in discovery practice that became noticeable in the 1960s.<sup>36</sup> Judicial case management has been the judges' response to the diverse tactical ploys employed by lawyers to gain illicit advantage.<sup>37</sup> Among the illicit means sometimes employed were the imposition of

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<sup>33</sup> Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 Minn. L. Rev. 1 (1984). Compare HUGH HENRY BRACKENRIDGE, *LAW MISCELLANIES* xviii (Philadelphia, Byrne, 1814): "I disclaim as lawyers those who avail themselves of the slips of counsel and would take advantage of a mistake. . . . They are not lawyers, but rather assassins of other peoples' rights." Or HENRY S. DRINKER, *LEGAL ETHICS* 83 (1953): "Five hundred years ago, the law was a game, the processes of which were continually and openly employed by means of obscure technicalities, serving no useful purpose. . . . Recently, with increasing frequency, the bar and the courts have taken radical steps . . . to simplify and develop promptly, and dispose of, finally and clearly, the real issues in the case. . . . It is clearly the duty of the bar to cooperate wholeheartedly in developing all such new procedures and in making them work practically."

<sup>34</sup> ROBERT W. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 217-19 (1952).

<sup>35</sup> POMEROY'S *EQUITY JURISPRUDENCE* §204 (5th ed. 1941).

<sup>36</sup> Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958).

<sup>37</sup> Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); William

costs on adversaries by excessive and pointless discovery, stonewalling, and burying adversaries in a blizzard of useless disclosures.<sup>38</sup> Such tactics can be controlled and even eliminated by prudent case management of big and bitterly contested cases in which they are most likely to appear.

Judicial case management is, however, in its more extreme forms a costly, radical transformation of the American legal tradition.<sup>39</sup> It is sometimes explained as a mere adaption of the judicial practices commonly found on the continent of Europe or in Japan.<sup>40</sup> And so, in important respects, it is. But the suitability of civil law practice in the United States is dubious. Courts in civil law countries are not generally used for the wide range of political and regulatory purposes that American courts are employed. Judges in those countries are selected at a very early stage in their professional careers and therefore have no political roots<sup>41</sup> and no connections to "interest groups." And there is no right to jury trial in civil cases underscoring the importance of individual access to courts. For these reasons, the civil law example is one to be followed only with the greatest caution.

The Civil Justice Reform Act was not cautious in promoting more aggressive case management,<sup>42</sup> its authors appeared to suppose that judicial management might be the key to the

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W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).

<sup>38</sup> Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618 (1996); John K. Setear, *The Barrister and The Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B. U. L. REV. 569 (1989); EBERSOLE, *supra* note 5.

<sup>39</sup> Judith Resnik, *Managerial Judging*, 96 HARV. L. REV. 374 (1982).

<sup>40</sup> Benjamin Kaplan, Arthur T. von Mehren, & Rudolf Schaefer, *Phases of German Civil Procedure I and II*, 71 HARV. L. REV. 1193, 1443 (1958).

<sup>41</sup> John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

<sup>42</sup> 28 U. S. C. §473(a)(1): "In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under



presumed if non-demonstrable problem of cost and delay. The votes are now in and it is clear that judicial management is not a magic bullet to achieve the stated aims of the Act.

The unvarnished truth now confirmed by this vast experiment is that we have no idea how to make a substantial dent in either cost or delay. The federal judiciary were, with some exceptions, already doing about as well as they knew how to do, and the adjurations of Congress to do better could have little effect in the absence of a genuine *Eureka!* of an idea. Case management was not so grand an idea, nor was any other available in 1990, nor has one been generated by experience under the Act.

To the contrary, the data generated is useful to demonstrate that judicial management has been oversold, that heavy management in the mine run of cases is a waste of time or worse.<sup>43</sup> The misdirection of a district judge's time and energy is a waste with extended consequences. Because judges are a scarce resource, their misuse results in losses felt elsewhere. The one most important and indispensable duty of district judges is to try cases, thus to enforce the law and to concentrate the minds of parties on the settlement of their disputes "in the shadow of the law."<sup>44</sup> If judicial case management reduces the availability of judges to conduct trials, that is an important loss.

There are other adverse effects of case management that are ineffable and therefore not noted in the ICJ Report. Thus, a secondary unwelcome effect of contemporary case management is

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section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction: systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case ...": see also BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM JUSTICE FOR ALL: REDUCING COST AND DELAY IN CIVIL LITIGATION 11 (1989).

<sup>43</sup> KAKALIK, *supra* note 2 at 68.

<sup>44</sup> Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 YALE L. J. 950 (1959).

a modification of the courts' focus away from the task of law enforcement. The primary concern of judges who manage cases is to achieve dispositions, i.e., to move cases through the court to whatever disposition the parties can be induced to accept. This is a different mission from that of courts trying cases, whose primary task is to achieve correct results, i.e., results conforming to the law.

Another unwelcome secondary effect of judicial management is to increase the moral responsibility of the individual trial judge. Whereas the institution of discovery expanded the temptations of counsel, case management expands the temptations of the judge because it increases the range of discretion exercised. When combined with the diminishing intensity of appellate review,<sup>45</sup> it has helped to make our district judges more like chancellors sitting on the woosack of autocratic power, and less like officers of the law accountable for their exercise of official power.<sup>46</sup> The hidden effect of case management is a transfer of power away from individual parties and their lawyers, and also from juries or appellate courts who would review decisions on the merits when and if rendered.

These unwelcome consequences of judicial case management are presented not as an argument for a return to the days when counsel were free to abuse or impede discovery. But, as the ICJ Report suggests, case management techniques should not be employed routinely in the absence of persuasive evidence that there are abuses to be prevented that cannot be controlled by

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<sup>45</sup> Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 643-444;; Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403; William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

<sup>46</sup> Paul D. Carrington, *An Unknown Court: Appellate Caseload and The "Reckonability" of the Law of the Circuit*, in *RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS* 209 (Arthur D. Hellman ed., 1990); *Disunionism*, supra note 15 at 932-40.

other means and thus that real benefits can be secured. Judicial involvement in pretrial litigation should be the exception, not the rule.

### FACILITATING CASE MANAGEMENT BY LAWYERS

Given appropriate incentives, lawyers can manage pretrial litigation in most cases with minimal involvement of judges. As the ICJ data suggest, the first and most essential incentive to be provided by the court is a reasonably firm trial date.<sup>47</sup> Such a date should with rare exception be set by conference call within hours after an issue is joined. While it is generally desirable that the date be sooner rather than later, there is no need or justification for haste so urgent that it deprives the parties of a full opportunity for discovery. Nor is there justification for refusing modest postponements necessitated by a surprise in discovery. But with those qualifications, it can be said that the single most important deed a district judge can perform in the administration of pretrial litigation is to set a trial date and stick as closely to that date as possible.

With a credible trial date, the lawyers can in most cases plan discovery without the participation of a judge. The ICJ study confirms that this is so. The discovery conference prescribed by Rule 26(f)<sup>48</sup> generally works when employed for its intended purpose.<sup>49</sup> Especially does it work if counsel comply with the disclosure requirements now set forth in Rule 26(a)(1).<sup>50</sup>

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<sup>47</sup> KAKALIK, *supra* note 2 at 57-58, 91-92.

<sup>48</sup> F. R. Civ. P. 26(f).

<sup>49</sup> KAKALIK, *supra* note 2 at 55-58; Rogelio E. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel A Re-examination of the Adversary Process*, 36 B. C. L. REV. 479, 494-96 (1995); Joseph E. Stevens et al, *Practical Aspects of the Revisions to the Federal Rules of Civil Procedure Effective 12/1/93*, 50 J. MO. B. 341 (1994).

<sup>50</sup> F. R. Civ. P. 26(a)(1).

Those disclosures, so despised by lawyers who perceive them as undermining their relations with clients,<sup>51</sup> are, however, essential to establish a framework for planning discovery without undue delay. If such disclosures are not made, planning by lawyers is impeded and the obvious alternative is for the court to step in and manage the case, a step that is in the end more a derogation of the role of counsel and parties than is compliance with modest disclosure requirements. The ICJ data point in the direction of retaining the substance of both 26(f) and (a)(1), making them the source of the discovery plan fit to the case that will control the conduct of pretrial litigation in all but the rare case.

As a concession to the concerns of lawyers who despise the idea of voluntary disclosure, the Civil Rules Committee ought consider re-writing those provisions. One change might be to make explicit the duty of parties and counsel to cooperate in discovery. Lawyers know of their duty, but parties often do not, and lawyers should be given all available help in explaining to their clients why disclosures must be made to adversaries without requiring rulings by the court at each point of revelation.

Another revision might be to change the diction of the disclosure requirements, perhaps to state them in the form of questions, as "standard interrogatories" to be answered as a predicate to the formulation of a discovery plan wrought by counsel.<sup>52</sup>

In addition, as an aid to parties and counsel in planning, the Rules should provide some presumptive parameters to be extended by agreement whenever good cause is shown. The most

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<sup>51</sup> E.g. Lawrence J. Fox, *Money Didn't Buy Happiness*, 100 DICK. L. REV. 531 (1996); Griffin B. Bell et al, *Automatic Disclosure in Discovery - The Rush to Reform*, 27 Ga. L. Rev. 1. 30 (1992); Laura Kaster & Kenneth A. Wittenberg, *Rulemakers Should be Litigators*, Nat'l L. J., August 17, 1992 at 15.

<sup>52</sup> Local Rule 33, U. S. District Court for the District of South Carolina.

important parameter is a time within which discovery will be completed. The ICJ data suggests that 120 days is generally a suitable presumptive norm.<sup>53</sup> Other parameters that might be useful include a presumptive limit on the number of interrogatories, and on the number and length of depositions. But the Rules should be explicit that the duty of cooperation includes a duty to go beyond the presumptive parameters for good cause.

To make it clear that discovery planning is a duty of counsel, it might also be prudent to relieve the court of the authority to intercede and manage a case that the parties are managing to their own satisfaction without intervention of the court, save perhaps in exceptional circumstances to be stated by the court. At the same time, the court must make it clear that the duty of parties to cooperate in planning discovery is a duty that the court will enforce and enforce so promptly that no counsel or party will be tempted to delay proceedings by making matters unnecessarily difficult for an adversary. To that end, the Rules might wisely provide that motions respecting discovery shall unless otherwise specifically ordered be made orally and ruled upon "forthwith." Judges who effectively and promptly enforce rights with respect to discovery are much less likely to be burdened with frequent interruptions of their work by frivolous discovery disputes than those who take such motions under advisement and await opportunities to read briefs and transcripts of depositions. Because delays in ruling create incentives for counsel to bicker over trifling discovery issues, judges who do not rule quickly make more work for themselves while imposing costs on the parties.

It might also be useful for the rules explicitly to authorize counsel to record discovery conferences as well as depositions. A recording would better enable a party to demonstrate a lack

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<sup>53</sup> KAKALIK *supra* note 2 at 183-84.

of cooperation by an adversary, and thus enhance the threat of sanctions against a party who does not cooperate in planning discovery.

Practice under the 1938 Rules was characterized by an absence of the application of sanctions under Rules 37.<sup>54</sup> Weak enforcement by courts contributed to the problem of abuse and delay by counsel.<sup>55</sup> While the sanctions provisions were strengthened by the addition of Rule 26(g),<sup>56</sup> it remains true that judges have been reluctant to punish lawyers for playing hostile games with discovery. A likely reason for this weakness is that judges were lawyers once and identify with pressures felt by lawyers to aggressively protect interests of clients even at the expense of performance of duties to the court. Another reason is that an application of sanctions creates satellite litigation on the appropriateness and measure of the sanction. The unhappy experience with sanctions under Rule 11<sup>57</sup> has likely reinforced the disinclination of many judges to impose sanctions on the abuse of discovery.

The Civil Rules Committee should therefore give serious attention to other possible incentives to cooperate. In particular, consideration should be given to the application of the

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<sup>54</sup> Rosenberg, *supra* note 36.

<sup>55</sup> \*\* For a striking example, see Jonathan Haar, *A CIVIL ACTION* (1995) [point cite? ].

<sup>56</sup> F. R. Civ. P. 26(g) was added om 1983, and with Rule 37 represents "the principal enforcement power to punish discovery abuse." Gregory Joseph, *Current Issues in Discovery*, in *CURRENT PROBLEMS IN CIVIL PRACTICE* 1994 at 321, 377 (PLI Litig. & Adm., Practice Course Handbook Series No. 498).

<sup>57</sup> Melissa L. Nelken, *Sanctions Under Amended Rule 11 - Some "Chilling Problems in the Struggle Between Compensation and Punishment*, 74 *GEO. L. J.* 1313 (1986). And see Jerold S. Solovy & Charles M. Shaffer Jr., *RULE 11 AND OTHER SANCTIONS: NEW ISSUES IN FEDERAL LITIGATION* (1987); Gregory P. Joseph, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (2d ed. 1994); Georgene M. Vairo, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* (2d ed. 1992).

English rule<sup>58</sup> on shifting attorneys' fees to the resolution of discovery disputes. This would mean that whenever a court ruled on a discovery issue, the prevailing party would be entitled automatically to a reasonable attorney's fee to compensate for the cost of litigating the issue. The demerit of this English rule in its application to final judgments is that it unduly chills the assertion of claims and defenses. But that is just the result desired with respect to discovery disputes. It would provide counsel with an additional reason to give her or his client for not contesting a discovery issue that there would be an additional cost associated with an unsuccessful contention. If the English rule were adopted for this limited purpose, the Civil Rules Committee ought consider the use of an English-style taxing master<sup>59</sup> to relieve the court of the burden and authority to fix the fee.

Moreover, in that rare case in which irrationally contentious parties are frequently resorting to the court over discovery issues, the court should be encouraged to appoint a special master to manage the case.<sup>60</sup> The merit of the special mastership is that it imposes the cost of childish bickering on sometimes infantile counsel and their clients rather than on the public, and leaves the judge accessible to those who need decisions on the merits or who need prompt attention

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<sup>58</sup> For a recent account of the rule and suggestions of its possible applications in the U.S., see Thomas D. Rowe, *Background Paper, American Law Institute Study on Paths to a Better Way: Litigation Alternatives and Accommodation*, 1989 DUKE L. J. 824, 887-92 (1989).

<sup>59</sup> "In modern practice, the English courts have developed an elaborate system of taxing costs. Under this system, the solicitor representing the winning party prepares a bill of costs, detailing each item of taxable expense. If the losing party agrees, it pays the bill; parties, however, seldom agree. When disputes, the parties present their itemized expenses to a taxing master who decides the appropriate amounts after a hearing." John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1571 (1993); see also William W. Schwarzer, *Fee-Shifting Offers of Judgment - An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147, 148 (1992); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

<sup>60</sup> F. R. Civ. P. 53; see also Linda J. Silberman, *Masters and Magistrates, Part I: The English Model & Part II: The American Analogue*, 50 N. Y. U. L. REV. 1070, 1297 (1975); Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989).

to legitimate discovery disputes. Experience in California suggests, however, the importance of regulating the fees of attorneys appointed as special masters.<sup>61</sup>

### OTHER SUGGESTED REFORMS

While the Civil Rules Committee is reunifying the discovery rules and reducing the role of the judge in the management of pretrial litigation, there are other minor changes worthy of consideration at this time.

First, the Rules should require exchange of signed or adopted statements, or perhaps statements of possible witnesses in any form that could be presented as evidence. The existing rule protects such statements as trial preparation material,<sup>62</sup> but requires that copies of such statements be supplied to the witnesses who adopted them,<sup>63</sup> from whom, of course, they are discoverable under Rule 45.<sup>64</sup> While an adopted statement is technically trial preparation material, it is much more than the mental impressions and thinking of counsel – it is potentially a prior inconsistent statement, and the thinking it reflects is primarily that of the party or witness, not the lawyer.<sup>65</sup> The protected retention of such statements in the present Rule disserves the aims of the process in other ways. It enables counsel to impose unnecessary costs on adversaries and to engage in sharp

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<sup>61</sup> *Ruisi v. Thieriot*, 61 Cal. Rept. 2d 598, withdrawn 1997 WL 88913 (1997).

<sup>62</sup> *Hickman v. Taylor*, 329 U. S. 495 (1946); F. R. Civ. P. 26(b)(3).

<sup>63</sup> F. R. Civ. P. 26(b)(3); Jeff A. Anderson et al, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 811-12 (1983).

<sup>64</sup> F. R. Civ. P. 45.

<sup>65</sup> Kathleen Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 WIS. L. REV. 305; Lawrence S. Feld, *Privilege and Confidentiality*, in LITIGATING COMMERCIAL CASES UP TO TRIAL 231, 253 (PLI Litig. & Admin. Practice Course Handbook Series No. 507, 1994); see also *Virginia Elec. Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F. R. D. 397, 403 (E. D. Va. 1975).



practice by misleading hints of the content of the statements. The present practice therefore gives too little service to the values of the work product protection and too much harm to the duty of cooperation to merit its continuation.

Rule 30 should be revised to create a presumptive limit on the number of depositions, and in three other respects. For one, it should be explicit that all objections to questions asked at a deposition are automatically reserved, unless examining counsel otherwise directs.<sup>66</sup> The purpose of this revision is to save the time of lawyers and deponents presently devoted to bickering over the form of questions. Absent such a non-waiver provision, the time limits on depositions will be made inappropriate in a particular instance by prolonged bickering. Counsel for the deponent should, of course, be expected to assert applicable evidentiary privileges,<sup>67</sup> but should otherwise remain silent during the examination by other parties, unless the examining counsel wishes assurance that a particular question and answer are in a form allowing them to be used at trial.

Secondly, it should be explicit in Rule 30 that a deposition can be reopened at the request of any party, provided however that unless the deponent agrees, or the court for good cause so orders, a secondary examination shall be conducted by teleconference or telephone, and further provided that such a discontinuous deposition shall not exceed the time allowed by the schedule, except for good cause. One effect of this change is to diminish the need to modify the discovery plan every time there is a surprise at a deposition. A second purpose is to allow for more efficient depositions and more efficient preparation by counsel, who could under such a revised rule prepare

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<sup>66</sup> Frank H. Pensi, *Defending Depositions*, in LITIGATING COMMERCIAL CASES, note 66 at 65, 70-71 (1994); Jay D. Blumenkopf, *Deposition Strategy and Tactics*, 10 Am. J. Trial Advoc. 15, 23 (1987); Steven B. Stein, *Oral Depositions in Federal Civil Practice*, in DEPOSITION TECHNIQUES IN COMMERCIAL LITIGATION 47, 76-78 (PLI Litig. & Admin. Practice Course Handbook Series No. 328, 1987).

<sup>67</sup> F. R. Ev. 501.

for a deposition with reduced concern for surprise testimony or revelation of documents not previously seen. If a surprise occurs during a deposition, a surprised party can discontinue the deposition and return to it at a later time, after further investigation and preparation has been pursued.

Third, Rule 30 should be amended to affirm that any deposition recorded on videotape or other comparable technologies can be used at trial, even though the deponent is within reach of a subpoena. The present rule requiring the use of live testimony<sup>68</sup> was written on the assumption that the deposition would have to be read into the record at trial by some person other than the deponent. That is no longer the case; indeed it would be appropriate to require the exhibition of videotape when available in order to preserve demeanor evidence that is lost when a substitute witness reads a deposition into the record. Moreover, it will save costs if litigants can be educated to expect that videotaped depositions will be the usual form in which testimony is taken and in which it is presented at trial. Videotaped depositions can be edited to eliminate useless banter as well as inadmissible evidence. And evidentiary rulings regarding testimony can be made *in limine*.<sup>69</sup>

Document discovery under Rule 34<sup>70</sup> is, it seems, the largest source of useless litigation cost. It is also the area in which parties are likely to have the most difficulty in refining a mutually satisfactory discovery plan. For perspective, it may be usefully recalled that the 1938 version of

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<sup>68</sup> F. R. Civ. P. 43.

<sup>69</sup> F. R. Civ. P. 16(c)(4), (16).

<sup>70</sup> \*\*F. R. Civ. P. 34(a); — Pope, *Rule 34: Controlling the Paper Avalanche*, 7 LITIGATION 28 (1981); William D. Underwood, *Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform*, 25 TEX. TECH. L. REV. 251, 261-62 (1994).

Rule 34 required leave of court for document requests;<sup>71</sup> it would seem imprudent to restore that requirement, but it suggests that special restraints may be more appropriately applied to documents. On the other hand, provisional limits on the number or length of documents are unmanageable and unsatisfactory and need not be considered.

It is worth considering whether a narrower definition of discoverability such as the American College of Trial Lawyers favors should be incorporated into Rule 34. The College's committee has proposed, since 1981, to delete language in Rule 26(b)(1) so that discovery is limited to matter relevant to a claim or defense.<sup>72</sup> I am uncertain what effect that provision would have, if any, and would disfavor that change except perhaps in Rule 34. If a new limit were to be imposed on document discovery, I would hope that clearer language might be supplied than that suggested by the College. One possibility is that Rule 34(b) be revised to require that the party seeking access to documents be required to state which disputed facts that party hopes to prove by means of documentary evidence obtained as a result of the production requested. A party of whom production is requested might then be better able to resist excessive production on the ground that the hope is so implausible that the court can and should limit production pursuant to Rule 26(b)(2)(iii) authorizing the court to restrain extravagant discovery.

Another suggestion is to afford a producing party the option of making a production of documents confidential for the scrutiny only of adversary counsel. A party making a confidential

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<sup>71</sup> F. R. Civ. P. 34 (1938): "Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter in the action and which are in his possession, custody, and control"

<sup>72</sup> \*\*quote College proposal

production would waive no<sup>1</sup> evidentiary privileges with respect to documents so produced.<sup>73</sup> No document so produced would be filed with the court or otherwise used or publicized by counsel receiving the documents in confidence without the express approval of the producing party. The purpose of such a provision would be to enable the disclosing party to produce vast quantities of material without the expense of thorough pre-screening of every document produced. Much expense is incurred in present practice as a result of producing counsel's fear that a privilege may be waived by improvident disclosure of a privileged document. Such a mistake would be very injurious to the reputation of counsel and could expose a law firm to enormous liabilities.<sup>74</sup> The purpose of my suggestion would be to relax those fears.

Of course, prudent counsel would, despite such a rule, not disclose in confidence material that was known to be sensitive. All care would not be abandoned. But there are situations in which very substantial savings might be effected. This would be so where, for example, a haystack is not known to contain any needles, and is unlikely to contain even a simple straight pin. A party might then reasonably calculate that the saving in the cost of prescreening is worth a slight risk that (a) prejudicial but privileged evidence will be discovered, and (b) adversary counsel will in violation of the rule refuse to return the privileged item and refrain from using it. In some commercial litigation, the savings resulting from such confidential disclosure could run to seven or even eight figures. A risk in this proposal is that it might facilitate the tactic of burying a

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<sup>73</sup> E.g., *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1098-99 (D. N. J. 1996); *Gorgenzo v. Maguire*, 62 F. R. D. 617, 621 (S. D. N. Y. 1973); *Independent Productions v. Loew's, Inc.*, 22 F. R. D. 266, 277 (S. D. N. Y. 1958).

<sup>74</sup> *Dacey v. Penn*, No. 77-3410, slip op. at 10-11 (S. D. N. Y., Oct. 6, 1978); *Mendenhall v. Barber Greene Co.*, 531 F. Supp. 951, 955 (N. D. Ill. 1982); see also Robert M. Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 CATH. U. L. REV. 465 (1993).

requesting party in an avalanche of documents. I make this last suggestion with special diffidence. Some might view this proposal as trenching on the Evidence Rules, or even on substantive state law.<sup>75</sup>

Another outstanding issue of discovery meriting discussion is the controversy regarding the practice of suppressing discovery material as part of a settlement, especially in mass tort litigation.<sup>76</sup> It is argued in favor of the practice that parties should not be permitted a free ride on expensive discovery conducted in earlier like cases involving the same adversary. To preserve such material for use in subsequent similar cases deprives the party against whom it is used of the settlement bargaining chit represented by the cost of discovery. The diseconomies of redundant discovery ought be avoided if possible. The bargaining chit in question is not one the law ought be at pains to protect because it has no relationship to the merits of claims and defenses. It reflects, instead, the unavoidable but regrettable deficiencies of the legal process. For this reason, I suggest that the discovery rules should generally obligate parties to produce discovery materials produced in other like cases even if those cases were resolved short of trial. I have particularly in mind transcripts of depositions and responses to interrogatories, data compilations, tangible things, and other like items that are not privileged and not subject to a work product protection.

In the short term, this last reform would eliminate one of the incentives to settlement of some cases, especially those that might be described as "test" cases. On the other hand, it would seem to reduce materially the cost of litigating later cases of the same type. It would therefore

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<sup>75</sup> "Substance" and "Procedure," supra note 23; and see Paul D. Carrington and Derek Apanovitch, *The Constitutional Limus of Judicial Rulemaking: The Illegitimacy of Mass Tort Settlements Under Federal Rules 23*, 39 ARIZ. L. REV. — (1997).

<sup>76</sup> E.g. *Short v. Western Electric*, 566 F. Supp. 932 (D. N. J. 1982); but see *In re Agent Orange*, 821 F., 2d. —, 145-48 (2d cir. 1983).

increase the settlement value of meritorious claims and defenses, a purpose that seems entirely at peace with the aims stated in Rule 1.<sup>77</sup>

### SUMMARY AND CONCLUSION

Taken together, the proposed changes would substantially reduce the involvement of judges in the conduct of pretrial litigation. While it is unlikely that these changes would materially reduce the evils of cost and delay, they might effect marginal improvements, and it seems almost certain that they would not contribute to any increase in cost or delay. It bears reiteration that the most important steps to be taken by judges are to set a reasonably firm trial date, provide reasonable and tailored parameters to the time for discovery, and rule promptly on discovery disputes. Beyond those steps the judges should not go, except in the rare case too complex to be managed by counsel. They should then concentrate their efforts on judging cases, not managing lawyers.

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<sup>77</sup> F. R. Civ. P. 1.

## APPENDIX: A MODEST PROPOSAL

To facilitate consideration of the proposed approach to case management, the following draft has been prepared; it is suggested as a new subdivision (a) of Rule 26. Given that I have no responsibility for the ultimate action taken by the Committee or the Court in promulgating rules, I have not attempted to draft with the care appropriate for a text that is actually in danger of becoming law. This provision would replace subdivisions (a),(b), and (c) of the present Rule 16 as well as subdivisions (a), (c), (d), (e), (f) and (g) of the present Rule 26.

### *(a) Duties of Parties with Respect to Discovery; Planning for Discovery; Sanctions*

*(1) Every party to a civil action has a duty to cooperate with the court and with other parties to discover evidence bearing on facts in dispute with the least expense and inconvenience to all parties the circumstances may permit. To perform this duty, unless otherwise directed by the court:*

*(A) Within 90 days after the complaint has been served on a defendant, the parties shall confer and develop a tentative plan to discover evidence bearing on any disputed issues of fact. With notice to other parties, a conference to draft or modify a discovery plan may be transcribed by any party.*

*(B) The tentative discovery plan shall be signed by counsel of represented parties and by any unrepresented party and filed with the court within 120 days after the complaint has been served on a defendant. A signature on such a plan is a certificate that the party accepts the duty of cooperation and believes that implementation of the plan as filed will result in prompt and inexpensive discovery of all relevant and unprivileged evidence known to the signing party.*

*(C) If there are factual disputes and the parties are unable to agree on a tentative discovery plan, and the court finds the case to be sufficiently complex that the inability of the parties timely to agree on a plan is warranted, the court shall confer with the parties and order a plan. If the parties' inability to agree is not warranted by the complexity of the case, the court shall appoint a special master to order discovery; the cost of the special mastership shall be borne by parties in proportion to their responsibility for the disagreements giving rise to the need for the appointment.*

(2) *The tentative discovery plan shall contain*

(A) *a tentative list of the disputed facts that each party will attempt to prove at trial;*

(B) *a tentative list of the persons possibly having information bearing on those facts who are to be interviewed or deposed, with a tentative schedule of depositions that shall set reasonable limits on the number of hours each deponent will be available for questioning by each party and the number of attorneys reasonably needed to conduct the interrogation;*

(C) *a tentative description by category and location of all documents, data, compilations, and tangible things to be examined to determine their bearing on the disputed facts, with a tentative schedule for their examination;*

(D) *a tentative limit on the number of interrogatories to be answered by each party and a tentative schedule for the service of the interrogatories and the responses;*

(E) *a tentative list of any necessary physical or mental examinations and a tentative schedule for such examinations;*

(F) *a tentative identification of any issues on which any party will present scientific or technical opinion evidence and a tentative schedule for the disclosure of the substance of such testimony;*

(G) *a schedule fixing the time frame within which discovery will be completed and a date for a further conference to consider settlement in light of information acquired through discovery; and*

(H) *a list of any issues regarding the plan on which the parties are unable to agree and which therefore require a ruling by the court, and the contention of each party with respect to all such issues.*

(3) *To facilitate the preparation of the plan, each party is obliged as part of the discovery conference required by clause (a)(1)(A) of this Rule to respond to the following standard interrogatories:*

(A) *Do you know of any individual or individuals likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings? If so, give their names, and, if known, the address and telephone number of each, and identify the subjects of the information each may have.*

(B) *Do you have in your possession, custody, or control, written statements reciting discoverable information and signed by any individual named in response to the preceding interrogatory? If so, attach a copy of such signed statements.*



(C) Are there documents, data, compilations, or tangible things in your possession, custody, or control that are relevant to disputed facts alleged with particularity in the pleadings? If so, provide a copy or a description by category and location.

(D) If you are making a claim for compensation, how have you computed damages? Provide a copy for inspection and duplication, of any documents or other evidentiary material not privileged or protected from disclosure, on which such computation is based, including material bearing on the nature and extent of harms suffered.

(E) If a claim for damages is made against you, are you insured or do you have a claim for indemnity against another party? If so, provide copy for inspection and duplication of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(4) No party shall be required to participate in discovery pursuant to Rules 26-37 of these rules except pursuant to a plan filed with or ordered by the court, provided however, that a court may, before any plan has been filed, order a deposition to be taken pursuant to Rule 30(a)(2)(C). Discovery will otherwise proceed according to the tentative plan as filed with the court, until the plan is modified. To facilitate timely modification, each party is under a continuing duty to other parties promptly to supply any additional information required by paragraph (3) of this subdivision that may become known during the course of trial preparation. The plan or order shall be freely modified by the parties to allow additional discovery

(A) to accommodate the interests of parties joined and served after the initial plan is prepared;

(B) to investigate previously unrecognized issues of fact revealed in the course of discovery conducted in accordance with the initial plan,

(C) to allow for the examination of documents or the deposition of witnesses not recognized at the time of the initial planning as possible sources of probative evidence bearing on the disputed issues; or

(D) when justice so requires.

A modification of the plan shall be signed by counsel for each party and filed with the court. To the extent that the parties are unable to agree on a proposed modification of a current tentative plan, they shall file a statement of their disagreement reciting any contentions of any party on which they are unable to agree and the court shall forthwith order any appropriate modification.

(5) *In the absence of disagreement among the parties, the court shall allow them to conduct discovery in accordance with their agreed plan or the court's order if any. If there is a disagreement among the parties regarding any aspect of discovery:*

*(A) The court shall hear and decide the matter forthwith. Unless the court otherwise orders, submissions with respect to discovery shall be oral and on the record.*

*(B) A party prevailing on any such issue shall be awarded an attorney's fee as just reimbursement for the cost of the presentation made to the court.*

*(C) If the parties have recurring disagreements in the administration of a plan, the court shall appoint a special master to hear and decide the issues. The rulings of the special master shall be reviewed only to correct errors of law.*

*(D) The fees and expenses of the special master with respect to each issue resolved by that process shall be taxed against the non-prevailing party.*

*(6) The court shall appoint a taxing master who shall establish and maintain a schedule of standard fees to be applied in determining the compensation of counsel engaged in the presentation of discovery matters to the court, and of special masters when appointed to establish or administer a discovery plan. The taxing master shall determine the fees to be paid in each instance in which a fee is paid to resolve a discovery dispute.*

*(7) If without substantial justification, a party fails to perform the duty of cooperation stated in this rule, the court shall impose an appropriate sanction on that party. The sanction shall include an order to compensate other parties for any delay resulting from the failure and may include an additional penalty sufficient to deter future deliberate failures to perform that duty. Any such additional penalty shall be paid into court.*



**MARCUS MEMORANDUM REGARDING POSSIBLE  
TECHNICAL CHANGES (ITEM 11)**

MEMORANDUM

To: Discovery file  
From: Rick Marcus, Special Reporter, Advisory Committee on  
the Civil Rules  
Date: June 2, 1997  
Re: Possible technical amendments to discovery rules

As in any large package of amendments, the 1993 changes to the discovery rules left some possible discrepancies that were not caught in the comment and review process. Even before then, a few others had surfaced that were not addressed in 1993. The Advisory Committee's present review of the discovery rules affords an opportunity to make changes that seem worthwhile to fill such lacunae or correct ambiguities that have crept into the rules. These possible changes do not seem to involve significant policy issues, although input from the bench and bar would be helpful to determine whether these warrant action by the Committee at all.

*Lacunae in the 1993 amendments*

(a) *Handling insurance agreements in districts without initial disclosure:* From 1970 to 1993, insurance agreements possibly covering a party's liability were discoverable because Rule 26 said so, resolving a previous dispute in the courts. In 1993, that discoverability provision was replaced by Rule 26(a)(1)(D), which requires disclosure of such agreements. The current problem exists because a district that opts out of Rule 26(a)(1) is left without the former provision on discoverability of insurance agreements, and arguably no ground for holding them discoverable. It is unclear how many times this problem has actually arisen. Should initial disclosure including insurance agreements be made uniform, that would solve the problem. Otherwise some provision should probably be made to fill the gap. Reference: 8 C. Wright, A. Miller & R. Marcus, Federal Practice & Procedure, § 2010 at 187.

(b) *Certification regarding supplementation:* Although Rule 26(e) was amended to require considerably broadened supplementation in 1993, no attention seems to have been paid to how supplementation should be treated for purposes of the certification requirements of Rule 26(g). Presumably it would be desirable that supplementation carry with it such a certification, although the nature of the supplementation obligation may make this unduly difficult to provide in the rules. Attention to this issue might improve the current arrangement. Reference: 8 id., § 2052 at 631-32.

(c) *Calculating numerical limitations on depositions and interrogatories; whether to focus on "parties" or "sides":* As amended in 1993, the rules now impose numerical limitations on depositions and interrogatories. These are phrased differently, however. For depositions, the limitations apply to a "side," and

for interrogatories to a "party." Each formulation has potential difficulties. If one looks to parties, does this make the limitation meaningless when a single lawyer represents ten co-parties? If one looks to a "side," it may become difficult to (particularly in more complex cases) to determine what the proper alignment should be. Assuming separate representation by different parties on a "side," unilateral deposition activity may cause problems. Particularly since numerical limitations may continue to be embraced, should further attention be given to these issues? Reference: 8A id., § 2104 at 47-48; § 2168.1 at 261.

(d) *Application of limitations on disruptive instructions to nonparties:* As amended in 1993, Rule 30(d)(1) forbids a "party" to instruct a witness not to answer except on specified grounds. It would appear that this limitation does not apply to the behavior of counsel for nonparty witnesses. That may be a desirable result, but seems to create some risk of frustrating the objectives of the rule change. The rule could explicitly be made applicable to all witnesses and all lawyers during the deposition process. Reference: 8A id., § 2113 at 98-99.

(e) *Sanctions for impeding or delaying examination during a deposition:* As amended in 1993, Rule 30(d)(3) permits the court to impose time limitations on depositions by local rule or order, and directs that additional time shall be allowed "if the deponent or another party impedes or delays the examination." It then provides that if the court finds "such an impediment," it may impose sanctions upon the responsible person. In form, it seems that this sanction power depends upon prior imposition of a durational limitation on the deposition, but it does not appear that this limitation should exist. It could be made clear that delay or frustration of the deposition is a ground for sanctions whether or not there is such a prior limitation. Reference: 8A id., §2113 at 99.

(f) *Relationship between Rule 26(d) and Supplemental Rule B(3):* Supplemental Rule B(3) for admiralty garnishment and attachment proceedings expressly authorizes the plaintiff to serve interrogatories on the garnishee with the complaint. When Rule 33 was amended in 1970 to permit the plaintiff to do so generally, Supplemental Rule B(3) became unimportant. But in 1993, Rule 26(d) was adopted imposing a moratorium on all discovery until after the Rule 26(f) conference of counsel. Because Supplemental Rule A says that the Civil Rules apply only if they are not inconsistent with the Supplemental Rules, the adoption of Rule 26(d) should not have affected service of interrogatories pursuant to Supplemental Rule B(3). But it may be that this opportunity to proceed with alacrity undermines the purposes of Rule 26(d) (assuming that is retained). If so, the rules could be amended to address this question more clearly. Reference: 12 C. Wright, A. Miller & R. Marcus, Federal Practice

& Procedure § 3213 (2d ed. 1997).

*Other possible improvements or resolution of ambiguities in the discovery rules:* Besides the above lacunae, a review of the rules suggests several other minor areas in which some changes might work useful improvements or resolve troubling ambiguities:

(g) *Improvement of proportionality provisions in Rule 26(b)(2):* As amended in 1983, Rule 26 now directs the court to limit discovery in certain circumstances involving issues of proportionality. At least the reported cases indicate that the rule has not been invoked with frequency. If it is little used, could revision of the rule give it more impact, and would that be desirable? Reference: 8 id., § 2008.1.

(h) *Possible uncertainty about who should be listed as expert witnesses under Rule 26(a)(2):* Rule 26(a)(2) directs that parties list all persons they "may call" as expert witnesses. Although this could be likened to a previously-rejected overbroad "may call" formulation, it appears that it was intended to correspond to Rule 26(a)(3)'s directive to list witnesses the party "expects to present" or "may call if the need arises." If this is a source of difficulty, a rewording of Rule 26(a)(2) might be worthwhile. Reference: 8 id., § 2031.1 at 440.

(i) *Copies of prior testimony of expert witnesses:* Under the 1993 amendments, Rule 26(a)(2) directs a party to include a list of all cases in which an expert witness it plans to use has testified in the past four years in its disclosures, but nothing is said about providing a transcript of that testimony if the proponent of the witness possesses such a transcript (or if the witness does). It is not clear whether this would be (or has been) a problem, but the rule could deal with the question. Reference: 8 id., § 2031.1 at 442.

(j) *Ten-deposition limit and expert witnesses:* The 1993 amendments limit each side to ten depositions, explicitly authorize depositions of expert witnesses, and direct that the deposition of most expert witnesses should be deferred until after they have provided the report required by Rule 26(a)(2). That being the case, it could happen that the ten-deposition limitation might interfere with taking depositions of designated expert witnesses. If that limitation has been a problem, it might be worthwhile for the rules to address the question. Reference: 8 id., § 2031.1 at 443.

(k) *Full-time employee as retained nontestifying expert under Rule 26(b)(4)(B):* The question whether a full-time employee can be "specially retained" as an expert consultant and thereby covered by the protections of Rule 26(b)(1)(B) has troubled and divided the courts. The rules could try to address the issue, or continue to leave it to caselaw. Reference: 8

id., § 2033 at 463-67.

(l) *Determining fees for expert witnesses who are deposed:* Although the actual fees charged by expert witnesses are customarily not recoverable costs of suit, Rule 26(b)(4)(C) directs that experts be paid for certain activities in connection with their depositions. The courts have found that there is little authority on how to determine what amount should be paid, and have occasionally found the amounts demanded outrageous. The rule could address this question, although there may be nothing the Committee could profitably say on the subject. Reference: 8 id., § 2034 at 469-70.

(m) *Sanctions for failure to supplement as required by Rule 26(e)(2):* In 1993, Rule 37(c)(1) was added to provide sanctions for failure to supplement as required by Rule 26(e)(1) (dealing with Rule 26(a) disclosures), but there remains no provision in Rule 37 for failure to supplement as required by Rule 26(e)(2) (dealing with responses to formal discovery). Courts have relied instead on inherent power, a somewhat uncertain alternative. Rule 37 (or perhaps Rule 26(e)) could be amended to correct this omission. Reference: 8 id., § 2050 at 607-09.

(n) *Distinction between witnesses and exhibits a party will use, and those it may use "if the need arises" in Rule 26(a)(3):* Rule 26(a)(3) appears to direct parties providing this pretrial disclosure regarding trial evidence to distinguish between witnesses and exhibits they will use and those they may use "if the need arises." The Advisory Committee Notes explicitly say that the witness list should be subdivided in this way. Although sensible trial preparation calls for employing such categories, it may be that they do not provide assistance in the preparation of such a listing. Given that responding to unforeseen events at trial may justify use of unlisted witnesses and exhibits, the continued use of this distinction may be unwarranted. Reference: 8 id., § 2054 at 645-46.

(o) *Right to transcription of deposition, and payment for that transcription:* Before the 1993 amendments, it was generally expected that most depositions would be transcribed and that the party which noticed the deposition would pay the costs of transcription. The 1993 amendments deleted a sentence previously in the rule saying "If requested by one of the parties, the testimony shall be transcribed." In addition, after the 1993 amendments there could be some debate about what is the "official" deposition if the noticing party uses one means to memorialize the testimony, and another party uses another. Further attention to when the deposition will be transcribed, who should pay, and what should be regarded as the official deposition might be in order. In addition, the rules could reaffirm what was clear under the 1970 version--that a nonparty witness does not have a right to require transcription if none of



the parties so desire. Reference: 8A id., § 2117 at 128-32; § 2115 at 117.

(p) *Relation between limitation on speaking objections and waiver of objections as to form:* The 1993 amendments require in Rule 30(d)(1) that an objection be "stated concisely and in a non-argumentative and non-suggestive manner." But Rule 32(d)(3)(B) says that objections to matters of form are waived unless made at the deposition, and the risk of waiver seems to justify some latitude in explaining the basis for the objection. Some reconciliation of these competing concerns might be in order. Alternatively, the waiver provision itself might be dropped in order to shorten depositions. See item 3 on June 2 memorandum listing possible ideas for rule amendments. Reference: 8A id., § 2156 at 206.

## Supplemental Materials



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August 21, 1997

MEMORANDUM TO BOSTON COLLEGE DISCOVERY SYMPOSIUM PARTICIPANTS

SUBJECT: *Discovery Reform Proposals and Federal Judicial Center Survey*

I am attaching discovery reform proposals submitted by five bar organizations, which are bound in a single volume. Copies of the discovery reform proposal from the American College of Trial Lawyers will be available at the meeting. The proposals will be the subject of the panel discussion for Friday morning. A survey of discovery practice completed by the Federal Judicial Center will be mailed separately to you.

A slightly revised agenda and an updated participant list are attached. The agenda and participant list may be subject to some late modifications. Any change to them will be circulated to you at the symposium. Please bring these materials to the Boston College School of Law discovery symposium.

*John K. Rabiej*  
John K. Rabiej

Attachments

ADVISORY COMMITTEE ON THE CIVIL RULES

Thursday, Sept. 4, 1997

9:00-9:45: **Historical Background of Federal Rules' Approach to Discovery:** This paper would examine the treatment of information disclosure before the adoption of the Federal Rules and the reasons why the framers of those rules concluded that a new regime should be substituted, including consideration of their misgivings about the new regime. It would also include some reflection on the movement towards national uniformity implicit in the adoption of the Rules Enabling Act and some consideration of the impact of the changes in discovery during the first decade or so after their adoption.

*Presenter: Prof. Stephen Subrin (Northeastern).*

BREAK

10:00-12:00: **Lawyers' Panel on Document Discovery:** This panel will address the concerns that have repeatedly been voiced about document production. Some likely areas of consideration include:

Burdens, and reasons therefor, of assembling documents for production

Burdens, and reasons therefor, of reviewing documents to be produced

Effect, if any, of Rules 26(a)(1) and 26(f) on document production

Effect of protective orders in facilitating or impeding document discovery

Importance of court-imposed document preservation

Problems of excessive production

Problems of failure to produce clearly pertinent materials

Problems of nonreview of documents by parties seeking production

*Panelists:*

*Allen Black*  
*George Davidson*  
*Joseph Garrison*  
*Arthur Greenfield*  
*Hon. Zachary Karol*  
*Richard Manetta*  
*Chilton Varner*  
*Bill Wagner*

*Moderator: Prof. Geoffrey Hazard (U. Penn.)*

12:00-1:00: Lunch (no organized activity)

1:00-1:45: **Report of results of FJC survey:** The Federal Judicial Center has performed a survey of recently-closed cases from across the country and will report its results.

*Presenters: Thomas Willging (FJC)*  
*John Shapard (FJC)*  
*Donna Stienstra (FJC)*

1:45-2:15: **Report of Rand data on discovery:** Drawing on the data it developed in its study of the operation of the Civil Justice Reform Act, Rand has prepared a report on discovery activity.

*Presenter: James Kakalik (Rand)*

2:15-3:15: **Commentary on empirical data on discovery reform.** This would include not only the official commentators (thought to have about 15-20 minutes each) but also possibly some inquiry and comment from the floor.

*Commentator: Prof. Linda Mullenix (U. Texas)*  
*Commentator: Bryant Garth (Am. Bar. Res. Found.)*

3:30-5:15: **Lawyers' Panel on Uniformity and Disclosure:** This panel should focus on the various types of disclosure prescribed in Rule 26(a) under the 1993 amendments, as well as the proliferation of local variations about these and other matters adopted in 1993 such as the moratorium on formal discovery (Rule 26(d)), the meet-and-confer session designed to develop a discovery plan (Rule 26(f)) and the numerical limits on discovery events. Topics include:

Real extent of burden caused by local differences, and whether it is limited to certain types of rule provisions

Actual experiences of difficulties and/or advantages of Rule 26(a)(1) initial disclosure (e.g., does it facilitate more focused document production?)

Possible revisions of the Rule 26(a)(1) initial disclosure scheme should it be made mandatory nationwide

Values and drawbacks of requiring attorney conference to plan discovery (Rule 26(f)) and imposing moratorium on formal discovery pending that conference (Rule 26(d))

Functioning of expert disclosure pursuant to Rule 26(a)(2), and whether it has caused any serious problems

Possible arguments that local variation is desirable because it permits conformity to practice in state court (turning the shift to the Rules Enabling Act from the Conformity Act on its head)

Comparison of the significance of differences between districts and the significance of differences between individual judges

*Panelists:*

*Patricia Benassi  
Elizabeth Cabraser  
Harvey Kaplan  
Robert Klein  
Hugh Plunkett  
Richard Willard*

*Moderator: Prof. Arthur Miller (Harvard)*

5:15: Adjourn.

6:45: Cocktails (at Brookline Country Club)

7:30: Dinner (at Brookline Country Club)

Friday, Sept. 5, 1997

9:00-9:45: **The Advisory Committee's History of Discovery Containment:** This will be an academic-type presentation reviewing the Committee's efforts since 1970 to contain the discovery genie it released in 1938 without killing it. A principal goal will be to create a sense of *deja vu*, albeit

not to indicate that there is any res judicata in the area of rulemaking. Few (if any) members of the Committee were deeply involved in the development of these earlier reforms.

*Presenter: Prof. Richard Marcus (Hastings)*

10:00-12:00: **Proposals for Reform:** This will be the occasion for probing the bar groups' reform ideas and reactions to possible reform proposals. The groups, and their representatives, are:

ABA Section of Litigation--*Gregory Joseph*  
American College of Trial Lawyers--*Jeffrey Barist*  
American Trial Lawyers Association--*Gerson Smoger*  
Defense Research Institute--*Stephen Morrison*  
Trial Lawyers for Public Justice--*Paul Bland*  
Product Liability Advisory Council--*John Scriven*

*Moderator: Prof. Stephen Burbank (U. Penn.)*

12:00-1:00: Lunch (no organized activity)

1:00-2:45: **Lawyers' Panel on Reform Proposals:** This panel (like the two on Thursday) is intended to consist of "unaligned" lawyers (in the sense that they are not representatives of bar groups). The objective is to flesh out whether they agree or disagree with the ideas voiced before lunch.

*Panelists:*

*William Barr*  
*Stuart Gerson*  
*Patricia Hynes*  
*William Jentes*  
*Philip Lacovara*  
*Peter Langrock*  
*Alan Morrison*  
*Jerold Solovy*  
*Stephen Susman*

*Moderator: Prof. Arthur Miller (Harvard)*

2:45-3:30: **Open mike session:** This period is intended to permit others to express views on these topics to the Committee during the meeting. Of course, written reactions are also invited, but this session may be of particular use to those invited guests who are not on panels and who wish to make some comments.

3:45-5:00: **"Alumni" panel on discovery reform:** This panel includes a variety of people who have past experience in discovery reform efforts to offer their views and advice for the Committee. To conclude the conference, we hope to get the reactions of these panelists on how the Committee should approach the task before it. Besides reactions to the various proposals that have come out during the conference, these panelists might also focus on:

Whether the reforms of the past 20 years have meaningfully improved matters

Whether the Committee should be oriented toward "tinkering" or fundamental change in Rules 26-37

Which reform ideas hold the greatest promise

Any "potholes" or potential pitfalls in the reform process the Committee should be alert to avoid

*Panelists:*

*Hon. Wayne Brazil*  
*Prof. Paul Carrington*  
*John Frank*  
*Hon. Patrick Higginbotham*  
*Mark Gitenstein*  
*Hon. Robert Keeton*  
*Prof. Arthur Miller*  
*Hon. Thomas Phillips*

*Moderator: Hon. Edward Becker (3d Cir.)*

5:00: Adjourn.





Participants in September Conference  
August 18, 1997

The following list contains information on participants for the Discovery Conference being held by the Advisory Committee on the Civil Rules on Sept. 4-5, 1997, at Boston College. A very few further names may later be added.

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September 2, 1997

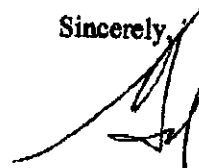
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Dear Dan:

At the request of Judge David Levi and Professor Richard Marcus, I ask you to prepare a suitable number of copies of the attached Memorandum on Standard for Production of Documents.

Best wishes.

Sincerely,



Geoffrey C. Hazard, Jr.

(accompanying pages 1)

GCH:rg

Memorandum to Standing Committee on Rules of  
Practice and Procedure

From: Geoffrey C. Hazard, Jr.

Re: Standard for Production of Documents under Rule 34

**Premise:**

Plaintiffs' lawyer submit sweepingly broad documents discovery demands because some have been "burned" in the past by nonproduction of important documents where the nonproduction (in cases where it has subsequently been ascertained that such documents exist) was justified by the responding party on the ground that the demand did not reach the category into which those documents fell. The *Fisons* case in Washington State is an illustration. Many teachers of civil procedure who had been in practice on the responding side report having observed, sometimes having had to participate in, verbal game playing of this kind.

Parties and their lawyers (chiefly defendants) who properly respond to documents discovery demands of sweeping scope appropriately complain about the burden and waste in responding to such demands. Parties and their lawyers who play the verbal games obviously do not report themselves. But the temptation to cheat and rewards of cheating are substantial, as is the capacity for rationalization in the verbal games. Hence, a vicious cycle is perpetuated.

**Reform:**

In my opinion some additional specification by reference to the issues such as that recommended by the American College of Trial Lawyers is warranted (and also a corresponding revision of the pleading rule in Rule 8). However, such a revision does not really respond to the situation. Accordingly, the standard for discovery might be revised essentially as follows:

- (a) The attorney of record for the party on whom a documents discovery demand is made shall inspect documents in possession of or accessible to that party and shall produce documents as described in paragraph (b). The attorney shall certify that production is complete based on a reasonably diligent search, except for documents identified as being withheld upon a claim of privilege.
- (b) All documents must be produced that a trial lawyer of substantial experience would reasonably recognize as ones that an opposing lawyer of similar experience would regard as discoverable under the standard of relevance stated in Rule 26(b).





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Washington, D.C. 20002

Dear John:

Herewith copies of the current version of the Agenda and the Participants List for the September Conference, along with a copy of a letter I have written to the bar group contact persons regarding their written submissions (among other things). I am hopeful that we will have most of those by Aug. 15 and that, along with the FJC draft report and the "final" versions of the agenda and participants' list, these will constitute the final packet of materials for the participants, and that this packet can go out by the end of the following week (e.g., Aug. 22).

If you can think of other loose ends, I'd appreciate a call. Otherwise, it looks like things are relatively ship-shape.

Sincerely,



Richard L. Marcus  
Distinguished Professor  
of Law

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Aug. 1, 1997

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Product Liability Advisory Council  
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Reson, Va. 22091

Re: September, 1997, Conference on Discovery, Advisory  
Committee on the Civil Rules

Gentlemen:

This is a follow-up to my earlier letter. I have been in contact with each group regarding the individual it will designate to participate in the panel at the conference on Friday morning and the written submissions we are hoping to receive from each group. I write now to bring you up to date on developments and to requests some actions by each of you.

First, I can report that as of today four of the six bar groups have designated a representative for the panel. ATLA should be doing so soon, and DRI has narrowed its choice down to two people. For the present, the representatives I can report are as follows:

Jeffrey Barist  
Milbank, Tweed, Hadley & McCloy  
1 Chase Manhattan Plaza  
New York, N.Y. 10005  
[212] 530-5000  
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[517] 636-1000  
FAX [517] 636-3228  
(Product Liability Advisory Council)

I also understand that each of the groups is at work on a written submission to the conference on ideas for discovery reform. I would hope that each of you could send copies of the contributions of your group to each panelist as soon as these are ready, and to Prof. Burbank, whose summer address is:

Prof. Stephen Burbank  
P.O. Box 1965  
Wellfleet, Ma. 02667

In that way, the participants will have the earliest possible notice of the views of other groups than their own.

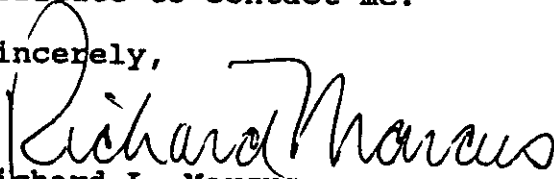
In addition, I would appreciate your sending copies of your written submissions to the Rules Committee Support Office at the following address:

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

If at all possible, it would important for these submissions to arrive by **Friday, August 15** so that they can be included in packets on the conference being sent out to members of the Advisory Committee and other participants.

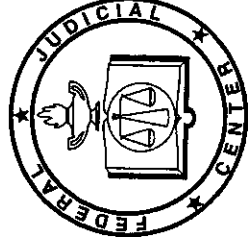
We very much appreciate the assistance and support we have received from each of you in connection with the upcoming conference, and hope that these requests do not prove onerous. If you have any questions, please don't hesitate to contact me.

Sincerely,

  
Richard L. Marcus  
Distinguished Professor  
of Law

cc: Prof. Burbank





**Report of Federal Judicial Center**

**Discovery Survey of Counsel**

**Advisory Committee on Civil Rules**

**Boston College Law School Symposium**

**September 4, 1997**

# **Objectives of the FJC study: To answer four questions**

- **How much discovery is there and how much does it cost?**
- **What kinds of problems occur in discovery and what is their cost?**
- **What has been the effect of the 1993 amendments to the federal rules governing discovery?**
- **Is there a need for further rule changes and if so what direction should they take?**

## **Cases and methods**

- **Sample of 1,000 cases**
  - **drawn from 85 of 91 federal districts, representing 97% of federal civil caseload**
  - **cases terminated in last three months of 1996**
  - **most cases were filed after 12/93 effective date of Rule 26(a)**
  - **cases likely to have discovery (45% of all cases)**
  - **excluded cases such as prisoner petitions, social security appeals, transfers, defaults, MDL cases, cases closed within 60 days of filing**
- **Questionnaire sent to 2,016 lawyers in 1,000 cases**
  - **59% response rate**
  - **Pl. and def. response rates reflect sample composition**



## **How much discovery was there?**

- **85%: some discovery or disclosure**
- **94% of these attorneys engaged in formal discovery**
- **72%: met and conferred**
- **72%: had a discovery plan or order entered**
- **High incidence of informal exchange (62%)**
- **Unexpectedly high rate of initial disclosure (58%)**
- **29%: expert disclosure; 80% of cases with expert discovery**

**Table 1<sup>1</sup>**

**Percentage of attorneys reporting that various types of discovery and, disclosure occurred, in cases involving some discovery or disclosure**

<u>Discovery activity</u>	<u>%</u>
Formal discovery	<u>N=886</u> 94.0
Meeting and conferring re discovery plan	72.0
Entry of discovery plan or scheduling order	72.0
Informal exchange of discoverable information	62.0
Initial disclosure (Rule 26(a)(1) or local provision)	58.0
Either expert disclosure or expert discovery	36.0
Expert disclosure (Rule 26(a)(2) or local provision)	29.0

<sup>1</sup> Tables are numbered as in the Center's written report to the Advisory Committee.

## What was the cost of discovery?

- Expenses=lawyer & paralegal fees, expert & transcript fees, other legal expenses (in dollars)
- Median litigation expenses: \$13,000 in attorney costs per client in cases with some discovery expenses
- Half of total litigation expenses were attributable to discovery
- No apparent differences between Pl. and Def. in % of total litigation expenses attributable to discovery
- Stakes = difference between best and worst “likely outcomes”
- Discovery relative to stakes was 3%, at most levels of stakes

## **What benefit was derived from discovery?**

- **The right amount of information: 69%**
- **Too little information: 8%**
- **Too much information: 9%**
- **Discovery expenses were “about right”: 54%**
- **Discovery expenses were low: 20%**
- **Discovery expenses were too high: 15%**

## **What kinds of problems occurred in discovery?**

- **Half of those with discovery had one or more problems**
- **If one problem was encountered, others were likely**
- **44%: Document production**
- **37%: Initial disclosure**
- **27%: Expert disclosure**
- **26%: Depositions**

**Table 10**

**Percentage of attorneys reporting problems with document production, initial disclosure, expert disclosure, or depositions, in cases in which the activity occurred**

<u>Discovery or disclosure procedure</u>	<u>%</u>
Document production (N=743)	44.0
Initial disclosure (N=517)	37.0
Expert disclosure (N=259)	27.0
Depositions (N=592)	26.0

# **Problems with document production**

- **For any single problem, incidence was moderate**
- **28%: failure to respond adequately (More Ps)**
- **24%: failure to respond in a timely fashion (Equal)**
- **16%: requests were vague (More Ds)**
- **15%: requests were excessive (More Ds)**

Table 26

Percentage of attorneys reporting problems with document production,  
in cases where document production was reported

<u>Type of problem</u>	<u>%</u>
A party failed to respond adequately.	28.0
A party failed to respond in a timely fashion.	24.0
One or more requests were vague.	16.0
An excessive number of documents were requested.	15.0
Materials provided were excessive or disordered.	8.0
Other	3.0
Number of respondents	743



## **What expenses were incurred because of problems?**

- **Expenses per client = attorney & paralegal fees, expert witness, transcripts, other expenses, not client time**
- **We asked about expenses incurred *unnecessarily* because of problems**
- **Estimates of unnecessary expenses averaged 19% of *discovery* expenses**
- **About 9% of *overall* litigation expenses in cases with problems**
- **For *all* cases, unnecessary discovery expenses amount to 4% of total litigation attorney expenses per client**

## **What are the fees and expenses associated with particular types of discovery?**

- **Depositions: Median = \$3,500**
- **Expert disclosure: Median = \$1,375**
- **Document production: Median = \$1,100**
- **Interrogatories: Median = \$1,000**
- **Initial disclosure: Median = \$750**
- **Discovery planning: Median = \$600**

**Table 28**  
**Expenses per client for indicated discovery activity,**  
**for cases with some such activity**

<u>Activity</u>	<u>Median</u>
Depositions	\$3,500
Expert disclosure or discovery	\$1,375
Request for and/or production of documents	\$1,100
Other	\$1,300
Interrogatories	\$1,000
Initial disclosure of documents	\$750
Meet and confer/discovery planning	\$600

## **What particular cases or activities account for higher cost**

- **“Other” cases are disproportionately represented among cases with highest discovery expenses**
- **“Other” case are disproportionately antitrust, securities, patent, & trademark cases**
- **Document production costs are high in these cases**
- **But, other discovery expenses are also high in these cases**
- **We found no particular type of activity responsible for higher costs**
- **Conclusion: It’s not the type of activity, it’s the case. Data are consistent with complex, contentious, high-stakes, high-volume cases presenting the problems.**

**Table 29**  
**Discovery expenses per client by type of case,**  
**for cases with some discovery expense**

<u>Case type</u>	<u>95th percentile</u>	<u>Median</u>	<u>10th percentile</u>	<u># of respondents</u>
Contract	\$64,000	\$4,000	\$300	199
Tort	\$88,000	\$6,600	\$750	236
Civil Rights	\$58,000	\$5,700	\$490	240
Other	\$300,000	\$4,000	\$400	224

**Table 30**  
**Expenses per client for requests for document production,**  
**for cases with such expense**

<u>Case type</u>	<u>95th percentile</u>	<u>Median</u>	<u>10th percentile</u>	<u># of respondents</u>
Contract	\$15,600	\$975	\$150	151
Tort	\$17,600	\$1,100	\$150	190
Civil Rights	\$10,800	\$1,200	\$120	182
Other	\$88,200	\$1,250	\$165	159

Table 31  
80th Percentile of discovery expenses by type of discovery activity,  
for respondents reporting any discovery expense

<u>Activity</u>	<u>80th percentile, patent, trademark, securities, and antitrust cases</u>	<u>80th percentile, cases with at least \$40,000 discovery expenses</u>	<u>80th percentile, all other cases</u>
Depositions	\$135,000	\$51,000	\$7,400
Request for and/or production of documents	\$67,000	\$27,000	\$2,900
Interrogatories	\$47,000	\$18,000	\$2,300
Expert disclosure or discovery	\$42,000	\$11,000	\$1,100
Meet and confer/discovery planning	\$12,000	\$10,000	\$1,250
Initial disclosure of documents	\$2,400	\$12,000	\$1,600
Number of respondents	53	105	888

## **How much was initial disclosure used?**

- **58% of attorneys who had some discovery used initial disclosure**
- **35% of those in opt-out districts engaged in initial disclosure**
- **55% of those with no disclosure were exempt by district or judge**
- **Likelihood of disclosure does not vary by case type or stakes**



# **What was the form of initial disclosure? Does it replace discovery?**

- **77%: provided at least some documents**
- **28%: the entire disclosure was only documents**
- **89% of those who used disclosure also engaged in discovery**

## **What were the *perceived* effects of initial disclosure?**

- About half, often more, said it had none of seven listed effects
- For those reporting an effect, the great majority said it was in the direction intended
  - Decreased amount of discovery 43%
  - Decreased expenses 39%
  - Increased settlement prospects 36%
- But 16% reported increased expenses due to disclosure

**Table 17**  
**Percentage of attorneys reporting specific effects of initial disclosure in  
 their case, in cases where initial disclosure occurred**

<u>Effect of initial disclosure on</u>	<u>Increased</u>	<u>Had no effect</u>	<u>Decreased</u>
Amount of discovery (N=522)	10.0	47.0	43.0
Your client's overall litigation expenses (N=522)	16.0	45.0	39.0
Number of discovery disputes (N=483)	5.0	62.0	33.0
Time from filing to disposition (N=508)	7.0	62.0	32.0
-----			
Overall procedural fairness (N=508)	37.0	54.0	9.0
Prospects of settlement (N=520)	36.0	59.0	6.0
Fairness of case outcome (N=500)	25.0	70.0	5.0

## **Did perceptions of initial disclosure's effects vary by attorney or case?**

- **More plaintiffs' attorneys said settlement prospects increased**
- **Attorneys in complex, contentious, and high stakes cases were more likely to report negative effects**

## **What problems were encountered in initial disclosure?**

- **37% of attorneys with initial disclosure reported problems**
- **The incidence of any single problem was modest**
- **But 19% said disclosures were too brief or incomplete**
- **Seldom excessive or done under pressure of motion or court order**
- **Problems more likely in complex, contentious, and high stakes cases**

**Table 18**  
**Percentage of attorneys reporting specific problems with initial disclosure,**  
**in cases where initial disclosure was reported**

<u>Type of problem</u>	<u>%</u>
Disclosure was too brief or incomplete.	19.0
A party failed to supplement or update the disclosures.	12.0
Some disclosed materials were also requested in discovery.	11.0
A party disclosed required information and another party did not disclose required information.	11.0
Disclosure occurred only after a motion to compel or an order from the court.	6.0
Other	3.0
Disclosure was excessive.	2.0
Sanctions were imposed for failure to disclose.	1.0
Number of respondents	517

## **How much was expert disclosure used?**

- **Expert *discovery* of any type was used by 36% of those who used discovery**
- **Expert *disclosure* was used by 29% of those who used discovery**
- **Far more likely to be used in tort cases**
- **Occurred more frequently in complex and high stakes case**
- **71% provided a written report**

## **What were the *perceived* effects of expert disclosure?**

- **More than half who used expert disclosure said it had none of five listed effects**
- **But 47% said it increased procedural fairness**
- **And 31% said it decreased litigation expenses**
- **But 27% said it increased litigation expenses**



**Table 20**  
**Percentage of attorneys reporting specific effects of expert disclosure,**  
**in cases where expert disclosure was reported**

<u>Effect of expert disclosure requirement on</u>	<u>Increased</u>	<u>Had no effect</u>	<u>Decreased</u>
Overall procedural fairness (N=234)	47.0	46.0	8.0
Fairness of case outcome (N=231)	37.0	56.0	7.0
Pressure to settle (N=230)	37.0	61.0	3.0
Client's overall litigation expenses (N=241)	27.0	43.0	31.0
Time from filing to disposition (N=232)	10.0	72.0	18.0

## **What problems were encountered in expert disclosure?**

- **27% of attorneys who used expert disclosure reported problems**
- **The incidence of any single problem was modest**
- **13% was highest: disclosures were too brief or incomplete**
- **Problems were more likely in contentious and high stakes cases**

**Table 21**  
**Percentage of attorneys reporting problems with expert disclosure,**  
**in cases where expert disclosure was reported**

<u>Type of problem</u>	<u>%</u> <u>(N=259)</u>
Expert disclosure was too brief or incomplete.	13.0
Expert disclosure was too expensive.	9.0
A party failed to supplement or update its disclosures.	9.0
Other	4.0

***Across districts, is nonuniformity of disclosure rules a problem?***

- **16%: a serious problem**
- **41%: there is no nonuniformity or it is not a problem**
- **Attorneys in multiple districts more often identify it as a problem**
- **30% had no opinion; more likely to practice in one district or to have small federal practice**

***Within districts, is nonuniformity of disclosure rules a problem?***

- **Nearly 75%: the problem is minor or there is no nonuniformity**
- **Only 6%: it is a serious problem**
- **Only 13% had no opinion**

**Table 34**  
**Percentage of attorneys holding certain opinions regarding the effect  
of nonuniformity in disclosure within and across districts**

<u>Attorney opinion</u>	Within a district ( <u>N=949</u> )	Across districts ( <u>N=765</u> )
Lack of uniformity creates serious problems	6.0	16.0
Lack of uniformity creates moderate problems	21.0	44.0
Lack of uniformity creates minor or no problems	27.0	28.0
There is no significant lack of uniformity	47.0	13.0

## **Should Rule 26(a)(1) be revised? If so, how?**

- **41%: prefer uniform rule requiring initial disclosure**
- **27%: prefer uniform rule with no initial disclosure and prohibition on local requirements**
- **30%: prefer status quo**

## **Who supports the various Rule 26(a)(1) changes?**

- **More likely to favor a national rule requiring disclosure were:**
  - **those who used initial disclosure;**
  - **plaintiffs' attorneys;**
  - **solo practitioners and those from small firms**
- **Their opposites were more likely to favor a prohibition on disclosure**
- **Even so, substantial numbers of those who represent defendants, who practice in large firms, and, surprisingly, who had problems with initial disclosure support its uniform application**



**Table 38**  
**Percentage of attorneys with specific preferences regarding**  
**uniform national rules on initial disclosure**

<u>Attorney opinion</u>	<u>%</u>
National rule requiring initial disclosure in every district	41.0
Allowing local districts to decide whether or not to require initial disclosure (status quo)	30.0
National rule with no requirement for initial disclosure and a prohibition on local requirements for initial disclosure	27.0
Other	2.0
Number of respondents	1112

## **When should rule changes, if any, occur?**

- **43% of those with an opinion: settle the nonuniformity issue now**
- **Preferences did not differ by type of client or years in practice**
- **More likely to favor revision to Rule 26: those in multiple districts and who had experienced problems with initial disclosure**

**Table 42**  
**Percentage of attorneys with various opinions on need for change**  
**in discovery rules at this time**

<u>Attorney opinion</u>	<u>%</u> (N=1101)
Changes in uniformity of initial disclosure practices (Rule 26(a)(1)) are needed now.	33.0
Changes are needed, but should not be considered until we have more experience with recent changes.	27.0
Changes in uniformity of expert disclosure practices (Rule 26(a)(2)) are needed now.	21.0
Other changes are needed now.	14.0
No changes are needed.	14.0
No opinion.	14.0

## **What changes would help reduce discovery expenses?**

- **54%: increase the availability of judges to resolve discovery disputes**
- **44%: adopt a uniform rule requiring disclosure**
- **42% each: sanctions and civility codes**
- **Plaintiffs: somewhat more likely to favor a uniform national rule requiring initial disclosure**
- **Defendants: somewhat more likely to favor narrower scope of discovery**

Table 35

Percentage of attorneys with certain opinions about whether specific changes in rules or case management practice would be likely to reduce expenses without interfering with fair case resolution

<u>Change in rule or case management practice</u>	<u>Decrease expenses in this case</u>	<u>Decrease expenses generally</u>
Increasing availability of district or magistrate judges to resolve discovery disputes	18.0	54.0
Adopting a uniform national rule requiring initial disclosure	17.0	44.0
Imposing fee-shifting sanctions more frequently and/or imposing more severe sanctions for violations of discovery rules or orders	14.0	42.0
Adopting a civility code for attorneys	13.0	42.0
Increasing court management of discovery	13.0	37.0
Deleting initial disclosure from the national rules	12.0	31.0
Narrowing the definition of what is discoverable (Rule 26(b))	12.0	31.0
Narrowing the definition of what documents are discoverable (Rule 34)	11.0	30.0
Limiting—or further limiting—the maximum number of hours for a deposition	9.0	27.0
Limiting—or further limiting—the number of interrogatories	8.0	26.0
Limiting—or further limiting—the number of depositions	7.0	23.0
Limiting—or further limiting—the time within which to complete discovery	8.0	19.0
Other change	2.0	5.0
Number of respondents	1036	1036

# **What is the most promising approach to reducing discovery problems?**

- **47%: judicial case management**
- **27%: revise the rules of civil procedure to further control or regulate discovery**
- **26%: address need for changes in client and/or attorney incentives regarding discovery**
- **No significant differences by case or attorney characteristics**

**Table 37**  
**Percentage of attorneys selecting each of three approaches as the most promising for reducing discovery problems**

<u>Approach</u>	<u>% (N=721)</u>
Increase judicial case management	47.0
Revise Federal Rules of Civil Procedure to further control or regulate discovery	27.0
Address need for changes in client and/or attorney incentives regarding discovery	26.0

**Although this survey shows that substantial numbers of attorneys favor uniformity in the disclosure rules, it also shows that only a quarter see further rule changes as the most effective way to reduce discovery problems.**

**The largest group of attorneys in this survey views increased judicial case management as the most promising single method for reducing discovery problems.**





**Discovery and Disclosure Practice, Problems, and Proposals for Change:  
A Case-based National Survey of Counsel in Closed Federal Civil Cases**

**Thomas E. Willging, John Shapard  
Donna Stienstra, and Dean Miletich**

**August 22, 1997**



**Submitted to the Judicial Conference Advisory Committee on Civil Rules,  
For Consideration at its Meeting September 4-5, 1997  
Boston College**

**Disclosure Practice, Problems, and Proposals for Change:  
A Case-based National Survey of Counsel in Closed Federal Civil Cases**

**Table of Contents**

I. Background	1
II. Highlights from the Research	2
III. Summary of the Research Findings	3
IV. Detailed Results and Analysis	10
1. What kinds of discovery do attorneys use?	10
2. How much does discovery cost the parties? What are its costs relative to total litigation costs, to the amount at stake, and to the information needs of the case?	13
3. How often do problems arise in discovery? What kinds of problems arise? Do problems arise in particular types of cases?	18
4. What proportion of discovery expense is due to discovery problems?	20
5. With what frequency is initial disclosure used? What are its effects? What kinds of problems arise in initial disclosure?	21
6. With what frequency is expert disclosure used? What are its effects? What kinds of problems arise in expert disclosure?	27
7. With what frequency are the other 1993 discovery rule amendments used (meet-and-confer requirements, discovery planning limits on deposition conduct, and limits on interrogatories and depositions)? What are their effects?	29
A. Meeting and conferring	29
B. Depositions	31
8. With what frequency does document production occur? What kinds of problems arise in document production?	33
9. What are the expenses for specific discovery activities?	34
10. In the view of attorneys, what causes discovery problems? To what extent are discovery problems due to judicial case management?	38
11. Is nonuniformity in the disclosure rules a problem?	40
12. If change is necessary, what direction should it take? What changes would be likely to reduce discovery expenses? Should change occur now or later?	41
V. Endnote	49
Appendix 1: Methods	51
Appendix 2: Questionnaire	

**Disclosure Practice, Problems, and Proposals for Change:  
A Case-based National Survey of Counsel in Closed Federal Civil Cases**

**Thomas E. Willging, John Shapard, Donna Stienstra, and Dean Miletich<sup>1</sup>  
Federal Judicial Center  
August 22, 1997**

**I. Background**

The Judicial Conference's Advisory Committee on Civil Rules requested that the Federal Judicial Center conduct research on questions relating to discovery. Judge Paul Niemeyer (4th Cir.), Chair, appointed a subcommittee chaired by Judge David Levi (E.D. Cal.) to determine the questions to be studied and to work with the Center in designing the research. In response to the committee's request and in consultation with the subcommittee, the Center determined that a national survey of counsel in closed federal civil cases would address many of the committee's questions.

This report presents findings from a national survey of responses to a questionnaire mailed on May 1, 1997 to 2,000 attorneys in 1,000 closed civil cases. We sampled from cases in which discovery might be expected by excluding cases such as Social Security appeals, student loan collections, foreclosures, default judgments, and cases that were terminated within sixty days of filing. Questionnaires were returned by 1,178 attorneys, a response rate of 59%. The cases in which respondents were involved appear to be representative of the sample as a whole. For further information concerning the sample and its representativeness, see Appendix 1. The questionnaire is attached at Appendix 2.

The Committee's interests cover four broad areas of inquiry: (1) How much discovery is there and how much does it cost? (2) What kinds of problems occur in discovery and what is their cost? (3) What has been the effect of the 1993 amendments to the federal rules governing discovery? (4) Is there a need for further rule changes and if so what direction should they take? This report provides information in response to the following specific questions derived from these four general topics:

1. What kinds of discovery do attorneys use?
2. How much does discovery cost the parties? What are its costs relative to total litigation costs, to the amount at stake, and to the information needs of the case?
3. How often do problems arise in discovery? What kinds of problems arise? Do problems arise more often in particular types of cases?
4. What proportion of discovery expense is due to discovery problems?

---

<sup>1</sup> We acknowledge the valuable assistance of a number of Research Division staff members in various stages of producing this report, including Joe Cecil, George Cort, Melissa Day, Yvette Jeter, Pat Lombard, Naomi Medvin, Jackie Morson, Aletha Janifer, David Rauma, Elizabeth Wiggins, and Carol Witcher.

5. With what frequency is initial disclosure used? What are its effects? What kinds of problems arise in initial disclosure?
6. With what frequency is expert disclosure used? What are its effects? What kinds of problems arise in expert disclosure?
7. With what frequency are the other 1993 discovery rule amendments used (meet-and-confer requirements, discovery planning, limits on deposition conduct, and limits on interrogatories and depositions)? What are their effects?
8. With what frequency does document production occur? What kind of problems arise in document production?
9. What are the expenses for specific discovery activities?
10. In the view of attorneys, what causes discovery problems? To what extent are discovery problems due to judicial case management?
11. Is nonuniformity in the disclosure rules a problem?
12. If change is necessary, what direction should it take? What changes would be most likely to reduce discovery expenses? Should change occur now or later?

## II. Highlights from the Research

1. High levels of discovery problems and high expenses were more likely to occur in cases with high stakes, high levels of contentiousness, high levels of complexity, or high volumes of discovery activity. Problems in these cases were not limited to a particular procedural area, such as disclosure or document production, but occurred in most or all aspects of discovery.
2. Overall, 48% of attorneys who had some discovery in their case reported discovery problems. Document production generated the highest rate of reported problems.
3. Generally, discovery expenses represented 50% of litigation expenses and 3% of the amount at stake in the litigation.
4. Discovery expenses incurred *unnecessarily* because of problems were typically about 13% of discovery expenses and about 4% of overall litigation expenses.
5. Depositions account for by far the greatest proportion of discovery expenses.
6. Initial disclosure is being widely used and is apparently working as intended, increasing fairness and reducing costs and delays far more often than decreasing fairness or increasing costs and delays.
7. Independent of the rules, there was a considerable amount of informal exchange of discoverable information.
8. Expert disclosure generally appears to be working as intended by increasing procedural fairness. About a quarter of those who used expert disclosure said it had increased their litigation expenses, but, perhaps more surprisingly, 31% said it had decreased their expenses.

9. Increased judicial case management is the means attorneys most often recommended for alleviating discovery problems and reducing discovery expenses.
10. The nonuniformity of disclosure rules across districts presents only moderate problems for most attorneys. Nonetheless, the majority of attorneys want a uniform national rule.
11. Attorneys are split over the direction a uniform national rule should take. A large majority of those who have used initial disclosure favor a rule continuing initial disclosure. A large majority of those from districts that have opted out oppose a rule requiring initial disclosure.

### **III. Summary of the Research Findings**

Set out below are the questions posed by the Advisory Committee on Civil Rules, along with short answers derived from the research. More detailed findings are reported in section IV. In most instances, the findings are reported by individual attorney responses, not by combining attorney responses for each case.

#### **1. What kinds of discovery do attorneys use?**

The Federal Rules of Civil Procedure have traditionally regulated the conduct of discovery according to the type of discovery activity used—e.g., depositions, document production, and interrogatories. For that reason, it is of interest to identify the kinds of activities that take place in the context of these rules and the problems that arise in using them.

In our sample, drawn from cases likely to have discovery, about 85% of the attorneys said some discovery activity had occurred in their case. This includes discovery planning, as well as formal discovery or disclosure. Of the 85% of cases that had some discovery activity, 94% of the attorneys reported that formal discovery occurred in their case (Tables 1 & 2).

The most frequent form of discovery activity was document production: 84% of those who said there was some discovery or disclosure in their case said they engaged in document production. Interrogatories and depositions also occurred at relatively high rates: 81% and 67% respectively. Fifty-eight percent (58%) of the attorneys reported that initial disclosure occurred in their case, and 29% said expert disclosure did (Table 2).

Nearly two-thirds of those who engaged in formal discovery or disclosure also informally exchanged discoverable information without being required by rule to do so (Table 1).

#### **2. How much does discovery cost the parties? What are its costs relative to total litigation costs, to the amount at stake, and to the information needs of the case?**

Of longstanding concern has been the cost of discovery and the relationship of that cost to the overall cost of litigation and the amount at stake in the case. Anecdotal information—and the occasional horror story—suggests that discovery expenses are excessive and disproportionate to the informational needs of the parties and the stakes in the case.

Discovery expenses generally.

We found that the median cost of litigation reported by attorneys in our sample was about \$13,000 per client (Table 3). About half of this cost was due to discovery (Table 4). The proportion of litigation costs spent on discovery differed little between plaintiffs and defendants.

Discovery relative to stakes.

Discovery expenses were quite low in relation to the amount at stake in the litigation. The median percentage was 3% of the stakes; however, a small percentage of the attorneys (5%) estimated discovery expenses at 32% or more of the amount at stake (Table 6). About half the attorneys thought the expenses of discovery and disclosure were about right in relation to their client's stakes in the case. Fifteen percent (15%) thought the expenses were high and 20% said they were low relative to the stakes (Table 8).

Discovery relative to information needs.

Most attorneys—representing plaintiffs and defendants alike—thought the discovery or disclosure generated by the parties was about the right amount needed for a fair resolution of their cases. Fewer than 10% thought the process generated too little information, and about 10% thought the process generated too much information (Table 9).

**3. How often do problems arise in discovery? What kinds of problems arise? Do problems arise in particular types of cases?**

Over the past decade considerable concern has developed over what are perceived to be widespread problems with discovery. In our sample, 48% of the attorneys who used discovery or disclosure reported one or more problems. Of those who reported problems, 44% said problems occurred in document production, 37% said they occurred in initial disclosure, 27% in expert disclosure, and 26% in depositions (Table 10). When attorneys reported problems in one discovery activity, like depositions, they often reported problems in other discovery activities, particularly document production (Table 11).

Attorneys in tort and civil rights cases were more likely to report discovery problems than attorneys in contracts or other cases. Both the likelihood of problems and the total incidence of problems increased as stakes, factual complexity, and contentiousness increased.<sup>2</sup>

**4. What proportion of discovery expense is due to discovery problems?**

About 40% of the attorneys reported unnecessary discovery expenses due to discovery problems. Where unnecessary expenses were reported, they amounted to about 19% of

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<sup>2</sup> Throughout the report we will refer to "complex" and "contentious" cases, by which we mean cases rated by the attorneys as complex or contentious. We are reporting the attorneys' subjective assessments of their cases, not an objective measure. In the interests of readability, however, we use the shorthand "complex case" and "contentious case."

total discovery expenses (Table 12); overall about 4% of litigation expenses are attributable to discovery problems.

The *percentage* of unnecessary discovery expenses attributed to problems did not vary with the total amount of discovery expenses, suggesting that the higher incidence of problems and greater absolute cost in larger or more complex cases may simply be in proportion to the greater amount of discovery in such cases.

**5. With what frequency is initial disclosure used? What are its effects?  
What kinds of problems arise in initial disclosure?**

The most controversial of the 1993 amendments is the revision of Fed. R. Civ. P. (hereafter Rule) 26(a)(1), which permits each district to determine whether to require attorneys to disclose specified types of information early in the litigation without requests from opposing counsel. The rule drafters intended to achieve a number of outcomes, including less formal discovery, lower litigation costs, and earlier settlements. Because Rule 26 (a)(1) permits districts, as well as attorneys by stipulation, to opt out of the rule, it has been unclear how many cases have actually been subject to the rule, much less what its impact has been.

Frequency of initial disclosure.

We found that over half of the attorneys (58%) who engaged in some discovery or disclosure either provided or received initial disclosure in their case (Table 2). The vast majority of attorneys (89%) who reported that initial disclosure occurred in their case also reported other types of discovery, indicating that initial disclosure seldom replaces discovery entirely.

Given the unexpectedly high incidence of initial disclosure, we examined whether the cases in our sample might overrepresent the amount of disclosure. We concluded that they do not, but also found, surprisingly, that more than a third of the attorneys in our sample who had engaged in initial disclosure had litigated their case in a district classified as having opted out of Rule 26(a)(1)'s requirements (Table 15). These data, together with the finding that 58% of cases with some discovery also involved disclosure, suggest that initial disclosure requirements may be more prevalent than some believe.

Effects of initial disclosure.

In general, initial disclosure appears to be having its intended effects. Among those who believed there was an effect, the effects were most often of the type intended by the drafters of the 1993 amendments. Far more attorneys reported that initial disclosure decreased litigation expense, time from filing to disposition, the amount of discovery, and the number of discovery disputes than said it increased them. At the same time, many more attorneys said initial disclosure increased overall procedural fairness, the fairness of the case outcome, and the prospects of settlement than said it decreased them (Table 17).

Nonetheless, more than a third of the attorneys (37%) who participated in initial disclosure identified one or more problems with the process (and generally with other aspects of discovery in their cases). The most frequently identified problem was incomplete disclosure (19% of attorneys who participated in disclosure). Relatively few attorneys



reported that disclosure requirements led to motions to compel, motions for sanctions, or other satellite litigation (Table 18). Problems in initial disclosure arose more frequently in cases involving large stakes and expenses or that were characterized as complex or contentious.

**6. With what frequency is expert disclosure used? What are its effects?  
What kinds of problems arise in expert disclosure?**

The 1993 revisions to Rule 26(a)(2) require attorneys, unless they stipulate otherwise, to provide opposing counsel a list of expert witnesses and, when appropriate, a written report summarizing the testimony to be offered by expert witnesses. Although it was likely that preparation of a written report might increase litigation costs, the rule drafters hoped it would enhance the amount of information available to each side and thus the fairness of the litigation.

Frequency of expert disclosure.

We found that most attorneys (73%) in our sample did not engage in expert disclosure. Of those who did, 71% said they provided an expert's written report to the opposing party (Table 19).

Effects of expert disclosure.

Like initial disclosure, expert disclosure appears to be having its intended effect, albeit with an increase in litigation expenses for 27% of the attorneys who used expert disclosure. That an expanded report may increase litigation expenses is not completely unexpected. Indeed, what may be more surprising is that slightly more attorneys—31%—reported decreased litigation expenses (Table 20).

Of the respondents who perceived an effect, far more said expert disclosure increased both overall procedural fairness and the fairness of the case outcome than said it decreased them. Many more also said expert disclosure increased pressure to settle than said it decreased such pressure (Table 20).

Of respondents in cases where expert disclosure took place, 27% reported problems with expert disclosure. The most frequent problems cited by attorneys were that expert disclosure was too brief or incomplete (13%), too expensive (9%), or not updated (9%) (Table 21).

**7. With what frequency are the other 1993 discovery rule amendments used (meet-and-confer requirements, discovery planning, limits on deposition conduct, and limits on interrogatories and depositions)? What are their effects?**

The 1993 rule revisions also brought several other changes. We discuss three—the requirement to meet and confer; the requirement to plan discovery; and the limits on the number of depositions and deposition conduct.

Meet and confer/discovery planning.

Amended Rule 26(f) requires parties to meet and confer to develop a proposed discovery plan prior to the court's scheduling conference, and amended Rule 16(b) in turn directs courts to "enter a scheduling order that limits the time . . . to complete discovery."

In our sample, about 60% of the attorneys reported that they met and conferred with opposing counsel. Most attorneys (72%) reported that a discovery plan was developed for their case. As was the case with the disclosure provisions, the majority of attorneys reported that meeting and conferring had no effect. The majority of those who reported effects said the effects were of the type intended by the rule drafters. That is, the process of meeting and conferring reduced overall litigation expenses, time from filing to disposition, and the number of issues in the case (Table 22). It was also seen as increasing overall procedural fairness and fairness of the case outcome.

Numerical limits on depositions.

The 1993 amendments revised Rule 30(a)(2)(A) to limit to ten the number of depositions that may be taken without court approval. For our sample of cases, 75% of attorneys who reported that depositions were used in their case said seven or fewer individuals were deposed, well within Rule 30's presumptive limit of ten depositions (Table 24). Only 4% of attorneys reported that too many depositions were conducted in their case (Table 25).

About 25% of the attorneys who had used depositions in the sample case (67% said they had) reported problems with this discovery tool. The most frequent complaint (12% of those who used depositions) was that too much time was spent on a deposition (Table 25). The median length of the longest deposition was four hours, and 25% of the longest depositions took seven hours or more (Table 24).

In 1991, the Advisory Committee considered but did not adopt a six hour time limit on depositions. Had this limit been in effect, it appears it would have affected about 30% of the cases in our sample.

Deposition conduct.

In 1993, the Rules Committee also amended Rules 30(d)(1) and (3) to proscribe using objections in an argumentative or suggestive manner, to limit attorneys from instructing witnesses not to answer questions, and to provide consequences for other unreasonable conduct. In our sample, a small number of attorneys reported problems in three areas of deposition conduct: that an attorney coached a witness (10%), instructed a witness not to answer (8%), or otherwise acted unreasonably (9%) (Table 25). These responses suggest that the 1993 amendments have not entirely eliminated these problems.

**8. With what frequency does document production occur? What kind of problems arise in document production?**

Anecdote has suggested that document production is one of the most costly parts of discovery and is fraught with difficulties. As we will discuss shortly, it is not one of the most expensive forms of discovery. However, it is the discovery device most frequently

used by attorneys—84%—and the activity for which the highest percentage of attorneys reported problems in their cases—44%.

The most frequently reported problems with document production were failure to respond adequately (28% of those who engaged in document production) and failure to respond in a timely fashion (24%) (Table 26). Those representing plaintiffs were more likely to complain that a party failed to respond adequately, while those representing defendants were more likely to complain that requests were vague or sought an excessive number of documents. Problems with document production are more likely to occur in high stakes, complex, or contentious cases, but a significant number of problems also occur in non-complex, non-contentious, and low-stakes cases.

#### **9. What are the expenses for specific discovery activities?**

Depositions accounted for by far the greatest amount of discovery expense (median=\$3,500 in cases with depositions). The next most costly types of discovery were expert discovery and disclosure (median=\$1,375), document production (median=\$1,100), and interrogatories (median=\$1,000). Less expense was incurred by initial disclosure (median=\$750) and meeting and conferring/discovery planning (median=\$600) (Table 28).

Document production, often said to be the most burdensome and costly part of discovery, typically involved rather modest costs.

#### **10. In the view of attorneys, what causes discovery problems? To what extent are discovery problems due to judicial case management?**

Among four types of attorney/client conduct that might have contributed to discovery problems, attorneys were most likely to attribute problems to one or more attorneys' or parties' intentional delays and complications; 55% of the attorneys cited this as a cause of discovery problems. Smaller percentages attributed problems to lack of client cooperation, pursuit of disproportionate discovery, or incompetent or inexperienced counsel (Table 32).

When judges were involved in discovery, as they were for 81% of the attorneys in our sample, they were far more likely to have been involved in the planning phase of discovery than to have decided motions or imposed sanctions. The vast majority of attorneys (83%) found no problems with the court's management of disclosure or discovery. While no single problem area had a high level of reported problems (Table 33), the most frequent specific complaints were that the time allowed for discovery was too short (7%) and that the court was too rigid about deadlines (5%) (Table 33 and text).

#### **11. Is nonuniformity in the disclosure rules a problem?**

Although for some time there has been growing concern about non-uniformity in the Federal Rules of Civil Procedure, those concerns became greater after 1993 when the revisions to Rule 26 explicitly permitted districts to opt out of the rule's initial disclosure

requirements. Since that time, an increasing number of voices among both the bench and bar have asserted that nonuniformity in the discovery rules—and in the disclosure rules in particular—is a serious problem and should be resolved.

That opinion is shared by the attorneys in our sample, at least with regard to nonuniformity of disclosure *across* districts. A clear majority—60%—of the attorneys with opinions on this subject said nonuniformity in the disclosure rules creates problems (Table 34). Most said the problems are moderate, but attorneys who practiced in four or more districts (10% of the respondents) are more likely than other attorneys to see such problems as serious. Even these national practitioners, however, are more likely to label the problems moderate than serious.

When asked about nonuniformity of disclosure requirements *within* districts, about 25% of the attorneys thought there are problems with nonuniformity of disclosure rules within the district in which the sample case was filed. Almost half said there is no significant lack of uniformity within the district in which their case was filed (Table 34).

**12. If change is necessary, what direction should it take? What changes would be most likely to reduce discovery expenses? Should change occur now or later?**

Given the concerns that have been raised about problems in discovery, the costs of discovery, and the impact of nonuniformity, both judges and lawyers, as well as policymakers within and outside each group, have asked what should be done. Are additional rule changes needed, for example? Or should judges and attorneys modify their behavior in some way? We examined the question of change in several ways.

**What kind of reform holds the greatest promise for reducing discovery problems?**

In response to a list of thirteen changes that might potentially reduce litigation costs, the most frequent choice by the attorneys was to increase the availability of judges to resolve discovery disputes (54%). Adopting a uniform rule requiring initial disclosure ranked second (44%), followed by two changes that tied for third place: imposing sanctions more frequently and severely (42%) and adopting a civility code (42%) (Table 35).

When we combined these thirteen response options into a more limited set, judicial case management ranked first (63%), followed closely by changing attorney behavior through sanctions or civility codes (62%) (Table 36).

The attorneys were then asked which of three approaches—more judicial case management, further rule revisions, or attention to attorneys' and clients' economic incentives—holds the *most* promise for reducing problems in discovery. About half the attorneys said increased judicial case management holds the most promise. Only about a quarter called for revising the rules to further control or regulate discovery, while the other quarter called for addressing the need for changes in client/attorney incentives (Table 37).

Do the discovery rules need to be changed? In what way should they be changed?

Although attorneys view judicial case management as the most promising approach to reducing discovery problems, 83% nonetheless want changes in the discovery rules. The desire for change centers on initial disclosure.

Regarding initial disclosure, a plurality of all respondents in the sample—41%—favor a uniform national rule requiring initial disclosure in every district. Another 27% favor a national rule with no requirement of initial disclosure and with a prohibition on local requirements for initial disclosure. Close to a third—30%—favor the status quo. Attorneys who participated in initial disclosure in the sample case were considerably more likely to favor requiring disclosure than attorneys who did not (Table 39).

When should changes be made.

Among those who think the discovery rules should be revised, a majority (54%) favor making changes now (Table 42 and accompanying text). Most of that group consists of attorneys who want immediate consideration of change to Rule 26(a)(1).

## IV. Detailed Results and Analysis<sup>3</sup>

### 1. What kinds of discovery do attorneys use?

Frequency of discovery activities.

Overall, about 85% of the attorneys in this national sample reported that some type of formal discovery activity—ranging from meeting and conferring to depositions and document production—occurred in their case.<sup>4</sup> For many of the 15% with no discovery, the case terminated relatively early: half in 180 days and 75% within a year of filing.

Table 1 shows the percentage of attorneys reporting each type of discovery activity when there was any discovery or disclosure in the case. The vast majority (94%) said some form of formal discovery—i.e., depositions, interrogatories, and so forth—had been conducted. Nearly three-quarters (72%) said a discovery plan or scheduling order had been entered in their case.

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<sup>3</sup> Results are based on each attorney's responses about the case included in the sample. Plaintiff and defendant attorneys' responses from the same case have not been matched for these analyses. Using only those cases in which at least one plaintiff's and one defendant's attorney responded would diminish the number of useful responses to about 300 cases.

Appendix 2 contains a copy of the questionnaire. Most tables contain cross-references to the questions in the questionnaire.

Unless otherwise noted, we are relying on Chi-square analyses when discussing differences between responses and are reporting only those differences that are statistically significant at the 0.05 level or better (i.e., the probability that the difference occurred by chance is at most 5%).

**Table 1**  
**Percentage of attorneys reporting that various general types of discovery and disclosure occurred, in cases involving some discovery or disclosure**

<u>Discovery activity</u>	%* (N=886)
Meeting and conferring re discovery plan (Q1)	72.0
Entry of discovery plan or scheduling order (Q3)	72.0
Informal exchange of discoverable information (Q4)	62.0
Initial disclosure (Rule 26(a)(1) or local provision) (Q5)	58.0
Either expert disclosure or expert discovery (Q9)	36.0
Expert disclosure (Rule 26(a)(2) or local provision) (Q9)	29.0
Formal discovery—Total (Interrogatories, Depositions, Documents, Requests for Admissions, Physical and Mental Examinations, Subpoenas, Inspections) (Q11 & Q12)	94.0

\* Note that respondents could select more than one response. The percentages are based on the total number of responses in the subset of cases involving some discovery or disclosure and are not expected to equal 100%.

Table 2 presents a finer breakdown of the specific forms of discovery and disclosure reported by respondents. Document production is the most frequent form of discovery, reported by 84% of attorneys who used some discovery or disclosure in their cases, followed closely by interrogatories (81%). The next most common forms of discovery are depositions (67%) and initial disclosure (58%).<sup>5</sup> Other forms of discovery, including expert discovery, occur in fewer than a third of the cases.

Given that Rule 26(a)(1) had been in effect for about three years at the time we drew our case sample, and given that about half of the courts in the sample had opted out of the district-wide application of initial disclosure, the finding that 58% of attorneys reported initial disclosure activity may be somewhat surprising. As we will see below, a sizable portion of disclosure activity appears to result from use of initial disclosure by individual judges in districts that have formally opted out of the rule.

In subsequent sections, we will explore many of these forms of discovery in greater detail. We will not, however, give further attention to requests for admission or physical and mental examinations. Before leaving these discovery methods altogether, let us present

<sup>4</sup> Recall that the sample was drawn from cases likely to have some discovery (see Appendix 1). The incidence of discovery in this study is thus likely higher than in studies that sample from all civil cases.

<sup>5</sup> Note that initial disclosure is a relatively recent addition to the discovery rules, with an effective date of December 1, 1993, though a few districts adopted a form of initial disclosure as part of their Civil Justice Reform Act Plan before the effective date of the federal rule. The sample includes cases to which the disclosure rules would not apply because the cases were filed before the effective date of the rule change or because they terminated prior to the time for filing disclosures (at or within ten days after the Rule 26(f) discovery planning meeting). Hence, the 58% of respondents reporting disclosure activity very likely understates the incidence of cases in which disclosure is now required.

two noteworthy items revealed by our data. First, requests for admission were more likely to be reported by attorneys in very contentious cases (54% of these attorneys) than by attorneys in cases rated as somewhat or not at all contentious (36%). Similarly, more attorneys in complex cases (40% of these attorneys) reported using requests for admission than did attorneys in cases that were somewhat complex (33%) or not at all complex (24%). Reported use of requests for admission was also more frequent when the stakes were greater than \$150,000 (37% of these attorneys) than in lower stakes cases (25%).

Second, physical and mental examinations were more likely to be reported by attorneys in tort cases (26% of these attorneys), but a sizable number of attorneys in civil rights cases (9%) also reported that a medical examination was conducted. Not surprisingly, few attorneys in contracts cases (1%) and in a miscellaneous category of "other" civil cases<sup>6</sup> (3%) reported that medical examinations occurred in their cases.

**Table 2**  
**Percentage of attorneys reporting that specific forms of discovery and disclosure occurred, in cases involving some discovery or disclosure**

<u>Discovery activity</u>	%* (N=886)
Document Production (Q12)	84.0
Interrogatories (Q12)	81.0
Depositions (Q11)	67.0
Initial disclosure (Rule 26(a)(1) or local provision) (Q9)	58.0
Requests for Admission (Q12)	31.0
Expert disclosure (Rule 26(a)(2) or local provision) (Q9)	29.0
Expert Discovery (Q9)	20.0
Physical or Mental Exam (Q12)	13.0
Other Formal discovery (Subpoenas, Inspections) (Q12)	9.0

\* Note that respondents could select more than one response. The percentages are based on the total number of responses in the subset of cases involving some discovery or disclosure and are not expected to equal 100%.

### Informal exchange.

While the findings discussed above are useful for understanding the extent to which attorneys use formal discovery, they also reveal that attorneys frequently engage in informal exchange of information. Looking back at Table 1, we see that 62% of attorneys informally exchanged discovery information in cases where there was also some discovery

<sup>6</sup> "Other" cases are mostly federal statutory actions and labor cases. In the rest of the report, we will refer to these cases by the term "other."

or disclosure. In the cases in which attorneys reported no discovery or disclosure, 46% exchanged information informally.

Not surprisingly, informal exchanges were significantly more likely to occur in cases where relationships between the opposing sides were not contentious (64% of these attorneys informally exchanged information) than in very contentious cases (46%) or somewhat contentious cases (53%). What is surprising, though, is that informal exchanges occurred in about half of the contentious cases, suggesting this may be a well-established practice or that it is perhaps encouraged by some judges. Also, experienced attorneys were more likely than attorneys with less experience to report making voluntary exchanges; the rates increased from 50% of those with the least experience to 63% of those with the most experience. Such exchanges were more likely to be reported in tort cases (69%) than in contract (54%), civil rights (54%), or other cases (52%).

Attorneys who reported engaging in informal exchanges were less likely to report problems with discovery (38% reported problems) than were attorneys who did not engage in informal exchanges (58%). Similarly, attorneys who exchanged information informally were less likely to report problems with court management of discovery (15%) than were attorneys who did not exchange information informally (23%).

Though intriguing, these data do not tell us anything about cause and effect, only that there are differences between the group of attorneys who engage in informal exchange and those who do not. Are attorneys more likely, for example, to exchange information because they are not having problems with discovery, or are they less likely to have problems because they have informally exchanged information? Or, there could be a causal relationship between these factors and an as yet unknown factor. We cannot tell, but the data suggest there may be a constellation of behaviors (and conditions, such as greater experience) that make for smoother discovery.

## **2. How much does discovery cost the parties? What are its costs relative to total litigation costs, to the amount at stake, and to the information needs of the case?**

### Discovery expenses in general and relative to total litigation costs.

To understand the impact of discovery costs, it is important to examine them first in the context of overall litigation costs. We asked attorneys to estimate their total litigation expenses, including attorney fees, paralegal fees, and fees for such items as expert witnesses, transcripts, and litigation support services. For our sample of attorneys, the median total litigation costs per client were about \$13,000 for cases involving any discovery expenses (Table 3).<sup>7</sup>

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<sup>7</sup> As with other data in this report, all figures pertaining to litigation expenses are reported on an attorney/client basis, not on a per case basis. Note also that we asked respondents to provide a dollar estimate for actual litigation expenses. We then asked for an estimate of the percentage of those expenses that were allocated to discovery and to particular types of discovery. We then applied these percentage estimates to the total dollar estimate to generate dollar estimates for discovery expenses.



**Table 3**  
**Total reported litigation expenses per client for cases involving any discovery expenses<sup>a</sup> (Q20)**

	<u>All respondents</u>	<u>Plaintiffs</u>	<u>Defendants</u>
95th percentile	\$170,000	\$200,000	\$150,000
Median	\$13,000	\$10,000	\$15,000
10th percentile	\$2,300	\$2,000	\$3,000
Number of respondents	899	415	484

Among attorneys reporting any discovery expense, the proportion of litigation expenses attributable to discovery is typically fairly close to 50%, as shown in Table 4. Half estimated that discovery accounted for 25% to 70% of litigation expenses. Both the mean and the median were about 50%, and there is no apparent difference between plaintiffs and defendants in this regard.

**Table 4**  
**Percentage of clients' total litigation expenses accounted for by discovery and disclosure, among cases with some discovery expense (Q21)**

	<u>All respondents</u>	<u>Plaintiffs</u>	<u>Defendants</u>
95th percentile	90.0	90.0	90.0
Median	50.0	50.0	50.0
10th percentile	10.0	10.0	10.0
Mean	47.0	47.0	47.0
Number of respondents	941	430	511

<sup>a</sup> We report the 95th percentile, median, and 10th percentile for expenses and other monetary information to provide a reasonably thorough picture of the range of the results. The 95th percentile is the point on the distribution of responses that marks the divide between the top 5% of responses and the lower 95% of responses. In Table 3, in other words, 5% of respondents reported total expenses of \$170,000 or more and 95% of respondents reported total expenses of \$170,000 or less. Similarly, the 10th percentile marks the divide between the bottom 10% of responses and the upper 90% of responses. In Table 3, in other words, 10% of the respondents reported litigation expenses of \$2,300 or less, and 90% reported expenses of \$2,300 or more. The median—or midpoint—is, of course, the 50th percentile.

We do not report the mean litigation expense because it is inflated by extreme values above the 95th percentile and so does not reflect anything close to what is "normal" or "typical." This same observation applies to all means for discovery and litigation expenses expressed in monetary terms in this study.

These data suggest that the typical case has rather modest litigation expenses—particularly relative to stakes, as we will see shortly—and that discovery expenses are a sizable but not surprising proportion of these expenses.

Discovery expenses relative to stakes.

For purposes of understanding discovery and its contribution to litigation expenses, it is also important to examine discovery expenses relative to the stakes of the case. We estimated the monetary amount at stake in the case as the difference between respondents' answers to questions concerning the best and worst "likely outcomes" in the case. For this sample of cases, the median estimated monetary stakes per client were \$150,000, with defendants estimating somewhat higher stakes than plaintiffs (Table 5).<sup>9</sup> Relative to these stakes, discovery expenses are very low—typically only 3% of the estimated stakes (Table 6). The proportion of discovery expenses relative to stakes is identical for plaintiffs and defendants.

**Table 5**  
Estimated amount at stake per client (Q23)

	All respondents	Plaintiffs	Defendants
95th percentile	\$5,000,000	\$3,000,000	\$5,500,000
Median	\$150,000	\$125,000	\$200,000
10th percentile	\$4,000	\$2,100	\$10,000
Number of respondents	1028	460	568

Discovery expenses typically amount to about 3% of the monetary stakes, whether the stakes are large or small. That is, when measured as a percentage of stakes, the amount spent on discovery is not correlated with stakes.<sup>10</sup> The *absolute dollars* spent on discovery are, however, correlated with the stakes. That is, as stakes rise the dollars spent on discovery also rise.

<sup>9</sup> We measured the monetary amount at stake in the case as the difference between the best and worst "likely outcomes" reported by the attorneys. For example, if a plaintiff's attorney reported that the best likely outcome in a case was a \$500,000 recovery and that the worst likely outcome was a \$250,000 recovery, we calculated the stakes to be \$250,000. Likewise, if a defendant's attorney reported the best likely recovery to be a \$100,000 loss and the worst likely recovery to be a \$500,000 loss, we calculated the stakes to be \$400,000. We do not report the mean in Table 5 for the reasons cited in note 8, *supra*.

<sup>10</sup> The Pearson correlation coefficient between the ratio of discovery expenses to stakes and the log of stakes is 0.10. The log is used because the Pearson coefficient assumes a linear relationship, and the log of stakes appears linearly related to discovery expenses as a percentage of stakes, while the absolute stakes are not linearly related to discovery expenses as a percentage of stakes.

**Table 6**  
**Discovery expenses as a percentage of amount at stake (Q21 & Q23)**

	<u>All respondents</u>	<u>Plaintiffs</u>	<u>Defendants</u>
95th percentile	32.0	32.0	32.0
Median	3.0	3.0	3.0
10th percentile	0.3	0.3	0.3
Number of respondents	801	361	440

Monetary stakes may not be the only reflection of a case's importance to the parties. The case may, for example, involve a request for equitable relief not susceptible to monetary valuation, or a party may be concerned about the case's impact on future claims. Almost 25% of the attorneys reported that such nonmonetary issues were of dominant concern in their case (Table 7). Attorneys in civil rights cases (70% of them) and in "other" cases (64%) were especially likely to report that their clients had such concerns (compared to 43% of attorneys in contract cases and 34% in tort cases).

**Table 7**  
**Percentage of attorneys reporting the extent to which their client was concerned about nonmonetary relief or consequences beyond the monetary relief sought in the case (Q24)**

<u>Importance of nonmonetary consequences</u>	<u>All respondents</u>	<u>Plaintiffs</u>	<u>Defendants</u>
Such consequences were of dominant concern*	23.0	24.0	21.0
Such consequences were of some concern*	32.0	24.0	38.0
Such consequences were of little or no concern*	46.0	52.0	41.0
Number of respondents	1022	457	565

\* The differences between plaintiffs' and defendants' responses are statistically significant.

Unlike the relationship we found between the amount of money spent on discovery and the amount at stake (i.e., as one rises the other does), we found no relationship between discovery expenses and nonmonetary stakes. That is, attorneys who reported that nonmonetary issues were of dominant concern to their clients were no more likely than other attorneys to have spent large sums of money on discovery. One possible explanation is that nonmonetary relief often arises in the context of a motion for a preliminary injunction. The truncated discovery schedule in such proceedings may serve to constrain discovery expenses.

We also examined the attorneys' subjective appraisals of the value of discovery in relation to stakes and, found that 15% of attorneys thought discovery expenses were high relative to the stakes in their case; 20% thought them to be low relative to stakes (Table 8).<sup>11</sup>

**Table 8**  
**Percentage of attorneys reporting whether discovery expenses, in relation to stakes, were high, low, or about right (Q30)**

	<u>All Respondents</u>	<u>Plaintiffs*</u>	<u>Defendants*</u>
High	15.0	17.0	14.0
About right	54.0	51.0	56.0
Low	20.0	20.0	20.0
No Opinion	11.0	12.0	10.0
Number of respondents	1089	497	592

\* The distribution of differences among plaintiffs and defendants is statistically significant.

An interesting question is whether sufficient information is obtained when discovery costs are low, especially when they are low relative to stakes. Some attorneys who had low costs relative to stakes, for example, may have found their information needs compromised. We found, to the contrary, that when attorneys reported that costs were low relative to stakes, by far the greatest proportion (88%) also reported that the information they obtained was about the right amount needed for a fair resolution of the case.<sup>12</sup> A mismatch between cost and usefulness of the discovered information was, in fact, more likely to occur when discovery costs were reported to be high relative to the stakes; 44% of attorneys who said costs were high relative to the stakes said the information obtained was more than the amount necessary for a fair resolution.

Discovery expenses relative to information needs.

In general, most attorneys, including both plaintiffs' and defendants' attorneys, thought the discovery or disclosure generated was about the right amount needed for a fair resolution of the case (Table 9). Fewer than 10% thought the process generated too little information, and about 10% thought the process generated too much information. Plaintiffs' attorneys were considerably more likely than defendants' attorneys to report that discovery yielded too little information.

<sup>11</sup> The mean percentage of discovery expenses unnecessarily incurred was about 15% for those who said the cost of discovery relative to stakes was low or about right (compared to about 30% for respondents reporting that discovery costs were high relative to the stakes).

<sup>12</sup> Note that the analysis in this paragraph was done after removing the "No opinion" responses.

**Table 9**  
Percentage of attorneys rating the amount of useful information discovered in relation to the informational needs of the case (Q29)

<u>Amount of discovered information</u>	<u>All respondents</u>	<u>Plaintiffs*</u>	<u>Defendants*</u>
Too much information	9.0	6.0	11.0
About the right amount of information needed for a fair resolution	69.0	68.0	71.0
Too little information	8.0	12.0	5.0
No opinion	14.0	14.0	14.0
Number of respondents	1094	499	595

\* The differences between plaintiffs' and defendants' responses are statistically significant.

**3. How often do problems arise in discovery? What kinds of problems arise? Do problems arise in particular types of cases?**

Frequency and nature of discovery problems.

Fifty-two percent (52%) of the attorneys in this sample reported that they had no problems with disclosure or discovery in their case. Defendants' attorneys (58%) were more likely than plaintiffs' attorneys (42%) to report that they had no problems. Of the attorneys who reported problems, 55% reported one to three types of problems, 22% reported four to five types of problems, and 23% reported more than five types of problems (responses are to a list of twenty potential problems relating to initial disclosure, document production, oral depositions, and expert disclosure).

Among the four types of discovery for which we examined the extent and nature of discovery problems, we found that document production generated the highest rate of problems (Table 10), with about half of the attorneys who had engaged in document production reporting one or more problems with the process. Thirty-seven percent (37%) of those who had engaged in initial disclosure encountered problems with this procedure, while depositions, which as we shall see consumed the most discovery dollars, caused the fewest problems.

**Table 10**  
Percentage of attorneys reporting problems with document production, initial disclosure, expert disclosure, or depositions, in cases in which the activity occurred (Q13)

<u>Discovery or disclosure procedure</u>	<u>%</u>
Document production (N=743)	44.0
Initial disclosure (N=517)	37.0
Expert disclosure (N=259)	27.0
Depositions (N=592)	26.0

Table 11 shows the frequency with which discovery problems of one sort occur in tandem with problems of another sort. We see that when an attorney reported problems in one discovery activity, that attorney often reported problems in other discovery activities as well. Attorneys who identified problems with initial disclosure, for example, were also more likely to identify problems with document production—that is, 77% of those who said initial disclosure was a problem also said document production was a problem. These findings seem to suggest, as do those in the following section, that there may be problem cases rather than isolated problems with each separate form of discovery. These findings are consistent with a phenomenon we discussed earlier: that cases with larger amounts of discovery are more likely to have more discovery problems. Then, if cases with problems in disclosure, to take an example, include a disproportionate number of cases with large amounts of discovery, more of these cases will also have problems in other types of discovery.

**Table 11**  
**Percentage of attorneys reporting problems with document production, initial disclosure, expert disclosure, or depositions, by their reports for each other type of problem\***

	<u>Initial disclosure</u>	<u>Expert disclosure</u>	<u>Depositions</u>	<u>Document production</u>
Initial disclosure (N=190)		31.0	41.0	77.0
Expert disclosure (N=69)	68.0		51.0	81.0
Depositions (N=154)	53.0	31.0		88.0
Document Production (N=326)	53.0	25.0	42.0	
Problem rate for entire sample	37.0	27.0	26.0	44.0

\* All of the differences in percentages of problems are statistically significant.

Discovery problems and nature of case.

In what turns out to be a common pattern, the presence of discovery problems differed by the type of case, size of monetary stakes in the litigation, complexity of the case, and contentiousness of relationships among attorneys and parties. Attorneys in tort cases (50% of attorneys in these cases) and civil rights cases (50%) were notably more likely to report discovery problems than were attorneys in contracts cases (36%) and "other" cases (43%). Discovery problems were also much more likely to be reported in cases with higher stakes. As the stakes increased from \$4,000 or less (27% of these attorneys saying there were problems) to over \$2 million (69%); the percentage reporting problems increased progressively. Likewise, 61% of attorneys in very complex cases reported problems with discovery, compared to 50% of attorneys in somewhat complex cases and 33% of attorneys in non-complex cases. On the contentiousness scale, 71% of attorneys in cases they rated as very contentious cases reported discovery problems, compared to 64% in somewhat contentious cases, and 29% in non-contentious cases.

Not only the presence but also the number of different types of discovery problems differed by monetary stakes, complexity, and contentiousness. Attorneys in cases valued over \$150,000 (28% of these attorneys) were more than twice as likely to report multiple types of problems with discovery than attorneys in lower-stakes cases (12%). Likewise, attorneys in very complex cases (39% of them) were more likely to report multiple types of problems than were attorneys in somewhat complex cases (21%) and in non-complex cases (15%). And, attorneys in very contentious cases were more likely to report multiple types of problems (42%) than attorneys in somewhat contentious cases (22%) and in non-contentious cases (12%).

Again, the data suggest that problems in discovery may not differ so much by which form of discovery is used as they do by the nature of the case. Where a lot of money is at stake, where the issues involve personal injury or matters of principle, where the relationships are contentious and the issues complex, here we see more discovery and more problems with discovery.

We should not take these findings to suggest, however, that problems with discovery are more serious or more likely to occur as a *consequence* of case complexity, contentiousness, amount at stake, or amount of discovery expenses. Such cases have more discovery problems and more expenses associated with discovery problems than do other cases, but this may simply be due to their having greater amounts of discovery. A problem in conducting a deposition, for instance, may be as likely to occur if the deposition is in a small, non-complex case as it is if that deposition occurs in a large, complex case. The large case, however, may be more likely to have some deposition problems, but perhaps only because it has more depositions than the small case.

The increase in incidence and in types of problems associated with larger and more complex cases is consistent with the findings that discovery expenses bear about the same ratio to total expenses and amount at stake regardless of whether total expenses or stakes are large or small. We see a picture, then, where the stakes, expenses, and number of problems are proportional—as one increases, the others do, too.

#### **4. What proportion of discovery expense is due to discovery problems?**

About 40% of attorneys reported that some discovery expenses were incurred unnecessarily because of problems in discovery. The mean percentage of expenses due to discovery problems was 19% (Table 12).

Though the absolute cost of unnecessary discovery is greater in cases with higher stakes and higher overall costs, we found little correlation between the *percentage* of unnecessary discovery expenses and variables that might plausibly be related to those expenses, such as overall discovery expense, overall litigation expense, and amount at stake in the case.<sup>13</sup> In other words, the expenses due to *unnecessary* discovery appear to be proportional to the size of the case, just as we found for discovery expenses generally.

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<sup>13</sup> The Pearson correlation coefficients were 0.09 for amount at stake, 0.08 for discovery expenses, and 0.12 for litigation expenses.

Table 12  
Attorney estimates of the percentage of discovery expenses per client  
incurred unnecessarily because of problems in discovery (Q14)

	<u>All Respondents</u>	<u>Plaintiffs*</u>	<u>Defendants*</u>
95th percentile	58.0	75.0	50.0
Median	13.0	15.0	10.0
15th percentile <sup>14</sup>	2.0	2.0	2.0
Mean*	19.0	21.0	17.0
Number of respondents	366	168	198

\* The differences between plaintiffs' and defendants' responses are statistically significant, but it is a matter of judgment whether, say, a five percentage point difference at the 10-15% range (looking at the median) represents a difference worthy of attention.

The attorneys' estimates of expenses incurred unnecessarily because of discovery problems permit us to place a value on the financial significance of these problems. Using the percentage of attorneys who reported some problems with discovery (48%) and the mean percentage of discovery expenses attributed to such problems (19%) and applying those numbers to the entire sample, we estimate that about 9% (48% times 19%) of all discovery expenses are thought by attorneys to be incurred unnecessarily as a consequence of problems in discovery. Since discovery expenses account for about 47% of all litigation expenses, we estimate, further, that unnecessary discovery expenses represent about 4% (9% times 47%) of total litigation costs.

**5. With what frequency is initial disclosure used? What are its effects?  
What kinds of problems arise in initial disclosure?**

Frequency and type of disclosure.

Of the attorneys in cases with some discovery or disclosure, 58% said they provided or received initial disclosure in the sample case (Table 2). As noted earlier, this may be an underestimate of current practice, since some of the cases in the sample were filed before disclosure requirements were in effect or terminated before they reached the stage where disclosure would occur. As we will discuss below (Table 15 and text), a considerable amount of disclosure occurred in districts that had opted out of the Rule 26(a)(1) requirements.

The likelihood of having disclosure in a case does not vary systematically by readily identifiable characteristics of cases, such as case type or stakes. Disclosure occurred in contract, tort, civil rights, and "other" cases at approximately equal rates. Similarly, disclosure was no more or less likely to occur in low or high stakes cases.

<sup>14</sup> We show the 15th rather than the 10th percentile here because the 10th percentile is 0%.



In the vast majority of cases in which attorneys reported that disclosure took place, they reported that discovery occurred as well (89%), indicating that disclosure infrequently replaces discovery entirely.

Form of initial disclosure.

For attorneys who engaged in initial disclosure under Rule 26 or local requirements, the most frequent form of disclosure included both lists and copies of documents (Table 13). About a quarter of those who engaged in disclosure, however, reported that their entire disclosure consisted of the documents themselves, even though Rule 26(a)(1) requires only a list or description of documents.<sup>15</sup> Altogether more than three-quarters of the attorneys reported that at least some copies were provided. More attorneys indicated that they disclosed documents and other information than indicated that they received such information.

**Table 13**  
**Percentage of attorneys reporting various forms of initial disclosure (Q6)\***

	<u>All Respondents</u>	<u>Plaintiffs</u>	<u>Defendants</u>
Entire disclosure was in lists	23.0	25.0	22.0
Entire disclosure was in copies of documents	28.0	29.0	27.0
Disclosure included lists and copies of documents	49.0	47.0	51.0
Number of respondents	499	215	284

\* None of the differences between plaintiffs' and defendants' responses are statistically significant.

Reasons for nondisclosure.

Of the 44% of attorneys who said there was no disclosure in their case, just about half reported that their case was exempt by district-wide local rules or other provisions (Table 14). Another 6% reported that their case was exempt by standing orders or because of case-by-case exemptions ordered by the district judge assigned to the case.

For the remaining half of the attorneys who had no disclosure in their case, it appears that disclosure rules were in effect in the district but were not applied in the sample case. This was usually for one of two reasons: (1) neither the parties nor the court took steps to initiate disclosure, or (2) disclosure did not apply because the case terminated before the disclosure deadline or was filed before disclosure rules went into effect. Very rarely did the parties stipulate out of disclosure.

<sup>15</sup> Local rules in a few districts require that disclosure be in the form of copies, not lists, of documents.

Table 14  
Percentage of attorneys reporting reason for lack of initial disclosure,  
in cases in which there was no initial disclosure (Q8)

<u>Reason</u>	<u>%</u> <u>(N=365)</u>
District exempted all cases or this type of case	49.0
Assigned judge exempted all cases or this case	6.0
Parties stipulated that disclosure would not apply	4.0
No one began the process and court did not enforce disclosure	21.0
Rule 26(a) did not apply because case terminated early or case filed before the rule's effective date*	20.0

\* These variables were added after recoding comments from "other" responses.

#### Prevalence of initial disclosure activity by district.

To determine whether the incidence of disclosure found in the study is unusually high, as some might suggest given the reported resistance to disclosure, we examined our sample in light of what we know about implementation of initial disclosure. Using available information about initial disclosure rules<sup>16</sup> to classify the practices of all the districts represented in the sample, we classified the districts as follows: (1) the national rule is fully in effect; (2) a less stringent form of initial disclosure is in effect by local rule or provision; (3) no disclosure is required by federal rule or local provision (opt-out); and (4) individual judge are authorized by local rule to require disclosure in individual cases.

We then examined the attorneys' responses to determine whether initial disclosure occurred in their case and matched those responses with the district in which the sample case was filed. What is noteworthy is that initial disclosure was reported in the sample case by more than a third of the attorneys practicing in districts classified as having opted out of Rule 26(a)(1)'s requirements (Table 15). These data—and our finding above that 58% of cases with some discovery also involved disclosure—suggest that initial disclosure requirements may be more prevalent than some believe. Why disclosure occurred in cases in non-disclosure districts is not clear, but one possibility is that individual judges in these districts are requiring disclosure.<sup>17</sup>

<sup>16</sup> D. Stienstra, *Implementation of Disclosure in United States Courts*, Federal Judicial Center, March 28, 1997.

<sup>17</sup> It is also possible that some attorneys misreported. Not likely, however, is that attorneys reported informal exchanges as disclosure, since the questions about each were quite precise in what they were seeking (Questions 4 and 5, Appendix 2).

**Table 15**  
Percentage of attorneys who did and did not use initial disclosure in their case,  
by type of disclosure requirement in district in which the case was filed  
(N=1178)

	National rule <u>in effect</u>	Less stringent <u>local variation</u>	No disclosure <u>required</u>	Individual judge <u>discretion</u>
Disclosure	73%	73%	35%	37%
No disclosure	27%	27%	65%	63%

We also examined our sample population to determine whether the relatively high portion of cases subject to disclosure might be the result of a higher response rate from districts that require initial disclosure. By comparing the responses with the original sample, we were able to determine that this is not the case; the responses closely track the distribution of the sample cases (Table 16). The sample cases themselves are a random national sample, with no known characteristics that would make the sample unrepresentative of federal cases generally (with the proviso, of course, that the sample is drawn from cases likely to have discovery).

**Table 16**  
Type of disclosure requirements in effect in the districts from which the sample  
cases were drawn and from which the responses were received\*

	National rule <u>in effect</u>	Less stringent <u>local variation</u>	No disclosure <u>required</u>	Individual judge <u>discretion</u>
District of sample attorneys (N=2015)	31%	21%	26%	22%
District of responses (N=1178)	32%	21%	27%	20%

\* None of the differences are statistically significant.

Perceptions of initial disclosure's effects.

When Rule 26 was amended in 1993, the rule drafters hoped it would have a number of effects, seven of which are shown in Table 17. For any single effect, at least a plurality, and usually a majority, of respondents did not see initial disclosure as having that effect. Altogether, however, more than 80% of the respondents said disclosure had at least one of the desired effects. Among those who reported an effect, the vast majority said the effect was in the direction intended by the drafters of the 1993 amendments.

Specifically, respondents who reported an effect were more likely to say that initial disclosure decreased their client's overall litigation expenses, the time from filing to

disposition, the amount of discovery, and the number of discovery disputes. They also were more likely to say that initial disclosure increased overall procedural fairness, fairness of case outcome, and the prospects for settlement.

Table 17  
Percentage of attorneys reporting specific effects of initial disclosure in their case (Q7)

Effect of initial disclosure on	Increased			Had no effect			Decreased		
	All	Pl.	Def.	All	Pl.	Def.	All	Pl.	Def.
Your client's overall litigation expenses (N=522)	16.0	16.0	15.0	45.0	44.0	46.0	39.0	40.0	39.0
Time from filing to disposition (N=508)	7.0	9.0	5.0	62.0	57.0	65.0	32.0	33.0	31.0
Overall procedural fairness (N=508)	37.0	39.0	36.0	54.0	50.0	57.0	9.0	11.0	7.0
Fairness of case outcome (N=500)	25.0	26.0	24.0	70.0	67.0	72.0	5.0	6.0	4.0
Prospects of settlement (N=520)*	36.0	38.0	34.0	59.0	53.0	63.0	6.0	9.0	3.0
Amount of discovery (N=522)	10.0	13.0	8.0	47.0	46.0	47.0	43.0	41.0	44.0
Number of discovery disputes (N=483)	5.0	7.0	4.0	62.0	57.0	66.0	33.0	36.0	30.0

\* Differences between plaintiffs' and defendants' responses are statistically significant.

Attorneys' views of the efficacy of disclosure do not appear in general to differ by whether they represented plaintiffs or defendants. In only one instance—disclosure's effects on the prospects for settlement—do evaluations of disclosure's effects differ by party type, with plaintiffs' attorneys more likely than defendants' attorneys to see disclosure as increasing the prospects of settlement. Likewise, attorneys' evaluations of disclosure appear not to differ by the type of case being litigated or by the importance of nonmonetary issues.

At least one of disclosure's hoped-for benefits does, however, appear to differ by the size of the monetary stakes: attorneys in cases where monetary stakes were higher than \$500,000 were less likely to report that initial disclosure increased overall procedural fairness (29% of these attorneys) than were attorneys in lower-stakes cases (40%). Moreover, in the higher stakes cases, plaintiffs' attorneys were notably more likely than defendants' attorneys to report a decrease in procedural fairness (25% vs. 7%). Along similar lines, as discussed in the next section, attorneys in cases with stakes over \$500,000 (43%) were more likely to find problems with initial disclosure, such as incompleteness, than were attorneys in lower-stakes cases (16%).

Reports of disclosure's efficacy also appear to differ by case complexity and contentiousness. Attorneys in complex cases (13% of these attorneys) were more likely than attorneys in non-complex cases (6% of these attorneys) to report that initial disclosure increased the amount of discovery conducted in their case. Similarly, attorneys in cases where relationships were contentious were more likely to say that initial disclosure increased the amount of discovery (27% vs. 8%) and increased litigation expenses (29%

vs. 14%), while they were less likely to say disclosure increased the fairness of the outcome (19% vs. 26%).

In short, these responses suggest that there is a subset of cases—a combination of those with high stakes, high complexity, or contentious relationships—in which initial disclosure was not as effective as in other cases.

Problems with initial disclosure.

We saw earlier (Table 10) that 37% of the attorneys who participated in initial disclosure perceived one or more problems with its implementation. That rate of problem identification was somewhat higher than for depositions (26%) and expert disclosure (27%) but somewhat lower than for document production (44%).

As Table 18 shows, the incidence of any single type of problem with initial disclosure is modest. Complaints centered on incompleteness, failure to supplement, duplication, and lack of reciprocity. Satellite litigation was seldom mentioned.

**Table 18**  
**Percentage of attorneys reporting specific problems with initial disclosure,**  
**in cases where initial disclosure was reported (Q13)**

<u>Type of problem</u>	<u>All Respondents</u>	<u>Plaintiffs</u>	<u>Defendants</u>
Disclosure was too brief or incomplete.	19.0	21.0	18.0
Disclosure was excessive.	2.0	3.0	2.0
Some disclosed materials were also requested in discovery.	11.0	9.0	13.0
A party failed to supplement or update the disclosures.	12.0	12.0	13.0
A party disclosed required information and another party did not disclose required information.	11.0	12.0	10.0
Disclosure occurred only after a motion to compel or an order from the court.	6.0	6.0	6.0
Sanctions were imposed for failure to disclose.	1.0	1.0	1.0
Other	3.0	2.0	3.0
Number of respondents	517	223	274

The incidence of reported initial disclosure problems differed meaningfully for several case characteristics. Problems were more likely to be reported in cases that lasted longer than a year, had monetary stakes greater than \$500,000, were very complex, or involved very contentious relationships. On the other hand, we found no statistically significant

differences between the presence of initial disclosure problems and the type of case, presence of nonmonetary stakes, type of party, practice setting, or number of years in the practice of law. Again, we see the difficulties in discovery—in this instance in initial disclosure—arising in cases that involve substantial sums of money and that are marked by complexity or contentiousness.

**6. With what frequency is expert disclosure used? What are its effects? What kinds of problems arise in expert disclosure?**

Frequency of expert disclosure and discovery.

Of the attorneys who had some discovery in their case, most (73%) did not report any expert discovery or disclosure. Of the 319 attorneys who did, 71% said they disclosed a written expert report to an opposing party pursuant to Rule 26(a)(2) or a similar local provision, and 57% reported receiving such a report (Table 19).

In cases that involved expert discovery or disclosure, about half of the attorneys reported participating in expert depositions. Only 4% of the attorneys who conducted expert discovery said they agreed not to disclose expert reports.

**Table 19**  
**Percentage of attorneys reporting that specific types of expert disclosure or discovery occurred in cases where some expert activity was reported (Q9)**

<u>Type of activity</u>	<u>%</u> <u>(N=319)</u>
Provide written expert report under 26(a)(2) or local provision	71.0
Receive written expert report under 26(a)(2) or local provision	57.0
Agree not to disclose expert report	4.0
Attend or conduct expert deposition	49.0
Conduct other expert discovery*	13.0

\* Respondents reported, among other things, that they designated experts, sent or received expert interrogatories, or examined expert evidence such as medical records.

Attorneys in tort cases (46% of these attorneys) were far more likely to have engaged in expert disclosure than were attorneys in contracts (13%), civil rights (17%), or "other" (13%) cases. Attorneys who rated their cases as very or somewhat complex and whose cases lasted longer than a year were also more likely to report that expert disclosure occurred in their case. As the monetary stakes increased, the likelihood of expert disclosure increased progressively from 10% of attorneys in cases with less than \$4,000 at stake to 36% of attorneys in cases with more than \$2 million at stake. The likelihood of engaging in expert disclosure did not differ, however, by the importance of nonmonetary stakes.

Perceptions of the effects of expert disclosure.

The most frequent response to questions about expert disclosure's effects was that it had none (Table 20). Attorneys were especially unlikely to see an effect on disposition time, settlement pressures, and fairness of the case outcome. At most, just under half the attorneys reported that one of the benefits of expert disclosure—increased procedural fairness—had been achieved. If, however, we consider responses to all five possible effects, over two-thirds of the attorneys responding to this question reported that at least one of the intended benefits was realized in their case.

Regarding litigation expenses, 27% of the attorneys who had engaged in expert disclosure reported that it increased expenses, a not-unexpected outcome given the requirement for a more comprehensive expert's report. When asked separately, however, about the expense of expert disclosure, only 9% reported that it was too expensive, suggesting that perhaps some of the added cost was expected and is not seen as problematic.

More surprising in some ways is the 31% who said expert disclosure decreased litigation expenses. Perhaps for some of these attorneys the written report served as a substitute for an expensive deposition, as the drafters of Rule 26(a)(2) hoped.

**Table 20**  
**Percentage of attorneys reporting specific effects of expert disclosure,**  
**in cases where expert disclosure was reported (Q10)**

<u>Effect of expert disclosure requirement on</u>	<u>Increased</u>			<u>Had no effect</u>			<u>Decreased</u>		
	<u>All</u>	<u>Pl.</u>	<u>Def.</u>	<u>All</u>	<u>Pl.</u>	<u>Def.</u>	<u>All</u>	<u>Pl.</u>	<u>Def.</u>
Client's overall litigation expenses (N=241)	27.0	31.0	22.0	43.0	40.0	46.0	31.0	29.0	32.0
Time from filing to disposition (N=232)	10.0	14.0	7.0	72.0	69.0	75.0	18.0	17.0	19.0
Overall procedural fairness (N=234)*	47.0	49.0	45.0	46.0	40.0	51.0	8.0	12.0	4.0
Fairness of case outcome (N=231)	37.0	38.0	37.0	56.0	52.0	60.0	7.0	10.0	3.0
Pressure to settle (N=230)	37.0	41.0	32	61.0	55.0	66.0	3.0	3.0	3.0

\* Differences between plaintiffs' and defendants' responses are statistically significant.

Whether or not expert disclosure increased or decreased litigation expenses, attorneys often perceived it as increasing procedural fairness, although those who said it decreased litigation expenses were far more likely to say it increased procedural fairness (68%) than were those who said it increased litigation expenses (40%). Both groups, however, reported increased procedural fairness far more often than they reported decreased fairness, suggesting that even when expert disclosure increases expenses it is often seen as increasing procedural fairness as well.

Problems with expert disclosure.

Among the four principal types of discovery examined earlier (Table 10), expert disclosure had the second lowest rate of reported problems—27% of the attorneys who used expert disclosure encountered problems with it. When we look more closely at the specific kinds of problems that arose in expert disclosure, we find that the most frequent problem referred to disclosures that were too brief or incomplete, reported by 13% of the attorneys (Table 21). Others reported that the process was too expensive (9%) or that a party failed to supplement or update its expert disclosures (9%).

**Table 21**  
**Percentage of attorneys reporting problems with expert disclosure in cases where expert disclosure was reported (Q13)**

<u>Type of problem</u>	All respondents (N=259)	Plaintiffs* (N=124)	Defendants* (N=135)
Expert disclosure was too brief or incomplete.	13.0	11.0	14.0
Expert disclosure was too expensive.	9.0	10.0	8.0
A party failed to supplement or update its disclosures.	9.0	6.0	12.0
Other	4.0	3.0	5.0

\* Differences between plaintiffs' and defendants' responses are not statistically significant.

Attorneys in cases with stakes higher than \$500,000 were twice as likely to report problems with expert disclosure as attorneys in lower-stakes cases (about 40% vs. 20%). Likewise, attorneys in very contentious cases (54% of them) and somewhat contentious cases (32%) were far more likely to report expert disclosure problems than attorneys in non-contentious cases (15%).

Overall, however, the incidence of problems is quite low and notably lower than the number of attorneys who encountered problems with initial disclosure (37%) and document production (44%).

**7. With what frequency are the other 1993 discovery rule amendments used (meet-and-confer requirements, discovery planning, limits on deposition conduct, and limits on interrogatories and depositions)? What are their effects?**

**A. Meeting and conferring**

Discovery planning.

About 60% of the attorneys reported that they met and conferred with opposing counsel, either by telephone, correspondence, or in person, to plan for discovery in accordance with Rule 26(f) or a similar local provision.



Attorneys in complex cases (69% of these attorneys) were more likely to have met and conferred than attorneys in cases that were not complex (54%), but even the majority of those in non-complex cases had such conferences. The frequency of meeting and conferring did not differ meaningfully by type of case, size of monetary stakes, the presence of nonmonetary stakes, or the contentiousness of the parties. Further, the likelihood of meeting and conferring appears not to be related to the number of discovery problems or case management problems reported by the attorneys.

One purpose of meeting and conferring is to develop a plan for discovery: other methods for developing a discovery plan are also available and therefore to determine the number of attorneys whose cases were subject to discovery planning, we included those who had met and conferred, those who reported that the court issued a discovery plan or scheduling order, or both. We found that for the great majority of attorneys in our sample—77%—a discovery plan or scheduling order had been entered in their case. A plan or order was especially likely in cases where the attorneys had met and conferred—64% of these attorneys reported a plan or order—but even for about half of the attorneys who did not meet and confer, a plan or order was entered (Table 22).

**Table 22**  
**Percentage of attorneys reporting that they met and conferred, by percentage of reported issuance of discovery plan or scheduling order (Q1 by Q3)**

	Discovery plan or <u>scheduling order</u>	No discovery plan or <u>scheduling order</u>	<u>Total</u>
Meet and confer	64.0	11.0	75.0
No meet and confer	13.0	12.0	25.0
Total (N=1035)	77.0	23.0	100.0

Not surprisingly, discovery planning and orders were less likely to be entered in cases with no formal discovery or disclosure. Along similar lines, cases terminated within 180 days were less likely to have discovery plans or scheduling orders. The incidence of discovery planning differed little by other case characteristics, such as the size of the monetary stakes, complexity, contentiousness, or nature of suit.

Among the attorneys who reported that a scheduling order or discovery plan had been issued, 90% also reported that the judge had held a conference to consider a discovery plan. For only 10% of the attorneys, then, was the scheduling order or discovery plan entered without consultation with the judge.

The median time limit imposed for completion of discovery was six months, with 75% of the attorneys reporting that they were limited to eight months or less. Although complaints about judicial management of discovery were uncommon, the two most frequently cited problems were that the time allowed for discovery was too short (7% of all respondents) and that the court was too rigid about deadlines (5%).

Perceived effects of meeting and conferring/discovery planning.

The majority of the 60% of attorneys who had met and conferred did not think meeting and conferring had any effect on litigation expenses, disposition time, fairness, or the number of issues in the case (Table 23). For those who thought there had been an effect, however, the effect was most often in the desired direction: lower litigation expenses (29%), shortened disposition time (29%), greater procedural fairness (33%), greater outcome fairness (21%), and fewer issues in the case (24%).

**Table 23**  
**Percentage of attorneys reporting specific effects of meeting and conferring\* (Q2)**

<u>Effect of meeting and conferring on</u>	Increased			Had no effect			Decreased		
	All	Pl.	Def.	All	Pl.	Def.	All	Pl.	Def.
Client's overall litigation expenses (N=646)	17.0	17.0	18.0	54.0	56.0	51.0	29.0	27.0	31.0
Time from filing to disposition (N=623)	9.0	11.0	8.0	62.0	58.0	65.0	29.0	31.0	28.0
Overall procedural fairness (N=619)	33.0	33.0	33.0	61.0	59.0	62.0	7.0	8.0	5.0
Fairness of case outcome (N=597)	21.0	20.0	22.0	73.0	73.0	73.0	5.0	7.0	4.0
Number of issues (N=619)	6.0	7.0	6.0	70.0	71.0	68.0	24.0	22.0	26.0

\* None of the differences between plaintiffs' and defendants' responses are statistically significant.

## **B. Depositions**

### Frequency of depositions.

For attorneys whose cases involved some discovery or disclosure, 67% reported that depositions had been conducted in their case (Table 2). The median number of *individuals* deposed was four and the mean was six (Table 24). Twenty-five percent (25%) of the attorneys reported that only one or two individuals were deposed, and for 75% of the attorneys no more than seven individuals were deposed.

The median number of *hours* spent by these attorneys in all depositions was ten. Again, the lowest 25% spent no more than five hours in depositions, while 75% of the attorneys spent no more than twenty-four hours in depositions. The high mean number of hours—twenty-five compared to a median of ten—suggests there were a small number of cases with a very high number of hours. Overall, however, the median length of the longest deposition is only four hours, and 75% of the attorneys reported that the longest deposition was no longer than seven hours.

In 1991, the Advisory Committee on Civil Rules proposed but did not adopt a six hour limit on the length of depositions. Had a six hour limit been in effect it would have affected about 30% of the cases; in those cases the district judge would have been authorized to make exceptions on a case-by-case basis.

Table 24  
Frequency and length (hours) of reported depositions (Q11)

	Number of <u>deponents</u> (N=592)	Average length (N=579)	Total hours (N=587)	Length of longest deposition (N=572)
75th percentile	7	5	24	7
Median	4	3	10	4
25th percentile	2	2	5	3
Mean	6	4	25	6

Attorneys were more likely to have participated in depositions in tort cases (83% of these attorneys) and civil rights cases (81%) than in contract cases (58%) or "other" cases (57%). The likelihood of depositions also differed by the stakes in the litigation and the complexity of the case but not the contentiousness of the case. Among attorneys in cases with more than \$2 million at stake, 85% had participated in depositions, while 50% of those with less than \$4,000 at stake had depositions. Likewise, among attorneys in very complex cases, 81% had participated in at least one deposition, compared to 72% of attorneys in somewhat complex cases and 67% in non-complex cases.

#### Problems with depositions.

Far fewer attorneys reported problems with deposition practice (26% of those who reported any discovery problems) than reported problems with document production (44%), the most problematic form of discovery. The most frequent specific complaints about depositions were that too much time was taken (12% of those who participated in a deposition) or that an attorney coached a witness during a deposition (10%) (Table 25).

In 1993, the Rules Committee also amended Rules 30(d)(1) and (3) to proscribe using objections in an argumentative or suggestive manner, to limit attorneys from instructing clients not to answer question, and to provide consequences for other unreasonable conduct. In our sample, small numbers of attorneys reported problems in three areas of deposition conduct: that an attorney coached a witness (10%), instructed a witness not to answer (8%), or otherwise acted unreasonably (9%) (Table 25). These responses suggest that the 1993 amendments have not entirely eliminated these problems. This study was not designed, however, to identify the incidence of such behavior before 1993 and thus cannot test what the incidence would have been if the amendments had not been adopted.

Few respondents (4%; twenty-five attorneys) reported that there were too many depositions. Of those who did, 75% reported participating in eight or more depositions, and 50% reported participating in fifteen or more depositions. Moreover, half of these attorneys reported spending more than fifty hours in depositions, and 25% reported spending 120 or more hours in depositions.

Table 25  
Percentage of attorneys reporting problems with depositions in cases  
where there was some discovery or disclosure (Q13)\*

<u>Type of problem</u>	<u>All Respondents</u>	<u>Plaintiffs</u>	<u>Defendants</u>
There were too many depositions	4.0	4.0	5.0
Too much time was taken in some or all depositions.	12.0	14.0	11.0
An attorney coached a witness during a deposition.	10.0	10.0	11.0
An attorney improperly instructed a witness not to answer.	8.0	9.0	7.0
An attorney acted unreasonably to annoy, embarrass, or oppress the deponent or counsel.	9.0	11.0	7.0
Other	3.0	3.0	3.0
Number of respondents	579	257	322

\* None of the differences between plaintiffs' and defendants' responses are statistically significant.

Plaintiffs' and defendants' attorneys did not differ in their reports of problems with depositions, whether considering number, length, or attorney conduct. Problems were reported far more frequently, however, in complex cases, contentious cases, and civil rights cases. Among attorneys in very contentious cases, 66% reported problems, while 35% of those in somewhat contentious cases and 10% in non-contentious cases did. Among attorneys in civil rights cases, 35% reported deposition problems, compared to 22% of attorneys in tort cases and 13% in contract cases. Finally, attorneys in very complex cases were far more likely to report deposition problems (41% of them) than were attorneys in somewhat complex (24%) or non-complex (22%) cases.

**8. With what frequency does document production occur? What kinds of problems arose in document production?**

A request for production of documents was the discovery device most frequently used by attorneys in our sample, reported by 84% of those who said some discovery or disclosure activity had taken place in their case (Table 2). Document production also generated the highest rate of reported problems; 44% of the attorneys who said document production occurred in their case reported one or more types of problems with this discovery activity (Table 10).

The most common problems in document production were failure to respond adequately (28% of attorneys who engaged in document production) and failure to respond in a timely fashion (24%) (Table 26). Those representing plaintiffs were more likely to complain that a party failed to respond adequately, while those representing defendants were more likely to complain that requests were vague or sought an excessive number of documents.

**Table 26**  
**Percentage of attorneys reporting problems with document production,**  
**in cases where document production was reported (Q13)**

<u>Type of problem</u>	<u>All Respondents</u>	<u>Plaintiffs</u>	<u>Defendants</u>
One or more requests were vague.*	16.0	12.0	20.0
An excessive number of documents were requested.*	15.0	11.0	19.0
Materials provided were excessive or disordered.	8.0	10.0	7.0
A party failed to respond in a timely fashion.	24.0	25.0	24.0
A party failed to respond adequately.*	28.0	33.0	24.0
Other	3.0	4.0	2.0
Number of respondents	743	335	408

\* Differences between plaintiffs' and defendants' responses are statistically significant.

Document production problems were far more likely to be reported by attorneys whose cases involved high stakes, but even in low-to-medium stakes cases (\$4,000 to \$500,000), 36% of the attorneys reported problems with document production. In cases involving \$500,000 to \$2 million, 56% of attorneys reported such problems, and in cases involving more than \$2 million, 75% reported document production problems.

In a similar vein, attorneys were far more likely to report document production problems in cases they labeled as very complex (66% of these attorneys) than in cases that were somewhat complex (44%) or not at all complex (35%). And attorneys were more likely to report such problems in very contentious cases (77% of these attorneys) than in somewhat contentious cases (54%) or in cases that were not at all contentious (29%).

Of all the discovery devices we examined, document production stands out as the most problem-laden. While the causes are elusive, the characteristics of complexity and contentiousness more often mark the cases where attorneys report document production problems. Despite these problems, however, document production is not the most costly part of discovery, as we shall see in the next section.

## 9. What are the expenses for specific discovery activities?

Earlier we reported on the overall expense of discovery (§ IV.2) and the proportion of discovery expenses attributable to discovery problems (§ IV.4). In this section, we report the costs of several specific discovery activities.

Table 27 shows the mean percentage of discovery expenses allocable to each of the principal types of discovery. That is, considering the total costs of discovery, what portion of it is due to each of the seven activities listed in the table?

We see that, for our sample of attorneys, depositions accounted for almost one-third of all discovery expenses, while production of documents (16%), initial disclosure (16%), and interrogatories (13%) accounted for substantially less, and expert disclosure consumed only a small portion of all discovery expenses. For each discovery activity, there was no meaningful difference between the percentages reported by plaintiffs' and defendants' attorneys.

**Table 27**  
**Allocation of discovery expenses for cases with some discovery expense\***  
**(Q's 20, 21, & 22) (N=921)**

<u>Discovery Activity</u>	<u>Mean percentage of discovery expense</u>		
	<u>All</u>	<u>Plaintiffs</u>	<u>Defendants</u>
Meet and confer/discovery planning	12.0	12.0	13.0
Initial disclosure	16.0	17.0	16.0
Expert disclosure or discovery	6.0	8.0	5.0
Depositions	30.0	29.0	31.0
Request for and/or production of documents	16.0	15.0	16.0
Interrogatories	13.0	13.0	13.0
Other discovery activities	6.0	6.0	6.0

\* None of the differences between plaintiffs' and defendants' responses are statistically significant.

The fact that expert discovery accounts for only 6% of all discovery expenses does not, however, imply that expert discovery is a low-cost activity. Table 27 is based on all cases in which there was some discovery, a large number of which had no expert discovery or disclosure. Thus, the percentage of discovery costs attributable to expert discovery is probably due to the relatively low number of cases with any such expense.

To correct for this problem, Table 28 provides information about the typical cost of each type of activity when that activity occurred in the case. It shows that when expert discovery occurred, it was the second most expensive of the discovery activities, with median expenses of \$1,375 per client. The most expensive discovery activity, by a considerable margin, was depositions, with median costs per client of \$3,500.

At least two notable points emerge from Tables 27 and 28. First, depositions accounted for about twice as much expense as any other discovery activity, whether on the basis of overall discovery expense (Table 27) or on the basis of deposition expense among cases with any deposition expense (Table 28). Second, production of documents did not result in unusually high expenses. Even at the 95th percentile (i.e., only 5% of attorneys reported higher costs than this), the expenses for document production were lower than expenses for depositions and expert disclosure.

**Table 28**  
**Expenses per client for indicated discovery activity, for cases with some such activity**  
**(Q's 20, 21, & 22)**

<u>Activity</u>	<u>95th percentile</u>	<u>Median</u>	<u>10th percentile</u>	<u># respondents</u>
Meet and confer/discovery planning	\$8,800	\$600	\$75	672
Initial disclosure of documents	\$9,000	\$750	\$105	608
Expert disclosure or discovery	\$31,000	\$1,375	\$160	342
Depositions	\$56,000	\$3,500	\$440	602
Request for and/or production of documents	\$23,000	\$1,100	\$150	682
Interrogatories	\$16,000	\$1,000	\$160	658
Other	\$21,000	\$1,300	\$110	179

Because we expected document production to represent very large expenses in at least a notable minority of cases, we pursued separate analyses of total discovery expenses and of document production expense for different types of cases. Tables 29 and 30 show the results. Both tables suggest that cases with very high overall discovery expenses and very high expenses for document production tend to arise in the miscellaneous category of "other" cases rather than in contract, tort, or civil rights cases.

**Table 29**  
**Discovery expenses per client by type of case, for cases with some discovery expense**  
**(Q's 20 & 21)**

<u>Case type</u>	<u>95th percentile</u>	<u>Median</u>	<u>10th percentile</u>	<u># of respondents</u>
Contract	\$64,000	\$4,000	\$300	199
Tort	\$88,000	\$6,600	\$750	236
Civil Rights	\$58,000	\$5,700	\$490	240
Other	\$300,000	\$4,000	\$400	224

**Table 30**  
**Expenses per client for requests for document production,**  
**for cases with such expense<sup>18</sup> (Q's 20, 21 & 22)**

<u>Case type</u>	<u>95th percentile</u>	<u>Median</u>	<u>10th percentile</u>	<u># of respondents</u>
Contract	\$15,600	\$975	\$150	151
Tort	\$17,600	\$1,100	\$150	190
Civil Rights	\$10,800	\$1,200	\$120	182
Other	\$88,200	\$1,250	\$165	159

Examining the "other" category more closely revealed that patent, trademark, securities, and antitrust cases stood out for their high discovery expenses. Table 31 shows the breakdown of discovery expenses for all patent, trademark, securities, and antitrust cases in our sample, along with the same information for all other types of cases and for those other cases involving at least \$40,000 in discovery expenses. This permits comparison of two groups of high-expense cases and all other cases. It also allows us to see whether particular types of discovery are responsible for high discovery expenses.

**Table 31**  
**80th Percentile of discovery expenses by type of discovery activity,**  
**for respondents reporting any discovery expense<sup>19</sup>**

<u>Activity</u>	<u>80th percentile, patent, trademark, securities, and antitrust cases</u>	<u>80th percentile, all other cases with at least \$40,000 discovery expenses</u>	<u>80th percentile, all other cases</u>
Meet and confer/discovery planning	\$12,000	\$10,000	\$1,250
Initial disclosure of documents	\$2,400	\$12,000	\$1,600
Expert disclosure or discovery	\$42,000	\$11,000	\$1,100
Depositions	\$135,000	\$51,000	\$7,400
Request for and/or production of documents	\$67,000	\$27,000	\$2,900
Interrogatories	\$47,000	\$18,000	\$2,300
Number of respondents	53	105	888

<sup>18</sup> Plaintiff and defendant expenses associated with document production differed only modestly. Both the median and 80th percentiles were about 50% higher for plaintiffs in contract cases, but higher for defendants in all other case types (about 40% higher in civil rights cases, 25% higher in tort cases, and 10% higher in other cases).



Table 31 suggests that no particular type of discovery is the culprit responsible for excessive discovery expenses. We singled out patent, trademark, securities, and antitrust cases as a group because that group generally has high discovery expenses, but the distribution of those expenses across types of discovery activity does not differ notably from the distribution in other cases. Deposition expenses are very high, but not disproportionately so, compared to either cases with expenses of at least \$40,000 or all other cases.<sup>20</sup>

**10. In the view of attorneys, what causes discovery problems? To what extent are discovery problems due to judicial case management?**

Attorney/client causes of discovery problems.

To what extent do attorneys and clients contribute to problems with discovery? About one-half to two-thirds of the attorneys in our sample did not think any of the four attorney/client causes we listed was a contributing factor to discovery problems, as shown in Table 32. More than half of the attorneys, however, identified intentional delays or complications as a moderate or major cause of discovery problems, and about 40% said lack of client cooperation, pursuit of disproportionate discovery, and incompetence or inexperience of counsel contributed to discovery problems.

**Table 32**  
**Percentage of attorneys reporting the contributions made by attorneys and clients to problems with discovery, in cases with perceived discovery problems (Q15)**

<u>Contributing factor/Level of contribution</u>	None			Moderate			Major		
	All	PL	Def.	All	PL	Def.	All	PL	Def.
Intentional delays or complications (N=332)*	45.0	38.0	53.0	28.0	28.0	28.0	27.0	35.0	19.0
Lack of cooperation by a client (N=325)	54.0	52.0	57.0	29.0	27.0	30.0	17.0	21.0	14.0
Pursuit of discovery disproportionate to the needs of the case (N=348)	62.0	66.0	59.0	21.0	20.0	22.0	17.0	14.0	19.0
Incompetence or inexperience of counsel (N=337)*	59.0	73.0	48.0	22.0	15.0	27.0	19.0	12.0	25.0

\* Differences between plaintiffs' and defendants' responses are statistically significant.

<sup>19</sup> We report the 80th percentile here because not all respondents reported expenses in every category, so lower percentiles reflect values too small to be informative. Because of the extreme expenses reported in a few instances, the mean is similarly uninformative.

Plaintiffs' attorneys were considerably more likely to attribute perceived discovery problems to intentional actions by a party or attorney. Defendants' attorneys, on the other hand, were more likely to attribute problems to the incompetence or inexperience of counsel. On the whole, these data suggest that intentional activity is thought to play a significant role in creating discovery problems.

#### Judicial causes of discovery problems.

When judges were involved in discovery, as 81% of the attorneys said they were, they were far more likely to have been involved in the planning phase of discovery than to have decided motions or imposed sanctions. Of the instances in which attorneys reported some court involvement in discovery or disclosure, the court imposed time limits on the completion of discovery in 80% of those instances. The median time limit imposed by the court was six months; 75% of the limits were shorter than eight months, and 25% were four months or less.

Of the instances in which a judge was reported to have been involved in discovery or disclosure, 57% of attorneys indicated the judge held a conference, by telephone, correspondence, or in person, to consider a discovery plan; 42% reported that the judge discussed discovery issues at another conference; 25% said the court ruled on a discovery motion; and 20% said the court enforced the federal rules' limits on the number of interrogatories and depositions.

Presented with a list of nineteen types of potential court management problems and an invitation to report any other problems, the vast majority of attorneys (83% of those in cases with some discovery or disclosure) reported no problems with the court's management of disclosure or discovery. Most of the specific problems were encountered by 2% or fewer of the attorneys who had some discovery in their cases. The problems most often encountered by attorneys—which were encountered by few—were the following: the time allowed for discovery was too short (7% of those in cases with some discovery), the court was too rigid about deadlines (5%), and rulings on discovery motions took too long (4%).

Overall, the problems with court management of discovery can be collapsed into four groups, as in Table 33. While the findings do not suggest a high level of court management problems, it appears that the most frequent problem area is planning and implementation. Within that activity, the most frequent complaints were that the time allowed for discovery was too short and that courts were too rigid about deadlines. Regarding discovery limits, few attorneys complained that limits on time or on the amount of discovery were too loose or that judges were too willing to grant extensions. In fact, they were as likely to say limitations were too restrictive as to say they were too lenient.

Problems with court management, like discovery problems generally, were far more likely to be reported by attorneys whose cases were very complex, very contentious, and had very high stakes. Attorneys in complex cases (39% of these attorneys) were more than twice as likely to report court management problems as were attorneys in cases rated as

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<sup>20</sup> Although it appears that the expenses for some discovery activities increase significantly more than for others, the differences are not likely to be statistically significant due to the limited number of responses and the fact that we focus here on the 80th percentile.

somewhat complex (19%) or not at all complex (14%). Similarly, attorneys in very contentious cases (43% of attorneys in such cases) were more likely to report court management problems than were attorneys in cases that were somewhat contentious (24%) or not at all contentious (12%). And finally, attorneys in cases with stakes of \$500,000 to \$2 million (25% of these attorneys) and in cases with stakes greater than \$2 million (36%) were more likely than those in lower-stakes cases (16%) to report problems with court management. There were no meaningful differences by party represented, type of case, or the attorney's level of experience.

**Table 33**  
**Percentage of attorneys reporting specific types of court management problems in cases with some discovery (Q17)**

<u>Types of court management problems</u>	<u>%</u> (N=828)
Discovery planning and implementation problems	13.0
Rulings on motions problems	7.0
Discovery limitations problems	5.0
Sanctions problems	4.0

Although court management was perceived as a problem in some types of cases, this was not generally the case. In fact, as we will discuss further in Section IV.12, attorneys in our sample call for increased case management.

### **11. Is nonuniformity in the disclosure rules a problem?**

In examining the issue of nonuniformity, we limited the inquiry to the disclosure rules and distinguished between nonuniformity across districts and nonuniformity within districts. As shown below, there is considerably greater concern about nonuniformity across districts than within districts.

#### Nonuniformity across districts.

Among attorneys who have an opinion on the issue (30% did not), 60% say moderate to serious problems are created by nonuniform disclosure rules across districts (Table 34). The largest percentage—44%—say the problem is moderate, while 16% rate it as serious. The balance of attorneys—41%—say there is no lack of uniformity or, if there is, it is not a problem.<sup>21</sup> Attorneys who practice in multiple districts are considerably more likely to

<sup>21</sup> Most of those who had no opinion on uniformity across districts said their federal practice takes place primarily in one district (86%). Half of the attorneys who expressed opinions reported practicing in more than one district. The attorneys with no opinion were also far more likely (48% of them) to report that 15% or less of their practice was in federal court than attorneys who expressed opinions (21%). Of the

identify nonuniformity in disclosure as a problem than are attorneys who practice in a smaller number of districts.

**Table 34**  
**Percentage of attorneys holding certain opinions regarding the effect of nonuniformity concerning disclosure within a district and across districts (Q31 & Q32)**

<u>Attorney opinion</u>	Within a district* (N=949)	Across districts** (N=765)
There is no significant lack of uniformity	47.0	13.0
Lack of uniformity creates serious problems	6.0	16.0
Lack of uniformity creates moderate problems	21.0	44.0
Lack of uniformity creates minor or no problems	27.0	28.0

\* Responses of "No opinion" (N=151) and "Other" (N=17) have been removed.

\*\* Responses of "No opinion" (N=333) and "Other" (N=20) have been removed.

Nonuniformity within districts.

In contrast to opinions about nonuniformity across districts, relatively few attorneys (6%) think serious problems are created by nonuniform disclosure requirements within the district where the study case was filed. In fact, nearly half the attorneys with an opinion on this issue say there is no significant lack of uniformity in the district.<sup>22</sup> Coupled with the 27% who say the problem is at most minor, nearly 75% of the attorneys think nonuniformity within a district is not a problem. Anecdote has suggested that attorneys often face a bewildering array of procedural rules within districts. Our findings suggest this is generally not the case for disclosure.

**12. If change is necessary, what direction should it take? What changes would be likely to reduce discovery expenses? Should change occur now or later?**

We asked attorneys, in several different ways, what changes, if any, should be made in the way discovery is conducted. In the discussion below we focus first on changes aimed at reducing problems and expense in discovery. We then turn to the question of uniformity in the rules—specifically whether uniformity is important and, if so, what form it should take in the case of disclosure.

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attorneys who expressed opinions on the subject, 76% had more than 15% of their practice in federal court.

<sup>22</sup> Also in contrast to the question about uniformity among districts, only 13% of attorneys did not have an opinion on the issue of uniformity within the district where their case was filed.

Changes likely to reduce discovery problems and expenses.

Table 35 sets out thirteen changes that might theoretically reduce discovery expenses. It shows, for both the specific case and cases in general, the percentage of attorneys who said the change would have the desired effect without unreasonably interfering with a fair resolution of the case.

**Table 35**  
**Percentage of attorneys with certain opinions about whether specific changes in rules or case management practice would be likely to reduce expenses without interfering with fair case resolution (Q18)**

(1)	(2) Decrease expenses in this case	(3) Decrease expenses generally		
		All	PL	Def.
<u>Change in rule or case management practice</u>				
Adopting a uniform national rule requiring initial disclosure*	17.0	44.0	50.0	40.0
Deleting initial disclosure from the national rules	12.0	31.0	29.0	33.0
Narrowing the definition of what is discoverable (Rule 26(b))*	12.0	31.0	22.0	38.0
Narrowing the definition of what documents are discoverable (Rule 34)*	11.0	30.0	23.0	37.0
Limiting—or further limiting—the time within which to complete discovery	8.0	19.0	20.0	18.0
Limiting—or further limiting—the number of depositions	7.0	23.0	23.0	23.0
Limiting—or further limiting—the maximum number of hours for a deposition*	9.0	27.0	30.0	24.0
Limiting—or further limiting—the number of interrogatories	8.0	26.0	27.0	26.0
Increasing court management of discovery	13.0	37.0	35.0	39.0
Increasing availability of district or magistrate judges to resolve discovery disputes	18.0	54.0	55.0	53.0
Imposing fee-shifting sanctions more frequently and/or imposing more severe sanctions for violations of discovery rules or orders	14.0	42.0	41.0	42.0
Adopting a civility code for attorneys	13.0	42.0	44.0	40.0
Other change	2.0	5.0	6.0	4.0
Number of respondents	1036	1036	474	562

\* Differences between plaintiffs and defendants are statistically significant.

The change most likely to reduce discovery expenses, in the view of our sample of attorneys, is to increase the availability of judges to resolve discovery disputes. Eighteen

percent (18%) said that would have helped in the specific case and 54% expect it would help in civil cases generally. The related concept of increasing court management of discovery also ranked high as a means for reducing discovery expenses, with 13% (fourth ranked) saying it would have reduced expenses in the specific case and 37% (fifth ranked) saying it would do so generally.

The second most promising change, both for the specific case and in general, would be a uniform rule requiring disclosure: 17% think it would have helped in the specific case and 44% say this reform would generally serve to reduce discovery expenses. Note that, with regard to the specific case, the 17% saying a uniform rule would have reduced expenses is considerably lower than the 39% who, after experiencing initial disclosure in the case at hand, said it had decreased their client's expenses. We are not sure what explains the discrepancy, though it is possible that a "uniform national rule," as the option was phrased, is not seen as having much effect beyond the effect already achieved by the federal or local provision under which disclosure was required in the sample case.

The third and fourth most-favored changes both involve controls on attorney behavior through more frequent and/or more severe fee-shifting sanctions and through adoption of a civility code for attorneys. For each change, forty-two percent (42%) of the attorneys thought it would reduce expenses generally, while 13%-14% said it would have done so in the specific case.

Plaintiffs' attorneys (50% of them) were more likely than defendants' attorneys (40%) to predict cost savings generally from a uniform national rule requiring initial disclosure. Defendants' attorneys, on the other hand, were more likely to predict cost savings from narrowing the scope of discovery, both in general and in relation to document production. This prediction was also more likely to be made by those who practiced in four or more districts and those in firms with ten or more attorneys.

In reading Table 35, a word of caution is in order. Note that for every option, substantially more attorneys predict a general effect (column 3) than would expect there to have been an effect in the specific case (column 2). Consider, for example, Row 3, column 3, which indicates that 31% of the attorneys in our sample think discovery expenses would be reduced by a uniform national rule narrowing the definition of what is discoverable. This should not be taken to mean that those attorneys believe narrowing the scope of discovery will do so in all cases or even in 31% of the cases. One might reasonably read column 3 as predicting that generally there will be a positive effect, namely, that litigation expenses will be reduced without interfering with fair case resolutions.

Column 2, which is based on the experience of attorneys in actual cases, may reflect more realistically the frequency with which the hoped-for effects would materialize. On the other hand, we should keep in mind that the responses in column 2 do not necessarily reflect the extent to which the changes would reduce costs, because for these cases some cost reductions may already have been realized through application of the practices. The actual impact of these practices would likely fall somewhere in between the expectations of column 2 and the predictions of column 3.

The thirteen options listed in Table 35 can be grouped into six broader categories, as they have been in Table 36, which permits us to look at the larger pattern of responses.<sup>23</sup> To reduce discovery expenses, the highest percentage of attorneys would look to increased availability of judges to rule on discovery disputes and/or increased court management of discovery (63%) and controls on attorney conduct through sanctions and/or a civility code (62%). While substantial numbers would also find certain rule changes helpful—for example, the 44% who said a uniform national rule requiring initial disclosure would reduce expenses and the 35% who said narrowing the scope of discovery would be helpful—changes in judge and attorney behavior clearly outweigh changes in the rules.

A slightly different picture emerges if we combine the responses regarding initial disclosure into a single category. When we do, 71% of the attorneys would find a change in the initial disclosure rules helpful, making this the approach favored by the highest percentage of attorneys. The sentiment is difficult to interpret, however, because the opinions we have combined point in very different directions, one toward requiring initial disclosure universally and the other toward deleting it altogether. While it is tempting to say that the combination points, at least, toward a widespread desire for a uniform rule, we suggest caution in doing so because, while the question about requiring initial disclosure specifically asked about uniformity, the question about deleting it did not. Further insight into attorneys' preferences may be provided, however, by the next two subsections.

**Table 36**  
**Percentage of attorneys saying certain types of changes would likely reduce expenses without interfering with fair case resolution (Q18)**

<u>Types of changes</u>	<u>%</u> <u>(N=1036)</u>
Increasing court management/availability of judges to rule on discovery disputes	63.0
Increasing sanctions/adopting civility code	62.0
Numerical limits on time or amount of discovery	45.0
Adopt a uniform national rule requiring initial disclosure	44.0
Rule Change - scope of discovery	35.0
Delete initial disclosure from the national rules	31.0

The most promising approach to reducing discovery problems.

After presenting the thirteen options above, we asked the attorneys to select the one approach that holds the most promise for reducing discovery problems. The choices focus

<sup>23</sup> An attorney who checked any item within the group is counted, but a single attorney cannot be counted more than once per group.

on three key components of the discovery process: judges, attorneys, and rules of procedure. Of the nearly two-thirds of the attorneys who had an opinion on the subject, about half said judicial case management is the most promising approach to reducing problems in discovery. The remaining half split about equally between revising the rules of civil procedure to further control or regulate discovery or changing client and/or attorney incentives regarding discovery. There were no significant differences in preference by type of party represented in the sample case, number of different discovery problems experienced in the sample case, the type of client the attorney usually represents, type of law practice, or number of years in practice. When pressed to select the single most promising approach to reducing discovery problems, then, the choice that clearly outstrips others is increased judicial case management.

**Table 37**  
**Percentage of attorneys selecting each of three approaches as the most promising for reducing discovery problems (Q19)**

<u>Approach</u>	<u>%</u> <u>(N=721)*</u>
Increase judicial case management	47.0
Revise the Federal Rules of Civil Procedure to further control or regulate discovery	27.0
Address the need for changes in client and/or attorney incentives regarding discovery	26.0

\* Note: Responses of "No opinion" (N=208) and "Other" (N=29) have been removed.

Revisions to the discovery rules: the desire for uniform rules.

Apart from the question of whether any changes hold promise for reducing discovery problems, we explored attorneys' preferences about rule changes and uniformity, specifically regarding Rule 26(a)(1). Our questions focused first on the direction change might take and secondly on the timing of any rule revisions.

As to the direction of change, the results are mixed (Table 38). Faced with choice of uniform application of initial disclosure in all districts, uniform absence of initial disclosure, or the status quo, a plurality of attorneys in our sample (41%) support uniform application of initial disclosure. On the other hand, 27% favor a rule with no initial disclosure requirements and a prohibition on local requirements. Setting aside the specific substance of the rule, about two-thirds of attorneys, both plaintiffs and defendants, favor some form of uniform national rule.

Another way to look at the data is to consider the 27% of attorneys who want to delete disclosure and the 30% who favor the status quo (the opt-out system)—in other words, a majority (57%) who prefer something other than a uniform national rule requiring initial disclosure. We must take care, however, not to conclude from this that a majority of attorneys oppose initial disclosure. Such a conclusion would rest on a false assumption that those who favor the status quo disfavor initial disclosure requirements. In fact, 42% of



those who favor the status quo are counsel in cases from districts that have implemented initial disclosure. Moreover, more than 40% of those who favor the status quo engaged in initial disclosure in the sample case. For these attorneys, initial disclosure is the status quo. A large proportion of those who favor the status quo, then, have experience with disclosure and do not oppose it (at least not enough to select that choice), but for some reason do not wish to impose a uniform national requirement on districts that have opted out of initial disclosure.

**Table 38**  
**Percentage of attorneys with specific preferences regarding types of uniform national rules (Q33)**

<u>Attorney opinion</u>	<u>All</u>	<u>Plaintiff*</u>	<u>Defendant*</u>
National rule requiring initial disclosure in every district	41.0	45.0	38.0
National rule with no requirement for initial disclosure and a prohibition on local requirements for initial disclosure	27.0	22.0	30.0
Allowing local districts to decide whether or not to require initial disclosure (status quo)	30.0	30.0	30.0
Other	2.0	2.0	2.0
Number of respondents	1112	504	608

\* Differences between plaintiffs and defendants are statistically significant.

Attorneys who reported use of initial disclosure in the study case were considerably more likely (52% of them) to favor a uniform rule requiring initial disclosure than attorneys who did not report engaging in disclosure (28%) (Table 39). Attorneys who did not use initial disclosure in the sample case were about as likely to favor initial disclosure as to favor prohibition of initial disclosure.

**Table 39**  
**Percentage of attorneys preferring certain types of uniform national rules, by participation in initial disclosure (Q33)**

<u>Attorney opinion</u>	<u>Disclosure</u> <u>(N=503)</u>	<u>No disclosure</u> <u>(N=401)</u>
National rule requiring initial disclosure in every district	52.0	28.0
National rule with no requirement for initial disclosure and a prohibition on local requirements for initial disclosure	22.0	31.0
Allowing local districts to decide whether or not to require initial disclosure (status quo)	23.0	38.0
Other	3.0	2.0

Of particular surprise, we found that many attorneys who reported problems with initial disclosure support a uniform national rule requiring disclosure, albeit not in so high a proportion as those experiencing disclosure generally. Of attorneys reporting initial disclosure problems, 47% favored uniform initial disclosure compared to 56% of attorneys who did not report such problems.

We also found that attorneys in cases from districts that had opted out of initial disclosure were somewhat less likely than their counterparts to support a uniform national disclosure rule (35% of these attorneys) and were far more likely to prefer maintenance of the status quo (37%) (Table 40).

**Table 40**  
**Percentage of attorneys preferring certain types of uniform national rules, for attorneys in districts opting out and not opting out of initial disclosure (Q34)**

<u>Attorney opinion</u>	<u>Opt-out (N=521)</u>	<u>No Opt-out (N=591)</u>
National rule requiring initial disclosure in every district	35.0	47.0
National rule with no requirement for initial disclosure and a prohibition on local requirements for initial disclosure	26.0	27.0
Allowing local districts to decide whether or not to require initial disclosure (status quo)	37.0	24.0
Other	2.0	3.0

Overall, attorneys who represented plaintiffs in the sample cases were more likely to support initial disclosure (45% of them, compared to 38% of defendants' attorneys), while attorneys who represented defendants were more likely to support rules barring initial disclosure (30% of them, compared to 22% of plaintiffs' attorneys) (Table 38). Along similar lines, attorneys who in their overall practice primarily represent plaintiffs (50%) and attorneys who represent plaintiffs and defendants about equally (45%) were more likely than attorneys who primarily represent defendants (34%) to support initial disclosure.

Attorneys' preferences also differed by their practice setting. Solo practitioners (52%) and attorneys in firms of two to ten attorneys (46% of these attorneys) were more likely to support a uniform national disclosure requirement than attorneys in firms of fifty or more attorneys (30%). Attorneys from the largest firms, in turn, were twice as likely to support a prohibition on initial disclosure (39%) than solo practitioners (20%) or attorneys in firms of two to ten attorneys (19%).

These differences might be partially explained by the fact that attorneys in firms of fifty or more attorneys are far more likely to report practicing in four or more districts (45%) than attorneys in firms of two to forty-nine attorneys (18%). Interestingly, though, a plurality of attorneys who practice in four or more districts support initial disclosure (42%)

(Table 41). At the same time, these attorneys are more likely (39% of them) than attorneys who practice in fewer districts (21%-32%) to support barring initial disclosure rules.

**Table 41**  
**Percentage of attorneys preferring certain types of uniform national rules,**  
**by number of districts in which they practice (Q33)\***

<u>Attorney opinion (N=1105)</u>	<u>1 district</u>	<u>2-3 districts</u>	<u>4 or more districts</u>
National rule requiring initial disclosure in every district	42	40	42
National rule with no requirement for initial disclosure and a prohibition on local requirements for initial disclosure	21	32	39
Allowing local districts to decide whether or not to require initial disclosure (status quo)	35	27	16
Other	3	2	4

\* The distributions in this table are statistically significant.

From our sample of attorneys, the following general picture emerges regarding preferences for the national rules on initial disclosure. Most attorneys prefer a uniform national rule. A plurality of attorneys prefer a rule requiring initial disclosure. This group is disproportionately made up of attorneys who have experience with disclosure, who represent plaintiffs, who practice in a small number of districts, and who practice alone or in small firms. Even so, one would find in this group substantial numbers of other types of attorneys, as well—those who represent defendants, who practice in four or more districts, who practice in large firms, and, surprisingly, who have had problems with initial disclosure.

#### The timing of rule changes.

While many attorneys favor revisions to the discovery rule, there is a split of opinion about the timing for such revisions (Table 42). A majority favor change in the disclosure rules now, but a substantial minority thinks change should wait until there is more experience with the 1993 changes.

A somewhat clearer picture emerges when we set aside the "No opinion" responses and combine some of the categories. Forty-three percent (43%) of the attorneys in this sample favor immediate changes in the uniformity provisions of the disclosure rules (Item 2 or 3 or both). More broadly, 54% think change of some sort, either in the disclosure rules or other rules, should take place now (Items 2, 3, or 4, or any combination). Finally, the broadest level of support—83% of attorneys—is for some sort of change, either now or later (Items 1, 2, 3, or 4, or any combination).

**Table 42**  
**Percentage of attorneys with various opinions on need for change**  
**in discovery rules at this time (Q34)**

<u>Attorney opinion</u>	<u>%*</u> <u>(N=1101)</u>
Changes are needed, but should not be considered until we have more experience with recent changes. (1)	27.0
Changes in uniformity of initial disclosure practices (Rule 26(a)(1)) are needed now. (2)	33.0
Changes in uniformity of expert disclosure practices (Rule 26(a)(2)) are needed now. (3)	21.0
Other changes are needed now. (4)	14.0
No changes are needed. (5)	14.0
No opinion (6)	14.0

\*Because respondents were allowed to choose more than one option, totals add up to more than 100%.

We found no statistically significant differences regarding the timing of change for plaintiffs versus defendants, by type of primary client, or by numbers of years in practice. Practitioners in four or more federal districts were, however, significantly more likely than others to say that changes in initial disclosure are needed now and significantly less likely to have no opinion (Table 41).

Those who experienced problems with discovery were more likely than those who had no problems to say other changes are needed (Item 4) and were less likely to have no opinion. Similarly, attorneys who experienced problems with initial disclosure were more likely to say changes in initial disclosure, as well as other changes, are needed now. They were also less likely to say they had “No opinion” on the subject.

While it is clear that substantial numbers of attorneys favor further rule changes—and that certain subsets of attorneys in particular favor changing the disclosure rules—it is important to keep in mind that judicial management is viewed by attorneys as the most promising single method for reducing discovery problems (Table 37).

## V. Endnote

We began this report by identifying four broad areas of inquiry: the volume and cost of discovery; problems associated with discovery and their cost; the effects of the 1993 amendments; and the need, if any, for rule changes. Our findings about the effects of the 1993 amendments seem relatively straightforward and we see no need to summarize them here. Our discussion of the volume, costs, and problems of discovery, however, warrant attention because they seem to us less clear-cut and definitive.

We found a clear relationship between the volume of discovery activity in a case—as measured by total litigation expenses and discovery expenses—and the monetary stakes in the litigation. That is, as the stakes increase, the volume of discovery, and of discovery problems, also increases. To some extent, then, it appears that the amount of discovery and the frequency of problems is driven simply by the size of the case.

We also identified some case characteristics—the factual complexity of the case as seen by the parties, their rating of the contentiousness of their relationships with the opposing party or counsel, and in some instances the type of case—that appear more often in cases with discovery problems than in other types of cases.

The puzzle that remains is whether these case characteristics have any direct relationship to the volume of discovery and the frequency of discovery problems or whether the size of the case alone explains both volume and the frequency of problems. One plausible hypothesis is that case size alone drives the volume of discovery and that such characteristics as contentiousness are a result of size. Another is that relationships that are already contentious at the outset of the litigation result in cases with large stakes, a high volume of discovery activity, and more discovery problems. Further analysis of our data might yield some answers. Identifying these variables as factors in the equation may help frame the issues for future research.

In any case, the case characteristics revealed by our study—stakes, complexity, contentiousness, and case type—may not help us very much with predicting exactly where the problems might arise, but they may be useful in informing judges and policymakers about what to look for when managing a case or addressing the question of whether to change the rules of civil procedure.

## Appendix 1

### Methods

#### Sample size.

Based on an earlier survey of attorneys, we estimated that about 10% of the respondents might identify problems with discovery.<sup>24</sup> Anticipating a response rate of 50%, a sample of 2,000 attorneys would yield about 1,000 responses and approximately 100 problem responses.<sup>25</sup> Therefore, a sample of 1,000 cases was drawn.

As it turned out, the response rate approached 60%,<sup>26</sup> and more than 40% of the attorneys reported some problems with discovery in response to a broad inventory of suggested possible problems. This relatively high rate of identification of problems, however, should not be taken to mean that problems with discovery have increased since the earlier survey. The methods used to identify problems were likely to yield results that are not comparable. In the present study, we sought a comprehensive inventory of problems in four major forms of discovery and we provided a list of potential problems to assist the respondent in identifying such problems, whereas in the previous study, respondents were asked to generate a written response without a list of possible problems.

#### Population Sampled From.

The survey does not purport to cover discovery in all federal civil cases, but instead to cover discovery in general civil litigation in which some discovery activity is reasonably likely. The population of cases sampled from was drawn from all civil cases terminated in the district courts during the last quarter of 1996 (the most recent data then available). For practical reasons we excluded the 8 districts (accounting for 3% of the total district court civil case population) from which we cannot electronically access docket data.<sup>27</sup>

The following types of cases were excluded as not encompassed in the common understanding of general civil litigation or as not likely to involve any discovery: loan collection, prisoner, land condemnation, foreclosure, bankruptcy, drug-related property forfeiture, social security, and asbestos product liability cases (because they are consolidated in an MDL proceeding). We also excluded breast implant cases disposed of in the Northern District of Alabama (about 7% of the total case population for the period) owing to the atypical and highly managed discovery that occurs in mass tort multidistrict proceedings and because the termination of the cases in the Northern District of Alabama did not represent a final resolution of those cases.

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<sup>24</sup> In the previous survey, about 8% of counsel mentioned discovery problems in written responses to a question asking about the causes of excessive cost or delay in their case. The survey was done as part of the Federal Judicial Center's most recent district court time study.

<sup>25</sup> Surveys were sent to 2,016 attorneys; subsequently, sixteen attorneys in nine cases were excluded from the study because they reported that their case was pending.

<sup>26</sup> Attorneys returned 1,178 questionnaires. Of those, thirty-one attorneys returned blank surveys indicating that no discovery had occurred in their case. Responses indicating the absence of discovery were entered for those attorneys.

<sup>27</sup> These districts may be systematically different from the districts included in the study.

We also excluded all cases that were disposed of by default judgment before issue was joined as well as cases whose termination in the district court is by definition not a final resolution. The latter group was comprised of cases remanded to a state court or to an agency and cases transferred to another district. Finally, we excluded cases that were terminated less than sixty days after their original filing in district court (about 8% of the total case population) on the assumption that very few such cases involve any discovery.

Overall, the population sampled from accounts for about 45% of civil cases filed in the district courts. That is, cases excluded from consideration account for about 55%.

#### Representativeness of the responses.

In the sample cases, 47% of the attorneys represented plaintiffs<sup>28</sup> and 53% represented defendants, including third party defendants. Among those who responded, 46% represented plaintiffs and 54% represented defendants. We also asked respondents what types of clients they generally represent and found that 28% represent primarily plaintiffs, 44% represent primarily defendants, and 27% represent plaintiffs and defendants about equally. We present data separately for attorneys for plaintiffs and defendants—based on the client represented in the sample case—when there are notable differences in their responses.

Responding attorneys, on the average, devoted 41% (median=30%) of their work time during the past five years to federal civil litigation. The majority (51%) practice primarily in one federal district, but 39% practice in two or three federal districts and 10% practice in four or more federal districts.

The majority practice in firms of two to forty-nine attorneys; 20% are from firms of fifty or more attorneys; 12% are sole practitioners; and 8% are government attorneys. On the average, these attorneys have practiced law for sixteen years; 75% have practiced law for at least ten years.

We compared the cases underlying the responses with the cases in the original sample and found the responses to be representative of the sample as a whole. We found little or no difference between the original set of cases and the subset of cases in which responding attorneys were counsel. In both sets, the types of cases and their life spans (from filing to disposition) showed no substantial differences, and the methods of disposition, whether by trial, settlement, motion, or otherwise were substantially equivalent.

We specifically examined the disclosure rules in place in various districts in the sample. Response rates were almost identical from districts with initial disclosure and from those without initial disclosure and from district with variations of disclosure and nondisclosure.

#### Data analysis.

At this preliminary stage, data analysis has generally been based on cross-tabulations of the data and comparison of responses using a Chi-square test of differences between pairs of variables. Occasionally, where noted in the text, we have used the Pearson correlation coefficient to examine relationships among variables.

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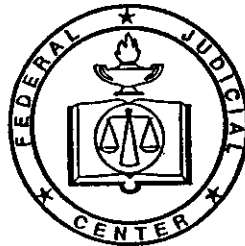
<sup>28</sup> The sample included a number of pro se plaintiffs and a smaller number of pro se defendants. In selecting the sample cases, we tried not to include those with pro se parties. Nonetheless, some made it into the sample. However, responses from pro se parties are not included in the analysis reported here.

## Appendix 2

### National Survey of Counsel re Disclosure and Discovery Practice in Closed Federal Civil Cases

#### For the Advisory Committee on Civil Rules of the Judicial Conference of the United States

*Designed and administered by the Federal Judicial Center*



#### **Who Should Complete the Questionnaire?**

Court records show that you represented a party in a recently terminated case identified in the cover letter ("the named case"). We ask that the questionnaire be completed by the primary attorney (or attorneys) who represented your client or clients in this case. If that is someone other than yourself, please pass this questionnaire along to the appropriate attorney. If the attorney primarily responsible for this case is no longer available, please return the questionnaire with a note to that effect. We are sending an identical questionnaire to attorneys for other parties in the litigation.

#### **Origin and Purpose**

This questionnaire was designed by the Federal Judicial Center at the request of the Judicial Conference's Civil Rules Advisory Committee. The Federal Judicial Center is the research arm for the federal judiciary. The Civil Rules Advisory Committee drafts and recommends changes in the Federal Rules of Civil Procedure pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. This research is being conducted by the Federal Judicial Center to assist the Advisory Committee in its current examination of discovery rules.

#### **Confidentiality**

All information that would permit identification of the named case, the lawyers, or the parties is strictly confidential. Findings will be reported in the aggregate so no individual person or case will be identifiable. The code number on the back of the questionnaire will be used only to link information from this questionnaire to information we have about the case from court records and to communicate further with you.

#### **Results**

If you would like a summary of the results, please check this box:

#### **Returning the Questionnaire**

Please return the questionnaire in the enclosed envelope by **May 16, 1997**. If you have questions or would like to discuss the questionnaire, please call Tom Willging or John Shapard at 202-273-4070.



**Part I: Discovery Activity in the Named Case.** *Please answer the questions in Part I with reference to the named case only.*

Discovery planning.

1. Did you, or other counsel for your client, meet and confer with opposing counsel, by telephone, correspondence, or in person, to plan for discovery, in accordance with Fed. R. Civ. P. 26(f) or a similar local rule, order, or other provision? *Note: The subscripts after each response box are for our use in entering the data accurately.*

Please check one: <sub>1</sub> Yes

<sub>2</sub> No -----> go to question 3.

<sub>3</sub> I don't recall -----> go to question 3.

2. Note that this question and a number of later questions ask about your client's litigation expenses. As to all such questions, if your client was not charged attorneys' fees on a standard hourly basis, please answer in light of what fees would likely have been if charged at a standard hourly rate.

What effects did meeting and conferring to plan for discovery have on the following aspects of the named case?

Please circle one number in each row:

<i>Effect of meeting and conferring on</i>	Increased	Had no effect	Decreased	I can't say
Your client's overall litigation expenses <sub>1</sub>	1	2	3	4
Time from filing to disposition <sub>2</sub>	1	2	3	4
Overall procedural fairness <sub>3</sub>	1	2	3	4
Fairness of case outcome <sub>4</sub>	1	2	3	4
Number of issues <sub>5</sub>	1	2	3	4

*Please note any other positive or negative aspects of meeting and conferring to plan for discovery in this case:* \_\_\_\_\_

3. Was there a plan for discovery, either as a stand-alone plan or as part of a scheduling order?

Please check one: <sub>1</sub> Yes

<sub>2</sub> No

<sub>3</sub> I don't recall

Informal exchange of discoverable information.

4. Apart from the requirements of the federal rules or local provisions, did you, or other counsel for your client, voluntarily provide or receive discoverable information informally in the named case?

Please check one:

<sub>1</sub> Yes

<sub>2</sub> No

<sub>3</sub> I don't recall

*If there was neither discovery of any type nor initial disclosure of information identified in Fed. R. Civ. P. 26(a)(1), (as defined in question 5), or a similar local provision, go to question 18, column 2 (page 9). Otherwise, proceed to question 5, below.*

Initial disclosure.

5. Fed. R. Civ. P. 26(a)(1) or similar local provisions in some districts require litigants to provide descriptions or lists of witnesses, documents, data compilations, damage computations, insurance agreements, or other tangible materials. Did you, or other counsel for your client, provide or receive initial disclosure in this case?

Please check one:

<sub>1</sub> Yes

<sub>2</sub> No -----> go to question 8.

<sub>3</sub> I don't recall -----> go to question 9.

6. Which of the following statements describe the initial disclosure that took place?

Please check all that apply:

- <sub>1</sub> My client disclosed lists or descriptions of documents and/or materials.
- <sub>2</sub> My client disclosed copies of documents and/or materials.
- <sub>3</sub> My client received lists or descriptions of documents and/or materials.
- <sub>4</sub> My client received copies of documents and/or materials.
- <sub>5</sub> I don't recall.

7 What effects did initial disclosure have on the named case?

Please circle one number in each row:

Effect of initial disclosure on	Increased	Had no effect	Decreased	I can't say
Your client's overall litigation expenses <sub>1</sub>	1	2	3	4
Time from filing to disposition <sub>2</sub>	1	2	3	4
Overall procedural fairness <sub>3</sub>	1	2	3	4
Fairness of case outcome <sub>4</sub>	1	2	3	4
Prospects of settlement <sub>5</sub>	1	2	3	4
Amount of discovery <sub>6</sub>	1	2	3	4
Number of discovery disputes <sub>7</sub>	1	2	3	4

Please note any other positive or negative aspects of initial disclosure in this case:

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**PLEASE GO TO QUESTION 9.**

Reason for lack of initial disclosure. To be answered only by those who answered "No" to question 5.

8. Why was there no initial disclosure in this case?

Please check all that apply:

- <sub>1</sub> The district exempted all cases from initial disclosure.
- <sub>2</sub> The district exempted this type of case from initial disclosure.
- <sub>3</sub> The judge assigned to this case has a standing order exempting all cases from initial disclosure.
- <sub>4</sub> The judge assigned to this case exempted this case from initial disclosure.
- <sub>5</sub> The parties stipulated that disclosure provisions would not apply to this case.
- <sub>6</sub> No one began the process and the court did not take action to enforce disclosure requirements.
- <sub>7</sub> Other (specify) \_\_\_\_\_
- <sub>8</sub> I don't know.

Expert discovery and disclosure

9. Did you, or another attorney for your client, do any of the following regarding expert witnesses?

Please check all that apply:

- 1 Provide, pursuant to Fed. R. Civ. P. 26(a)(2) or a similar local provision, a written expert report (not just a list of the experts)
- 2 Receive, pursuant to Fed. R. Civ. P. 26(a)(2) or a similar local provision, another party's written expert report (not just a list of the experts)
- 3 Agree with an opposing party not to disclose written reports of anticipated expert testimony
- 4 Attend or conduct the deposition of an expert
- 5 Conduct other expert discovery (please specify): \_\_\_\_\_
- 6 None of the above
- 7 I don't recall

10. Regardless of whether disclosure occurred in this case, if expert disclosure was or would have been required by Fed. R. Civ. P. 26(a)(2) or a similar local provision, what effects did that requirement have?

If expert disclosure was not required or would not have been required, go to question 11.

Please circle one number in each row:

<i>Effect of expert disclosure requirement on</i>	Increased	Had no effect	Decreased	I can't say
Your client's overall litigation expenses <sub>1</sub>	1	2	3	4
Time from filing to disposition <sub>2</sub>	1	2	3	4
Overall procedural fairness <sub>3</sub>	1	2	3	4
Fairness of case outcome <sub>4</sub>	1	2	3	4
Pressure to settle <sub>5</sub>	1	2	3	4

Please note any other positive or negative aspects of expert discovery in this case: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Types of discovery.

11. If you, or another attorney for your client, conducted, defended, or attended a deposition by oral examination, what was

- 13a. the estimated number of individuals deposed? \_\_\_\_\_ deponents
- 13b. the estimated total hours spent in those depositions? \_\_\_\_\_ hours
- 13c. the estimated length of the longest deposition? \_\_\_\_\_ hours

12. Aside from oral depositions or initial disclosure, what other types of discovery were used in this case?

*Please check all that apply:*

- <sub>1</sub> Interrogatories
- <sub>2</sub> Requests for production of documents
- <sub>3</sub> Requests for admissions
- <sub>4</sub> Physical or mental examination
- <sub>5</sub> Other (please specify): \_\_\_\_\_
- <sub>6</sub> I can't recall

Problems in disclosure or discovery

13. Please indicate which, if any, of the following types of problems occurred in the named case in relation to any party in the case.

*Please check all that apply:*

- There were no problems with disclosure or discovery-----> go to question 16.

**Initial disclosure**

- Disclosure was too brief or incomplete.  
 Disclosure was excessive.  
 Some disclosed materials were also requested in discovery.  
 A party failed to supplement or update the disclosures.  
 A party disclosed required information and another party did not disclose required information.  
 Disclosure occurred only after a motion to compel or an order from the court.  
 Sanctions were imposed for failure to disclose.  
 Other (please specify): \_\_\_\_\_

**Document production**

- One or more requests were vague.  
 An excessive number of documents were requested.  
 Materials provided were excessive or disordered.  
 A party failed to respond in a timely fashion.  
 A party failed to respond adequately.  
 Other (please specify): \_\_\_\_\_

**Oral depositions**

- There were too many depositions.  
 Too much time was taken in some or all depositions.  
 An attorney coached a witness during a deposition.  
 An attorney improperly instructed a witness not to answer a question.  
 An attorney acted unreasonably to annoy, embarrass, or oppress the deponent or counsel.  
 Other (please specify): \_\_\_\_\_

**Expert Disclosure**

- Expert disclosure was too brief or incomplete.  
 Expert disclosure was too expensive.  
 A party failed to supplement or update its disclosures.  
 Other (please specify): \_\_\_\_\_

**Other Problems**

- Please identify any other problems with disclosure or discovery: \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

14. Please estimate the percentage of your client's discovery expenses that were incurred unnecessarily because of these problems:

\_\_\_\_\_ %

15. To what extent did each of the following factors contribute to any problems in discovery in relation to any party?

Please circle one number in each row:

Factor	No contribution	Moderate contribution	Major contribution	I can't say
Intentional delays or complications <sub>1</sub>	1	2	3	4
Lack of cooperation by a client <sub>2</sub>	1	2	3	4
Pursuit of discovery disproportionate to the needs of the case <sub>3</sub>	1	2	3	4
Incompetence or inexperience of counsel <sub>4</sub>	1	2	3	4

Please identify any other factors that may have contributed to discovery problems in this case: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Court management of discovery.

16. Did the court do any of the following in this case?

Please check all that apply:

- <sub>1</sub> Hold a conference (by telephone, correspondence, or in person) to consider a discovery plan
- <sub>2</sub> Hold a conference at which discovery issues (other than a discovery plan) were discussed
- <sub>3</sub> Limit the time for completion of discovery? If so, to how many months? \_\_\_\_\_ months
- <sub>4</sub> Enforce the federal rules' limits on the number of interrogatories or depositions
- <sub>5</sub> Limit the number of interrogatories or depositions to fewer than specified in the federal rules
- <sub>6</sub> Increase the number of interrogatories or depositions to more than specified in the federal rules
- <sub>7</sub> Rule on a discovery motion
- <sub>8</sub> None of the above

17. Please indicate whether any of the following problems occurred regarding the court's management of discovery in relation to any party.

Please check all that apply:

- There were no problems with the court's management of disclosure or discovery -----> go to question 18

**Discovery planning and implementation**

- There were no time limits on discovery and such limits were needed.  
 The time allowed for discovery was too long.  
 The time allowed for discovery was too short.  
 The court allowed too many extensions of the deadline to complete discovery.  
 The court allowed too many extensions of time to respond to discovery requests.  
 The court was too rigid about deadlines.  
 Other (please specify): \_\_\_\_\_

**Limitations on discovery**

- There were no limits on interrogatories and such limits were needed.  
 There were no limits on depositions and such limits were needed.  
 Limits on interrogatories were too lenient.  
 Limits on interrogatories were too restrictive.  
 Limits on depositions were too lenient.  
 Limits on depositions were too restrictive.  
 Other (please specify): \_\_\_\_\_

**Rulings on motions**

- There was no decisionmaker available to rule on disputes during depositions.  
 Rulings on discovery motions took too long.  
 There were no rulings on discovery motions and such rulings were needed.  
 Other (please specify): \_\_\_\_\_

**Sanctions**

- There were no rulings on sanctions motions and such rulings were needed.  
 Rulings on sanctions motions took too long.  
 Rulings on sanctions motions were generally too lenient.  
 Rulings on sanctions motions were generally too harsh.  
 Other (please specify): \_\_\_\_\_

**Other problems**

- Please identify any other problems with the court's management of discovery in this case: \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_



Changes in rules or case management practices

18. Which of the following types of changes in the Federal Rules of Civil Procedure or court management practices would be likely to have reduced discovery expenses either in this case or generally, without unreasonably interfering with the fair resolution of this case or most cases?

Please circle all that apply:

Change in rule or case management practice	(Column 1)	(Column 2)
	Would have been likely to decrease expenses <u>in this case</u> without unreasonably interfering with fair resolution	Would <u>generally</u> be likely to decrease expenses without unreasonably interfering with fair resolutions
Adopting a uniform national rule requiring initial disclosure <sub>1</sub>	1	2
Deleting initial disclosure from the national rules <sub>2</sub>	1	2
Narrowing the definition of what is discoverable (Rule 26(b)) <sub>3</sub>	1	2
Narrowing the definition of what documents are discoverable (Rule 34) <sub>4</sub>	1	2
Limiting—or further limiting—the time within which to complete discovery <sub>5</sub>	1	2
Limiting—or further limiting—the number of depositions <sub>6</sub>	1	2
Limiting—or further limiting—the maximum number of hours for a deposition <sub>7</sub>	1	2
Limiting—or further limiting—the number of interrogatories <sub>8</sub>	1	2
Increasing court management of discovery <sub>9</sub>	1	2
Increasing availability of district or magistrate judges to resolve discovery disputes <sub>10</sub>	1	2
Imposing fee-shifting sanctions more frequently and/or imposing more severe sanctions for violations of discovery rules or orders <sub>11</sub>	1	2
Adopting a civility code for attorneys <sub>12</sub>	1	2
Other change (specify) <sub>13</sub> _____	1	2

19. In considering changes to civil rules regarding discovery, discovery case management practices, or other reforms, which of the following approaches holds the most promise for reducing any problems in discovery?

Please check one:

- <sub>1</sub> Revise the Federal Rules of Civil Procedure to further control or regulate discovery
- <sub>2</sub> Increase judicial case management
- <sub>3</sub> Address the need for changes in client and/or attorney incentives regarding discovery
- <sub>4</sub> Other (please specify): \_\_\_\_\_
- <sub>5</sub> No opinion

Expenses of this litigation.

- 20 Please estimate the total litigation expenses for your client in this case, 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. If your client was not charged attorneys' fees on a standard hourly basis, please answer the following questions in light of what fees would likely have been if charged at a standard hourly rate.

\$ \_\_\_\_\_

21. Approximately what percentage of the total litigation expenses for your client were associated with disclosure and discovery activity?

\_\_\_\_\_ % of the total litigation expenses

22. Please indicate the approximate percentage of total discovery expenses allocable to each of these types of discovery. Fair estimates from your recollection are satisfactory, but the estimates should add up to 100%. Include estimates of the expenses of motions activity in the categories to which the motion pertained.

\_\_\_\_\_ <sub>1</sub>% Meet and confer/discovery planning

\_\_\_\_\_ <sub>2</sub>% Initial disclosure of documents and materials by rule or order, or voluntarily

\_\_\_\_\_ <sub>3</sub>% Expert disclosure or discovery

\_\_\_\_\_ <sub>4</sub>% Depositions

\_\_\_\_\_ <sub>5</sub>% Requests for and/or production of documents not disclosed at any initial disclosure

\_\_\_\_\_ <sub>6</sub>% Interrogatories

\_\_\_\_\_ <sub>7</sub>% Other (please describe): \_\_\_\_\_

100 % Total

Stakes in the case.

23. Aside from the expenses of litigation, what specific relief was at stake for your client in this case? If possible, estimate and include the monetary value of any nonmonetary relief at stake.

23a. The dollar value of the worst likely outcome, including damages, monetary relief and quantifiable nonmonetary relief, was that my client would

gain or  lose      \$ \_\_\_\_\_

23b. The dollar value of the best likely outcome, including damages, monetary relief and quantifiable nonmonetary relief, was that my client would

gain or  lose      \$ \_\_\_\_\_

24. To what extent was your client concerned about nonmonetary relief that was not quantified above or about possible consequences beyond the relief sought in this specific case, such as future litigation based on similar claims, legal precedent, harm to reputation, or a desire to maintain a business relationship with a party?

- Please check one:*
- <sub>1</sub> Such consequences were of dominant concern to my client.
- <sub>2</sub> Such consequences were of some concern to my client.
- <sub>3</sub> Such consequences were of little or no concern to my client.
- <sub>4</sub> I can't say.

Attorneys' fees.

25. What was your arrangement with your client regarding attorneys' fees in this case?

- Please check all that apply:*
- <sub>1</sub> Hourly billings
- <sub>2</sub> Contingent fee (percentage of recovery)
- <sub>3</sub> Other arrangement not based on hours or case outcome
- <sub>4</sub> I can't say

26. Was there a statutory provision for recovery of attorneys' fees applicable to this case?

- Please check one:*
- <sub>1</sub> Yes
- <sub>2</sub> No
- <sub>3</sub> I don't recall

Complexity.

27. How complex were the factual issues in this case?

- Please check one:*
- <sub>1</sub> Very complex
- <sub>2</sub> Somewhat complex
- <sub>3</sub> Not at all complex
- <sub>4</sub> I don't recall

Contentiousness.

28. Overall, how contentious were the relationships among opposing attorneys and clients in this case?

- Please check one:*
- <sub>1</sub> Very contentious
- <sub>2</sub> Somewhat contentious
- <sub>3</sub> Not at all contentious
- <sub>4</sub> I don't recall

Summary assessment

29. On the whole, did the disclosure and discovery generated by all parties in this case amount to too much, too little, or about the right amount of the information needed for a fair resolution of this case?

Please check one

- <sub>1</sub> Too much  
<sub>2</sub> About right  
<sub>3</sub> Too little  
<sub>4</sub> No opinion

30. On the whole, was the cost of disclosure and discovery in this case high, low, or about right relative to your client's stakes in this case?

Please check one:

- <sub>1</sub> High  
<sub>2</sub> About right  
<sub>3</sub> Low  
<sub>4</sub> No opinion

**Part II. Opinions Based on Personal Experiences.** *For the questions in this section, you need not limit your responses to the experiences gained in the case identified earlier in the survey, but please draw only upon experiences with your own federal cases.*

Uniformity.

31. How serious is the lack of uniformity, if any, in practices among district judges in the district in which the named case was filed in regard to disclosure activity?

Please check all that apply:

- <sub>1</sub> In my experience, there is no significant lack of uniformity in that district.  
<sub>2</sub> The lack of uniformity in that district creates serious problems.  
<sub>3</sub> The lack of uniformity in that district creates moderate problems.  
<sub>4</sub> The lack of uniformity in that district creates minor problems or no problems.  
<sub>5</sub> Other (please explain): \_\_\_\_\_  
<sub>6</sub> No opinion

32. How serious is the lack of uniformity, if any, in practices among districts in regard to disclosure activity?

Please check all that apply:

- <sub>1</sub> In my experience, there is no significant lack of uniformity among districts.  
<sub>2</sub> The lack of uniformity among districts creates serious problems.  
<sub>3</sub> The lack of uniformity among districts creates moderate problems.  
<sub>4</sub> The lack of uniformity among districts creates minor problems or no problems.  
<sub>5</sub> Other (please explain): \_\_\_\_\_  
<sub>6</sub> No opinion

33. Some have asserted that uniform national rules should be adopted regarding initial disclosure under Fed. R. Civ. P. 26(a)(1). Which of the following proposed types of uniform national rules do you prefer?

Please check one

- <sub>1</sub> A national rule requiring initial disclosure in every district
- <sub>2</sub> A national rule with no requirement for initial disclosure and a prohibition on local requirements for initial disclosure
- <sub>3</sub> Allowing local districts to decide whether or not to require initial disclosure (the status quo)
- <sub>4</sub> Other (please explain): \_\_\_\_\_

Changes in discovery rules.

34. What is your opinion regarding the need for change in the discovery rules at this time?

Please check all that apply:

- <sub>1</sub> Changes are needed, but should not be considered until we have more experience with recent changes.
- <sub>2</sub> Changes in uniformity of initial disclosure practices (Rule 26(a)(1)) are needed now.
- <sub>3</sub> Changes in uniformity of expert disclosure practices (Rule 26(a)(2)) are needed now.
- <sub>4</sub> Other changes are needed now. Please identify: \_\_\_\_\_
- <sub>5</sub> No changes are needed.
- <sub>6</sub> No opinion

**Part III. Nature of Law Practice.**

35. Which of the following best describes your law practice setting?

Please check one:

- <sub>1</sub> Sole practitioner
- <sub>2</sub> Private firm of 2-10 lawyers
- <sub>3</sub> Private firm of 11-49 lawyers
- <sub>4</sub> Private firm of 50 or more lawyers
- <sub>5</sub> Legal staff of a for-profit corporation or entity
- <sub>6</sub> Legal staff of a non-profit corporation or entity
- <sub>7</sub> Government
- <sub>8</sub> Other (please specify): \_\_\_\_\_

36. How many years have you been engaged in the practice of law? \_\_\_\_\_ years

37. What types of clients do you generally represent?

Please check one:

- <sub>1</sub> Primarily plaintiffs
- <sub>2</sub> Primarily defendants
- <sub>3</sub> Plaintiffs and defendants about equally
- <sub>4</sub> Other (specify): \_\_\_\_\_

38. What percentage of your work time has been devoted to federal civil litigation during the past five years (or during the time you have been in practice, if less than five years)?

\_\_\_\_\_ % of my work time

39. In how many federal districts does your federal practice primarily take place?

Please check one: <sub>1</sub> Primarily in 1 federal district

<sub>2</sub> Primarily in 2 or 3 federal districts

<sub>3</sub> In 4 or more federal districts

40. Comments. *Please add any comments you may have about your experiences with discovery or disclosure generally.*

**THANK YOU**

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Discovery Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging or John Shapard at 202-273-4070.