PROPOSED CHANGES TO DISCOVERY RULES IN AID OF "TORT REFORM": HAS THE CASE BEEN MADE?*

PAUL R. SUGARMAN**
MARC G. PERLIN***

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** Dean and Professor of Law, Suffolk University Law School, Boston, Massachusetts. J.D., Boston University; LL.D. (hon.), Suffolk University. Fellow, American College of Trial Lawyers; Fellow, International Society of Barristers.

*** Professor of Law, Suffolk University Law School, Boston, Massachusetts. B.A., Boston University; J.D., Northeastern University.

INTRODUCTION

Former Vice President Dan Quayle's recent law review article recommends a major restructuring of the ground rules for pretrial discovery in civil litigation.[1] Quayle formally unveiled his proposals for discovery reform, as well as other significant reforms to the civil litigation system,[2] as part of the recommendations of the now-defunct President's Council on Competitiveness.[3] The Vice President contends that "pretrial discovery is frequently the source of needless delay and expense"[4] and asserts that the discovery rules have given attorneys too much discretion to control and abuse the process by which facts and information are obtained and preserved in

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1. *See* Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 563-64, 568-69 (1992) (presenting, as one component of overall program for reforming nation's civil justice system, proposed limits for what is alleged to be "time-consuming, burdensome, and expensive pretrial discovery process").

2. Fifty specific changes have been recommended for the current civil litigation system in the areas of voluntary dispute resolution, discovery, more effective trial procedures, expert testimony, punitive damages, attorney's fees, improved use of federal judicial resources, enhanced incentives for encouraging meritorious litigation, reducing unnecessary burdens on federal courts, and eliminating litigation resulting from poorly drafted legislation. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 11-13 (Aug. 1991) [hereinafter AGENDA FOR CIVIL JUSTICE REFORM]. A copy of the Council's report is reproduced as an appendix to this volume of *The American University Law Review*.

3. *Id.*; *see* Quayle, *supra* note 1, at 559 (noting that some proposals were first unveiled in May 1991 at annual Judicial Conference of Federal Circuit while full Agenda for Civil Justice Reform was later presented to organized bar at 1991 annual meeting of American Bar Association).

President Bush created the President's Council on Competitiveness in March 1989 to foster the prosperity and competitiveness of U.S. companies by providing a check on the issuance of new regulations by federal agencies. *See* John W. Mashek, *Suddenly, Quayle Becomes a Bully Pulpit*, BOSTON GLOBE, Aug. 15, 1991, at 3 (noting role and influence of then-Vice President Dan Quayle and Council on Competitiveness). On January 22, 1993, however, the newly elected Clinton administration abolished the Council on Competitiveness in favor of a more open regulatory review process. *See infra* note 13 and accompanying text (discussing abolition of Council on Competitiveness). The Council on Competitiveness labeled lawyers and the litigation process as a "major factor" contributing to the cited decline in competitiveness of the United States in the international marketplace. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 1-3 (citing, as one indication of disadvantages facing U.S. corporations in world markets, fact that foreign competitor product liability insurance costs are 20-30 times less than U.S. costs). For instance, as former chair of the Council, Quayle asserted that the current procedural system adds to "the unnecessarily high cost of litigation" and U.S. lack of standing in the global marketplace by prolonging resolution of disputes and encouraging wasteful litigation. *Id.* at 3. As an example, Quayle claimed that "as much as 80% of the cost of litigation is in the discovery process." *Id.* One of the goals of Quayle's civil justice reform proposals, therefore, is to reduce cost and delay and improve the standing of American industry in the world marketplace by reforming the litigation process. *See id.* at 1-3 (suggesting that costs of litigation have detrimental effect on U.S. economy and harm overall competitiveness of U.S. companies in world markets); *cf.* Talbot D'Alemberte, *Justice for All, A Response to the Vice-President*, TRIAL, May 1992, at 55, 55-56 (responding to Quayle's charge "that U.S. lawyers are responsible for a litigation explosion clogging the courts and sapping our competitive strength" by arguing that lawyers are not part of competitiveness problem as alleged).

4. Quayle, *supra* note 1, at 563.

connection with civil litigation.[5] The former Vice President blames the present discovery rules for causing delay in trials and imposing excessive burdens and expenses on litigants.[6] Others have joined the refrain.[7]

In commenting on the proposals presented by the Council on Competitiveness, former Vice President Quayle asserts in his article that the reforms are merely procedural and are not intended to affect substantive rights or bar meritorious claims; rather, they seek to ensure and increase access to the courts so that people may vindicate their rights.[8] Much of this Article is devoted to testing the accu-

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5. *See* Quayle, *supra* note 1, at 563 (characterizing taking of depositions, use of interrogatories, and document demands as "intrusive," "burdensome," and "onerous").

6. Quayle, *supra* note 1, at 563.

7. *See, e.g.*, William Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178, 178 (1991) (noting that one area of widespread agreement is notion that discovery, as now practiced, "spawns some abuse and, more importantly, is prone to overuse leading to expense and delay"). William Schwarzer is a district court judge from San Francisco who presently heads the Federal Judicial Center in Washington, D.C. *Id.* at 183. In *Slaying the Monsters of Cost and Delay*, Schwarzer reviews the problems with discovery and possible alternatives and ultimately recommends "a system of mandatory early and ongoing reciprocal disclosure, replacing all discovery other than what the court specifically orders." *Id.* at 178; *see* Terry Carter, *Judge Schwarzer Goes to Washington*, CAL. LAW., Sept. 1991, at 21, 21 (commenting that "Schwarzer came to Washington with a mandate to help streamline civil litigation" and that he transformed Federal Judicial Center "into a bully pulpit" to promote "his own radical concept of discovery reform"). *See generally* William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 703-23 (1989) [hereinafter Schwarzer, *The Federal Rules*] (providing earlier elucidation of Schwarzer's proposal for discovery reform).

The 1991 preliminary draft of the Federal Rules of Civil Procedure encompasses a similar approach in proposing "a massive shift from discovery to disclosure." *See infra* note 31 and accompanying text (providing relevant portion of proposed amendment to rule 26 that imposes duty of disclosure); Richard P. Holme, *Proposed Amendments to the Federal Civil Rules: The Sirens of Revolution*, 21 COLO. LAW. 923, 923 (1992) (reviewing August 1991 preliminary draft of Federal Rules of Civil Procedure and noting that litigators should "pay most heed" to "revolutionary" proposals concerning discovery).

Substantial disagreement exists with respect to the scope and severity of the alleged discovery "problem" as well as to the proposed solutions. *See, e.g.*, Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 155-56 (1991) (agreeing with notion that problem exists, but disagreeing that additional rulemaking approaches of Schwarzer and 1991 draft would cure "discovery ills"); Reagan W. Simpson, *Suggestions for Change: Discovery Reform*, 55 TEX. B. J. 340, 342-44 (1992) (suggesting proposal for discovery reform "that borrows from, and adds to, the current suggestions"). One article has gone so far as to call for the abandonment of discovery. *See* Loren Kieve, *Discovery Reform*, A.B.A. J., Dec. 1991, at 79, 79-81 (noting that because discovery has become "monstrous nightmare," obvious solution is to follow lead of English and civil law systems, neither of which employs discovery).

8. Quayle, *supra* note 1, at 560. The former Vice President stated:

> It bears emphasis that these reforms are procedural in nature—directed at reforming the process of resolving disputes. They are not intended to affect substantive rights. Furthermore, none of the proposals by the Council is designed to close the courthouse doors to any meritorious claim or to any person. Instead, the proposals seek to open those doors and create more doors for people to vindicate their rights by clearing court dockets to hear truly meritorious claims.

Id.

racy of these assertions as they pertain to the Council on Competitiveness' recommendations relating to discovery.

The principal recommendations of the President's Council on Competitiveness take aim at litigation brought by consumers against those who may be liable for defective products.[9] The Council's proposals, not coincidentally it is submitted, come at a time when a well-organized general movement at both the federal and state levels is calling for "tort reform."[10] In its broadest sense, and as portrayed in the Council's report and former Vice President Quayle's article, the tort reform movement seeks a reexamination of what its proponents believe to be an unfair burden imposed on American industry by injured consumers.[11] With that in mind, it is not surprising that most of the Council's proposals seek to limit or impede, through the judicial process, a plaintiff's recovery in product liability cases and as such are enthusiastically endorsed by the

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9. *See* Quayle, *supra* note 1, at 561 (citing recent survey reporting that "potential liability concerns caused 47% of U.S. manufacturers to withdraw products from the market, resulted in 25% of U.S. manufacturers discontinuing some forms of product research, and prompted approximately 15% of U.S. companies to lay off workers as a direct result of product liability experience").

10. *See, e.g.*, Donald Harris, *Tort Law Reform in the United States*, 11 OXFORD J. LEGAL STUD. 407, 407 (1991) (reviewing arguments in United States for reform of personal injury law); George L. Priest, *The Inevitability of Tort Reform*, 26 VAL. U. L. REV. 701, 702 (1992) (asserting that "serious and systematic reform of modern tort law," characterized as " 'culture' of enterprise liability," is inevitable); Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 14-15 (1988) (examining historical antecedents to present tort reform movement and discussing possible tort reform goals).

11. *See* AMERICAN TORT REFORM ASS'N, ATRA PAMPHLET 1-3 (1992) (on file with *The American University Law Review*) (detailing ATRA's efforts and activities in area of tort reform, including need to address liability problems of members in present legal climate). ATRA's mission statement provides:

> ATRA's mission is to bring greater efficiency, fairness, and predictability to the civil justice system through public education and the enactment of state legislation. It accomplishes its mission in three ways:
>
> *By coordinating and supporting the activities of state legislative coalitions. . . .*
>
> *By keeping its members informed of tort-reform developments and mobilizing them for action.*
>
> . . .
>
> *By keeping public attention focused on the need for tort reform.*

Id. at 1.

Another tort reform alliance is the Product Liability Alliance, a coalition representing more than 300 trade associations and corporations, including manufacturers, nonmanufacturing product sellers, and insurers, that actively seek enactment of federal product liability tort reform legislation. THE PRODUCT LIABILITY ALLIANCE, TPLA FACT SHEET 1 (1992); *see* E. PATRICK MCGUIRE, THE IMPACT OF PRODUCT LIABILITY 1-35 (1988) (providing results of survey of 500 CEOs who assert that product liability litigation and substantial jury verdicts significantly affect not only direct, indirect, and operating costs, but also future business plans). Among some of the effects of product liability suits noted in this survey are the "pernicious" impact on business planning and decisionmaking and the "major impact on the ability of U.S. firms to remain competitive in world markets." *Id.* at 1, 3; *see* Gary Lee, *Corporate Lobby Tries To Create 'Big Mo' on Product Liability Bill*, WASH. POST, July 29, 1991, at A9 (noting efforts of major corporations to escalate campaign to persuade Congress to pass new liability law that is more protective of corporate interests).

American Tort Reform Association.[12] Even though the 1992 presidential election resulted in a change of administration and the abolition of the Council on Competitiveness,[13] the proponents of tort reform are unlikely to be deterred, and the issues will continue to be the subject of debate and concern, especially in view of the enormous effort invested and momentum already created.[14]

The purpose of this Article is to analyze and put into perspective how the Council on Competitiveness' general recommendations regarding discovery relate to the overall goals of tort reform advocates and to discuss whether those discovery proposals are desirable. Part I of the Article examines the Council's specific recommendations regarding discovery. Part II briefly reviews the evolution of discovery, reveals some of the reasons why the discovery system developed as it did, and explains the functions served by discovery. Part III questions who will win and who will lose by the adoption of the Council's proposals concerning discovery. It examines the practical workings of the present discovery rules and speculates about the likely impact on consumer litigation that adoption of the Council's proposals will have. Part III will also attempt, through analysis and example, to examine some specific uses and abuses of discovery. This Article concludes that by restricting discovery and thereby limiting information, the substantive rights of consumer litigants are likely to be harmed in product liability cases.

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12. *See* AMERICAN TORT REFORM ASS'N, STATE TORT REFORM OUTLOOK FOR 1992 1 (1992) [hereinafter ATRA, OUTLOOK FOR 1992] (on file with *The American University Law Review*) (praising 50 proposals in *Agenda for Civil Justice Reform* as helping to renew debate over tort reform). As of January 1989, the General Membership and Steering Committee of ATRA included hundreds of trade associations and corporations, including such representative organizations as Allstate Insurance, American Trucking Association, Chemical Manufacturers Association, E.I. DuPont de Nemours & Company, Exxon Company, U.S.A., General Aviation Manufacturers Association, Monsanto Chemical Company, National Association of Chain Drug Stores, National Association of Manufacturers, Pharmaceutical Manufacturers Association, Procter & Gamble Company, RJR/Nabisco, Inc., and Sporting Goods Manufacturing Association. AMERICAN TORT REFORM ASS'N, MEMBERSHIP LIST 1-5 (1989); *see* Statement by the Vice President, Chairman of the Council on Competitiveness 1 (Nov. 30, 1989) (press release) (on file with *The American University Law Review*) (noting that Council on Competitiveness "is working with groups from all sectors of our economy to reform our product liability laws").

13. *See* Martin Tolchin, *Settling In: Rewriting the Rules; Last-Minute Bush Proposals Rescinded*, N.Y. TIMES, Jan. 23, 1993, at A10 (noting that spokeswoman for newly elected Vice President Gore stated that "instead of the Council on Competitiveness, the new administration will pursue a much more open process for reviewing regulations across the Government").

14. *See supra* notes 11-12 (reviewing membership and goals of groups advocating tort reform); *see also* ATRA, OUTLOOK FOR 1992, *supra* note 12, at 1-40 (1992) (reviewing extensive state-by-state tort reform initiatives).

I. THE DISCOVERY REFORM PROPOSALS OF THE COUNCIL ON COMPETITIVENESS

A. Background to Proposals

The Council on Competitiveness presented five proposals for general reform of pretrial discovery procedures.[15] These proposals are discussed in general by the former Vice President in his recent law review article.[16] Two additional proposals affecting discovery concern motion practice and safeguards for trade secrets.[17]

In his article, the former Vice President summarizes what he perceives to be the governing deficiencies in the present discovery rules. He asserts that the rules are flawed because "litigants have virtually unlimited ability to take sworn depositions of witnesses, request documents, and submit written questions to parties."[18] In addition, he states that litigants have "relatively free access to the most private documents of their adversary" and the right to take depositions that "often last for several days and occasionally even weeks."[19] Quayle describes interrogatories as "potentially intrusive and burdensome" and ultimately alleges that the "most onerous aspect of discovery . . . is the document demand whereby litigants can force the opposing party to open all of their filing cabinets to inspection."[20]

The Vice President makes the foregoing statements and urges the adoption of the Council's reform proposals with little, or questionable, supportive empirical data, and also fails to make any attempt to explain the rationale or history underlying the present rules of discovery.[21] Instead, he relies on a discourse based on anecdote and

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15. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 16-18 (recommending that new discovery rules require disclosure of "core information," adopt numerical limits on discovery, provide that additional discovery be governed by market incentives, penalize abusive discovery, encourage parties to admit facts not in dispute, and tie discovery requests to pleadings).

16. *See* Quayle, *supra* note 1, at 563-64 (discussing alleged problems with present discovery practices).

17. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 18-19.

18. Quayle, *supra* note 1, at 563.

19. Quayle, *supra* note 1, at 563.

20. Quayle, *supra* note 1, at 563. Regarding discovery requests generally, the former Vice President adds:

> Although discovery requests are relatively inexpensive to make, the responding party's costs can be staggering, involving the time of employees to produce materials, attorney fees for review of materials to be produced, and the physical copying or recording costs. Under the current federal rules, there are no limits to the number of requests a party can make for discovery items as long as the requests are at least tenuously related to the action.

Id.

21. *See* Marc Galanter, *Public View of Lawyers: Quarter-Truths Abound*, TRIAL, Apr. 1992, at 71, 73 (writing of Quayle's characteristic mode of argument that "assertions are made about

"quarter-truths."[22] In citing the breakup of American Telephone & Telegraph (AT&T) as the only example justifying his array of discovery reforms, the former Vice President commented that "in one antitrust case, . . . the discovery stage lasted almost a decade; the plaintiff's final pretrial statement was over 10,000 pages long and cross-referenced approximately 250,000 pages of documents."[23] By using such an illustration, the former Vice President has cited a case that is virtually unparalleled in American litigation, involving complex issues of antitrust law between two "Goliaths," the U.S. Gov-

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complex matters without any sense of responsibility to some body of reliable information. It seems to be assumed that in dealing with the legal system, fibs and fables are sufficient.").

22. *Id.* The Council on Competitiveness in the Agenda for Civil Justice Reform and the former Vice President in his article place emphasis on the assertion that "individuals, businesses and governments spend more than $80 billion a year on direct litigation costs and higher insurance premiums, and a total of up to $300 billion indirectly, including the cost of efforts to avoid liability." AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 1; Quayle, *supra* note 1, at 560. The source of this assertion is an article from *Forbes* in which the authors note a book by Peter Huber that presents these figures and refers to them as a "tort tax" on the economy. *See* Peter Brimelow & Leslie Spencer, *The Plaintiff Attorneys' Great Honey Rush*, FORBES, Oct. 4, 1989, at 197, 197-98 (presenting "tort tax" figures as partial evidence of negative impact plaintiff attorneys are having on U.S. economy) (citing PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 3-5 (1988)). To arrive at his assessment, Huber used a multiplier of 3.5, a figure that is based on an estimate that doctors spend $3.50 for extra x rays and other defensive mechanisms for every dollar that they spend on liability insurance. HUBER, *supra*, at 4. Some doubt exists regarding the accuracy of these figures, however. *See* Carolyn Colwell, *A Defense Lawyer for Lawyers*, NEWSDAY, Nov. 2, 1992, at 36 (presenting views of John P. Bracken, president of New York State Bar Association, who calls figures "absolutely erroneous"). Professor Paul Weiler of Harvard University Law School uncovered two analytical problems with the $80 billion figure relied on by the former Vice President and the Council on Competitiveness. First, " 'the medical multiplier shouldn't be applied to nonmedical situations because the costs of defensive medicine make up a small percentage of the total indirect costs of the liability system. The second problem is . . . [the assumption that] there are no gains from costs incurred to avoid liability.' " *Id.* (quoting Professor Paul Weiler).

With its graphs depicting the increase in the number of American lawyers in "comparison" to the number of lawyers in some other countries, the Council, without stating so explicitly, implies a causal relationship between the number of American lawyers and the issues addressed in the report. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 2 (providing graph depicting lawyers per 100,000 population for Japan, England and Wales, Germany, and United States). The Council and the former Vice President are in tacit agreement in attributing significance to their proposals and the number of American lawyers. Even during his nomination acceptance speech at the 1992 Republican National Convention, then-Vice President Quayle used the opportunity to charge that the United States has more than 70% of the world's lawyers. Colwell, *supra*, at 36.

Professor Marc Galanter of the University of Wisconsin Law School has attacked the empirical support for this particular statistic as being a "quarter truth." *See* Marc Galanter, *Pick a Number, Any Number*, AM. LAW., Apr. 1992, at 82, 82 (criticizing Vice President Quayle's assertion that United States is home to 70% of world's lawyers as "overblown" and a "wild guess"). Professor Galanter also found the Council on Competitiveness' statement that "the legal system . . . now costs Americans an estimated $300 billion a year" to be a "product of casual speculation." *Id.* With respect to these estimates and assertions, Galanter contends that "there is an utterly cavalier treatment of facts, a use of sources that would shame any first-year law student, and no attempt whatever to make a serious assessment of what is going on in the world." *Id.*

23. Quayle, *supra* note 1, at 563. The Council on Competitiveness makes similar reference to the AT&T case in its report. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 3-4.

ernment and AT&T.[24] It is clear, however, that the target of the reforms is not large-scale business disputes such as the AT&T litigation, but personal injury lawsuits.[25] The paucity of supporting data and the misplaced emphasis on a single aberrational antitrust case between giants, together with the overall emphasis by the Council on Competitiveness on product liability litigation between consumers and corporate interests, should raise a question as to the true motivation behind the suggested discovery "reforms."[26]

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24. *See* United States v. American Tel. & Tel., 642 F.2d 1285, 1288 (D.C. Cir. 1980) (stating that Government charged AT&T with monopolizing, attempting to monopolize, and conspiring to monopolize markets for telecommunications services and equipment).

25. *See* Deborah Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244, 250 (1992) ("But at the heart of the Council on Competitiveness's agenda are some notions that appear to be motivated by concerns that go well beyond civil procedural reform. These proposals seek to change the current balance between individual plaintiffs and corporate defendants, in favor of the latter."). Public Citizen's *Congress Watch* contends:

> Now President Bush and Vice President Quayle have taken on the corporate crusade to limit liability, cleverly masking the same anti-consumer proposals within lawyer-bashing rhetoric. The truth is that Bush and Quayle have nothing against lawyers who rip off consumers and taxpayers. . . . Instead, when Bush and Quayle bash lawyers, they confine their attack to the very system that allows ordinary consumers who are injured by dangerous products to sue the corporations that care more about profits than safety. This attack has nothing to do with competitiveness, and everything to do with the corporate wish list to eliminate an important component of health and safety protection: access to the courts.

PUBLIC CITIZEN, THE BUSH-QUAYLE PLAN TO CURB ACCESS TO THE COURTS WILL HURT CONSUMERS AND INJURED VICTIMS, NOT LAWYERS 1 (1991) (on file with *The American University Law Review*); *see also* Kenneth Jost, *Tampering with Evidence, the Liability and Competitiveness Myth*, A.B.A. J., Apr. 1992, at 44, 49 (calling "competitiveness theme . . . a defective product manufactured by business groups to reduce costs for product-related injuries without really reforming the legal system"); Jerry J. Phillips, *Attacks on the Legal System, Fallacy of 'Tort Reform' Arguments*, TRIAL, Feb. 1992, at 106, 109 (calling "alleged tort crisis . . . pretext for an attack on the civil jury system"); *supra* notes 11-12 and accompanying text (noting importance of product liability issues and involvement of U.S. industry in tort reform movement); *see also infra* notes 135-78 and accompanying text (discussing winners and losers under Council's recommendations).

26. The present Federal Rules of Civil Procedure are not without supporters. Professor Geoffrey Hazard of Yale Law School is reported as arguing:

> "Modern products liability claims, toxic tort claims and environmental litigation would be simply inconceivable without the combination of liberal pleading, liberal joinder, and *liberal discovery*. The total effect of this development [the flexibility of the Federal Rules of Civil Procedure] has redounded to the benefit of 'have nots' relative to 'haves.' "

Stephen N. Subrin, *Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure*, 73 JUDICATURE 4, 6 (1989) [hereinafter Subrin, *Fireworks*] (emphasis added) (quoting Professor Geoffrey Hazard, Yale Law School); *see id.* (reporting varying degrees of praise and criticism for present federal rules).

This article also summarized federal district court Judge Jack Weinstein's criticism of recent attempts to amend the Federal Rules of Civil Procedure:

> [T]he judge detected an anti-access movement, not in Congress, but in the federal courts themselves. He saw two prongs to the attack: one seeks to close the doors under "disingenuous guises" of "administrative efficiency" and "a purported 'litigation explosion.' " The other attack is on "the degree to which current federal practice resembles the Rules drafters' original plan." As to the first, Judge Weinstein said, "statistical evidence indicates that we are no more overwhelmed now than at

This Article concludes that the net effect of the discovery reform proposals endorsed by the Council on Competitiveness, former Vice President Quayle, and the proponents of tort reform will be to limit discoverable information. The Article also recommends caution before embarking on a course that will result in changing discovery procedures where that course has not been validated by sufficient and credible empirical data, and where the Council's proposals may be driven by a hidden agenda favoring one class of litigants.[27]

B. The Council's Proposals Concerning Discovery

The remainder of this Part will focus on the specific proposals relating to discovery that are presented by the Council on Competitiveness. The Council's discovery proposals are discussed below.

1. Require disclosure of "core information"

The Council's recommendation requiring disclosure of core information[28] is similar to draft amendments proposed by the Advisory Committee on Civil Rules and circulated for public comment by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.[29] The Council report and the draft proposal were both issued in August 1991. These pro-

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many times in the past." The alleged litigation explosion "is a weapon of perception, not substance." In fact, federal judges "have maintained roughly the same number of cases per judge as we had in 1960." Regardless, "[w]e are public servants pledged to do justice, not exalted elites who bless the masses with such bites of judicial time as we deign to dole out."

Id. (quoting Weinstein, J.).

27. *See supra* notes 11-12, 21-26 and accompanying text (reviewing notion of hidden agenda and criticizing proffered empirical data); *see also* JULIUS B. LEVINE, DISCOVERY: A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSALS 119 (1982) (noting that U.S. Supreme Court "has not been misguided by over-generalized allegations of discovery abuse since 1970, just as it was not misled by the same allegations made before it expanded discovery by promulgating the 1970 Amendments" to Federal Rules of Civil Procedure) (citation omitted); Milo Geyelin, *Quayle's Data in Proposed Reform of Legal System Called Misleading*, WALL ST. J., Feb. 4, 1992, at B7 (noting criticisms of plan to overhaul civil justice system as "based on skewed and misleading statistics").

28. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 16. The Council's recommendation states:

> Parties should be required to disclose basic (or "core") information, such as the names and addresses of people having knowledge likely to bear on the claims and defenses and the location of documents most relevant to the case. This requirement would obligate the parties to make disclosure on their own initiative. Should the core information not be provided, the offending party would not be able to engage in any additional discovery.

Id.

29. *See* COMMITTEE ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 3, 14-26 (1991), *reprinted in* 137 F.R.D. 53, 87-99 (1991) [hereinafter 1991 PROPOSED AMENDMENTS] (setting forth proposed rule 26 revisions that are based on concept of disclosure rather than discovery).

posals have in common the requirement that each litigant must initiate disclosure of certain types of information without prior request. The Council's proposal requires the disclosure of "basic" or "core" information,[30] while the draft proposal to amend rule 26 of the Federal Rules of Civil Procedure requires each party to initiate disclosure, without prior request, of certain categories of information that are likely to bear significantly on any claim or defense.[31] The draft proposal to amend rule 26 precipitated a great deal of commentary from the legal community, most of which was critical.[32] As finally approved by the Judicial Conference of the United States and transmitted to the U.S. Supreme Court by memorandum dated Novem-

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30. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 16.

31. 1991 PROPOSED AMENDMENTS, *supra* note 29, at 87-88. The draft proposal to amend rule 26(a)(1) provides in part:

> Rule 26. General Provisions Governing Discovery; Duty of Disclosure
>
> (a) Required Disclosures: Methods to Discover Additional Matter.
>
> (1) Initial Disclosures. Except in actions exempted by local rule or when otherwise ordered, each party shall, without awaiting a discovery request, provide to every other party:
>
> (A) the name and, if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense, identifying the subjects of the information;
>
> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense.

1991 PROPOSED AMENDMENTS, *supra* note 29, at 14-15. The draft proposal to rule 26 further provides for disclosure of information relating to damages claimed and insurance agreements. *Id.* at 15-16. *See generally Federal Rules: Major Changes Sought by Judicial Conference Working Group*, 60 U.S.L.W. 2158, 2158 (1991) [hereinafter *Federal Rules: Major Changes Sought*] (providing brief summary of judicial conference's proposed changes for 20 rules and noting that "[m]ost significant among the proposed changes is a broad overhaul of Fed. R. Civ. P. 26 and related discovery provisions").

The draft proposal for rule 26 comports with the recommendations set forth in articles by Magistrate Judge Wayne Brazil and Judge William Schwarzer. *See* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1349 (1978) (proposing that duty be imposed on both counsel and client "to disclose voluntarily, and at all stages of trial preparation, all potentially relevant evidence and information"); Schwarzer, *The Federal Rules*, *supra* note 7, at 721 (formulating new approach to discovery that requires prompt disclosure of all material documents and information and permits "supplemental traditional discovery for good cause only"); *see also supra* note 7 and accompanying text (detailing Judge Schwarzer's proposals on discovery and other reform alternatives).

32. *See, e.g.*, *Mandatory Pretrial Disclosure Idea, Under Fire, Likely To Be Dropped by Panel*, 24 Sec. Reg. & L. Rep. (BNA) No. 14, at 460 (Apr. 3, 1992) (noting that proposal to amend rule 26(a) "was criticized by an overwhelming majority of the nearly 200 individuals and organizations filing comments"); *Federal Rule 26 Amendments: Wrong Medicine for Discovery Problems*, 58 DEF. COUNS. J. 454, 455 (1991) (criticizing disclosure requirement as "likely to lead to overdisclosure, increased discovery, new disputes regarding disclosure, more court involvement in resolution of such disputes, and more delays, without any concomitant systematic benefits"); Mengler, *supra* note 7, at 156-60 (reviewing proposed changes to federal rules and noting number of areas of concern with initial disclosure provision); Richard C. Ferris II, Note, *Friend or Foe?—The Proposed Amendments to Rule 26 of the Federal Rules of Civil Procedure*, 2 REGENT U. L. REV. 39, 41 (1992) (stating that "neither the proposed rule nor the existing rule has been studied in sufficient detail to justify such 'radical' change to the nation's current discovery practices").

ber 27, 1992,[33] the proposed amendment to rule 26 retains the requirement of initial disclosure without prior request. It requires each party to provide certain information concerning "each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings" and information concerning "documents, data compilations, and tangible things . . . that are relevant to disputed facts alleged with particularity in the pleadings."[34]

The recommendation from the Council on Competitiveness, on the other hand, fails to define "core" information. The Council uses language such as "likely to bear on the claims and defenses" and "documents most relevant to the case."[35] This proposal is

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33. *See* COMMITTEE ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 72 (1992) [hereinafter 1992 PROPOSED AMENDMENTS] (transmitting to Supreme Court proposed amendment to rule 26 of Federal Rules of Civil Procedure, as recommended by Judicial Conference). Pursuant to 28 U.S.C. § 2074, the Supreme Court must "transmit to the Congress not later than May 1 . . . a copy of the proposed rule . . . [which] shall take effect no earlier than December 1" unless Congress provides otherwise. 28 U.S.C. § 2074 (Supp. I 1989). This Article was written while these proposals were pending before the Supreme Court.

34. The full text of rule 26(a), as recommended by the Judicial Conference, provides as follows:

> Rule 26. General Provisions Governing Discovery; Duty of Disclosure
> (a) Required Disclosures: Methods to Discover Additional Matter.
> (1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:
> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;
> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;
> (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and
> (D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.
> Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

1992 PROPOSED AMENDMENTS, *supra* note 33, at 72-74. In addition, rule 26(a)(2) pertains to disclosure of expert testimony. *Id.* at 74.

35. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 16 (using language strikingly similar to language in 1991 draft proposal).

likely to cause disputes over the meaning of what must be voluntarily disclosed. Even under the more recent proposal of the Judicial Conference requiring disclosure of witnesses with "discoverable information" and documents "relevant to disputed facts,"[36] disputes regarding what must be disclosed will probably result. It is likely that what may be subject to disclosure will create problems that are associated with uncertainty or confusion, such as motions and other actions seeking to verify or force compliance with the voluntary disclosure requirements.[37]

The various proposals leave to the party in possession of information the obligation to determine what is "core," "significant," "bears significantly on any claim or defense," "discoverable," "relevant," or "alleged with particularity in the pleadings," and what is not. The use of a "vague and ill-defined term to control something as important as discovery"[38] leaves too much leeway for resisting discovery, especially in the context of a culture that reportedly has tended to resist discovery of information.[39] As one commentator has stated, "Dodging legitimate discovery should not be made easier by allowing such a fuzzy loophole."[40] That same commentator

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36. 1992 PROPOSED AMENDMENTS, *supra* note 33, at 73.

37. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738-39 (1906) (noting that at one point in history of lawsuits, much judicial time was spent analyzing propriety of writs and pleadings under "sporting law" system of common law and equity pleading). *See generally* CHITTY ON PLEADING (London, 1st ed. 1809) (providing forms for writs and pleadings); TIDD'S PRACTICE (London, 1st ed. 1790-1794) (providing comprehensive collection of contemporary writs and pleadings). Some battles never end; they just move to a later stage of the lawsuit. Thus, one might say that the enactment of the Federal Rules of Civil Procedure in 1938 merely shifted the battle from the pleading stage to the discovery stage. *See* WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 11 (1968) (noting that discovery was intended not only to reduce trickery and surprise, but also to produce more focused trial: "less irrelevant evidence would be introduced[,] . . . fewer unnecessary witnesses would be called[,] . . . [c]ertain issues could be eliminated from the trial[,] . . . [and] [b]ecause the testimony of parties and witnesses would be recorded at an early stage in the litigation[,] . . . testimony at trial would be marred by fewer fabrications"). One might hypothesize that adoption of a mandatory disclosure system would merely move the battleground, together with its costs and delays, further down the line. *See* Ferris, *supra* note 32, at 42 (stating that proposal "would cause an increase in motion practice, waste the defendants' resources, and consume already scarce judicial resources"); *see also* REPORT OF THE AMERICAN BAR ASS'N WORKING GROUP ON CIVIL JUSTICE SYS. PROPOSALS, ABA BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM 69-70 (1992) (noting support for disclosure of core information, but calling for refinement of recommendation, particularly in light of problems associated with notice pleading system and definition of "core information").

38. Gerald R. Powell, *The Docket Movers: A Critique of Proposed Amendments to the Federal Rules of Civil Procedure*, 1 J. AM. BOARD TRIAL ADVOC. 1, 14 (1991).

39. *See* Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 219-51 (presenting perceptions, attitudes, and ideas of sample group of Chicago litigators with respect to system of civil discovery and its problems); Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals To Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 191 (1992) (noting that discovery abuse is merely rational, deliberate, economically motivated behavior, and that efforts to eliminate such behavior must focus on incentives that lead lawyers to engage in it).

40. Powell, *supra* note 38, at 15.

thought "naive" the suggestion that lawyers will comply with automatic disclosure requirements because they are officers of the court.[41] The lawyer's ethical duty to the client to provide "zealous representation"[42] or to act "with reasonable diligence"[43] may create a dilemma or give added reason to avoid discovery insofar as the lawyer may be obligated to determine what is, or is not, core information.[44]

Another criticism of such a "self-executing"[45] system of discovery is that lawyers may be inclined to produce long lists of irrelevant information in hope of "burying important witnesses in the midst of a voluminous list of people with slight knowledge."[46]

2. *Presumptive numerical limits on discovery, with additional discovery governed by market incentives*

Presently, the Federal Rules of Civil Procedure do not limit the number or frequency of depositions or interrogatories but do provide a mechanism by which courts may impose such limitations for specified reasons.[47] Once again, the recommendation of the Council on Competitiveness[48] has similarities to the Judicial Conference's proposed amendments to the discovery rules. Under the proposed amendment to rule 30 of the Federal Rules of Civil Procedure, plaintiffs, defendants, or third-party defendants are limited to ten

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41. Powell, *supra* note 38, at 14.

42. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1980).

43. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

44. *See* Ferris, *supra* note 32, at 56-57 (discussing probable attorney-client conflicts that may result from proposed rule 26).

45. *Federal Rules: Major Changes Sought*, *supra* note 31, at 2158.

46. Powell, *supra* note 38, at 14.

47. Rule 26(b)(1) of the Federal Rules of Civil Procedure provides in part:

> 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).

FED. R. CIV. P. 26(b)(1); *see also* FED. R. CIV. P. 26(c) (setting forth provision relating to protective orders).

48. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 17. Recommendation 7-8 states:

> After the disclosure of core information, discovery should be conducted within presumptive quantitative limits and a market-based framework. The parties would be required to formulate a discovery plan within predetermined numerical limits. The parties would then be entitled to conduct any additional discovery, provided that each party would pay the opponent's 'production' costs. Judges would be permitted to change the pre-set limits and review costs for good cause.

Id.

depositions without leave of court or stipulation.[49] In addition, the Judicial Conference's proposed amendment to rule 33 of the Federal Rules of Civil Procedure limits the number of interrogatories to twenty-five without leave of court or stipulation.[50] The Council's recommendation states that after the exchange of core information, "the parties would meet to formulate a plan that would limit and direct discovery efforts within preset limits."[51]

It is unclear whether these preset limits are expected to be similar to those in the Judicial Conference's proposed amendments to the federal rules. Both the Council and the Judicial Conference favor initial limitations on discovery, regarding both frequency and number, with additional discovery available only upon stipulation or for cause,[52] whereas the present system provides no such limitations unless imposed for cause.[53] The net effect of both proposals is to limit the ability to obtain information by discovery. These numerical limitations have been justified on the basis that there is less need for these devices in view of the provisions for initial mandatory disclosure.[54] This tradeoff is thus dependent on how well voluntary disclosure will work in practice, a premise already questioned by this Article.[55]

The Council apparently would allow discovery beyond the preset

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49. 1992 PROPOSED AMENDMENTS, *supra* note 33, at 114-27. Under the 1992 proposed rule 26(b)(2), discovery in excess of the preset limits may be granted by the court if certain factors are found to exist. *Id.* at 79-80. Some of these factors include "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." *Id.* at 80. Omitted from the 1992 Judicial Conference proposal is the recommendation contained in the August 1991 draft proposal that each deposition be limited to six hours. 1991 PROPOSED AMENDMENTS, *supra* note 29, at 38-39 (proposed rule 30(d)(1)).

50. 1992 PROPOSED AMENDMENTS, *supra* note 33, at 138; *see supra* note 48 and accompanying text (noting Council on Competitiveness' proposed standard under which additional interrogatories may be propounded). The Judicial Conference's August 1991 draft proposal contained a limitation of 15 interrogatories. 1991 PROPOSED AMENDMENTS, *supra* note 29, at 49 (proposed rule 33(a)).

51. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 17. The Judicial Conference proposes a similar conference between the parties. *See* 1992 PROPOSED AMENDMENTS, *supra* note 33, at 85-86, 88-91 (providing that discovery may not commence until parties meet as stipulated in rule 26(f)).

52. *See* 1992 PROPOSED AMENDMENTS, *supra* note 33, at 114-27, 138-41 (proposed rules 30 and 33) (limiting parties to 10 depositions and 25 interrogatories without leave of court or stipulation); *supra* note 48 and accompanying text (outlining Council recommendation 7-8, which provides for presumptive numerical limits on discovery with additional discovery governed by market incentives); *supra* note 49 and accompanying text (noting when additional discovery beyond preset limits may be undertaken under 1992 proposed rule 26(b)(2)).

53. FED. R. CIV. P. 26(b)(1).

54. For example, the committee notes to the Judicial Conference's proposed rule 33(a) state: "Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it." 1992 PROPOSED AMENDMENTS, *supra* note 33, at 141.

55. *See supra* notes 32, 37 and accompanying text (discussing potential problems associated with mandatory disclosure).

limits for depositions and interrogatories, but only where the party seeking discovery agrees to pay the costs that the other party incurs due to the additional discovery.[56] The Judicial Conference's proposal contains no such burden when a motion for additional depositions or interrogatories is allowed.[57] Additionally, the Judicial Conference proposes no new limitations on document requests under rule 34 of the Federal Rules of Civil Procedure.[58] For its part, it appears that the Council on Competitiveness proposes that costs of document productions after initial disclosure be borne by the requesting party.[59] The additional disadvantage to a consumer litigant in this regard should be obvious. The Council's "pay as you discover" approach gives the advantage to the party most able to bear the cost and at the same time imposes the burden on the party needing information. It should not be difficult to predict that the party most disadvantaged by such a rule will be the consumer-plaintiff rather than the corporate defendant in a product liability case.

It is also a mistake to conclude that these changes will serve the goal of economizing judicial resources and reducing expenses to the litigants. The effectiveness of such rules ultimately must turn on the ability of trial judges to manage cases and determine when it is appropriate to allow discovery in excess of the preset limits.[60]

3. Penalize abusive discovery

Presently, rules 26(c) and 37 of the Federal Rules of Civil Procedure provide the basis for protecting against and penalizing abuses of discovery, including overzealous use of discovery and noncompliance with and attempts to thwart discovery requests.[61] The rules

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56. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 17. The Council's recommendation and explanatory text, although not free of ambiguity, state that without judicial intervention, additional discovery may be pursued only upon payment of the opponent's costs. *See supra* note 48 (providing text of recommendation 7-8).

57. *See supra* note 49 (discussing factors court may use to extend discovery beyond present limits of 1992 proposed rule 26(b)(2)).

58. 1992 PROPOSED AMENDMENTS, *supra* note 33, at 85-86, 88-91 (proposing that document requests under rule 34 should not be permitted until *after* mandatory disclosure and specified conferences).

59. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 17 (noting that parties would "be entitled to conduct any additional discovery, provided that each party . . . pay the opponent's 'production' costs").

60. *See* THE FOUNDATION FOR CHANGE, INC., PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM 50-57 (1989), *reprinted in The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 157-64 (1990) (providing survey of federal trial judges and various segments of federal litigating bar and noting strong support for increasing role of federal judges as active case managers as part of any procedural improvement of possible reform).

61. Current rule 26(c) provides in part:

> [T]he court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,

clearly provide sufficient sanctions for abuse, but they must be utilized to be effective.[62]

4. Encourage parties to admit facts not in dispute

Rule 36 of the Federal Rules of Civil Procedure, as well as cognate state rules, already encourage admissions of facts not in dispute.[63] The use of rule 36 provides all the necessary tools to accomplish this laudable goal. Without further explanation by the Council on Competitiveness, its recommendation to encourage admissions[64] is redundant and otherwise meaningless. Why the Council believes that a party would seek discovery of an admitted fact is not clear. If

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including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions . . .; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

FED. R. CIV. P. 26(c).

Similarly, current rule 37 provides parties with, among other things, means to compel disclosure or discovery by moving "for an order compelling an answer, or a designation, or an order compelling inspection in accordance with [such] a request," when the opposing party has failed to so comply. FED. R. CIV. P. 37(a)(2). If such a motion is granted, the "party or deponent whose conduct necessitated the motion" will be required by the court to pay the "reasonable expenses incurred" by the party obtaining the order. FED. R. CIV. P. 37(a)(4).

62. *See, e.g.*, FED. R. CIV. P. 37 (providing that sanctions for abuse of discovery may include assessment of costs and expenses, prohibitions against introduction of evidence, contempt citations, dismissal, or default). A 1983 Advisory Committee note with regard to amendments to rule 26(b)(1) noted that, on the whole, federal judges have been "reluctant to limit the use of discovery devices." FED. R. CIV. P. 26(b)(1) advisory committees' note; *see* C. RONALD ELLINGTON, A STUDY OF SANCTIONS FOR DISCOVERY ABUSE 96-101 (1978) (presenting, in part, 1978 survey of federal judges that documents that "many judges do not in fact grant sanctions except for flagrant abuses"); Brazil, *supra* note 39, at 245 (reporting that judges are generally unwilling to resolve discovery disputes).

Recommendation 9 of the Agenda for Civil Justice Reform states:

> Amend the Federal Rules of Civil Procedure to establish clear standards for imposing sanctions upon attorneys who abuse the system. The party whose conduct necessitated the discovery motion would bear the burden of establishing that its position was substantially justified. Sanctions would be automatic in instances where the court finds an unreasonable, vexatious, or abusive discovery practice.

AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 17.

63. *See* FED. R. CIV. P. 36 (providing pleading process whereby parties may request admissions of fact for pending action only); *see also* FLA. R. CIV. P. 1.370 (allowing parties to request admissions); ILL. R. CIV. P. 216 (permitting service of request for admissions of truth or fact); MINN. R. CIV. P. 36.01-.02 (establishing procedure for requests of admissions of truth); PA. R. CIV. P. 4014 (providing for requests for admissions); TEX. R. CIV. P. 169 (permitting parties to request admissions of truth or fact).

64. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 18 (setting forth recommendation 10, which states: "After a party has admitted factual information, further discovery should not automatically be allowed. The court should have authority, where appropriate, to prevent further inquiry regarding the area admitted.").

indeed that were to occur, appropriate remedies to prevent abusive discovery already exist.[65]

5. Tie discovery requests to the pleadings

The Council's proposal to tie discovery requests to the pleadings[66] will create problems rather than solve them because the attention of lawyers and judges will likely be deflected from the modern use of broad and liberal notice pleading under the federal rules to the archaic and discredited search for the "supposedly exact pleading" to determine what is discoverable.[67] It is difficult to imagine what rationale could support this recommendation. The proposal will inevitably result in a purposeless return to an arcane, outmoded, and thoroughly discredited system of pleading, a system that the 1938 adoption of the federal rules was designed to change.[68] If nothing else, this recommendation demonstrates a lack of appreciation for the historical and present realities of litigation practice. Its apparent aim is to limit access to information unless a litigant is willing to prepare a complex and lengthy pleading. This result may create a "catch-22" violation of rule 11 of the Federal Rules of Civil Procedure.[69]

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65. *See* FED. R. CIV. P. 26(c) (providing for protective orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"); *id.* 37(c) (providing remedy of payment of reasonable expenses and attorney's fees to moving party where opposing party improperly fails to admit matter under rule 36).

66. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 18 (setting forth recommendation 11, which states: "In making discovery requests, the parties should be compelled to supply the rationale for the discovery by referring to the portion of the complaint, answer or other relevant pleading to be addressed in the desired discovery.").

67. Massachusetts Supreme Judicial Court Justice Benjamin Kaplan, a preeminent commentator on the Federal Rules of Civil Procedure, described the underlying philosophy of the notice pleading provisions of the Massachusetts Rules of Civil Procedure, which track the federal rules, as follows: "We would be loath to renew the futile paper chase for the supposedly exact pleading, and shall resist any tendency to interpret the new [Massachusetts] Rules contrary to their purpose and spirit." Charbonnier v. Amico, 324 N.E.2d 895, 899 (Mass. 1975); *see* FED. R. CIV. P. 8(e) (requiring that pleadings generally be "simple, concise and direct").

68. *See infra* notes 96-121 and accompanying text (reviewing discovery rules and policy goals behind implementation of Federal Rules of Civil Procedure in 1938). *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.1, at 237-38 (1985) (discussing various reasons necessitating simplification of pleading process); Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456, 469-72 (1942) (advocating civil procedure reform by means of added simplicity and flexibility in pleading).

69. Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part:

> The signature of an attorney or party [to a pleading, motion, or other paper] constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon

The recommendation will also give the party against whom discovery is sought the opportunity to avoid discovery by claiming that the pleading fails to disclose the rationale for the discovery.[70] This proposal, combined with the Council's other proposed limitations,[71] almost guarantees that information will be more difficult to obtain. To the extent that it will result in disputes over pleadings and frequent motions to amend pleadings, the cost to the litigants will be increased and more judicial time expended.[72]

The Judicial Conference's proposal to amend rule 26 also "ties" discovery to the pleadings,[73] but in a fashion that is far more limited than the Council on Competitiveness' proposal. The Judicial Conference's proposal is limited to the initial mandatory disclosure requirements; it is inapplicable to subsequent discovery procedures.[74] The Council on Competitiveness, on the other hand, would "tie" all discovery to the pleadings.[75] The limited nature of the Judicial Conference's proposal will present fewer problems than the Council's wide-reaching proposal. Nevertheless, a rule departing from notice pleading and renewing reliance on factual allegations, even in this limited context, is a step in the wrong direction.

6. *Other reforms*

In addition to the five recommendations discussed above, the Council on Competitiveness proposed two reforms to govern motion practice with regard to discovery disputes. First, the Council requires parties to consult before seeking court intervention in dis-

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> motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11. A cynic might be inclined to conclude that prior to obtaining information, one must possess it.

70. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 18 (recommending requirement that discovery requests supply underlying purpose by tying request to relevant pleading).

71. *See supra* notes 28-46 and accompanying text (presenting and criticizing Council's proposed rule that requires disclosure of core information).

72. AMERICAN BAR ASS'N WORKING GROUP ON CIVIL JUSTICE SYS. PROPOSALS, ABA BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM 72 (1992) (opposing proposal to tie discovery requests to pleadings and characterizing proposal as "unnecessary and counterproductive" and likely to increase litigation costs); *see supra* note 37 and accompanying text (discussing how disputes surrounding pleadings often have occupied judicial resources).

73. *See supra* note 34 and accompanying text (presenting and discussing Judicial Conference's 1992 proposed amendment to rule 26).

74. 1992 PROPOSED AMENDMENTS, *supra* note 33, at 72.

75. *See supra* notes 66-72 and accompanying text (evaluating Council's proposal tying discovery requests to pleadings).

covery disputes,[76] and second, it invokes a "loser pays" rule for discovery motions.[77] As indicated by the Council, the first reform is already in place in many courts[78] and conserves judicial resources by recognizing that parties may settle their own disputes if required to consult with each other. Thus, the first proposal offers nothing new.

As for the proposed "loser pays" rule for discovery motions, rule 37(a)(4) of the Federal Rules of Civil Procedure presently provides that courts should award reasonable expenses, including attorney's fees, to prevailing parties who bring or oppose motions to compel discovery.[79] Only if a court finds that the making of or opposition to a motion was "substantially justified or that other circumstances make an award of expenses unjust" should it refrain from awarding expenses.[80] The current system recognizes that there may be legitimate room to disagree and does not penalize counsel for taking a

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76. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 18 (setting forth recommendation 12, which states: "Before requesting that the court resolve a discovery dispute, counsel should be required to certify that they have conferred with their opponent and, despite good faith negotiations, are unable to agree upon a resolution.").

77. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 19 (setting forth recommendation 13, which states: "When the court decides a discovery motion, the losing party would pay to the winner the costs and attorney fees to vindicate the prevailing position. As with the other "loser pays" provisions, this cost and fee shifting could be limited by judicial discretion where appropriate.").

78. *See, e.g.*, ARIZ. UNIF. R. PRAC. IV(g) (providing that discovery motions will not be considered unless accompanied by certification stating that "after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter"); DEL. SUPER. CT. R. 37(e) (requiring that motions for discovery sanctions include certification by moving party detailing attempts to reach agreement on subject of discovery-related motion); MASS. SUPER. CT. R. 9C (stating that "[c]ounsel for each of the parties shall confer in advance of filing any motion under MASS. R. CIV. P. 37 [discovery sanctions] in a good faith effort to narrow areas of disagreement to the fullest possible extent").

The Judicial Conference proposal also would require the parties to confer with each other prior to application to the court for resolution of disputes regarding disclosure or discovery. 1992 PROPOSED AMENDMENTS, *supra* note 33, at 148-50 (proposed rule 30(a)(2)(A)-(B)).

79. FED. R. CIV. P. 37(a)(4).

80. *Id.* Rule 37(a)(4) provides as follows:

> *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.
>
> If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.
>
> If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Id. The Judicial Conference's proposal retains the text of present rule 37 regarding an award of costs. 1992 PROPOSED AMENDMENTS, *supra* note 33, at 150-52 (proposed rule 37(a)(4)(A)-(B)).

justifiable position in court.[81] If the Council's proposal was intended simply as a restatement of current rule 37(a)(4), it adds nothing to the dialogue.

In the summary following the recommendation, however, the Council states that "*[f]ee-shifting* for discovery motions will be an *added* incentive for the parties to limit unnecessary discovery and should help discourage abusive discovery practices."[82] This approach is a request for more frequent imposition of sanctions than presently exists under rule 37(a)(4), although the test that the Council would have the court use to impose sanctions is largely undefined, and neither the Council nor the former Vice President cites any empirical data indicating a need for added sanctions.[83] In consumer litigation, the financial burden of added sanctions would clearly fall on the party most vulnerable to the sanctions' effect, namely the individual plaintiff rather than the corporate defendant. Additionally, neither the Council nor the former Vice President presents any data as to the likely chilling effect that this proposal may have on "zealous" or "diligent" advocacy, a standard required by disciplinary codes.[84] To the extent that the Council's proposal inhibits the use of motions to compel discovery or motions for additional discovery, it will have the inevitable effect of limiting the availability of information.

An additional Council on Competitiveness proposal seeks to maintain safeguards for trade secrets. The Council recommends that "[c]ourts should retain the ability to preserve confidential and trade secret information. These safeguards should not be eroded by legislative action or rules changes."[85] Presently, rule 26(c) of the Federal Rules of Civil Procedure permits a court, in appropriate circumstances, to protect trade secrets by preventing their discovery or forbidding their dissemination.[86] The Council's position is consis-

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81. *See* FED. R. CIV. P. 37(a)(4) (allowing for "substantially justified" opposition to discovery without penalty).

82. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 19 (emphasis added).

83. *See supra* note 21 and accompanying text (noting Council's lack of empirical data).

84. *See supra* notes 42-43 (noting ethical duties imposed on lawyers by professional codes of conduct). One may also quite reasonably ask what incentive a plaintiff's lawyer working under a contingency fee agreement would have for expending time and resources in order to engage in unnecessary discovery tactics.

85. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 19.

86. FED. R. CIV. P. 26(c). Rule 26(c) provides in part:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; . . . .

tent with a product manufacturers' movement seeking to preserve trial courts' unlimited discretion to issue protective orders designed to forbid the disclosure of information to the public or the sharing of that information with other consumers injured by the same defective product.[87] The use of protective orders is a common technique employed by product manufacturers in settlement agreements to prevent helpful material obtained in discovery from being shared with the public or with other injured persons.[88]

Legislative proposals have been introduced in several states to limit this type of enforced silence.[89] Generally, these proposals, while recognizing the need to preserve legitimate trade secrets, seek to establish guidelines limiting protective orders where an overriding public interest is involved.[90] In addition, proponents of such reform contend that secrecy orders are realistically intended to prevent consumers injured by the same product from obtaining useful

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Id.; *cf. Protective Orders: BNA's 50-State Survey*, 20 Prod. Safety & Liab. Rep. (BNA) No. 47, at 33-39 (Nov. 27, 1992) [hereinafter *BNA Survey*] (listing state rules and laws governing protective order use in all 50 states and describing pending reform activity).

The Judicial Conference recommends the substitution of the term "reveal" in place of the term "disclose." 1992 PROPOSED AMENDMENTS, *supra* note 33, at 85 (proposed rule 26(c)(7)). The corresponding committee notes are silent regarding this change. A likely interpretation for the substituted language is that the term "disclose" has become a term of art under proposed rule 26(a) that refers to "initial disclosures," and to avoid misinterpretation, the drafters merely selected a synonym in order to ensure that the meaning of the former rule is retained.

87. *See BNA Survey*, *supra* note 86, at 3-6 (noting intense opposition by business community and defense bar to various state proposals to limit protective order use).

88. *See generally* 2A LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 19.06[3][a], at 19-112 (1992) (noting that some parties condition settlement on keeping discovery materials confidential); *see also infra* note 93 (noting that Dow Corning has utilized secrecy orders in product liability litigation). The mechanisms regarding the issuance of protective orders usually involve what has been described as "settle and seal" agreements, which are formed when the product manufacturer agrees to settle on condition that the injured consumer agrees to a court order preventing disclosure of information obtained through discovery. *BNA Survey*, *supra* note 86, at 43.

89. *See, e.g.*, Margaret C. Fisk, *The Reform Juggernaut Slows Down*, NAT'L L.J., Nov. 9, 1992, at 1, 1 (noting efforts in some states to pass legislation limiting use of secrecy orders); John H. Kennedy, *Secrecy Orders Put New Burdens on Legal Systems*, BOSTON GLOBE, Feb. 5, 1992, at 53 (reporting that more than 20 states have considered imposing laws restricting secrecy orders); Gina Kolata, *Secrecy Orders in Lawsuits Prompt States' Efforts To Restrict Their Use*, N.Y. TIMES, Feb. 18, 1992, at D10 (noting that California, Florida, New York, and Texas are working on instituting laws restricting secrecy order utilization); *see also* Russ M. Herman, *Secrecy, Discovery Abuse Breed Unethical Conduct*, NAT'L L.J., Aug. 1, 1988, at 18, 19-21 (noting ABA and congressional failure to adequately address problems that arise through use of secrecy orders in product liability litigation). Such "sunshine" provisions restricting protective order use recently have been adopted by court rule in Texas, TEX. R. CIV. P. 76a, 166b(5), and by statute in Florida, FLA. STAT. ANN. ch. 69.081 (Harrison 1992). *See generally BNA Survey*, *supra* note 86, at 33-39 (listing current reform activities in each state).

90. *See BNA Survey*, *supra* note 86, at 43 (noting that California legislature, for example, has sought to balance private business need for protective orders against public freedom of information concerns).

information rather than to safeguard legitimate trade secrets.[91] The advocates of protective orders contend that there is insufficient evidence of a need for change and that restrictions will not only create a threat to privacy, but will also be a disincentive for innovation and a burden on employment opportunities.[92]

In addition, the Council's proposal is inconsistent with the goal of reducing litigants' costs and judicial resources related to discovery insofar as parties will be forced to engage in similar discovery requests in subsequent cases involving the same product. The primary benefit of protective orders in product liability cases will inure to the corporate defendant in those cases where the corporation may avoid disclosing information already deemed to be helpful to another consumer who was injured by the same product. For example, it has been alleged that Dow Corning used protective orders to keep information about defective silicone breast implants from public scrutiny.[93] The Council's proposal favoring protective orders raises not only issues of public safety[94] but also serious issues of

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91. *BNA Survey*, *supra* note 86, at 40; *see infra* notes 93-94 and accompanying text (noting allegations that protective orders serve only to seal useful information from other plaintiffs).

92. *See, e.g.*, *BNA Survey*, *supra* note 86, at 42 (presenting arguments of California State Senator Barry Keene in opposition to increased protective order restrictions).

93. *See, e.g.*, Liza Kaufman, *Critics Decry Bell's Hiring for Implant Probe; Questions Raised About Former Attorney General's Ties to Dow Corning, and His Investigations of Other Companies*, RECORDER, Feb. 28, 1992, at 5 (reporting one attorney's allegation that Dow Corning requested secrecy orders prior to agreeing to release documents); Kennedy, *supra* note 89, at 53 (noting that FDA panel was denied information because of secrecy orders and agreements stemming from prior Dow breast implant litigation); Gina Kolata, *Questions Raised on Ability of F.D.A. To Protect Public*, N.Y. TIMES, Jan. 26, 1992, at A1 (noting that secrecy orders regarding documents produced in product liability litigation have frustrated FDA attempts to investigate safety of Dow's breast implants and Upjohn's Halcion).

Conversely, a supporter of protective orders provides the following justification for his position:

> [I]t seems patently clear that, among a list of adverse effects, settlements would be discouraged, all discovery would be necessarily resisted, and copycat lawsuits would be filed if trade secrets and other confidential information were denied protection. And from that it seems inescapably correct that the *public* would be harmed—that *people* would be denied access to already congested courts and that *consumers* would ultimately pay the increased costs of litigation.

BNA Survey, *supra* note 86, at 42 (statement of Barry Keene, California State Senator).

94. *See, e.g.*, Smith v. BIC Corp., 869 F.2d 194, 201 (3d Cir. 1989) (affirming lower court decision not to issue protective order regarding accident and claims information in view of fact that BIC "failed to show how it would suffer serious harm and embarrassment as a result of the public disclosure of similar accidents or complaints"); Scott v. Monsanto Co., 868 F.2d 786, 792 (5th Cir. 1989) (finding use of protective order to be nonprejudicial despite claims of harm stemming from inability to confer with other plaintiffs); Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 790-92 (1st Cir. 1988) (upholding modification of preexisting protective order to give intervening public interest group access to previously protected discovery materials), *cert. denied*, 488 U.S. 1030 (1989). *See generally* Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 644-55 (1991) (supporting recently adopted Texas rule that encourages public accessibility to civil court records); Richard L. Marcus, *The Discovery Confidentiality Crisis*, 1991 U. ILL. L. REV. 457, 467-87, 506 (arguing that public interest in obtaining confidential discovery doc-

state and federal constitutional law.[95]

II. THE EVOLUTION OF DISCOVERY

A. Precursors to Modern Discovery

The discovery rules did not appear as a genie from a magic lamp. The modern system of discovery was part of a procedural rules reformation that sought to free the system from the shackles of common law pleading. Common law pleading was prefigured and technical, shaped by the twelfth-century system of writs and formalistic pleading requirements that originated in the King's Chancery Court.[96] Under the writ system, courts decided cases based on meaningless formulas and distinctions rather than on the merits of the cause of action.[97] Noncompliance with rigid pleading requirements often resulted in the death of the action.[98]

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uments is insufficient to justify implementation of doctrine of general public access); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 490-502 (1991) (opining that courts should carefully balance interests in confidentiality with that of public access, and criticizing some states for adopting laws that presume public access); *Experts Offer Opinions on Secrecy in the Courts; Confidentiality Issues Roundtable*, NAT'L L.J., July 30, 1990, at 15, 24-25 (surveying experts on issues surrounding administration of court secrecy orders); Russ Herman, *No More Dirty Little Secrets in the Courts*, WASH. POST, Sept. 15, 1989, at A31 (discussing recent decisions where sealed records containing information beneficial for protection of public health were made publicly accessible); Paul Marcott, *Keeping Secrets: Plaintiffs' Lawyers Claim Sealed Records Harm the Public*, A.B.A. J., Nov. 1989, at 32, 32 (reporting on mounting opposition to secrecy orders by various trial lawyers' advocacy groups); Amy D. Marcus, *Firms' Secrets Are Increasingly Bared by Courts*, WALL ST. J., Feb. 4, 1991, at B1 (noting trend in many states of restricting issuance of protective orders that would seal court documents); Arthur R. Miller, *Private Lives or Public Access?*, A.B.A. J., Aug. 1991, at 65, 68 (recognizing nationwide move calling for "presumption of public access" and arguing that such change in direction is not needed because present system adequately serves confidentiality interests as well as public access concerns).

95. *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36-37 (1984) (finding protective order limiting litigant's access to information in immediate trial as not violative of litigant's First Amendment rights); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 914-15 (E.D. Pa. 1981) (determining that First Amendment did not require vacating of protective order in antitrust case that sealed documents containing confidential commercial information); Davenport v. Garcia, 834 S.W.2d 4, 11 (Tex. 1992) (finding gag order to be unconstitutionally broad restraint on speech under Texas Constitution).

96. FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 99 (1915).

97. 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 195 (2d ed. 1968). Pollock and Maitland wrote about the writ system of Henry III:

> A "register of original writs" which comes from the end of that period will be much longer than one that comes from the beginning. Apparently there were some writs which could be had for nothing; for others a mark or a half-mark would be charged, while, at least during Henry's early years, there were others which were only to be had at high prices. We may find creditors promising the king a quarter or a third of the debts that they hope to recover.

Id. (footnotes omitted).

98. *Id.* at 99. In the words of Oliver Wendell Holmes, "When I began [in 1864] the law presented itself as a ragbag of details." OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 301 (1920).

Thus, under common law procedure, the vast majority of prelitigation disputes focused on the phrasing of the pleadings, which set forth the parties' causes of action and defenses.[99] Courts and litigants focused on the technical niceties of pleading rather than on the collection of information designed to elicit the truth.[100] One commentator has noted that "[o]ne of the few blemishes that Blackstone permitted himself to impute to the common-law system was its lack of any means of discovery."[101]

B. The Evolution of the Current Discovery Rules

Many of the disputes over writs and pleadings had as little relationship to a search for truth as the question of how many lawyers could stand on the head of a pin.[102] In spite of the early common law courts' overemphasis on the formalities of pleading, rules regarding discovery gradually evolved.[103] The common law courts themselves began to recognize the need for making pertinent information more accessible by allowing some primitive forms of discovery, such as bills of particulars and devices to force production of certain instruments when relied on in the opposing party's pleading.[104] Equity proceedings, on the other hand, developed substan-

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99. *See* RODOLPHUS DICKINSON, A DIGEST OF THE COMMON LAW, THE STATUTE LAWS OF MASSACHUSETTS, AND OF THE UNITED STATES AND THE DECISIONS OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS RELATIVE TO THE POWERS AND DUTIES OF JUSTICES OF THE PEACE 219 (1818) (defining pleading in era before modern discovery as "the statement of the *facts* which constitute the plaintiff's cause of action, or the defendant's ground of defence, in a logical and *legal form*; it is the formal mode of alleging that on the record, which would be the support or the defence of the party in evidence").

100. *See id.* at 222-24 (discussing necessary components comprising "methodical legal form" of pleadings).

101. ROBERT W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 201 (1952).

102. Under the common law, pleading became very technical because the system was designed only for single-issue resolution. *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914-16 (1987) [hereinafter Subrin, *Perspective*] (discussing evolution of pleading system into 19th century). As the system became more inflexible under numerous pleading rules, lawyers were forced to analogize their causes of action to known writs and to utilize "fictions" or risk losing on technical grounds. *Id.* at 917. These commonly used lawyering practices "made a mockery of the common law's attempt to define, classify, and clarify." *Id.*

In 1890, Lord Chief Justice Coleridge wrote of the need for reform of this procedural system: "[In 1847] the Common Law rested mainly, though not exclusively, upon special pleadings, and truth was investigated by rules of evidence so carefully framed to exclude falsehood, that very often truth was quite unable to force its way through the barriers erected against its opposite." Lord Coleridge, *The Law in 1847 and the Law in 1889*, 37 CONTEMP. REV. 797, 798 (1890).

103. *See* GEORGE RAGLAND, DISCOVERY BEFORE TRIAL 13-16 (1932) (presenting development of discovery procedures in chancery and ecclesiastical courts in England).

104. LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 533 (1991); *see* EDSON R. SUNDERLAND, CASES AND MATERIALS ON TRIAL AND APPELLATE PRACTICE 1-4 (2d ed. 1941) (noting that motions for bills of particulars and independent actions for discovery through

tially broader discovery mechanisms.[105] "Equity's discovery devices—principally interrogatories, production and inspection of documents, and depositions—served as the precursors of modern discovery practice."[106]

These devices, however, were quite limited and "did not permit a party to discover what evidence the opposing party would use to prove the opposing party's case at trial."[107] The requirement that discovery occur primarily in a separate proceeding in equity was "cumbersome, slow, and expensive."[108] In the late 1800s, these problems led to proposed changes that eventually served the goals of merging law and equity courts and permitting the use of limited discovery in civil actions.[109] Even state-level discovery reforms were limited in comparison to the modern rules, however. For example, oral depositions generally were limited to "certain categories of witnesses related to the parties, such as their employees, as well as witnesses who might be unavailable at trial."[110] Discovery was also limited to "facts pertaining to the case of the party seeking discovery and . . . facts or documents that would be admissible in evidence at trial."[111]

In federal court actions, availability of discovery followed patterns similar to those that developed in the state courts, with federal statutes and rules allowing some limited discovery in both law and equity.[112] As in the state system, however, the scope of discovery was limited.[113] It was the adoption of the Federal Rules of Civil Procedure in 1938,[114] which provided for discovery in rules 26-37, that

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bills of discovery were available for specified purposes, thus providing very primitive and impractical discovery tools).

105. *See* Subrin, *Perspective*, *supra* note 102, at 918-21 (discussing development in equity proceedings of more liberal discovery procedures).

106. TEPLY & WHITTEN, *supra* note 104, at 533.

107. TEPLY & WHITTEN, *supra* note 104, at 534-35.

108. TEPLY & WHITTEN, *supra* note 104, at 535.

109. The most well-known example of state-level reform that was successful in combining law with equity as well as providing more general rules was the New York Field Code of 1848. *See* Subrin, *Perspective*, *supra* note 102, at 932-39 (discussing development of Field Code). The significance of similar reforms has been described as follows: "The state reforms of the nineteenth century, in effect, substituted statutory means of obtaining depositions and discovery for separate equity actions." TEPLY & WHITTEN, *supra* note 104, at 536.

110. TEPLY & WHITTEN, *supra* note 104, at 536.

111. TEPLY & WHITTEN, *supra* note 104, at 536.

112. *See* Rules of Practice for the Courts of Equity of the United States, 226 U.S. 627 (1912) (adopting rules for courts of equity). These equity rules permitted limited discovery by means of depositions and interrogatories. *Id.* at 661-62 (permitting taking of depositions "in Exceptional Instances"). These rules also prescribed time limits on interrogatory processes. *Id.* at 665-66.

113. *See* TEPLY & WHITTEN, *supra* note 104, at 537-38 (noting that equity rules of 1912 served to streamline already cumbersome procedure rather than to broaden discovery base).

114. *See* Orders *Re* Rules of Procedure, 302 U.S. 783 (1937) (adopting rules of civil procedure); *see also* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE

introduced the concept of broad discovery as we know it today. The 1938 federal discovery rules allowed a litigant to obtain information from any party or witness without regard to whether the information would be admissible at trial.[115] As stated by the Supreme Court, the new federal rules "restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial."[116]

Over the next half century, almost all states adopted similar rules regarding discovery.[117] The purpose of the new rules on discovery was to facilitate "an orderly search for the truth in the interest of justice rather than a contest between two legal gladiators with surprise and technicalities as their chief weapons."[118] Since their original adoption in 1938, the federal civil discovery rules have undergone several revisions.[119] Amendments in 1970, 1980, and

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§ 1004, at 28 (1987) (relating that Federal Rules of Civil Procedure became effective on September 16, 1938, after Congress adjourned without taking action regarding Supreme Court's adoption of civil procedure rules).

115. FED. R. CIV. P. 26(b) advisory committee's notes.

116. Hickman v. Taylor, 329 U.S. 495, 501 (1947). In 1946, the Advisory Committee reviewing the Federal Rules of Civil Procedure wrote about the amendment to rule 26(b):

> [Discovery] may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his [or her] case. . . . In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice.

FED. R. CIV. P. 26(b) advisory committee's notes (citations omitted).

117. *See* FRIEDENTHAL ET AL., *supra* note 68, § 7.1, at 380 n.8 (1985) (noting that at least 37 states have adopted similar broad rules of discovery).

118. ARTHUR T. VANDERBILT, CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 10 (1952). Other purposes for discovery are to create and preserve information for use at trial; to determine which issues are actually in controversy; and to obtain information that may lead a party to obtain evidence. FRIEDENTHAL ET AL., *supra* note 68, § 7.1, at 380-81.

119. 8 WRIGHT & MILLER, *supra* note 114, § 2002, at 21. In 1948, the rules were amended to clarify certain ambiguities uncovered through practice and experience. *Id.* In 1963 and 1966, the rules were again amended, but only minor revisions were made. *Id.* Recognizing a need for major changes in the rules, the Advisory Committee on Civil Rules launched a comprehensive study in 1963. *Id.*

The Advisory Committee commissioned the Project for Effective Justice of Columbia Law School to conduct a field survey (Columbia Survey) of discovery practice. Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Depositions and Discovery, 43 F.R.D. 211, 220 (1967). The Columbia Survey found no evidence to warrant a drastic change in the "philosophy" of the discovery rules. *Id.* at 220. The costs of discovery were not deemed oppressive, and no major flaws were found in the availability or scope of discovery. *Id.* The Committee, relying largely on the Columbia Survey findings, published a preliminary draft of proposed amendments in 1967. *Id.* at 217. *See generally* Changes Ahead in Federal Pretrial Discovery, 45 F.R.D. 479, 481-84 (1968) (discussing Columbia Survey's empirical data and noting Advisory Committee's receipt of findings prior to drafting amendments). In 1969, after substantial revision, the Judicial Conference of the United States recommended the amendments' adoption by the Supreme Court. Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487,

1983 tended to increase the availability of information,[120] but at the same time they attempted to curb abuses of discovery at the extremes, both in cases of abuse by overuse and avoidance.[121]

Thus, since the adoption of the discovery rules in 1938, the trend has been to encourage more disclosure prior to trial.[122] Presently, parties to a civil action are entitled to all pertinent information from any person unless such information is in some way privileged.[123] The evolution of the discovery rules reflects change and improvement after demonstrated need.

Whatever merit the Council's recommendations relating to discovery may have, no such radical change should be undertaken without adequate empirical studies. The Civil Justice Reform Act of 1990[124] authorized the creation of pilot programs in the federal district courts that will serve as laboratories for the generation and study of data to determine what improvements, if any, are neces-

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487-91 (1970). The Supreme Court adopted the amended rules in 1970. Order of March 30, 1970, 48 F.R.D. 459, 459 (1970). Further amendments in 1980 and 1983 were intended to curb some of the perceived abuses of discovery. *See* FED. R. CIV. P. 26 advisory committee's note (explaining that amendments were prompted partially by heavy criticism of discovery abuse and use of discovery tools as "tactical weapons"). Further amendments of a technical nature were made in 1987. *Id.*

In August 1991, the Judicial Conference of the United States published further proposed amendments to the discovery rules and requested commentary from practitioners and the general public. Committee on Rules of Practice & Procedure, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53, 56, 74-158 (1991); *see* Ferris, *supra* note 32, at 47-48 (presenting pros and cons of proposed amendments to rule 26 and concluding that initial disclosure requirement is not justified at this time). After comments and revisions, the Judicial Conference submitted the proposed changes to the U.S. Supreme Court in November 1992. Letter from L. Ralph Mechan, Director, Administrative Office of the United States Courts, to the Chief Justice of the United States and the Associate Justices of the Supreme Court 1 (Nov. 22, 1992) (on file with *The American University Law Review*). As of the time of this Article's writing, these proposals were pending before the Supreme Court.

120. *See generally* FED. R. CIV. P. 26-37 advisory committee's notes (illustrating increased availability of information after 1970 revision of discovery rules). For example, the 1970 amendments to rule 26 provided for discovery of insurance policies as a matter of right, *id.* 26(b)(2) advisory committee's note, and eliminated the requirement of a showing of good cause for the production of documents and things. *Id.* 34 advisory committee's note. Provisions for the discovery of opinions of experts to be called to testify at trial were also added. *Id.* 26(b)(4) advisory committee's note.

121. *See generally* FED. R. CIV. P. 26-37 advisory committee's notes (explaining that 1980 and 1983 revisions addressed misuse and abuse of discovery). For example, the 1980 amendments provided for discovery conferences. *Id.* 26(f) advisory committee's note. The 1983 amendments added provisions that "attempt[ed] to address the problem of duplicative, redundant, and excessive discovery." *Id.* 26(a) advisory committee's note.

122. *See generally* 8 WRIGHT & MILLER, *supra* note 114, §§ 2001-2002, at 13-22 (discussing purposes and evolution of federal discovery rules). The aims of discovery reflected in the modern rules are generally said to be threefold: (1) to avoid surprise and possible miscarriage of justice; (2) to disclose fully the nature and scope of the controversy; and (3) to narrow, frame, and simplify the issues for trial. *Id.* § 2001, at 17-18.

123. FED. R. CIV. P. 26(b)(1).

124. 28 U.S.C. §§ 471-482 (Supp. II 1990).

sary.[125] The Act requires each federal district to develop a civil justice expense and delay reduction plan, the purpose of which is "to facilitate deliberate adjudication of civil cases on the merits, *monitor discovery*, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."[126] These pilot programs have already begun, and some contain discovery provisions that are similar to those recommended by the Council or the Judicial Conference.[127] The changes proposed by the Council and the Judicial Conference should, at the very least, await the results of ongoing examinations now occurring in the federal district courts.[128] In fact, some commentators have recommended that the Advisory Committee delay consideration of principal recommendations until after evaluation of the pilot programs.[129] The Advisory Committee thought it best not to postpone implementation because its recommendations would permit federal districts "to depart from the national standards."[130]

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125. *Id.* § 471. *See generally* Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521 (1993) (discussing results of federal district court pilot programs).

126. 28 U.S.C. § 471 (Supp. II 1990) (emphasis added).

127. For example, the District of Massachusetts, one of the "laboratory" districts, amended its local rules, effective October 1, 1992, and adopted provisions similar to those recommended by the Judicial Conference. U.S. DIST. CT. FOR THE DIST. OF MASS., AMENDMENTS TO THE LOCAL RULES 1 (1992) (on file with *The American University Law Review*). With respect to limitations on discovery events, Massachusetts limits each side to five depositions, 30 interrogatories, and two sets of requests for production without court order. D. MASS. R. CIV. P. 26.1(C). The provisions for automatic disclosure are also similar to the Judicial Conference proposal. *See id.* 26.2(A) (setting forth requirements for automatic document disclosure and noting that disclosure is continuous and reciprocal obligation throughout case).

The Massachusetts example illustrates that the experimental procedures in the pilot districts, together with their variations, can provide a basis for evaluating the Judicial Conference's proposals. *See id.* 26.5 (providing uniform set of definitions applicable to all discovery requests, thus making comparison and evaluation even more feasible).

128. Subrin, *Fireworks*, *supra* note 26, at 47 (explaining that litigated cases should be reviewed on variety of bases because some procedures may be suitable for one type of case and not another); Francis H. Hare, Jr. & William Remine, *Abuse of Discovery in Products Liability Cases*, *in* SOUTHERN METHODIST UNIV. PRODUCTS LIABILITY INST., PERSONAL INJURY AND PRODUCTS LIABILITY SYMPOSIUM, § 4.02, 4-6 to -7 (1988) (commenting that cases involving discovery abuse by "overuse" usually occur in commercial litigation); *cf. also* Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (noting that potential for abuse of liberal discovery rules may be more common in securities litigation than in other types of cases). Congress itself has recognized the need to study the question of whether there ought to be "systematic, differential treatment of civil cases that tailors the level of individualized and case specific management" to specified criteria. 28 U.S.C. § 473(a)(1) (Supp. II 1990).

129. Letter from Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Attachment B) 7 (May 1, 1992) [hereinafter Letter] (on file with *The American University Law Review*).

130. *Id.* Chairman Pointer wrote in full:

> Many critics also urged that early disclosure requirements not be adopted until after the studies of the experience of courts under the Civil Justice Reform Act. To delay consideration of rules changes until completion of those studies would effectively postpone the effective date of any national standards until December 1998, a delay the Advisory Committee believed unwise. However, the proposed rule is written in a

History has demonstrated the necessity of examining empirical data before embarking on radical revision of the discovery rules. For example, prior to proposing changes in the discovery rules that were adopted in 1970, the Advisory Committee itself noted the preliminary need for "field studies" to examine the "values claimed for discovery and abuses alleged to exist."[131] After completion of an empirical study entitled the Columbia Survey,[132] the Advisory Committee stated:

> The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of

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manner that permits district courts during the period of experimentation to depart from the national standards and determine whether and to what extent pre-discovery disclosures should be required.

Id.

In addition, rule 26(b)(2) of the proposed rules enables the federal districts to alter the provisions regarding the number of depositions and interrogatories and to limit the length of depositions. 1992 PROPOSED AMENDMENTS, *supra* note 33, at 79-80. Interestingly, the Advisory Committee deleted earlier language proposing limitations on the time length of depositions, 1991 PROPOSED AMENDMENTS, *supra* note 29, at 38-39 (proposed rule 30(d)), while stating: "A majority of the Committee, however, concluded that any presumptive limit on the length of depositions is a matter more properly left at this time for experimentation under the Civil Justice Reform Act, and the draft has been changed to effect this result." *See* Letter, *supra* note 129, at 9.

It should be noted that the committee notes to the Judicial Conference proposal regarding initial disclosure indicate that "[t]he rule is based upon the experience of district courts that have required disclosure of some of this information through local rules," as well as on experience of courts in Canada and the United Kingdom. 1992 PROPOSED AMENDMENTS, *supra* note 33, at 94-95 advisory committee's notes. The committee notes to proposed rule 33(a) also state: "Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable." *Id.* at 141 advisory committee's notes. The committee notes do not provide any citation, details, or analysis regarding these "experiences."

131. Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 489 (1970) [hereinafter 1970 Proposed Amendments]. The proposal stated:

> Despite widespread acceptance of discovery as an essential part of litigation, disputes have inevitably arisen concerning the values claimed for discovery and abuses alleged to exist. Many disputes about discovery relate to particular rule provisions or court decisions and can be studied in traditional fashion with a view to specific amendment. Since discovery is in large measure extrajudicial, however, even these disputes may be enlightened by a study of discovery "in the field." And some of the larger questions concerning discovery can be pursued only by a study of its operation at the law office level and in unreported cases.
>
> The Committee, therefore, invited the Project for Effective Justice of Columbia Law School to conduct a field survey of discovery. Funds were obtained from the Ford Foundation and the Walter E. Meyer Research Institute of Law, Inc. The survey was carried on under the direction of Prof. Maurice Rosenberg of Columbia Law School. The Project for Effective Justice has submitted a report to the Committee entitled "Field Survey of Federal Pretrial Discovery" . . . .

Id.

132. COLUMBIA UNIV. PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY, REPORT TO THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE (1968) [hereinafter COLUMBIA SURVEY].

> discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement. On the other hand, no positive evidence is found that discovery promotes settlement.[133]

Although the data involved in the Columbia Survey are stale and the conclusions may or may not be correct today, the course adopted prior to the 1970 amendments demonstrates the wisdom of "looking" before "leaping."[134]

III. WINNERS AND LOSERS

A. What Is the Real Agenda Behind the Recommendations of the President's Council on Competitiveness Relating to Discovery?

The history of the discovery rules has shown that they were developed to improve outmoded practices and, as they evolved, continued to broaden the availability of information.[135] Simply put, the rules allow parties to focus on the merits rather than on the technical niceties of pleadings. The discovery rules have reached their current form after close scrutiny, deliberative discussion, trial and error, and empirical studies. Thus far, the rules appear to have resisted change based simply on "shoot-from-the-hip" proposals and potentially misleading anecdotal examples.[136]

Both the Council's recommendations and former Vice President Quayle's article are replete with assertions that are supported by little valid empirical data.[137] Granting one class of litigant an advantage over another is not an adequate reason for credible change.

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133. 1970 Proposed Amendments, *supra* note 131, at 489.

134. *Cf.* New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.) ("[A] page of history is worth a volume of logic.").

135. *See* Subrin, *Perspective*, *supra* note 102, at 917 (commenting that rigidity of common law system of technical pleading stimulated evolution of discovery rules to facilitate recovery of information).

136. Professor Stephen Subrin has pointed out the desirability of maintaining the credibility of the rulemaking process:

> Since even projects that look into delay can have a " 'political element,' " Justice (then reporter) Kaplan suggested that perhaps the soon-to-be-developed "Judicial Center" might wish to do the study. "To involve the [Advisory] Committee in public debates of that sort creates a possibility of putting at risk the reputation for impartiality and scientific skill which the rulemakers have been at pains to build up since the 1930's."
>
> To quote Professor Rosenberg quoting the immortal Yogi Berra: 'It's *deja vu* all over again.'

Subrin, *Fireworks*, *supra* note 26, at 47 (citations omitted).

137. *See, e.g.*, *supra* notes 21-22 and accompanying text (presenting costs cited by former Vice President Quayle and critics' opinions of those numbers).

The President's Council on Competitiveness makes reference to potential product liability costs as a factor that has led U.S. manufacturers to withdraw products from the market and to discontinue certain forms of product research.[138] The Council also asserts that the "current *procedural* system adds costs by prolonging resolution of disputes and encouraging wasteful litigation."[139] Under the topic of "discovery," the Council further contends that "[o]ver 80 percent of the time and cost of a typical lawsuit involves pretrial examination of facts through discovery."[140] The Council also refers to burdensome discovery practices, including depositions, interrogatories, and the "most onerous aspect of discovery, . . . the document demand."[141] In addition, the Council cites other perceived problems with the litigation system that it claims add to the burden on American industry.[142]

The common thread running through the Council's proposals and former Vice President Quayle's related article is an interest in improving the lot of product manufacturers by reducing the adverse impact of consumer litigation. To accomplish this purpose, they seek to change the rules of discovery, the result of which is likely to be less information available to plaintiffs who bear the burden of proof. The formulation of changes that will be applicable to *all* civil litigation in the federal courts with the goal of promoting the interests of a class of civil litigants—product manufacturers—and on the basis of assertions unsupported by empirical data runs a real risk of making the wrong change for the wrong reason.[143] These proposals

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138. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 3.

139. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 3.

140. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 3. William A. Glaser commented on the Columbia Survey's results and concluded:

> Discovery costs money, but the amount in the average case may be less than one expects from the literature, which emphasizes problems of big cases. . . .
>
> Daily discovery costs are higher in commercial than in personal injury cases, and particularly in patent and contract suits. Antitrust suits also have high total discovery costs, but are spread over many lawyer-days of work.
>
> Contrary to the fears of some observers, discovery has not become the principal item of cost in litigation. In the average law suit, most time and money are devoted to other work. . . .
>
> Complaints that the adversary created oppressive costs are not common, except in the bigger commercial suits. They reflect higher than usual expenditures and thus are not fictitious. Most arise from conflicts between bigger litigants and are not attempts by the stronger side to bankrupt the smaller.

GLASER, *supra* note 37, at 185-87; *see also infra* note 143 (discussing results of Columbia Survey). Although these comments were made on the basis of data gathered during the 1960s, they illustrate the potential gap between perception and reality.

141. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 3.

142. AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 4-6 (discussing high costs involved with use of expert witnesses and junk science, and assessment of punitive damages).

143. Discovery was the subject of sustained empirical study in the early 1960s. *See* GLASER, *supra* note 37, at 38-50 (evaluating need to determine impact of discovery through

may very well benefit one class of litigant, but they also may harm another class of litigant or present unknown risks to others.

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use of empirical studies to accurately assess necessary amendments to procedural rules); COLUMBIA SURVEY, *supra* note 132. The methods used by Columbia Survey researchers included personal interviews and mailed questionnaires. COLUMBIA SURVEY, *supra* note 132, at 1-2; Maurice Rosenberg, *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479, 482-83 (1969). The Columbia Survey concluded that the regime of liberal discovery worked. *See* GLASER, *supra* note 37, at 83-87 (presenting statistics of gains from discovery). "In three-fourths of the . . . cases the lawyers said that if they had not been able to avail themselves of discovery, they would simply not have obtained the evidence uncovered." Rosenberg, *supra*, at 488.

In 1981, researchers at Notre Dame Law School, with the assistance of the Federal Judicial Center, completed a law-in-the-books analysis of federal litigation behavior that resulted in the imposition of sanctions. *See generally* ROBERT E. RODES, JR. ET AL., SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 1 (1981) (reporting survey that studied imposition of sanctions for violations of Federal Rules of Civil Procedure through use of case law, local rules, and secondary literature). The Notre Dame sanctions study was completed prior to the 1980 amendments to rules 26 and 37 of the Federal Rules of Civil Procedure. *Id.* The methodology employed was chiefly a content analysis of available case law. *Id.* The researchers gathered all available citations from cases decided in the federal courts involving rules 11, 16, 37, 41(b), and 55 through February 1, 1979. RODES, *supra*, at 1. The researchers performed an intensive content analysis of district court cases in the 1978-1979 period in order to summarize current trends. *Id.* at 1-2. The Notre Dame study did not attempt a statistical analysis of judicial behavior. Rather, the researchers focused on describing patterns of litigation behavior as derived from the pages of judicial reports. *Id.* at 3. The authors commented that the principal problem of discovery abuses was in enforcement. *Id.* at 85. The researchers concluded:

> The typical pattern of sanctioning that emerges from the reported cases is one in which the delay, obfuscation, contumacy, and lame excuses on the part of litigants and their attorneys are tolerated until the court is provoked beyond endurance. At that point the court punishes one side or the other with a swift and final termination of the lawsuit by dismissal or default.

Id. Trial judges employed an "all or nothing" approach in applying discovery rules. *Id.* Thus, the actual practice of discovery laws-in-action undermined the discovery laws-in-the-books, which envisioned a "scheme of increasingly severe sanctions to maintain court control." *Id.* Consequently, the authors recommended greater use of financial penalties to augment discovery rules. *Id.* at 86.

A study conducted by Paul R. Connolly and others and commissioned by the Federal Judicial Center in 1978 examined six federal courts and was limited in time and geographic area. *See* PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 1, 85-90 (1978) (describing methodology of study). The study reached what many today would characterize as a remarkable and surprising conclusion: in more than half of the cases evaluated, no discovery was undertaken. *Id.* at 28-29. In the cases where discovery was conducted, the discovery was extremely limited. *Id.* at 28-35. The study preceded the 1980 amendments to the discovery rules, however, and thus its usefulness is somewhat limited. *See* Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals To Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 193 (1992) (noting risk of relying on Connolly's data because report was completed before 1980 amendments to Federal Rules of Civil Procedure, which were designed to curb discovery abuse).

Professor Wayne Brazil conducted extensive field research by interviewing litigators in the Chicago area in 1980. *See* Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 219 [hereinafter Brazil, *Views from the Front Lines*] (discussing American Bar Foundation's pilot empirical study of practicing attorneys' views, assessments, and complaints regarding civil discovery system); *see also* Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 790 (reporting lawyers' evaluation of present state of discovery system and their views about relative severity of several major problems that burden discovery process); Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 875, 890-921, 937-55 (proposing comprehensive model rule that courts could use to manage pre-

B. Broad Discovery Versus Narrow Discovery: Knowledge or Ignorance; Who Benefits?

Supreme Court Justice William J. Brennan, Jr. stated that the major benefit achieved by discovery is " 'assuring that right and justice shall have the most favorable opportunity of prevailing in cases that are tried.' "[144] A consumer litigant alleging injury from a defective product and having the burden of proof needs information concerning that product. Without that information, little can be accomplished. " 'Modern products liability claims, toxic tort claims and environmental litigation would be simply inconceivable without the combination of liberal pleading, liberal joinder, and liberal discovery. The total effect of this development has redounded to the benefit of "have nots" relative to "haves." ' "[145]

A consumer claiming to have been injured by a defective product requires much information that is commonly available only from the defendant's own files. A few examples, among a myriad of others, include field test reports, epidemiological studies, plans and specifications, prior incidents of consumer complaints, and intracompany

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trial development of civil actions, proposing revisions to rule 16 of Federal Rules of Civil Procedure, and suggesting sanctions that provide compensation for damages caused by opponent's violation of discovery obligations). Professor Brazil also found that discovery abuses were more prevalent in complex litigation than in routine litigation. Brazil, *Views from the Front Lines*, *supra*, at 223-35 (noting that discovery problems, such as inefficiency and delays due to "intentional tactical jockeying" by counsel, occur more frequently in larger, more complex cases). One commentator remarked that both the Federal Judicial Center study and the Chicago-area study reveal that "lawyers behave badly when they think their clients stand to gain from abusive behavior and when courts tacitly allow it." Dudley, *supra*, at 193 (citation omitted).

In 1986, a study committee was charged by the Iowa Supreme Court to examine the effectiveness of the discovery system in the Iowa District Court. *See* David S. Walker, *Professionalism and Procedure: Notes on an Empirical Study*, 38 DRAKE L. REV. 759, 771 (1988-89) (noting Iowa Supreme Court's appointment of special study committee to investigate discovery issues). The study consisted of a random selection of 1400 routine civil cases, including tort, contract, and property matters, although debt collection cases composed the largest number of cases. *Id.* at 772-73. "[D]ebt-related claims constituted 40% of the random sample, nearly twice the percentage of tort cases." *Id.* at 776. Further, in over 50% of the cases selected for examination in the study, the damages requested were $5000 or less. *Id.* at 782. The results of the study revealed that "less than a quarter of the cases in the sample entailed the use of any formal discovery devices; less than 5% entailed more than five separate discovery events, and less than 3% involved more than nine." *Id.* at 781. Domestic relations cases were excluded from these percentages. *Id.* Answers to questionnaires in connection with the Iowa study showed that attorneys and judges agree that certain types of discovery abuses occur in "a real minority of the civil cases in which discovery takes place." *Id.* at 783. Nevertheless, the author concluded that "[i]n the final analysis, the attorneys' and judges' responses estimating percentages of cases in which certain problems occurred and their conclusions about how well the 'current system of discovery' is working are inconclusive." *Id.* at 785.

144. Chief Justice G. Joseph Tauro, *Improving the Quality of Justice in Massachusetts*, 49 MASS. L.Q. 7, 19 (1964) (quoting Justice William J. Brennan, Jr., Address at The Round Table on Administration of Justice, San Juan, Puerto Rico (Feb. 5, 1962)).

145. Subrin, *Fireworks*, *supra* note 26, at 6 (quoting Professor Geoffrey Hazard, Address at the 50th Anniversary of Federal Rules Conference (Oct. 7-8, 1988)).

memoranda relating to design issues.[146] One should not lose sight of the real issue, however, which is not that information helps or harms one side or the other, but rather that it be available to determine the truth. This objective is the very concept upon which the modern rules are based. To tilt the rules in favor of one class of litigant puts the entire system at risk.[147]

Instances where information has proven to be successful to the vindication of consumer rights abound. Some examples should illustrate the point. In *Cloroben Chemical Corp. v. Comegys*,[148] the defendant resisted discovery of prior consumer complaints involving its drain cleaner.[149] Plaintiff, who was injured by the product, claimed that because of the high sulfuric acid content, the drain cleaner was unsuitable for home use.[150] A discovery order resulted

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146. *See* 2A FRUMER & FRIEDMAN, *supra* note 88, § 17.02, at 17-20 (noting importance of discovery in product liability claims). Frumer and Friedman state:

> [T]he importance of discovery in a products liability case cannot be overemphasized. Proper discovery may substantially aid a plaintiff in preparing and proving his [or her] case against a defendant. Interrogatories may provide a history of the product from conception to the date of injury thus aiding a plaintiff in determining those parties in the chain of distribution, whether there was intermediate handling, and perhaps pinpointing a defect. Various documents may also be helpful, especially those relating to design of the product, the manufacturing process, quality control, knowledge of and compliance with safety standards and certain aspects of the product's history such as consideration of safety devices or alternate physical or chemical composition.

Id. This section also contains a lengthy list of examples and citations involving the illustrative uses of discovery by plaintiffs in product liability cases. *Id.* § 17.04, at 17-40 to -88.

147. *Cf.* Hickman v. Taylor, 329 U.S. 495, 507 (1947) (stating that mutual knowledge of relevant facts is necessary for proper litigation). The Supreme Court stated:

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his [or her] opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he [or she] has in his [or her] possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

Id. (citation omitted).

Nor is it suggested that the rules be designed to favor the plaintiff over the defendant. The goal should be a system that is designed to achieve fairness and to reveal the truth. The Supreme Court added in *Hickman*:

> But framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant.

Hickman, 329 U.S. at 507. Nor should the plaintiff be able to hide the truth without sanction. To the extent such abuse occurs, it should be dealt with appropriately. *See, e.g.*, Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 992-93 (8th Cir. 1975) (upholding dismissal of plaintiff's suit in connection with plaintiff's failure to disclose existence of information).

148. 464 A.2d 887 (Del. 1983).

149. Cloroben Chem. Corp. v. Comegys, 464 A.2d 887, 889-90 (Del. 1983).

150. *Id.* at 891.

in the disclosure of documents acknowledging consumer complaints and proving the manufacturer's prior knowledge of the product's danger.[151] Similarly, in *Dunn v. Owens-Corning Fiberglass*,[152] internal documents demonstrated the manufacturer's longstanding awareness of the health hazards of its asbestos product.[153] And in *Gryc v. Dayton-Hudson Corp.*,[154] an internal company memorandum showed that the manufacturer was aware that lenient government standards were not sufficient to ensure the safety of its highly flammable cotton flannelette nightwear, but that the product was not changed because of economic concerns.[155]

In *Piper Aircraft Corp. v. Coulter*,[156] the Florida District Court of Appeals found Piper liable for a plane crash caused when a door opened in flight due to a faulty door latch.[157] Evidence revealed during discovery showed that although the manufacturer's testing had disclosed the problem, no action had been taken to remedy this situation.[158] Also, in *Ford Motor Co. v. Stubblefield*,[159] an internal report suggested that implementation of safety measures involving fuel system improvements should not be undertaken in deference to profits.[160] The defect caused a vehicle to become engulfed in flames during a crash, resulting in the death of several passengers.[161]

The foregoing examples demonstrate how information enabled the civil justice system to arrive at the truth. This result should be no startling revelation. The President's Council on Competitiveness and former Vice President Quayle refer to the burdens and abuses of discovery as reasons for changing the procedural rules.[162]

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151. *Id.* at 890-91.

152. 774 F. Supp. 929 (D.V.I. 1991).

153. Dunn v. Owens-Corning Fiberglass, 774 F. Supp. 929, 948-49 (D.V.I. 1991), *aff'd in part and vacated in part sub nom.* Dunn v. Hovic, No. 91-3837, 1992 U.S. App. LEXIS 22749 (3d Cir. Sept. 18, 1992), *vacated, reh'g en banc granted*, No. 91-3837, 1992 U.S. App. LEXIS 25457 (3d Cir. Oct. 8, 1992); *see* Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242, 249-51 (Fla. Dist. Ct. App. 1984) (noting that defendant corporation suppressed scientific evidence, which was later uncovered in discovery, of danger of its product).

154. 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921 (1980).

155. Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 733-38 (Minn.), *cert. denied*, 449 U.S. 921 (1980).

156. 426 So. 2d 1108 (Fla. Dist. Ct. App. 1983).

157. Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108, 1109 (Fla. Dist. Ct. App. 1983).

158. *Id.* at 1110. Similarly, in Airco v. Simmons First Nat'l Bank, 638 S.W.2d 660 (Ark. 1982), a field report in the manufacturer's files indicated the known risk that identical hoses on an artificial breathing machine posed a danger of being confused in the operating room. *Id.* at 661-63. During plaintiff's surgery, the wrong hose was connected, seriously injuring the plaintiff. *Id.* at 661.

159. 319 S.E.2d 470 (Ga. Ct. App. 1984).

160. Ford Motor Co. v. Stubblefield, 319 S.E.2d 470, 474-78 (Ga. Ct. App. 1984).

161. *Id.* at 474.

162. *See* AGENDA FOR CIVIL JUSTICE REFORM, *supra* note 2, at 3-4 (finding that 80% of time and cost of typical lawsuit involves discovery); Quayle, *supra* note 1, at 563 (stating that discovery procedures are often burdensome and result in increased expenses).

Neither, however, discloses the extent to which some of those whom they seek to assist have gone in attempts to prevent the release of appropriate information requested through discovery. Some examples that the Council or Quayle may have "overlooked" follow for purposes of illustration.

The case of *Carlucci v. Piper Aircraft Corp.*[163] involved an action resulting from the death of three persons in the crash of an airplane manufactured by the defendant.[164] The plaintiffs alleged that various design defects in the aircraft led to the crash.[165] The district court judge found as follows with regard to the actions of the defendant manufacturer:

> I conclude that the defendant engaged in a practice of destroying engineering documents with the intention of preventing them from being produced in lawsuits. Furthermore, I find that this practice continued after the commencement of this law suit and that documents relevant to this law suit were intentionally destroyed. I would note that I am not the first fact finder to conclude that Piper has intentionally destroyed documents.[166]

The court defaulted the defendant not only for the foregoing conduct but also for having disobeyed orders and having made misrepresentations to the court with regard to the existence of documents.[167]

In *Kozlowski v. Sears, Roebuck & Co.*,[168] the plaintiff, a minor, was severely burned when his pajamas caught on fire.[169] Plaintiff requested, through discovery, records of prior complaints and communications concerning other such instances involving nightwear manufactured or marketed by the defendant.[170] The court ordered the defendant to produce the information, but the defendant failed to comply, claiming that it indexed claims alphabetically by the name of the claimant rather than by type of product and thus could not easily locate the pertinent records.[171] The court, in defaulting the defendant, stated: "The defendant's failure to produce records of similar complaints is due basically to an indexing system of its

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163. 102 F.R.D. 472 (S.D. Fla. 1984).

164. Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 474 (S.D. Fla. 1984).

165. *Id.*

166. *Id.* at 485-86 (citing Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108, 1110 (Fla. Dist. Ct. App. 1983)).

167. *Id.* at 486. This portion of the district court decision was echoed in a related action. Carlucci v. Piper Aircraft Corp., 775 F.2d 1440 (11th Cir. 1985).

168. 73 F.R.D. 73 (D. Mass. 1976).

169. Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 74 (D. Mass. 1976).

170. *Id.*

171. *Id.* at 75-77.

own devising, so maintained as to obstruct full discovery."[172]

In *Stanton v. Iver Johnson's Arms, Inc.*,[173] the plaintiff claimed that his injuries were caused by a defect in a firearm manufactured by the defendant.[174] The plaintiff sought certain information by way of interrogatories and the defendant failed to supply the information, although ordered to do so by the court.[175] The court sanctioned the defendant by ordering that certain material facts be deemed admitted, including the fact that the defect in the product proximately caused plaintiff's injury.[176] The court also noted that two consecutive attorneys representing the manufacturer sought withdrawal from the case due to lack of cooperation from the corporate client.[177]

The foregoing cases are noted by way of example only, but for a point that should be obvious. Discovery procedures that aid in making information available to litigants favor the truth, although that truth may not be to the benefit of a particular litigant where the "truth hurts."[178] The President's Council on Competitiveness and the former Vice President have set out an agenda to redesign an entire procedural scheme, developed over more than a half century, in order to benefit product manufacturers. If their recommendations are adopted, they will have accomplished their goal, but at whose expense?

CONCLUSION

The President's Council on Competitiveness and former Vice President Quayle have proposed sweeping changes to the discovery

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172. *Id.* at 76; *cf. also* Lewy v. Remington Arms Co., 836 F.2d 1104, 1111 (8th Cir. 1988) (noting that manufacturer's policy regarding record retention called for destruction of evidence of product malfunctions); Craig v. A.H. Robins Co., 790 F.2d 1, 3 (1st Cir. 1986) (litigating case involving deliberate destruction of documents); Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1240 (Kan. 1985) (stating that defendant commissioned studies that it later dropped when they turned out to be unfavorable and "consigned hundreds of documents to the furnace" instead of informing consumers of risks).

173. 88 F.R.D. 290 (D. Mont. 1980).

174. Stanton v. Iver Johnson's Arms, Inc., 88 F.R.D. 290, 290 (D. Mont. 1980).

175. *Id.* at 290-91.

176. *Id.* at 292; *cf. also* Rozier v. Ford Motor Co., 573 F.2d 1332, 1349 (5th Cir. 1978) (discussing judgment for defendant that was reversed on appeal due to defendant's failure to produce document during discovery). The defendant claimed that it was justified in not producing the document because the plaintiff had asked for a "cost-benefit analysis" and that the document in question was a "trend-cost analysis." *Id.* at 1341. The appellate court was not impressed with the defendant's semantic gamesmanship. *Id.* at 1341-42.

177. *Stanton*, 88 F.R.D. at 291. The court commented that both of the attorneys were "exceptionally able attorneys. For both of them to seek to withdraw from the defense of this action is a telling indication of defendant's uncooperative, contemptuous conduct." *Id.*

178. This rule should apply to all litigants, whether they are consumers, manufacturers, or others. *E.g.*, Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 992-93 (8th Cir. 1975) (dismissing plaintiffs' complaint for failure to comply with discovery rules).

provisions of the civil litigation system. We believe that the proposed changes will limit the availability of information to injured consumers in order to benefit manufacturers. The proponents of the changes appear to have chosen one side over the other and have attempted to structure new rules to benefit the favored side. Even if the attempt to favor manufacturers over consumers could be considered a desirable goal, the proponents of change are obligated to state their goals openly and present meaningful empirical studies rather than assertions gathered from superficial data or biased sources.

The changes proposed can in no way be considered minor tinkering. Rather, their implementation has the potential to unravel much of the civil justice system as it is presently structured. For the former Vice President to have stated, in support of the adoption of the proposals, that they are neither "intended to affect substantive rights" nor "designed to close the courthouse doors to any meritorious claim or . . . person," but rather are intended "to open those doors"[179] is contrary to the evidence at hand and contrary to the stated and unstated agenda of the proponents. Furthermore, the discovery amendments to the Federal Rules of Civil Procedure proposed by the Judicial Conference should not be implemented until the data to be gathered under the Civil Justice Reform Act are considered. If analysis of the data warrants the conclusion that the amendment will improve the system and measure the reforms' effect on the substantive rights of *all* litigants, then, and only then, may the amendments rightfully be adopted.

DEVELOPMENTS OCCURRING AFTER SUBMISSION OF THIS ARTICLE

Following submission of the final version of the manuscript for this Article on March 12, 1993, the Supreme Court of the United States acted on the amendments to the discovery rules proposed by the Judicial Conference. On April 22, 1993, the Supreme Court ordered that the Federal Rules of Civil Procedure be amended, and in accordance with the provisions of 28 U.S.C. § 2074, submitted the amendments to Congress.[180] The transmittal letter of the Chief Justice submitting the amendments to Congress contains the following

179. Quayle, *supra* note 1, at 560; *supra* note 8 (quoting full text of relevant portion of article).

180. A copy of the order, the letter of transmittal to Congress, and the accompanying statements are attached hereto as Appendix A. It should be noted that the amendments proposed by the Judicial Conference and adopted by the Court include amendments relating not only to the rules concerning discovery but also amendments to other rules. *See* 61 U.S.L.W. 4365 (U.S. Apr. 27, 1993).

statement: "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted."[181]

Three Justices issued a dissenting statement to the amendments regarding discovery.[182] The dissenting statement authored by Justice Scalia and joined by Justices Thomas and Souter focuses on the provisions of the amendments imposing on litigants "a continuing duty to disclose to opposing counsel, without awaiting any request, various information 'relevant to disputed facts alleged with particularity.' "[183] As reasons, the dissent refers to the likely increased burdens on district court judges resulting from motion practice regarding questions of compliance with the mandatory disclosure provisions; questions raised about the attorney's duty owed to a client versus the attorney's duty under the new rule to determine, for the benefit of the other party, what is, or is not, subject to mandatory disclosure; and the questioned wisdom of putting into effect a "radical alteration" to the discovery rules without any prior "significant testing on a local level."[184]

In his dissenting statement, Justice Scalia cites an article entitled *Automatic Disclosure in Discovery—The Rush To Reform* and authored by Griffin B. Bell, Chilton Davis Varner, and Hugh Q. Gottschalk.[185] Although dated "Fall 1992," this article in fact was not distributed to the public until after April 1, 1993.[186] This article, critical of the mandatory disclosure provisions contained in the proposal of the Judicial Conference, was supported through a grant from the Product Liability Advisory Council Foundation.[187] The article cites wide-

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181. Letter from William H. Rehnquist, Chief Justice, The Supreme Court of the United States, to Thomas S. Foley, Speaker of the U.S. House of Representatives (Apr. 22, 1993), *reprinted in* app. A, *infra*.

182. Justice Scalia and Justice Thomas also dissented from amendments to rule 11 of the Federal Rules of Civil Procedure. 61 U.S.L.W. 4365, 4392-94 (U.S. Apr. 27, 1993). Justice White, in a separate statement, expressed reservations about the role of the Supreme Court in the statutory process by which amendments to the Federal Rules of Civil Procedure are adopted. *Id.* at 4390-92.

183. *Id.* at 4393.

184. *Id.* at 4393.

185. Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush To Reform*, 27 GA. L. REV. 1 (1992).

186. However, "a first draft [of the article] was mailed to the Supreme Court on February 9, 1993 and a final draft on March 16, 1993." Letter from Michael M. Raeber, Editor-in-Chief, *Georgia Law Review*, to Paul P. [sic], Sugarman, Dean, Suffolk University Law School (Apr. 30, 1993) (on file with *The American University Law Review*).

187. Bell, *supra* note 185, at 1. The Product Liability Advisory Council represents the interests of manufacturers and other businesses in procedural and substantive issues related to product liability litigation. Through the filing of amicus briefs and the funding of selected topics and authors, it purports "to influence the rational development of the common law of product liability." PRODUCT LIABILITY ADVISORY COUNCIL, FRIEND OF THE COURT IN PRODUCT

spread opposition to the mandatory disclosure proposals cutting across the lines between those who represent injured consumers and those who represent the interests of manufacturers in product liability cases.[188]

Why the proponents of tort reform, who were allied with former Vice President Quayle and the Council on Competitiveness, oppose mandatory disclosure as proposed by the Judicial Conference is a question worth pondering. One might speculate that the proponents of tort reform may have been willing to embrace mandatory disclosure coupled with all of the other modifications to the discovery process as proposed by the Council on Competitiveness but not willing to embrace the Judicial Conference proposal on disclosure standing alone. The mandatory disclosure requirements may present too much uncertainty as to how they would affect either consumer interests or corporate interests and as such may unleash forces that cannot be predicted. In addition, the problems presented by the mandatory disclosure provisions probably raise the worst fears for both sides: the consumer's fear that information will not be disclosed and the manufacturer's fear that too much may have to be disclosed. The radical and untested changes present a justifiable fear for all litigants.

LIABILITY 4 (1990) (on file with *The American University Law Review*). It also purports "to provide an effective counterweight to the plaintiffs' bar and to attempt to bring balance and common sense to product liability law." *Id.* at 3. The Product Liability Advisory Council Foundation and the Product Liability Advisory Council share the same address and telephone number.

188. Bell, *supra* note 185, at 28-32 & nn.107-21.

APPENDIX A*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1993

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Justice White has issued a separate statement. Justice Scalia has issued a dissenting statement, which Justice Thomas joins and Justice Souter joins in part.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

William H. Rehnquist

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

* Excerpted from H.R. Doc. No. 103-74, 103d Cong., 1st Sess. (1993).

SUPREME COURT OF THE UNITED STATES

THURSDAY, APRIL 22, 1993

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rules 1, 4, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, and 76, and new Rule 4.1, and abrogation of Form 18-A, and amendments to Forms 2, 33, 34, and 34A, and new Forms 1A, 1B, and 35.

[See infra., pp. _____ _____ _____.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1993, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

SUPREME COURT OF THE UNITED STATES

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

[April 22, 1993]

Statement of JUSTICE WHITE. 28 U. S. C. §2072 empowers the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the federal courts, including proceedings before magistrates and courts of appeals.[1] But the Court does not itself draft and initially propose these rules. Section 2073 directs the Judicial Conference to prescribe the procedures for proposing the rules mentioned in §2072. The Conference is authorized to appoint committees to propose such rules. These rules advisory committees are to be made up of members of the professional bar and trial and appellate judges. The Conference is also to appoint a standing committee on rules of practice and evidence to review the recommendations of the advisory committees and to recommend to the Conference such rules and amendments to those rules "as may be necessary to maintain consistency and otherwise promote the interest of justice." §2073(b). Any rules approved by the Conference are transmitted to the Supreme Court, which in turn transmits any rules "prescribed" pursuant to §2072 to the Congress. Except as provided in §2074(b), such rules become effective at a specified time unless Congress otherwise provides.

The members of the advisory and standing committees are carefully named by THE CHIEF JUSTICE, and I am

[1] Section 2075 vests a similar power in the Court with respect to rules for the bankruptcy courts.

quite sure that these experienced judges and lawyers take their work very seriously. It is also quite evident that neither the standing committee nor the Judicial Conference merely rubber stamps the proposals recommended to it. It is not at all rare that advisory committee proposals are returned to the originating committee for further study.

During my 31 years on the Court, the number of advisory committees has grown as necessitated by statutory changes. During that time, by my count at least, on some 64 occasions we have "prescribed" and transmitted to Congress a new set of rules or amendments to certain rules. Some of the transmissions have been minor, but many of them have been extensive. Over this time, Justices Black and Douglas, either together or separately, dissented 13 times on the ground that it was inappropriate for the Court to pass on the merits of the rules before it.[2] Aside from those two Justices, Justices Powell, Stewart and then-Justice REHNQUIST dissented on one occasion and JUSTICE O'CONNOR on another as to the substance of proposed rules. 446 U. S. 995, 997 (1980) (Powell, J., dissenting); 461 U. S. 1117, 1119 (1983) (O'CONNOR, J., dissenting). Only once in my memory did the Court refuse to transmit some of the rule changes proposed by the Judicial Conference. 500 U. S. ___ (1991).

That the Justices have hardly ever refused to transmit the rules submitted by the Judicial Conference and the

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[2] 421 U. S. 1019, 1022 (1975) (Douglas, J., dissenting); 416 U. S. 1001, 1003 (1974) (Douglas, J., dissenting); 411 U. S. 989, 992 (1973) (Douglas, J., dissenting); 409 U. S. 1132 (1972) (Douglas, J., dissenting); 406 U. S. 979, 981 (1972) (Douglas, J., dissenting); 401 U. S. 1017, 1019 (1971) (Black and Douglas, JJ., dissenting); 400 U. S. 1029, 1031 (1971) (Black, J., with whom Douglas, J., joins, dissenting); 398 U. S. 977, 979 (1970) (Black and Douglas, JJ., dissenting); 395 U. S. 989, 990 (1969) (Black, J., not voting); 383 U. S. 1087, 1089 (1966) (Black, J., dissenting); *ibid.* (Douglas, J., dissenting); 383 U. S. 1029, 1032 (1966) (Black, J., dissenting); 374 U. S. 861, 865 (1963) (Black and Douglas, JJ., dissenting).

fact that, aside from Justices Black and Douglas, it has been quite rare for any Justice to dissent from transmitting any such rule, suggest that a sizable majority of the 21 Justices who sat during this period concluded that Congress intended them to have a rather limited role in the rulemaking process. The vast majority (including myself) obviously have not explicitly subscribed to the Black-Douglas view that many of the rules proposed dealt with substantive matters that the Constitution reserved to Congress and that in any event were prohibited by § 2072's injunction against abridging, enlarging or modifying substantive rights.

Some of us, however, have silently shared Justice Black's and Justice Douglas' suggestion that the enabling statutes be amended

> "to place the responsibility upon the Judicial Conference rather than upon this Court. Since the statute was first enacted in 1934, 48 Stat. 1064, the Judicial Conference has been enlarged and improved and is now very active in its surveillance of the work of the federal courts and in recommending appropriate legislation to Congress. The present rules produced under 28 U. S. C. § 2072 are not prepared by us but by Committees of the Judicial Conference designated by THE CHIEF JUSTICE, and before coming to us they are approved by the Judicial Conference pursuant to 28 U. S. C. § 331. The Committees and the Conference are composed of able and distinguished members and they render a high public service. It is they, however, who do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power. If the rule-making for Federal District Courts is to continue under the present plan, we believe that the Supreme Court should not have any part in the task; rather, the statute should be amended to substitute the Judicial Conference. The Judicial Conference can participate

> more actively in fashioning the rules and affirmatively contribute to their content and design better than we can. Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid." 374 U. S. 865, 869–870 (1963) (footnote omitted).

Despite the repeated protestations of both or one of those Justices, Congress did not eliminate our participation in the rulemaking process. Indeed, our statutory role was continued as the coverage of § 2072 was extended to the rules of evidence and to proceedings before magistrates. Congress clearly continued to direct us to "prescribe" specified rules. But most of us concluded that for at least two reasons Congress could not have intended us to provide another layer of review equivalent to that of the standing committee and the Judicial Conference. First, to perform such a function would take an inordinate amount of time, the expenditure of which would be inconsistent with the demands of a growing caseload. Second, some us, and I remain of this view, were quite sure that the Judicial Conference and its committees, "being in large part judges of the lower courts and attorneys who are using the Rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we." 383 U. S. 1089, 1090 (1966) (Douglas, J., dissenting).

I did my share of litigating when in practice and once served on the Advisory Committee for the Civil Rules, but the trial practice is a dynamic profession, and the longer one is away from it the less likely it is that he or she should presume to second-guess the careful work of the active professionals manning the rulemaking committees, work that the Judicial Conference has approved. At the very least, we should not perform a *de novo* review and should defer to the Judicial Conference and its committees

as long as they have some rational basis for their proposed amendments.

Hence, as I have seen the Court's role over the years, it is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity. If it has not, such a fact, or even such a claim, about a body so open to public inspection would inevitably surface. This has been my practice, even though on several occasions, based perhaps on out-of-date conceptions, I had serious questions about the wisdom of particular proposals to amend certain rules.

In connection with the proposed rule changes now before us, there is no suggestion that the rulemaking process has failed to function properly. No doubt the proposed changes do not please everyone, as letters I have received indicate. But I assume that such opposing views have been before the committees and have been rejected on the merits. That is enough for me.

Justice Douglas thought that the Court should be taken out of the rulemaking process entirely, but as long as Congress insisted on our "prescribing" rules, he refused to be a mere conduit and would dissent to forwarding rule changes with which he disagreed. I note that JUSTICE SCALIA seems to follow that example. But I also note that as time went on, Justice Douglas confessed to insufficient familiarity with the context in which new rules would operate to pass judgment on their merits.[3]

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[3] In dissenting from the order transmitting the Chapter XIII Bankruptcy Rules, Justice Douglas, among other things said: "Forty years ago I had perhaps some expertise in the field; and I know enough about history, our Constitution, and our decisions to oppose the adoption of Rule 920. But for most of these Rules I do not have sufficient insight and experience to know whether the are desirable or undesirable. I must, therefore, disassociate myself from them." 411 U. S. 992, 994 (1973).

With respect to Amendments to the Rules of Criminal Procedure forwarded by the Court a year later, the following statement was

In conclusion, I suggest that it would be a mistake for the bench, the bar, or the Congress to assume that we are duplicating the function performed by the standing committee or the Judicial Conference with respect to changes in the various rules which come to us for transmittal. As I have said, over the years our role has been a much more limited one.

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appended to the Court's order, 416 U. S. 1003 (1974): "MR. JUSTICE DOUGLAS is opposed to the Court's being a mere conduit of Rules to Congress since the Court has had no hand in drafting them and has no competence to design them in keeping with the titles and spirit of the Constitution."

SUPREME COURT OF THE UNITED STATES

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

[April 22, 1993]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom JUSTICE SOUTER joins as to Part II, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 11 (relating to sanctions for frivolous litigation), and 26, 30, 31, 33, and 37 (relating to discovery). In my view, the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system.

I

Rule 11

It is undeniably important to the Rules' goal of "the just, speedy, and inexpensive determination of every action," Fed. Rule Civ. Proc. 1, that frivolous pleadings and motions be deterred. The current Rule 11 achieves that objective by requiring sanctions when its standards are violated (though leaving the court broad discretion as to the manner of sanction), and by allowing compensation for the moving party's expenses and attorney's fees. The proposed revision would render the Rule toothless, by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by providing a 21–day "safe harbor" within which, if the party accused

of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.

To take the last first: In my view, those who file frivolous suits and pleadings should have no "safe harbor." The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty. The proposed revision contradicts what this Court said only three years ago: "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 398 (1990). The advisory committee itself was formerly of the same view. *Ibid.* (quoting Letter from Chairman, Advisory Committee on Civil Rules).

The proposed Rule also decreases both the likelihood and the severity of punishment for those foolish enough not to seek refuge in the safe harbor after an objection is raised. Proposed subsection (c) makes the issuance of any sanction discretionary, whereas currently it is *required.* Judges, like other human beings, do not like imposing punishment when their duty does not require it, especially upon their own acquaintances and members of their own profession. They do not immediately see, moreover, the system-wide benefits of serious Rule 11 sanctions, though they are intensely aware of the amount of their own time it would take to consider and apply sanctions in the case before them. For these reasons, I think it important to the effectiveness of the scheme that the sanctions remain mandatory.

Finally, the likelihood that frivolousness will even be *challenged* is diminished by the proposed Rule, which restricts the award of compensation to "unusual circum-

stances," with monetary sanctions "ordinarily" to be payable to the court. Advisory Committee Notes to Proposed Rule 11, pp. 53–54. Under Proposed Rule 11(c)(2), a court may order payment for "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation" only when that is "warranted for effective deterrence." Since the deterrent effect of a fine is rarely increased by altering the identity of the payee, it takes imagination to conceive of instances in which this provision will ever apply. And the commentary makes it clear that even when compensation is granted it should be granted stingily—only for costs "directly and unavoidably caused by the violation." *Id.*, at 54. As seen from the viewpoint of the victim of an abusive litigator, these revisions convert Rule 11 from a means of obtaining compensation to an invitation to throw good money after bad. The net effect is to decrease the incentive on the part of the person best situated to alert the court to perversion of our civil justice system.

I would not have registered this dissent if there were convincing indication that the current Rule 11 regime is ineffective, or encourages excessive satellite litigation. But there appears to be general agreement, reflected in a recent report of the advisory committee itself, that Rule 11, as written, basically works. According to that report, a Federal Judicial Center survey showed that 80% of district judges believe Rule 11 has had an overall positive effect and should be retained in its present form, 95% believed the Rule had not impeded development of the law, and about 75% said the benefits justify the expenditure of judicial time. See Interim Report on Rule 11, Advisory Committee on Civil Rules, reprinted in G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures, App. I-8–I-10 (2d ed. 1991). True, many lawyers do not like Rule 11. It may cause them financial liability, it may damage their professional reputation in front of important clients, and the cost-of-litigation savings it produces are savings not to lawyers but to litigants. But the overwhelming approval of the Rule by the federal

district judges who daily grapple with the problem of litigation abuse is enough to persuade me that it should not be gutted as the proposed revision suggests.[1]

II

Discovery Rules

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information "relevant to disputed facts alleged with particularity." See Proposed Rule 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery.* It will likely *increase* the discovery burdens on district judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohib-

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[1] I do not disagree with the proposal to make law firms liable for an attorney's misconduct under the Rule, see Proposed Rule 11(c), or with the proposal that Rule 11 sanctions be applied when claims in pleadings that at one time were not in violation of the rule are pursued after it is evident that they lack support, see Proposed Rule 11(b); Advisory Committee Notes to Proposed Rule 11, p. 51.

It is curious that the proposed rule regarding sanctions for discovery abuses *requires* sanctions, and specifically recommends financial sanctions and compensation to the moving party. See Proposed Rule 37(a)(4)(A), (c)(1). No explanation for the inconsistency is given.

iting, in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.

It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, see *id.*, at 94, been subjected to any significant testing on a local level. Two early proponents of the duty-to-disclose regime (both of whom had substantial roles in the development of the proposed rule—one as Director of the Federal Judicial Center and one as a member of the advisory committee) at one time noted the need for such study prior to adoption of a national rule. Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 723 (1989); Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295, 1361 (1978). More importantly, Congress itself reached the same conclusion that local experiments to reduce discovery costs and abuse are essential *before* major revision, and in the Civil Justice Reform Act of 1990, Pub. L. 101–650, §§ 104, 105, 104 Stat. 5097–5098, mandated an extensive pilot program for district courts. See also 28 U. S. C. §§ 471, 473(a)(2)(C). Under that legislation, short-term experi-

ments relating to discovery and case management are to last at least three years, and the Judicial Conference is to report the results of these experiments to Congress, along with recommendations, by the end of 1995. Pub. L. 101–650, § 105, 104 Stat. 5097–5098. Apparently, the advisory committee considered this timetable schedule too prolonged, see Advisory Committee Notes to Proposed Rule 26, p. 95, preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.[2] See Fed. Rule Civ. Proc. 26.

I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations. See generally Bell, Varner, & Gottschalk, Automatic Disclosure in Discovery—The Rush to Reform, 27 Ga. L. Rev. 1, 28–32, and nn. 107–121 (1992). Indeed, after the proposed rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 U. S. C. § 2071(b), public criticism was so severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule. 27 Ga. L. Rev., at 35.

* * *

Constant reform of the federal rules to correct emerging

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[2] For the same reason, the proposed presumptive limits on depositions and interrogatories, see Proposed Rules 30, 31, and 33, should not be implemented.

problems is essential. JUSTICE WHITE observes that Justice Douglas, who in earlier years on the Court had been wont to note his disagreements with proposed changes, generally abstained from doing so later on, acknowledging that his expertise had grown stale. *Ante*, at 5. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address. It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.

In the respects described, I dissent from the Court's order.