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# Congress and the 2000 Federal Civil Rules Amendments

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# CONGRESS AND THE 2000 FEDERAL CIVIL RULES AMENDMENTS

*Carl Tobias\**

In April 2000, the United States Supreme Court promulgated, and Chief Justice William H. Rehnquist transmitted to the United States Congress, a comprehensive package of amendments to the Federal Rules of Civil Procedure.<sup>1</sup> The Judicial Conference of the United States, the policymaking arm of the federal courts, had forwarded these proposals to the Supreme Court in September 1999, and the Justices transmitted the amendments to Congress without making any modifications. The new group of federal rules amendments warrants assessment for two reasons. First, a few provisions in the package of revisions are comparatively controversial and could significantly change important aspects of federal civil practice in the discovery process. Second, unless Congress exercises its authority under the Rules Enabling Act of 1934 to alter the amendments, they will become effective in December 2000.<sup>2</sup> These propositions mean that the procedural modifications that the Supreme Court recently prescribed merit evaluation. This Article undertakes that effort.

Part I traces the origins and development of the amendments. Part II selectively analyzes the most disputed provisions in the amendments and considers the impacts of the 2000 revisions. Finding that certain amendments are rather controversial and may have substantial effects either individually or synergetically, Part III examines alternatives available to Congress and provides recommendations for it.

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<sup>1</sup> See Letter from William H. Rehnquist, Chief Justice of the United States Supreme Court, to J. Dennis Hastert, Speaker of the House of Representatives (Apr. 17, 2000), reprinted in H.R. DOC. NO. 106-228, at 1-2 (2000).

<sup>2</sup> See 28 U.S.C. § 2074(a) (1994). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1925 (1982); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1599-600 (1994).

## I. ORIGINS AND DEVELOPMENT OF THE 2000 AMENDMENTS

The Supreme Court has promulgated three important packages of amendments in the Federal Rules of Civil Procedure over the last two decades.<sup>3</sup> Perhaps the most remarkable feature of the 1980 set was the dissent by Justice Lewis F. Powell, Jr., who admonished that "Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms."<sup>4</sup> Notwithstanding this prediction, the Supreme Court prescribed a second, significant group of amendments affecting the discovery process in 1983. Those amendments imposed a proportionality requirement and numerous, additional strictures on discovery, while substantially increasing district judges' control over the pretrial litigation process generally and discovery in particular. These amendments also greatly enlarged judicial authority to levy sanctions on parties and lawyers for violation of commands that govern pre-filing investigations under Federal Rule 11,<sup>5</sup> pretrial conferences under Federal Rule 16, and discovery under Federal Rule 26.<sup>6</sup>

The Supreme Court again reformed the discovery process in 1993. In that year, the Court promulgated a package of amendments that imposed mandatory pre-discovery, or automatic, disclosure. This was the most contested proposal to change the Federal Rules in fifty-five years.<sup>7</sup> Practically all elements of the organized bar vociferously criticized the suggestions for automatic disclosure. They argued that the concept recommended would

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<sup>3</sup> See Order Amending the Federal Rules of Civil Procedure, 507 U.S. 1091 (1993); Order Amending the Federal Rules of Civil Procedure, 461 U.S. 1097 (1983); Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997 (1980). For the pre-1980 history, see John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 513-20 (2000); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

<sup>4</sup> Order Amending the Federal Rules of Civil Procedure, 446 U.S. at 1000 (Powell, J., dissenting). See generally Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 998-1000 (1983); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 756-60 (1998); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 456-59 (1991).

<sup>5</sup> The 1983 modification of Rule 11 proved to be the most controversial amendment ever implemented and was further revised in 1993.

<sup>6</sup> See Order Amending the Federal Rules of Civil Procedure, 461 U.S. 1097 (1983). See generally ARTHUR R. MILLER, *THE 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (1984); Subrin, *supra* note 3, at 744-45.

<sup>7</sup> See FED. R. CIV. P. 26(a)(1). See generally Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 17-18 (1992); Marcus, *supra* note 4, at 764-68; Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 233-36 (1999); Tobias, *supra* note 2, at 1611-13.

institute another, unwarranted layer of discovery; undermine the traditional adversary system; create numerous, delicate ethical problems; and leave uncertain exactly what material must be divulged, thereby fostering unnecessary and expensive satellite litigation over the provision's phraseology.<sup>8</sup> The 1993 automatic disclosure amendment also authorized each of the ninety-four federal district courts by local rule, judges by order in particular cases, and parties by consent to opt out of the compulsory automatic disclosure requirements.<sup>9</sup>

In 1996, the Judicial Conference Advisory Committee on Civil Rules ("Advisory Committee")—the body with the primary responsibility for studying the Federal Rules of Civil Procedure and developing constructive suggestions for improvement—appointed a Discovery Subcommittee to explore the possibility of additionally revising the provisos that govern discovery.<sup>10</sup> The Advisory Committee appointed this Subcommittee even though three factors militated against doing so: (1) the Supreme Court had adopted three major sets of discovery amendments since 1980, one of which had been adopted only three years earlier;<sup>11</sup> (2) most federal rule revisions require a generation of application and evaluation before their effectiveness can be accurately ascertained;<sup>12</sup> and (3) a growing number of federal courts observers had called for less frequent federal rule amendment.<sup>13</sup>

The Discovery Subcommittee investigated the need to modify

<sup>8</sup> See, e.g., Order Amending the Federal Rules of Civil Procedure, 507 U.S. 1091, 1099 (1993) (Scalia, J., dissenting); Bell et al., *supra* note 7, at 28-32. For recent articulations, see Thornburg, *supra* note 7, at 233-35 and D. Jeffrey Campbell & Christina H. Wang, *Proposed Amendments to Fed. Rule 26 Could Streamline Mandatory Initial Disclosure*, 22 ASBESTOS LITIG. REP. 10 (2000).

<sup>9</sup> See FED. R. CIV. P. 26(a)(1); *infra* note 25 and accompanying text. See generally Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929 (1996); Marcus, *supra* note 4, at 766-68; Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules*, 14 REV. LITIG. 49 (1994); Tobias, *supra* note 2, at 1612-15.

<sup>10</sup> See Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules to Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure, 181 F.R.D. 24, 25 (1998) [hereinafter Niemeyer, Memorandum]; Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 521 (1998) [hereinafter Niemeyer, *Here We Go Again*].

<sup>11</sup> See *supra* notes 3-8 and accompanying text.

<sup>12</sup> Two Advisory Committee Reporters so claimed. See Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 52-53 (1967) (citing Professor Benjamin Kaplan's view); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 677 (1979) (agreeing with Professor Kaplan's view).

<sup>13</sup> See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 854-55 (1993); John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 435 (1994); Thornburg, *supra* note 7, at 230-33.

the provisions that govern discovery partly through authorizing studies of discovery. The Subcommittee commissioned assessments by the Federal Judicial Center ("FJC"), the principal research arm of the federal courts, and the RAND Corporation Institute for Civil Justice, which had recently concluded a comprehensive examination of expense and delay reduction procedures applied in the federal district courts under the Civil Justice Reform Act of 1990 ("CJRA").<sup>14</sup> After evaluating the results of these studies as well as considerable, additional relevant information, the Discovery Subcommittee recommended that the Advisory Committee propose certain amendments to the discovery rules.<sup>15</sup> In early 1998, the Advisory Committee assembled a package of proposed amendments in the discovery provisions and forwarded those suggestions to the Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee"), which has the responsibility to review recommendations for improvement developed by the Judicial Conference advisory committees on appellate, bankruptcy, civil, criminal, and evidentiary rules.<sup>16</sup> In the summer of 1998, the Standing Committee concomitantly issued proposed amendments and solicited public input on those amendments through written submissions and three public hearings conducted in Baltimore, Chicago, and San Francisco.<sup>17</sup> During June 1999, the Standing Committee considered the public comments, instituted a small number of minor alterations, and submitted the package to the Judicial Conference.<sup>18</sup> In September of that year, the Judicial

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<sup>14</sup> See James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998).

<sup>15</sup> See Niemeyer, Memorandum, *supra* note 10, 181 F.R.D. at 24. See generally Beckerman, *supra* note 3, at 506-09; Marcus, *supra* note 4, at 768-84; Thornburg, *supra* note 7, at 246-49.

<sup>16</sup> See Niemeyer, Memorandum, *supra* note 10, 181 F.R.D. at 24-27; Terry Carter, *The Latest Discovery Mission*, A.B.A. J., Sept. 1999, at 20. The Advisory Committee rejected by a nine to four vote deletion of the provision that would narrow discovery's scope. See Letter from Professor Thomas D. Rowe to Carl Tobias (Nov. 19, 1999); see also Beckerman, *supra* note 3, at 542 n.154; *infra* notes 36-45 and accompanying text.

<sup>17</sup> See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Civil Procedure, 181 F.R.D. 18 (1998) [hereinafter Proposed Amendments]. I refer here to the proposed revisions reprinted in the Federal Rules Decisions, because they are most accessible and because the provisions I discuss were not changed. See generally Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433 (1999).

<sup>18</sup> It rejected by a ten to two vote deletion of the provision that would have narrowed the scope of discovery. See Letter from Richard H. Middleton, Jr., President, Association of Trial Lawyers of America, to Honorable William H. Rehnquist, Chief Justice of the United States (Apr. 12, 2000); see also *infra* notes 36-45 and accompanying text.

Conference approved the proposed amendments except for one requirement,<sup>19</sup> and tendered the recommended amendments to the Supreme Court.<sup>20</sup> In April 2000, after the Justices had analyzed the package of amendments, the Court transmitted the set, unchanged, to Congress.

## II. ANALYSIS OF THE 2000 AMENDMENTS

The second section of this Article first descriptively and critically assesses the specific 2000 amendments to the discovery requirements recently promulgated by the Supreme Court. It then evaluates the effects that the amendments could have separately and in combination. This section emphasizes those amendments that would institute the greatest changes in the current discovery system or that have been most controversial, although additional alterations may prove to be similarly controversial once federal judges have implemented and interpreted the rules.

### A. *Specific Amendments*

#### 1. Automatic Disclosure

The 2000 amendment to Federal Rule 26(a)(1) would significantly change the 1993 requirement that a litigant disclose information that is “relevant to disputed facts alleged with particularity in the pleadings.”<sup>21</sup> The 2000 amendment would mandate that a party divulge only material that “support[s] its claims or defenses, unless solely for impeachment.”<sup>22</sup> The 2000 amendment, therefore, would narrow considerably the 1993 provision because the modified concept demands that litigants exchange less information.<sup>23</sup> Moreover, the 2000 amendment will

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<sup>19</sup> See Proposed Amendments, *supra* note 17, 181 F.R.D. at 87-89 (proposed amendment in Rule 34(b)). See generally Thornburg, *supra* note 7, at 239-40; Tobias, *supra* note 17, at 1441. The one requirement that the Conference rejected was the “cost-bearing requirement,” which would have authorized judges to permit discovery that was disproportionate to the needs of a case only if the party seeking broader discovery paid for it.

<sup>20</sup> It also rejected by a thirteen to twelve vote deletion of the provision that would have narrowed the scope of discovery. See Letter from Thomas D. Rowe to Carl Tobias, *supra* note 16; see also *infra* notes 36-45 and accompanying text.

<sup>21</sup> FED. R. CIV. P. 26(a); see also Proposed Amendments, *supra* note 17, 181 F.R.D. at 57-58 (amendment in Rule 26(a)(1)). See generally Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479 (1995); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—“Much Ado About Nothing?”*, 46 HASTINGS L.J. 679 (1995); Thornburg, *supra* note 7, at 236-37.

<sup>22</sup> See Proposed Amendments, *supra* note 17, at 57-58 (amendment in Rule 26(a)(1)).

<sup>23</sup> The new provision should decrease incentives to plead with specificity and, thus, honor the Federal Rules’ notice pleading regime. See generally Beckerman, *supra* note 3,

apply nationwide in every federal district court.<sup>24</sup> This contrasts with the 1993 version, which empowered all ninety-four districts to “opt-out” by prescribing local variations on the federal strictures or by completely rejecting those requirements; a substantial number of courts exercised that authority primarily to eschew the commands in the federal proviso.<sup>25</sup>

The rule revision entities, and in particular the Advisory Committee, seemingly premised their determination to alter automatic disclosure in substantial measure on two important perceptions. The first was the controversial character of the disclosure mandates imposed by the 1993 revision.<sup>26</sup> Second, the opt-out mechanism had further balkanized the already fractured state of federal civil practice and procedure by encouraging the district courts to implement local disclosure procedures that departed from the federal disclosure requirements, or to reject these requirements entirely.<sup>27</sup>

Those perceptions may have been inaccurate, however. First, the 1993 disclosure amendment has apparently been somewhat less controversial as a practical matter than numerous critics had predicted. For example, the FJC assessment found many more lawyers (1) “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” and (2) stated that “disclosure increased overall procedural fairness, the fairness of the case outcome, and the prospects of settlement than said it decreased them.”<sup>28</sup> Second, the opt-out device may have fragmented federal civil procedure less substantially than some observers claimed. For instance, only sixteen percent of counsel whom the FJC surveyed believed that the application of inconsistent disclosure measures and discovery

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at 534-43; Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986). However, the revision that narrows the scope of discovery may increase the incentives to plead with particularity. See *infra* notes 40-41 and accompanying text.

<sup>24</sup> See Proposed Amendments, *supra* note 17, at 57 (amendment in Rule 26(a)(1)).

<sup>25</sup> See FED. R. CIV. P. 26(a)(1); see also Donna Stienstra, *Implementation of Disclosure in United States District Courts with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26*, 182 F.R.D. 304 (1998); *supra* note 9 and accompanying text.

<sup>26</sup> See *supra* notes 7-8 and accompanying text.

<sup>27</sup> See Niemeyer, *Here We Go Again*, *supra* note 10, at 519; Campbell & Wang, *supra* note 8; Willging et al., *supra* note 14, at 541; see also *supra* notes 9, 25 and accompanying text.

<sup>28</sup> Willging et al., *supra* note 14, at 535. The FJC reported little evidence of satellite litigation that involved disclosure. See *id.* The RAND study agreed with this idea and found that disclosure only minimally affected cost and delay. See Kakalik et al., *supra* note 14, at 658, 678.

provisions across federal districts produced serious problems, and a mere six percent considered intradistrict conflicts to create such complications, notwithstanding the FJC's assertion that growing numbers of judges and attorneys have claimed that disuniformity in the disclosure and discovery strictures poses serious difficulties warranting resolution.<sup>29</sup>

It is unclear why the Advisory Committee decided to recommend the change in automatic disclosure at this time. The FJC and RAND evaluations suggest that the 1993 disclosure amendment has functioned rather effectively. Insofar as the amendment has seemingly operated less well, these perceptions may have been attributable to the comparatively limited implementation and assessment that the revision has received or to the controversy surrounding the initial consideration and promulgation of the 1993 disclosure amendment.

Even if the present need for modification were more compelling, it remains uncertain that the changes instituted by the 2000 amendment will constitute significant improvement. The amendment replaces phraseology that has relatively definite meaning, and to which judges, counsel, and parties are accustomed, with wording that may be somewhat ambiguous. The new terminology might correspondingly lead to considerable ancillary litigation that involves its interpretation and the scope of disclosure mandated, thus causing expense and delay.<sup>30</sup> Moreover, the requirement that parties divulge less material will arguably complicate plaintiffs' efforts to secure the information they need for proving and settling their cases.<sup>31</sup> Furthermore, the 2000 amendment alters the disclosure requirements applicable in every lawsuit, even though the FJC and RAND evaluations concluded that the 1993 measure was problematic in a comparatively small number of cases, especially in complex litigation.<sup>32</sup>

In the final analysis, the rule revisors, and, most importantly,

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<sup>29</sup> See Willging et al., *supra* note 14, at 541-42, 583-84. Sixty percent of the lawyers polled think that interdistrict inconsistency creates problems. *See id.* at 583; *see also supra* note 27 and accompanying text. Fewer than half of the districts applied the federal disclosure strictures. *See Stienstra, supra* note 25.

<sup>30</sup> *See* Pearl Zuchlewski, *Proposed Amendments May Transform Civil Discovery Rules*, N.Y. L.J., Aug. 10, 1999, at 1. *See generally* Beckerman, *supra* note 3, at 540-41.

<sup>31</sup> *See* Thornburg, *supra* note 7, at 249-54; Zuchlewski, *supra* note 30. Disclosure also applies nationally, thus forfeiting flexibility to tailor the measure to local conditions and to experiment, testing which might lead to the development of a better disclosure procedure. *See infra* notes 69-70 and accompanying text; *see also* Tobias, *supra* note 2, at 1615-16; Carter, *supra* note 16.

<sup>32</sup> *See* Kakalik et al., *supra* note 14, at 682; Willging et al., *supra* note 14, at 538, 551. *See generally* Beckerman, *supra* note 3, at 506-09; Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 685-86 (1998); Thornburg, *supra* note 7, at 246-49.



the Advisory Committee, appeared to express substantial ambivalence regarding the disclosure concept.<sup>33</sup> The Advisory Committee seemed to acknowledge that judges and attorneys have not enthusiastically endorsed the 1993 amendment and that the disclosure provision has minimally affected discovery, but the Advisory Committee evinced reluctance to abandon the mechanism altogether and attempted to maintain a vestige of the notion.<sup>34</sup> The Advisory Committee's perspective may reflect the ambivalence evidenced by numerous members of the bench and bar.<sup>35</sup>

## 2. Scope of Discovery

In addition to the changes in disclosure requirements, the 2000 amendments will circumscribe the scope of discovery that has traditionally been available. For decades, parties have been able to discover information that is "relevant to the subject matter involved in the pending action."<sup>36</sup> The new version would restrict the scope of discovery to material "that is relevant to the claim or defense," while litigants would be able to secure information that is relevant to the subject matter only after parties file motions that show that they have good cause to request broader discovery.<sup>37</sup> The apparent objectives of the federal rule revision entities in developing the amendment are to limit discovery and "fishing expeditions" by restricting parties to discovery of material that implicates matters raised in the pleadings.<sup>38</sup>

Several features of the change in the scope of available discovery resemble features of the change in disclosure. First, it is unclear why the rule revision entities prescribed this alteration now. For example, the FJC and RAND assessments indicate that discovery

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<sup>33</sup> See Edward D. Cavanagh, *Obstacles in the Search for Truth: Proposed Amendments to the Federal Rules of Civil Procedure Hinder Discovery in Ways Unnecessary and Unjust*, LEGAL TIMES, July 27, 1998, at 21.

<sup>34</sup> See *id.*; see also *supra* note 8 and accompanying text. Indeed, the Advisory Committee chair frankly conceded:

[T]he beginning was a strong disclosure rule that could be, and was, defeated by local option. The next step is a diluted disclosure rule that cannot be defeated by local option. Perhaps in several more years the time will come for a strong disclosure rule that cannot be defeated by local option.

Niemeyer, Memorandum, *supra* note 10, 181 F.R.D. at 30.

<sup>35</sup> See Willging et al., *supra* note 14, at 543, 592; Carter, *supra* note 16.

<sup>36</sup> FED. R. CIV. P. 26(b)(1). Information is discoverable, if it "appears reasonably calculated to lead to the discovery of admissible evidence," even if it is not admissible at trial. *Id.* See generally Beckerman, *supra* note 3, at 513-17; Marcus, *supra* note 4, at 764-68; Subrin, *supra* note 3, at 734-45.

<sup>37</sup> Proposed Amendments, *supra* note 17, at 64 (amendment in Rule 26(b)(1)). See generally Thornburg, *supra* note 7, at 237-39; Gregory P. Joseph, *Civil Rules II*, NAT'L L.J., Apr. 24, 2000, at A17.

<sup>38</sup> See Niemeyer, Memorandum, *supra* note 10, at 27, 32-33; Cavanagh, *supra* note 33. See generally Beckerman, *supra* note 3, at 540-42; Subrin, *supra* note 3, at 734-39.

operates effectively in a majority of cases and that the 1993 changes have worked reasonably well.<sup>39</sup> Insofar as too-expansive discovery poses difficulties, judges presently have numerous means for narrowing the breadth of discovery.

If modification in discovery were clearly needed now, the revision promulgated may not represent a significant advance and may in fact serve only to confuse and complicate the discovery process. The revision substitutes a new standard, the “relevant to the claim or defense” standard, for the long-standing “subject matter” concept. Although the “subject matter” concept has comparatively clear meaning and is a criterion with which judges, lawyers, and parties are familiar, the “relevant to the claim or defense” concept could well foster satellite litigation over its construction and over discovery’s scope. Moreover, the amendment might undermine the traditional notice pleading regime that the initial Advisory Committee incorporated in the original Federal Rules in 1938 and that federal judges have steadfastly maintained over the subsequent six decades.<sup>40</sup> For example, the “claim or defense” phraseology may require plaintiffs to draft relatively particularized pleadings before they have access to information under the control of defendants that would currently be available through discovery.<sup>41</sup> The new terminology might concomitantly encourage plaintiffs to draft broader pleadings than the material they possess can substantiate in order to secure increased discovery and, thus, make them vulnerable to Rule 12(b) motions to dismiss and to Rule 11 sanctions.

Narrowing discovery could also complicate the attempts of plaintiffs to prove and settle their lawsuits. The provision for plaintiffs to seek broader discovery on motions for good cause shown and for judges to exercise their discretion in granting the requests might ameliorate these circumstances somewhat. However, several pragmatic realities of modern civil litigation could make the

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<sup>39</sup> See Kakalik et al., *supra* note 14, at 682; Willging et al., *supra* note 14, at 534-35. *But see* Beckerman, *supra* note 3, at 508-09. The changes seem to have limited some contentiousness that involved discovery without preventing parties from securing necessary discovery. See Tobias, *supra* note 17, at 1440.

<sup>40</sup> See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). See generally Beckerman, *supra* note 3, at 534-43; Marcus, *supra* note 23; Carl Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C. DAVIS L. REV. 357 (1994); Joseph, *supra* note 37; Letter from Richard H. Middleton, Jr. to Honorable William H. Rehnquist, *supra* note 18, at 2.

<sup>41</sup> See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Report of the Advisory Committee on Civil Rules, Summary of Public Comments (1999); Joseph, *supra* note 37; Zuchlewski, *supra* note 30. These effects warrant comparison with those that the disclosure revision may have. See *supra* note 23 and accompanying text.

proviso insufficient. Those phenomena include the expense that plaintiffs must absorb when pursuing greater discovery, pressures imposed on federal district courts by docket growth and the increasing need for judicial case management, and many judges' reluctance to expend scarce resources on the resolution of discovery disputes.<sup>42</sup> This situation, together with the reduced information that parties must exchange through automatic disclosure,<sup>43</sup> may upset the comparative equilibrium that has previously obtained between the interests of plaintiffs and defendants.<sup>44</sup> Finally, the new rule may prove too much. Although the FJC and RAND evaluations suggest that overly broad discovery creates difficulties only in a rather small number of relatively complex lawsuits, the new rule will affect every civil case brought in the federal courts.<sup>45</sup>

### B. *General Ideas*

This examination reveals several similarities between those components of the federal rule revision package that are most controversial and that would effect the greatest change. First, the current need for alteration, particularly given the findings in the FJC and RAND studies that automatic disclosure and discovery now function rather effectively, remains uncertain. Second, insofar as disclosure or discovery produces complications which warrant remediation, the problems seem to arise in comparatively few cases, and judges have numerous measures available to them that can effectively address the difficulties. These propositions suggest the inadvisability of applying the new requirements to all lawsuits. Third, if changes are in fact necessary, the suggested amendments may not realize improvements. Illustrative is the lingering uncertainty about whether the new provisions would upset the delicate balance that presently prevails between plaintiffs and

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<sup>42</sup> See Beckerman, *supra* note 3, at 564-69; Joseph, *supra* note 37; Thornburg, *supra* note 7, at 251-53.

<sup>43</sup> See *supra* notes 22-23, 31 and accompanying text.

<sup>44</sup> See Beckerman, *supra* note 3, at 540-41, 561-69; Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform,"* 63 LAW & CONTEMP. PROBS. (forthcoming 2000); Thornburg, *supra* note 7, at 231; Zuchlewski, *supra* note 3; Letter from Richard H. Middleton, Jr., to Honorable William H. Rehnquist, *supra* note 18. *But see* Niemeyer, Memorandum, *supra* note 10, at 27; Carter, *supra* note 16.

<sup>45</sup> See *supra* note 39 and accompanying text. Similar ideas apply to the revision that imposes presumptive limitations on depositions of one day or seven hours. See Proposed Amendments, *supra* note 17, at 83 (amendment in Rule 30(d)(2)). For instance, it is unclear that this revision is needed. To the extent that deposition length is problematic, judges can use Rule 30 or match temporal limitations with particular cases' needs in pretrial conferences. The change also applies to all lawsuits when restrictions may be warranted in few. See Tobias, *supra* note 17, at 1440 n.42.; Cavanagh, *supra* note 33.

defendants by favoring defense interests too much.<sup>46</sup> More specifically, plaintiffs will either have access to less information or incur expense in securing that material to which they are now entitled. Both the disclosure and discovery changes would also replace strictures that have relatively definite meaning, and to which judges, attorneys, and litigants are accustomed with new terminology that may prove ambiguous, will require a decade of implementation and interpretation, and could foster costly ancillary litigation over the language employed.

In short, the disadvantages that important, specific components of the 2000 federal rules amendments would impose both alone and synergistically may outweigh the benefits. Nevertheless, the foregoing conclusions remain controversial and somewhat unclear, while the proposed amendments were developed by expert rule revision entities after they had commissioned assessments and undertaken considerable study, and solicited and examined substantial public input. Congress, therefore, should seriously consider scrutinizing the package of amendments to ascertain whether any of its constituents or the group warrants alteration.

### III. SUGGESTIONS FOR THE FUTURE

#### A. *An Introductory Word*

Senators and representatives have several options available to them under the court rule-making regime that the Rules Enabling Act of 1934 prescribes. Legislators can simply institute no action and allow the revisions that the Supreme Court promulgated to become effective in December 2000.<sup>47</sup> Congress could also reject or change individual amendments or the entire set. Lawmakers might correspondingly introduce bills that would modify the revisions and use the legislation proposed as a vehicle for evaluating particular amendments or the whole package.

The last course of action appears preferable for two reasons. First, the Rules Enabling Act of 1934, especially as modernized by the Judicial Improvements and Access to Justice Act of 1988 (“JIA”), appears to contemplate an arguably increased measure of congressional involvement in the rule revision process.<sup>48</sup> Second,

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<sup>46</sup> See *supra* notes 43-44 and accompanying text.

<sup>47</sup> See *supra* note 2 and accompanying text.

<sup>48</sup> The JIA accorded Congress several additional months to review amendments that the Supreme Court promulgates, and lawmakers apparently intended that this change facilitate review. See 28 U.S.C. § 2074(a)(1994); see also H.R. REP. NO. 100-889, at 27-28 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 5986-88. See generally Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991); Tobias, *supra* note 2, at 1600 n.61.

the earlier analysis suggests that there are legitimate concerns about the need for specific components of this group of amendments and perhaps for the entire set. These concerns have salience today, so soon after the major 1993 alterations, when those changes have been rather efficacious, and problems have seemingly arisen in rather few cases, while judges have apparently been able to address many of them effectively.<sup>49</sup> Too-frequent rule amendment can also deprive attorneys, parties, and judges of familiar concepts, language, and interpretations, replacing them with different ideas and phraseology, which lawyers and litigants must learn about, comprehend, and satisfy, and judges have to master, enforce, and construe.<sup>50</sup> The institution of a new discovery regime, accordingly, will require a "shakedown" period as the revised strictures are implemented, often through time-consuming, unnecessary satellite litigation over the terminology of the nascent rules.<sup>51</sup> Even if modification is warranted now, it is not clear that the amendments promulgated will yield significant improvement for the numerous reasons canvassed above. Furthermore, such congressional action would not be unprecedented. Lawmakers have increasingly participated in rule amendment over the last quarter century, albeit to mixed reviews.<sup>52</sup>

Senators and representatives should evaluate a number of countervailing considerations. Perhaps most important are certain systemic matters. The 2000 revisions constitute the second significant test of the rule amendment procedures imposed by the JIA, and the federal rule revisors seem to have followed closely the process prescribed.<sup>53</sup> For example, the Advisory Committee appointed a Discovery Subcommittee to explore the need for modification, and this entity commissioned several informative

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<sup>49</sup> See *supra* notes 28, 32, 39, 45 and accompanying text.

<sup>50</sup> See Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1422-25 (1992). See generally Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1, 30-33 (1997).

<sup>51</sup> Cf. Arthur R. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 505-06 (1990). See generally Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1930-34 (1989); *supra* note 12 and accompanying text.

<sup>52</sup> See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 902-07 (1999); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1187-91 (1996); Oakley, *supra* note 13, at 436-37; Tobias, *supra* note 2, at 1598; Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 460-62 (1993).

<sup>53</sup> The first test led to the 1993 revisions. See Mullenix, *supra* note 48; Tobias, *supra* note 2; see also *supra* note 48 and accompanying text.

studies.<sup>54</sup> The Subcommittee relied on the empirical data adduced in the analyses conducted to recommend changes that the Advisory Committee adopted.<sup>55</sup> Moreover, the Standing Committee solicited and assessed much public input, and the Judicial Conference did jettison one of the most controversial provisions suggested.<sup>56</sup> In short, there are convincing reasons why lawmakers might exercise deference to the expert Judicial Conference committees, which have carefully studied modern discovery, crafted proposed alterations, and evaluated considerable public input on those recommendations. These entities, comprised of committee members who are principally judges with substantial responsibility for day-to-day dispute resolution and experienced advisors on whom they rely, may well have better institutional memory, broader expertise, greater appreciation of the relevant issues, and more resources to commit to the rule amendment endeavor than Congress has.

In the final analysis, senators and representatives confront a close question about whether they should intervene in the rule revision process that produced the 2000 amendments or even scrutinize those changes. Persuasive arguments favor deferring to the rule revisors. However, equally strong arguments suggest the advisability of at least assessing certain, individual amendments in the package and the rule revision process. In particular, the enhanced congressional role envisioned by the JIA and the actual need for a set of amendments at this time as a general matter, and for narrowing the scope of disclosure and discovery specifically, warrant evaluation.

### B. *Specific Suggestions*

Members of Congress should introduce proposed legislation that could serve as a mechanism for considering the group of revisions recently adopted by the Supreme Court. The Senate Judiciary Subcommittee on Administration of the Courts or the House Judiciary Subcommittee on Intellectual Property and the Courts may want to schedule public hearings to examine, and solicit

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<sup>54</sup> See *supra* notes 10, 14-15 and accompanying text.

<sup>55</sup> See *supra* notes 14-16 and accompanying text. Numerous observers have decried the lack of empirical support for rule revision. See, e.g., Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994); Walker, *supra* note 52, at 455-59.

<sup>56</sup> See *supra* notes 17-19 and accompanying text. The JIA required that the rule revisors encourage and consider greater public input in the revision process. See Mullenix, *supra* note 48, at 799-800; Tobias, *supra* note 2, at 1599-600; Walker, *supra* note 52, at 468-69.

public input on, the package of amendments promulgated.<sup>57</sup>

Lawmakers might initially analyze several general or systemic issues. First, senators and representatives could explore whether the increased frequency of federal rule revision, especially with respect to discovery, has exacerbated certain above-mentioned disadvantages, such as the cost of ancillary litigation over rapidly changing procedures, and, if so, whether these detrimental consequences outweigh the benefits.<sup>58</sup> Should Congress reach an affirmative conclusion, it might admonish the rule amendment entities to revise the provisions less frequently, impose a prescribed period for modifications, or even declare a moratorium on rule amendment.<sup>59</sup>

A second, related question is whether alteration of the discovery regime is necessary. Legislators could probe the issue in light of the FJC and RAND determinations that disclosure and discovery are generally working well and having the effects that the rule revisors intended, that many cases involve no discovery, and that discovery is problematic only in a small percentage of lawsuits, and that judges have numerous means for addressing those difficulties that do materialize.<sup>60</sup> Congress should concomitantly explore whether amendment is warranted at this juncture, so soon after the important 1993 revisions, given the complications entailed in too-frequent amendment.<sup>61</sup> These ideas suggest that change in the discovery system may not be needed now.<sup>62</sup>

Even if lawmakers conclude that modification in discovery is currently required, they should closely evaluate whether the revisions that the Supreme Court has promulgated will be an improvement over the present system by examining the projected disadvantages and benefits. One disadvantage is that the 2000 package, especially the provisions that narrow the scope of automatic disclosure and discovery, appear overly favorable to defendants.<sup>63</sup> Other disadvantages include the loss of concepts and terminology to which judges, attorneys, and litigants are accustomed; the expense for parties and counsel of comprehending and conforming to the altered strictures; and the cost of satellite

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<sup>57</sup> These are the subcommittees that have jurisdiction over the federal courts generally and rule revision specifically.

<sup>58</sup> See *supra* notes 49-50, 52 and accompanying text.

<sup>59</sup> See sources cited *supra* note 13.

<sup>60</sup> See *supra* notes 28, 32, 39, 45 and accompanying text.

<sup>61</sup> See *supra* notes 49-50, 52 and accompanying text.

<sup>62</sup> See Mullenix, *supra* note 32, at 689; Stempel, *supra* note 44; Thornburg, *supra* note 7, at 262-65.

<sup>63</sup> See *supra* notes 43-44, 46 and accompanying text. Central to this imbalance is the apparently misplaced reliance on judges to manage discovery and broaden its scope when needed.

litigation over the interpretation of different phraseology.<sup>64</sup> The benefits ostensibly encompass improved discovery measured in terms of economic and temporal savings as well as reduced discovery abuse.<sup>65</sup> The disadvantages, and even more the benefits, may resist very accurate measurement, until judges have applied the new procedures and lawyers and parties have attempted to satisfy them.

The examination above indicates that the proposed amendments will not be an improvement, either because the detriments would seemingly outweigh the putative advantages or because the question is sufficiently close to warrant consideration of alternatives. For example, a felicitous approach might be to limit alterations of the present discovery scheme to those relatively few cases in which discovery is most problematic. More specifically, this change could be modeled on the differential procedural treatment prescribed by the *Manual for Complex Litigation*.<sup>66</sup>

A third, general question is the propriety of the Advisory Committee's decision to replace virtually all of the discovery provisions for local option with federal requirements that apply in all ninety-four federal district courts.<sup>67</sup> Attorneys and legal scholars have criticized these local options because they undercut uniform national procedure and complicate efforts to practice in multiple districts, which may impose diverse strictures.<sup>68</sup> However, some courts apparently honor the idea of national consistency in the breach, and local option provisions do afford districts the requisite flexibility for experimenting and for employing local measures that treat unusual local conditions.<sup>69</sup> In the end, national uniformity should override the need to test and to match procedures with peculiar local situations because, for instance, there are other ways of facilitating experimentation.<sup>70</sup>

<sup>64</sup> See *supra* note notes 30, 50 and accompanying text.

<sup>65</sup> This assumes that the notion of discovery abuse, over which there has been a long-standing, controversial debate, can be satisfactorily defined, identified, and treated. See, e.g., Mullenix, *supra* note 32, at 684; Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's The Barrister and the Bomb*, 69 B.U. L. REV. 649 (1989). See generally Beckerman, *supra* note 3.

<sup>66</sup> See MANUAL FOR COMPLEX LITIGATION (THIRD) §§ 21.4-21.494 (1995). See generally A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 898-99 (1993); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994); Cavanagh, *supra* note 33.

<sup>67</sup> See *supra* notes 24-25 and accompanying text.

<sup>68</sup> See, e.g., sources cited *supra* note 9; *supra* note 29 and accompanying text.

<sup>69</sup> See Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853 (1989). See generally Levin, *supra* note 66, at 888-94; Carl Tobias, *Some Realism About Federal Procedural Reform*, 49 FLA. L. REV. 49, 67-68, 71-73 (1997).

<sup>70</sup> For example, Congress should revive and prescribe a 1991 proposed amendment to



Lawmakers might also explore several specific questions that have been mentioned earlier. Perhaps most important, Congress should evaluate whether the 2000 amendments would narrow the scope of discovery too substantially and, if so, whether the provision for parties to seek expanded discovery on good cause shown and for judges to permit broader discovery suffices. Legislators might similarly examine whether the amendment would unduly circumscribe automatic disclosure. Senators and representatives should correspondingly assess whether the new wording that implements these two alterations is clear and whether the terminology will foster ancillary litigation.

#### CONCLUSION

The Supreme Court recently transmitted to Congress a thorough package of amendments in the Federal Rules of Civil Procedure that govern discovery. The need for the most significant and controversial changes in the set and for the package as a whole remains uncertain. Therefore, lawmakers ought to scrutinize the revisions to ascertain whether they should take effect in December 2000.

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Rule 83, which the rule revisors withdrew in deference to the Civil Justice Reform Act experimentation, and which could facilitate testing. See Levin, *supra* note 66, at 891-92; Tobias, *supra* note 2, at 1616. See generally A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67 (1988).