

5-2005

## Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process

Glenn S. Koppel

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# Toward A New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process

*Glenn S. Koppel\**

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## I. INTRODUCTION

There is a sense of *déjà vu* to the vision of a uniform body of state procedural law applicable in every state court throughout the nation. *Swift v. Tyson*'s<sup>1</sup> dream of a nationally uniform body of state substantive common law<sup>2</sup> that mirrored an evolving body of uniform federal common law never materialized because state courts refused to defer to federal common law, which was applied only in federal court.<sup>3</sup> *Swift* itself was overturned in 1938 by the Supreme Court's ruling in *Erie Railroad v. Tompkins*<sup>4</sup> that federal courts must defer to the substantive lawmaking authority of state courts. But almost simultaneously with the demise of *Swift*, the dream of uniform state common law was reincarnated into a vision of uniform state *procedural* law through the enactment of the Rules Enabling Act (REA) and the adoption of the Federal Rules of Civil Procedure.

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1. 41 U.S. 1 (1842).

2. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 2.36 (5th ed. 2001) ("The rule in *Swift v. Tyson* might have formed the basis for pervasive expansion of federally formulated decisional law. If the state courts had deferred to federal court decisional law, a nationally uniform common law might have developed as it did in Canada.")

3. *Id.* ("As it happened, the doctrine of *Swift v. Tyson* was extended to many matters that seemed 'purely local,' but the rules involved were applied only in federal court." (citing PAUL M. BATOR ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 694-702 (2d ed. 1973))).

4. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

The Federal Rules prescribed a uniform code of federal procedure applicable in every federal district court, replacing the hodgepodge of federal practice that had developed under the Conformity Act of 1872.<sup>5</sup> Inter-federal district court uniformity was premised on the ideal that “any lawyer could go to any federal court, and be secure that she could understand and master the procedure required, since that procedure would be at once uniform and simple.”<sup>6</sup> Just as Justice Story had hoped that state courts would defer to an evolving and enlightened body of uniform federal decisional law, so too did the proponents of the REA expect the states to follow the uniform body of procedural law embodied in the Federal Rules.<sup>7</sup> They hoped to produce intrastate procedural uniformity<sup>8</sup> and reverse the prior federal court practice under the Conformity Act of following local state procedure. As states replicated the federal rules, interstate procedural uniformity throughout state courts would result.<sup>9</sup>

During the first thirty years after their adoption, the Federal Rules realized the drafters’ goal of inter-federal district procedural uniformity.<sup>10</sup> And, until the mid-1970s,<sup>11</sup> it seemed that the goal of

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5. See Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 757 (1995) (“[The adoption of the Federal Rules of Civil Procedure in 1938] represented a triumph of uniformity over localism.”).

6. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2018 (1989).

7. See, e.g., Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 320 (2001) (noting the expectation behind the Rules Enabling Act that “the Federal Rules would be so enlightened and simple that intra-state uniformity would follow naturally as states voluntarily adopted the federal model.”); Subrin, *supra* note 6, at 2026 (“To those who advocated federal rules, intrastate uniformity was to result from the modeling by state supreme courts of state procedure on federal.”).

8. The term “intra-state uniformity” is employed in this article to mean “identical formal (or textual) rules for federal and state courts.” Main, *supra* note 7, at 320. Professor Main notes that intra-state uniformity has also been used to connote uniformity among federal district courts within a given state. *Id.* at 324; see also Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 80 (1997) (“I use intrastate uniformity to describe a state’s having the same civil procedural rules in both its state courts and in the federal district courts that are housed within the state.”).

9. See Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 274 (1989) (“The concept of uniformity among federal district courts, between federal and state courts, and among the states represents a variation on the idea of simplicity.”). *But see* Subrin, *supra* note 6, at 2007-08 (noting Senator Thomas Walsh’s opposition to uniform federal rules: “[Walsh] believed it was unlikely . . . that all states would agree to follow a new set of federal rules. Conditions around the country varied and different regions needed different procedures.”).

10. See Subrin, *supra* note 8, at 80 (“By inter-federal district court uniformity, I mean national procedural uniformity across all federal district courts.”); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 551-52:

interstate procedural uniformity would be achieved from the top down as a lengthening list of states adopted the federal rules.<sup>12</sup> The words of one commentator reflected this optimism: "The drafters of the 1938 Federal Rules of Civil Procedure hoped to establish those rules as a model that the states could adopt, thus fostering national and intrastate procedural uniformity."<sup>13</sup>

Despite this early trend, however, the vision of interstate procedural uniformity has not materialized for two reasons. First, the uniformity of the federal rules has fragmented with the proliferation of local court rules, resulting in a balkanization of federal procedure.<sup>14</sup>

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The Advisory Committee and the federal judiciary were able to maintain the fundamental procedural tenets [underlying the rules] during the first three decades after the 1938 federal rules' adoption. . . . The judges also preserved and fostered uniformity by prescribing comparatively few local procedures, especially strictures that were inconsistent with the federal rules of acts of Congress.

11. See John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 358-59 (2002/2003):

[A]fter a nearly constant rate of state-court replication of the FRCP from 1949 to 1975, a twenty-six-year period in which the number of replica jurisdictions rose from four to twenty-three, in the ensuing ten years from 1975 to 1985 not a single state had joined the ranks of federal replicas . . . [and] the pace of state court procedural reform stopping short of replication but, nonetheless, moving state procedure substantially closer to the federal model had also slackened almost to a halt during 1975-1985.

12. See, e.g., Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 937 (1996) ("State courts and legislatures in most states soon perceived [the benefits of federal discovery] and replicated the federal practice in their state courts."); Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 602 (2002) ("State procedure rules soon followed the federal model as a majority of the states adopted the main features of the new federal procedure."); Thomas Wall Shelton, *A New Era of Judicial Relations*, 23 CASE & COMMENT 388, 393 (1916):

The conceded failure of state conformity called for a substitute. The Federal government could not follow the states, so it was reasonable to give the states an opportunity to follow the Federal government. That state which tries to live unto itself will suffer, if it does not perish. In spite of ourselves, we are all for one and one for all . . . . [A] simple, scientific correlated system of rules, such as would be prepared and promulgated by the Supreme Court of the United States, would prove a model that would, for reasons of convenience as well as of principle, be adopted by the states.

13. Carl Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 ARIZ. ST. L.J. 615, 615 (2002); see also Carrington, *supra* note 12, at 938 ("Over the last three decades, there has been a degeneration of federal civil practice.").

14. See Chemerinsky & Friedman, *supra* note 5, at 737 (criticizing the trend toward localism in federal rulemaking); A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1579 (1991) (suggesting that judges, "impatient with the failure of the national system to solve pressing, indeed urgent, procedural problems," craft local rules as a means of experimenting with pragmatic solutions to those perceived problems, e.g., discovery abuse, frivolous civil rights suits, inordinately heavy caseloads.); Main, *supra* note 7, at 315-16 ("The proliferation of local rules of procedure in the late 1980s and early 1990s, the Civil Justice Reform Act of 1990, and the 1993 amendments to the discovery provisions of the Federal Rules of Civil Procedure, all have contributed to an increasing diversity of procedures in federal courts across the country."); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 380 (1992) ("What began as an aesthetic of procedural simplicity

There has been widespread scholarly criticism of the “movement to localism”<sup>15</sup> in federal procedure and the paucity of sound empirical research to inform the flurry of discovery reforms implemented by recent federal rules amendments, local court rules and Civil Justice Reform Plans implemented by district courts pursuant to the Civil Justice Reform Act of 1990 (“CJRA”).<sup>16</sup> Second, although the federal rules once exerted a powerful influence on state procedure,<sup>17</sup> during the last two decades state deference to the federal rules has waned as state jurisdictions have reasserted their rulemaking independence. In a 2002 update of his definitive 1986 study comparing state and federal procedural rules, Professor Oakley observed: “Not only has the trend toward state conformity to the federal rules stopped accelerating – it has substantially reversed itself.”<sup>18</sup> The “trend . . . away from

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has been transformed, over fifty years, into a reigning reality of procedural complexity. Today, federal practice and procedure is impossibly arcane.”)

15. Chemerinsky & Friedman, *supra* note 5, at 759; Tobias, *supra* note 13, at 615 (“The growing balkanization of federal civil procedure has received considerable critical commentary.”); Tobias, *supra* note 10, at 554 (“Another critical source of mounting dissatisfaction with the Federal Rules of Civil Procedure has been the profound increase in local procedures since the 1938 rules’ adoption, a phenomenon that has expanded exponentially in the last quarter century.”).

16. See Chemerinsky & Friedman, *supra* note 5, at 770-71:

[T]rue experimentation – which can be very valuable – requires accurate data collection and reporting, control groups, and a basis for assessing success and failure. The CJRA provides for none of this. Advisory groups necessarily engaged in extremely unscientific studies of cost and delay, as well as the state of the docket. There were no national questionnaires or studies. Much of the “evidence” collected was anecdotal. . . . [P]lans varied widely. For most of the districts there were no control groups. As the saying goes, “garbage in, garbage out.” The Judicial Conference’s conclusions cannot hope to have any real value, because the “data” are so unreliable. Experiments can yield important information, but not if they are designed improperly.

See also Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1940 (1989) (“We need fewer mind experiments and more field experiments, procedural rules as well as procedural theories that are ‘based on experience.’ . . . A ‘veil of ignorance’ may be an apt metaphor to describe federal rulemaking to date.”); Carrington, *supra* note 12, at 962-963, referring to local rules experimentation under the Civil Justice Reform Act:

Alas, there is very little science to be employed in these experiments. The experiments are uncontrolled; there is no scientific method employed in planning them; there are ninety-four experiments proceeding at once; and the experiments were to be completed within three years, long before secondary or tertiary effects can be experienced and measured.

See also Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 778 (1998) (“As a general matter, the Federal Rules of Civil Procedure have been drafted without the benefit of detailed empirical input.”).

17. As late as 1979, Professor Rowe observed that “[w]ell over half the states now have civil rules closely patterned after the Federal Rules of Civil Procedure, and movement toward adoption of federal-model rules continues in at least some of the other states.” Thomas D. Rowe, *A Comment on the Federalism of the Federal Rules*, 1979 DUKE L. J. 843, 843.

18. Oakley, *supra* note 11, at 355.

uniformity and toward localism”<sup>19</sup> in the federal rules is manifested in state civil procedure as well.

The “top-down” federal rules model for achieving inter-state uniformity has failed. During the past fifteen years, most states have adopted a bewildering variety of discovery rule amendments that diverge from the federal model.<sup>20</sup> A select group of trend-setting states—Arizona, Texas, Colorado, and Illinois—have outdistanced the federal rules in the pursuit of discovery reform, vying with federal rulemakers for leadership in discovery reform.<sup>21</sup> In 1992, Arizona, a so-called “replica” state<sup>22</sup> that traditionally conformed to the federal rules model of civil procedure, took off on its own discovery reform trip, adopting a package of discovery reforms more aggressive than anything the federal rules have implemented.<sup>23</sup> Colorado, Illinois, and Texas have followed in this divergence.<sup>24</sup> As illustrated in Part IV, most states have charted their own paths toward civil discovery reform, paths that diverge from each other and from the federal rules.<sup>25</sup> This phenomenon has produced a potpourri of variations in civil discovery rules. In Part II, I contend that variation in the kinds of procedural rules that impact on substantive rights is a detriment to the fair and efficient administration of civil justice,<sup>26</sup> and that the policy arguments supporting federal rules uniformity are equally applicable to state court procedure as well.

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19. Chemerinsky & Friedman, *supra* note 5, at 757.

20. See *infra* Part IV; see also, e.g., Moskowitz, *supra* note 12, at 613 (“Analysis of the changes in the discovery provisions of the fifty state rules of civil procedure over the past fifteen years reveals a very complex situation.”).

21. *Id.* at 647 (“While many states continue to follow the model of the Federal Rules, others are experimenting with innovations that follow quite different paths. These developments may be the harbinger of a future procedural regime, changing the traditional roles of both attorneys and judges in civil litigation.”).

22. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377 (1986).

23. See Tobias, *supra* note 13, at 624-27 (discussing the reforms); Thomas A. Zlaket, *Encouraging Litigators to be Lawyers: Arizona’s New Civil Rules*, 25 ARIZ. ST. L.J. 1, 1 (1993) (in which the author of Arizona’s new discovery rules criticizes the previous rules, which replicated the federal model, for encouraging lawyers to behave in an overly aggressive and adversarial manner).

24. Moskowitz, *supra* note 12, at 599 (observing that Texas, Arizona, Illinois, and Colorado “are engaged in a variety of procedural experiments attempting to make civil litigation cheaper, faster and more efficient.”); *id.* at 613 (“Analysis of the changes in the discovery provisions of the fifty state rules of civil procedure over the past fifteen years reveals a very complex situation.”) For a cogent “overview of general trends in state discovery rules together with vignettes of four specific states – Texas, Arizona, Illinois and Colorado,” see *id.* at 613-37.

25. See *infra* Part IV.

26. See Chemerinsky & Friedman, *supra* note 5, at 777-78 (“The diversity of practice [in federal courts] is troubling, because discovery most assuredly is a practice that affects substantive rights and litigation outcomes.”).



In deviating from the federal model, state judicial systems have experimented with state civil discovery, picking and choosing from a smorgasbord<sup>27</sup> of initiatives aimed at controlling excessive discovery and discovery abuse. In so doing, the states are functioning as “laborator[ies] for experimentation with promising mechanisms”<sup>28</sup> for reducing cost and delay in discovery. The proliferation of variations among state discovery rules, though subject to the same criticism directed at procedural disuniformity in the federal courts, has created fertile soil for empirical evaluation of these reforms to assess their efficacy. The resulting empirical data could be shared among all states, informing their continuing efforts at rules reform. Yet, no empirical evaluations have been forthcoming. For example, in Arizona, one of the leaders in aggressive discovery reform, no empirical evaluation of the Zlaket Rules has been undertaken during the nine years these rules have been in effect.<sup>29</sup> As proposed in Part III, state jurisdictions should collaborate to fashion model rules of civil procedure by fulfilling their role as laboratories for procedural innovation<sup>30</sup> based upon a coordinated and controlled process of empirical research.

A central thesis of this Article is that interstate procedural uniformity remains a desirable, viable and achievable goal despite the failure of the federal-rules-model approach. The momentum for developing uniform state procedural rules must, however, originate from the states themselves. The states have already shown their

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27. Professors Chemerinsky and Friedman use the term “smorgasbord” to describe the Civil Justice Reform Act’s Model Plan which contains a “menu” of case management techniques from which federal district courts can choose in formulating their respective case management plans under the Act. *Id.* at 771.

28. Moskowitz, *supra* note 12, at 613 (referring to “the changes in the discovery provisions of the fifty state rules of civil procedure over the past fifteen years” as an illustration in the procedural arena of Justice Brandeis’s characterization of states as “laboratories” in which experiments in the law might be conducted.); *see also* Tobias, *supra* note 13, at 629-30:

The Arizona Supreme Court should attempt to determine exactly how well its discovery reforms instituted during the 1990s have worked. . . . The Justices should carefully assemble, analyze and synthesize the maximum, feasible empirical data respecting these questions. Minimal empirical data currently exist because the Arizona Supreme Court has undertaken no formal attempt to study the impacts of the recent reforms generally, while baselines for comparing the effects of discovery devices’ application have yet to be established specifically.

29. *Id.* at 628; Moskowitz, *supra* note 12, at 625 (referring to Arizona’s drastic reform of its civil discovery rules and stating “no statistical confirmation of these premises [underlying the reforms] is available and no studies have been performed regarding the effect of the rules despite the fact that the rules have been in effect for more than nine years”).

30. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

willingness to experiment, albeit haphazardly and largely uninformed by empirical research, with a wide variety of discovery reforms. I propose that this commitment be channeled, reinforced and sustained by an institutional mechanism that promotes cooperation and collaboration among state judicial systems in experimenting with rules of civil procedure for state courts based upon sound empirical data. If states refuse to follow the federal lead, they need to fashion a vigorous rulemaking process that supports a proactive, national rulemaking role for state courts independent of the federal approach. By pooling their rulemaking resources, state judicial systems can leverage their new assertiveness into an authentic and sustainable leadership role in civil procedure reform that is responsive to the needs of state courts.

Procedural diversity is built into the federal structure of fifty state judicial systems, which are natural laboratories for controlled procedural experimentation. Building upon existing structures, like the National Center for State Courts, state courts can move towards developing a model code of civil procedure based upon sound empirical data developed through centrally-controlled experiments that take advantage of existing procedural diversity. I characterize this approach to state rulemaking as a “new federalism” in the administration of state civil justice.

One can view a reinvigorated role for the states in crafting rules of state civil procedure as part of the resurgence of state government authority in substantive law<sup>31</sup> and constitutional rights<sup>32</sup> promoted by the Rehnquist Court’s “new federalism” jurisprudence. By “protect[ing] the principle that the states enjoy considerable freedom to compete as laboratories of social and economic policies,”<sup>33</sup> the “new federalism” has reversed, or at least slowed, the erosion of state authority brought about by the centralizing influence of New Deal legislation.<sup>34</sup> In the words of one commentator, the New Deal

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31. William H. Pryor, Jr., *Madison’s Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1181 (2002) (“[T]he Rehnquist Court has protected the principle that the states enjoy considerable freedom to compete as laboratories of social and economic policies.”)

32. Marianna Brown Bettman, *Identical Constitutional Language: What is a State Court to Do? The Ohio Case of State v. Robinette*, 32 AKRON L. REV. 657, 663 (1999) (“[T]he ‘new federalism’ permits state courts to provide greater protection for individual rights under their state constitutions than is required under federal constitutional standards.”).

33. Pryor, *supra* note 31, at 1181.

34. Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1281-83 (1997) (viewing the REA in the context of the New Deal and the balkanization of federal procedure as an aspect of the end of the New Deal). *But see* Carl Tobias, *Fin-De-Siècle Federal Civil Procedure*, 51 FLA. L. REV. 641, 643 (1999):

treated state governments "as little more than convenient districts for the administration of the federal government's policies."<sup>35</sup> Similarly, in the procedural arena, recent widespread efforts by state jurisdictions to experiment with their civil discovery rules heralds a reversal of the dominant influence of the federal judiciary that was ushered in by the 1938 Rules Enabling Act.

As a procedural variation on the "new federalism" theme, I propose that state judicial systems continue to develop their independent rulemaking capabilities, but not by competing with each other. Rather than *competing* as laboratories, I propose that states *cooperate* as laboratories through a mechanism of controlled experimentation designed to inform a collaborative rulemaking process leading to a model code of state civil procedure. Like the federal rules, these model rules would continue to evolve and improve through continued controlled experimentation among state courts. Acting individually, state judiciaries cannot match the rulemaking resources of the federal courts available through the U.S. Judicial Conference and the Federal Judicial Center. Collectively, however, the states can reduce their dependence on the federal judiciary by developing an enhanced capacity for independent rulemaking through a mechanism of voluntary cooperation that maximizes the role of state judicial systems as laboratories of civil procedure.

This Article identifies the possibilities that arise from two seemingly disparate critiques of contemporary procedural rulemaking: those that bemoan the lack of procedural uniformity as well as those that call for systematic empirical data to support rules reform. Several writers have proposed a system of controlled experimentation

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Professor Walker's reliance on the end of the New Deal as an explanation for the changes enables him to recount a rather neat story; however, what actually transpired appears more complex, subtle and untidy. I, therefore, offer complementary explanations for the four alterations and different views of their import while elaborating his account.

35. Pryor, *supra* note 31, at 1172-73:

Madison's second challenger appeared in the early twentieth century, with the rise of the Progressive Movement and later the New Deal. The adversaries of Madisonian federalism sought increased centralization of government power in the national government. I will call this view the "National Statist" vision of federalism. New Dealers have referred to it as "cooperative federalism." Where States' Rights federalism was centrifugal, National Statist or cooperative federalism was (and is) centripetal. The key development in the rise of National Statist federalism was the move away from any real sense that Congress is constrained by Article I, Section 8 of the Constitution. Thus unleashed, Congress entered a multitude of public policy areas once understood to be the exclusive domain of state governments, including a wide variety of business regulation and, more recently, matters of criminal law and public education. State governments' authority was curtailed. At the limit, state governments have been treated as little more than convenient districts for the administration of the federal government's policies, much like the German model.

within the federal judicial system to resolve the tension that otherwise exists between the need for local experimentation to provide empirical support for rules reform and norm of procedural uniformity.<sup>36</sup> I propose that the fifty state rule-making entities, many of which have already exercised their independent authority to adopt an enormous variety of civil discovery reform packages, are uniquely able to take advantage of controlled experimentation.

As discussed in Part II, most critical commentary addressing procedural disuniformity focuses on *interfederal district* fragmentation of uniform federal procedure.<sup>37</sup> The relatively limited scholarship that considers the impact of fragmentation on state civil practice focuses on *intrastate* disuniformity—the degree to which state civil procedure diverges from the federal model.<sup>38</sup> Legal scholarship has not taken the next logical step to assess the costs of *interstate* disuniformity and the benefits of uniform rules of state civil procedure.<sup>39</sup> The lack of scholarly attention to state court rulemaking processes is striking in light of the increasingly prominent role played by state courts in discovery reform<sup>40</sup> and the fact that state courts process the vast

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36. Carrington, *supra* note 12, at 962-63; Levin, *supra* note 14, at 1581-82; Tobias, *supra* note 10, at 618; Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67, 84 (1998).

37. See, e.g., Tobias, *supra* note 13, at 615 (“The growing balkanization of federal civil procedure has received considerable critical commentary.”).

38. See, e.g., *id.* at 616:

Although Congress, judges, attorneys and legal academicians have devoted considerable attention to federal procedure, these observers have essentially ignored the impacts of federal developments on state civil process. The comparatively limited comment those effects have received is unfortunate, because the individuals and entities with responsibility for state procedural reform often have derived helpful guidance from activities at the federal level.

Main, *supra* note 7, at 324 (noting that intrastate disuniformity “has received very little attention in the past decade” and suggesting that “[t]his lack of attention is a curious phenomenon because much of the uniformity of rhetoric devoted to the issue of inter-district disuniformity is similarly applicable to intra-state disuniformity.”); Moskowitz, *supra* note 12, at 595 (“Although state courts dispose of the vast majority of cases in the United States, academic writings on procedural matters, particularly discovery, often overlook this area.”).

39. The more general question of interstate judicial cooperation and coordination of state court proceedings has been addressed in the form of a proposal for a mechanism for interstate transfer and consolidation of state court litigation similar to 28 U.S.C. § 1407. See Elinor P. Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917, 963-79 (1982) (discussing proposal for interstate transfer and consolidation).

40. Moskowitz, *supra* note 12, at 613 (referring to “the changes in the discovery provisions of the fifty state rules of civil procedure over the past fifteen years” as an illustration in the procedural arena of Justice Brandeis’s characterization of states as “laboratories” in which experiments in the law might be conducted.)

majority of civil cases.<sup>41</sup> Section II refocuses the widespread criticism of the balkanization of the federal rules on the variety of civil discovery reforms implemented by state courts with little or no empirical support. Part II then argues that the “aesthetic”<sup>42</sup> of the procedural reform that informed the federal rules in 1938—“careful, informed study that leads to the adoption and amendment of simple rules that are uniform throughout the country”<sup>43</sup>—is equally applicable to state civil procedure.

Critics have also condemned the lack of “systematic, cumulative data [to improve the civil justice system, which] makes it possible for far-reaching policy proposals to be advanced on the basis of tendentious anecdotes,”<sup>44</sup> noting in particular that “little empirical research has been done to objectify and quantify discovery abuse.”<sup>45</sup> Part III develops the premise that a system of controlled empirical research is not only necessary for sound rule-making, but also promotes the benefits of procedural uniformity. The link between empirical research and uniformity was noted, on the federal level, by Professor Tobias, who argued that “[t]he maximum applicable empirical material must inform . . . attempts to limit proliferation [of federal court local rules].”<sup>46</sup> I argue, in Part II, that the seemingly random experimentation underway on the state level needs to be harnessed to improve the quality of rulemaking through a coordinated rulemaking process that empirically evaluates controlled experiments and shares resulting data to improve the quality of rulemaking and, where warranted, provides uniform approaches to shared problems and conditions among the states.

Part IV’s survey of recent state civil discovery reforms illustrates the magnitude of the problem of interstate disuniformity by showing that state jurisdictions have experimented with a myriad of discovery reforms<sup>47</sup> aimed at what is perceived to be runaway

41. *Id.* at 595 (“Although state courts dispose of the vast majority of cases in the United States, academic writings on procedural matters, particularly discovery, often overlook this area.”).

42. See Mullenix, *supra* note 14, at 380 (citing generally Janice Toran, *Tis A Gift To Be Simple: Aesthetics And Procedural Reform*, 89 MICH. L. REV. 352 (1990)).

43. *Arnstein v. Porter*, 154 F.2d 464, 479 (2d Cir. 1946) (Clark, J., dissenting).

44. Marc Galanter et al., *How to Improve Civil Justice Policy: Systematic Collection of Data on the Civil Justice System is Needed for Reasoned and Effective Policy Making*, 77 JUDICATURE 185, 185 (1994)

45. Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a) – “Much Ado About Nothing?”*, 46 HASTINGS L.J. 679, 703 (1995).

46. Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 579 (2002).

47. Moskowitz, *supra* note 12, at 599 (observing that Texas, Arizona, Illinois, and Colorado “are engaged in a variety of procedural experiments attempting to make civil litigation cheaper,

discovery. Part V sets forth my proposal for a mechanism to centralize and coordinate controlled state procedural experimentation and to fashion model rules of state civil procedure.

## II. THE CASE FOR PROCEDURAL UNIFORMITY

### A. *The Problem of Interstate Procedural Disuniformity*

#### 1. The Decline of Inter-Federal District Uniformity: Cracks in the Federal Rules Model of National Procedural Uniformity

The drafters of the Federal Rules not only intended to provide a uniform body of federal procedure applicable in every federal district court—*inter-federal district court uniformity*<sup>48</sup> but also to provide a model of procedural uniformity to be followed by the states (*intra-state uniformity*).<sup>49</sup> Reformers thereby hoped to produce uniform state procedure—*inter-state uniformity*.<sup>50</sup> As the role of the Federal Rules in achieving inter-federal district uniformity of procedure declined during the 1980s and 1990s, so, too, did the role of the federal rules as a model of uniformity for the states to emulate.

The federal model of simplified and uniform rules has fragmented.<sup>51</sup> Professor Tobias cogently describes this widely criticized phenomenon:

Observers of the increasingly fractured procedural regime in the federal arena have voiced concerns about the mounting numbers of strictures, the accelerating pace of procedural change and the growing inconsistency of the requirements imposed. Illustrative are the major 1983 and 1993 federal discovery amendments, which new discovery provisions further revised in December 2000. The Civil Justice Reform Act of 1990 concomitantly encouraged all ninety-four federal districts to prescribe local procedures for reducing expense and delay in civil litigation, and these measures

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faster and more efficient.”); *id.* at 613 (“Analysis of the changes in the discovery provisions of the fifty state rules of civil procedure over the past fifteen years reveals a very complex situation.”).

48. Subrin, *supra* note 8, at 80 (“[T]he twentieth century ABA movement for uniform federal procedural rules started with the proposition that the Conformity Act of 1872 had failed, and that lawyers had difficulty knowing what procedure would apply in any given federal district court. The procedure should be the same in every federal district court, the argument went (inter-federal district court uniformity).”)

49. *Id.* (“The Supreme Court of the United States would make such modern, correlated, and enlightened rules, the proponents continued, that the states would see the light and follow suit (intrastate uniformity).”)

50. Tobias, *supra* note 13, at 615 (“The drafters of the 1938 Federal Rules of Civil Procedure hoped to establish those rules as a model that the states could adopt, thus fostering national and intrastate procedural uniformity.”).

51. See Carrington, *supra* note 12, at 938 (“Over the last three decades, there has been a degeneration of federal civil practice.”).

conflicted with the Federal Rules. The fragmentation described above is most clearly manifested in the area of discovery, which is a critical feature of many modern civil lawsuits.<sup>52</sup>

Professor Resnik explains the proliferation of local rule-making as a result of the "exercise of individualized discretion" by federal judges that is "built into the federal rules of 1938" and is a "feature that works against the aspiration of uniformity."<sup>53</sup> By the 1980s, a "failing faith"<sup>54</sup> in flexible pleading rules and liberal discovery to foster decisions on the merits—a fundamental precept of the initial Federal Rules—accelerated local rules proliferation, further undermining the precept of procedural uniformity. Congressional and judicial impatience with the national rulemaking authority's perceived failure to address problems of cost and delay associated with the so-called "litigation explosion," attributed largely to liberal discovery,<sup>55</sup> prompted a variety of local experiments that circumvented and, in some cases, conflicted with the Federal Rules. Judges have taken matters into their own hands, utilizing "local rules in an effort to shape pragmatic solutions."<sup>56</sup> Congressional impatience with the pace

52. Tobias, *supra* note 13, at 615.

53. Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 200 (1997):

The observation that trial judges are deeply committed to their own discretion helps to explain the proliferation of local rulemaking, both before and after the CJRA. Uniformity is, inevitably, in tension with the exercise of individualized discretion, and thus, built into the federal rules of 1938 is a feature that works against the aspiration of uniformity.

54. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 497 (1986) ("We have moved from arguments about the need to foster judicial decisions "on the merits" by simplifying procedure to conversations about the desirability of limiting the use of courts in general and of the federal courts in particular."); *id.* at 540 ("In the nineteen-thirties, the rulemakers railed against the technical, 'rigid' procedure of their time and sought flexibility by liberal rules of pleading and by discovery (to get to the 'truth' quickly).").

55. Tobias, *supra* note 46, at 540:

By the 1970s, a number of developments had fostered increasing disenchantment with the federal rules. Some observers contended that the federal courts were encountering a "litigation explosion," whereby counsel and parties were pursuing too many civil lawsuits, a number of which lacked merit. Additional critics found troubling the abuse of the litigation process, particularly discovery, by lawyers and clients. Certain judges and attorneys argued that the federal rules were unresponsive to these difficulties and that a few features of the initial rules, namely their flexible, open-ended character, especially during discovery, might even have led to the complications.

56. See Levin, *supra* note 14, at 1579:

I suggest that we are dealing with nothing less than how courts, impatient with the failure of the national system to solve pressing, indeed urgent, procedural problems, utilize local rules in an effort to shape pragmatic solutions. . . . Judges perceive problems: discovery abuse, frivolous civil rights suits, or simply inordinately heavy caseloads. Solutions are proposed, and the judges either have confidence in them or are willing to try them because others have confidence in them. Local rules offer the most expeditious means of experimenting.

of change in the Federal Rules to reduce cost and delay contributed to local rules proliferation through the enactment in 1990 of the CJRA, which spawned a variety of cost and delay reduction plans.<sup>57</sup>

Some observers predict the eventual demise of the federal rules Advisory Committee's traditional role as the guardian of uniformity. According to one writer, the federal rules Advisory Committee itself "dealt a serious symbolic, and perhaps fatal, blow to the cause of a national, uniform procedural code" when it included a provision allowing local districts to alter, or to opt out completely from, the 1993 required disclosure amendment to Rule 26.<sup>58</sup> Another commentator attributes "the demise of the influence of the Advisory Committee in judicial rulemaking"<sup>59</sup> to the politicization of procedure that is shifting the locus of federal rulemaking authority to Congress, which is more

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See also Tobias, *supra* note 46, at 540-41 ("Local procedures became important vehicles for implementing several solutions – such as increased emphasis on managerial judging and on the pretrial process and enhanced judicial discretion – which districts and judges applied in attempting to rectify the problems identified in this paragraph.").

57. See, e.g., Chemerinsky & Friedman, *supra* note 5, at 758-59 ("The CJRA expressly invites every one of the ninety-four districts to adopt its own model of how federal litigation should proceed, dealing with such important topics as case management, tracking for different cases, motion practice, and alternative dispute resolution."); Mullenix, *supra* note 14, at 380-81:

The Civil Justice Reform Act is at war with the concept of uniform procedural rules throughout the federal district courts. The Act instead directly contributes to an increased balkanization of federal civil procedure, a process that began with *Federal Rule of Civil Procedure 83*, which authorizes the creation of local rules. What began as an aesthetic of procedural simplicity has been transformed, over fifty years, into a reigning reality of procedural complexity. Today, federal practice and procedure is impossibly arcane. . . . A federal practitioner must now know, in addition to the Federal Rules of Civil and Appellate Procedure, the existing local rules of ninety-four district courts and eleven federal circuits. The practitioner simply cannot know the procedures of any other federal district without looking them up, just as an out-of-state practitioner must research the rules of a foreign jurisdiction. As a consequence of the Act, the practitioner's life will now be further complicated by the overlay of new rules, measures, and programs promulgated and implemented on the recommendation of ninety-four local advisory groups.

See also Tobias, *supra* note 10, at 548 (noting that the adoption by district courts of a wide variety of civil justice expense and delay reduction plans as required by the CJRA "have further fragmented the already fractured condition of civil procedure and may actually have increased expense and delay in civil suits . . .").

58. Tobias, *supra* note 46, at 552-53:

The enormous symbolic significance of the local option mechanism may well have surpassed its great pragmatic importance. Many federal courts experts have long viewed the Advisory Committee as the "Defender of the Faith" in the national, consistent procedural regime which the 1938 Rules instituted. When that entity, seemingly for purposes of political expediency or to revive its diminishing influence, acceded to an approach which facilitated the prescription of conflicting strictures that govern a significant constituent of the increasingly emphasized pretrial process, thereby exacerbating local proliferation, the Committee dealt a serious symbolic, and perhaps fatal, blow to the cause of a national, uniform procedural code.

59. Linda Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991).



directly responsive to the political influence of lobbyists.<sup>60</sup> Local rules have been used by Congress and the Judicial Conference as a convenient tool with which to evade politically volatile issues.<sup>61</sup>

Inter-federal district court disuniformity complicates federal litigation, increasing cost and delay in the administration of civil justice.<sup>62</sup> Many legal scholars have criticized inter-federal district court disuniformity in the realm of discovery, which “is a practice that affects substantive rights and litigation outcomes.”<sup>63</sup> In this vein, Professor Subrin asks whether “similar cases [can] be decided in similar ways and with similar results when the discovery rules and other rules have become so divergent.”<sup>64</sup> Critics have described contemporary federal procedure as “impossibly arcane,”<sup>65</sup> cluttered<sup>66</sup> by local rules that are “overly complex, very different, and even inconsistent, or are quite difficult to find, comprehend, and satisfy.”<sup>67</sup>

60. *Id.* at 801-02 (1991) (“[T]he inevitable politicization of the Civil Rules Advisory Committee foreshadows the decline of that body’s role in procedural rule-drafting. . . . [T]he partisan rule reformers eventually will abandon the Advisory Committee and take their causes to other rulemaking bodies, namely the congressional committees with federal rulemaking oversight.”).

61. Subrin, *supra* note 6, at 2019 (“Perhaps because there is no consensus, Congress and the Judicial Conference repeatedly try to solve problems by leaving important questions to local rules.”)

62. Carrington, *supra* note 12, at 951 (“By the mid-1980s, the legal clutter by local rules had become an impediment to the practice of law, a source of cost and delay, and a significant trap for the unwary.”).

63. Chemerinksky & Friedman, *supra* note 5, at 778 (“The diversity of practice [in federal courts] is troubling, because discovery most assuredly is a practice that affects substantive rights and litigation outcomes.”); Subrin, *supra* note 6, at 2023-24 (noting significant difference among federal district courts with respect to local discovery rules, including rules imposing discovery limits); Tobias, *supra* note 13, at 615 (“The fragmentation [of the federal procedural rules] . . . is most clearly manifested in the area of discovery, which is a critical feature of many modern civil lawsuits.”).

64. Subrin, *supra* note 6, at 2047.

65. See, e.g., Mullenix, *supra* note 14, at 380:

What began as an aesthetic of procedural simplicity has been transformed, over fifty years, into a reigning reality of procedural complexity. Today, federal practice and procedure is impossibly arcane. . . . A federal practitioner must now know, in addition to the Federal Rules of Civil and Appellate Procedure, the existing local rules of ninety-four district courts and eleven federal circuits. The practitioner simply cannot know the procedures of any other federal district without looking them up, *just as an out-of-state practitioner must research the rules of a foreign jurisdiction*. As a consequence of the [Civil Justice Reform Act], the practitioner’s life will now be further complicated by the overlay of new rules, measures, and programs promulgated and implemented on the recommendation of ninety-four local advisory groups.

(emphasis added)

66. Carrington, *supra* note 12, at 946 (“Localism creates legal clutter. . . .”)

67. Tobias, *supra* note 10, at 605 (noting the adverse impact on cost and delay of disuniformity in federal rules: “Judges, lawyers, and parties simply confront too many requirements, substantial numbers of which are overly complex, very different, and even inconsistent, or are quite difficult to find, comprehend, and satisfy.”).

They also assert that such rules give a tactical advantage to the local “cognoscenti” over the outside practitioner and to the “expert litigator over the lawyer making episodic appearances in court.”<sup>68</sup> Other scholars have observed that localism increases the cost of legal services by requiring out-of-district litigants to retain local counsel, restricting competition for legal services.<sup>69</sup> Local procedure has also been criticized for “complicat[ing] federal practice, particularly for entities that litigate in multiple districts, such as the Department of Justice, public interest organizations like the Sierra Club, and large corporations.”<sup>70</sup>

As noted in Parts II.A.3 and illustrated in Part IV, state procedure—particularly discovery practice—exhibits the same phenomenon of fragmentation that afflicts federal procedure.

The problem of fragmentation of federal procedure is compounded by non-existent or inadequate empirical research to evaluate local procedural experimentation. Historically, local rules experimentation has frequently informed national rulemaking policy.<sup>71</sup> Viewing federal district courts as procedural laboratories, some observers have defended procedural diversity as a “perceived good . . . in allowing experiments on a small scale.”<sup>72</sup> However, without sound empirical evaluation, the potential advantages of local

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68. Carrington, *supra* note 12, at 948 (noting that legal clutter diverts litigation from the merits to satellite controversies, “gives undue advantage to cognoscenti,” gives local lawyers “an advantage over counsel from other districts,” and favors the “expert litigator over the lawyer making episodic appearances in court.”); Mullenix, *supra* note 14, at 380 (“The practitioner simply cannot know the procedures of any other federal district without looking them up, just as an out-of-state practitioner must research the rules of a foreign jurisdiction.”) (emphasis added).

69. Carrington, *supra* note 12, at 946 (noting that legal clutter increases “the cost of legal services . . . by a diminution of competition and retention of redundant counsel”); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 932 (1999) (“Specialized local rules add to entry costs and reinforce the market power of local lawyers, at least if competition in the district is already weak. Indeed, one might predict the emergence of rather detailed local rules, since complex rules raise the costs of entry.”).

70. Tobias, *supra* note 10, at 605 (“These developments . . . enormously complicat[ed] federal practice, particularly for entities that litigate in multiple districts, such as the Department of Justice, public interest organizations like the Sierra Club, and large corporations.”); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1423-24 (1992) (criticizing inter-district disuniformity, e.g., complicates efforts of lawyers who litigated nationally, public interest litigants, lack of neutrality of increasingly balkanized procedure; “[p]rocedural choices that enhance complexity and disuniformity can foster particular values and serve specific interests;” balkanized procedure is fertile ground for capitalizing on tactical advantages).

71. Resnik, *supra* note 53, at 157 (“National rulemaking—be it proposed by Congress or the federal judiciary—frequently represents codification of practice and reflection of change rather than the commencement of newly-minted regimes.”) (emphasis removed).

72. Levin, *supra* note 14, at 1581.

experimentation remain unrealized. Professor Levin, one of many scholars advocating controlled experimentation, confirms the paucity of sound empirical data: "With a few notable exceptions, results are reported on the basis of impressions: 'We think this is working . . . the bar seems satisfied, or at least the bar can live with it.'"<sup>73</sup>

Although the CJRA required district courts to collect data to evaluate their respective case management plans, the data were not empirically sound. Professor Carrington has criticized this politically tainted effort at empirical research:

Alas, there is very little science to be employed in these experiments. The experiments are uncontrolled; there is no scientific method employed in planning them; there are ninety-four experiments proceeding at once; and the experiments were to be completed within three years, long before secondary or tertiary effects can be experienced and measured. In this respect, the Act is further confirmation of the disjunction between the politics of court reform and the realities of what happens in court.<sup>74</sup>

## 2. The Decline of Intra-State Uniformity: Fading Influence of the Federal Rules Model on State Procedure

The disintegration of the uniform federal rules ideal has been accompanied by a decline in the federal judiciary's influence over state procedure. Professor Oakley, in an update of his 1986 nationwide survey of state procedure conformity with the Federal Rules, concludes:

My fresh look at the federal rules in state courts reveals that, from a state perspective, the FRCP have lost credibility as avatars of procedural reform. Federal procedure is less influential in state courts today than at anytime in the past quarter-century.<sup>75</sup>

As a concomitant of waning federal leadership in procedural rulemaking, states are assuming greater responsibility for their own court rules. Consider the following observation by Professor Seymour Moskowitz in his survey of recent changes in state procedure rules:

While many states continue to follow the model of the Federal Rules, others are experimenting with innovations that follow quite different paths. These developments may be the harbinger of a future procedural regime, changing the traditional roles of both attorneys and judges in civil litigation.<sup>76</sup>

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73. *Id.* at 1582.

74. Carrington, *supra* note 12, at 962-63.

75. Oakley, *supra* note 11, at 355.

76. Moskowitz, *supra* note 12, at 647; *see also* Subrin, *supra* note 6, at 2045 n.233 (noting that, in an official "Statement of Duties for Reporter to an Advisory Committee on Rules of Practice and Procedure," one of the duties listed is "[to examine] the state experience in judicial procedure, giving particular attention to changes which have been made by those states which have followed the federal rules in adapting their local needs."); Oakley, *supra* note 11, at 359 (claiming that states "have elected to abstain from experimenting with dubious 'new ways' of adjudicating civil actions than that they have chosen to 'return to . . . old ways that they had

In 1992, Arizona, a former died-in-the-wool replica state<sup>77</sup> that reflexively followed the federal rules,<sup>78</sup> broke new ground in discovery reform. As more fully detailed in Part IV, Arizona's Zlaket Rules<sup>79</sup> created a comprehensive mechanism of required disclosure<sup>80</sup> that substantially replaced formal discovery. Arizona's disclosure rules are far more ambitious than the 1993 federal rules disclosure amendment<sup>81</sup> and represented a radical departure from the 1938 federal model of attorney-managed liberal discovery. The Zlaket Rules attempt nothing less than the elimination of "the adversarial component from the pretrial exchange of information,"<sup>82</sup> relegating civil discovery "to a process for filling gaps in the disclosure statements."<sup>83</sup>

Arizona's role reversal from procedural follower to leader dramatically symbolizes the emerging confidence of state jurisdictions to engage in procedural experimentation. Arizona was the first state to emulate the federal model<sup>84</sup> because its bench and bar believed that "the Federal Rules were the product of thousands of lawyers, and *Arizona was unlikely to improve upon them.*"<sup>85</sup> Fifty years later, the Zlaket Rules reflect a newly emergent confidence of Arizona's bench and bar that the state's "discovery scheme is *superior to the existing federal scheme* in that it better serves the needs of the Arizona judiciary, lawyers, parties and citizens."<sup>86</sup> The Arizona judiciary's

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previously renounced. It is the Federal Rules that appear to have moved away from the states, rather than vice versa.").

77. Oakley & Coons, *supra* note 22, at 1377.

78. See Subrin, *supra* note 6, at 2027-28 (noting, as late as 1967, that "Arizona would rather be uniform than right").

79. Moskowitz, *supra* note 12, at 598-99 ("Thomas Zlaket, author of Arizona's new discovery rules, articulates this indictment of discovery [as too expensive, too time consuming and often abusive] and argues the previous rules encouraged lawyers to act in an overly aggressive and adversarial manner.").

80. For a comprehensive summary of the Zlaket Rules, see Moskowitz, *supra* note 12, at 623-27.

81. In 2000, the federal disclosure rules were amended to reduce the scope of automatic disclosure, "so that parties will have to divulge less information before undertaking formal discovery." Subrin, *supra* note 6, at 2027-28.

82. Moskowitz, *supra* note 12, at 624 (citing ARIZ. R. CIV. P. 26.1 cmt.).

83. *Id.* at 623-24.

84. Oakley & Coons, *supra* note 22, at 1381; Subrin, *supra* note 6, at 2026 ("In 1940, Arizona became the first state to change its civil procedure to follow the federal model.").

85. *Id.* at 2027 (italics added).

86. See Tobias, *supra* note 13, at 616 (emphasis added):

Arizona has recently participated in considerable discovery reform, which differs somewhat from the federal discovery scheme. Moreover, the Arizona bench and bar may believe that their discovery scheme is superior to the existing federal scheme in that it better serves the needs of the Arizona judiciary, lawyers, parties and citizens.

*Id.* at 627:

dissatisfaction with recent amendments to the Federal Rules<sup>87</sup> and its willingness to depart from the federal discovery rules reflect a state rulemaking process that has matured since the Federal Rules were adopted. Arizona, by “tailor[ing] the reform of discovery and the pretrial process more precisely to the perceived problems with discovery and the litigation system in the Arizona state courts,”<sup>88</sup> set a tone for state court rulemaking that manifests a heightened awareness of the differences between state and federal courts.

Texas, Illinois, and Colorado<sup>89</sup> followed Arizona’s lead in crafting their own custom-tailored models of civil discovery and case management reform that depart significantly from the federal model,<sup>90</sup> as more fully set forth in Part IV.

One can only speculate about the causes of the declining influence of the federal rules model. First, the diminished authority of the Civil Rules Advisory Committee to maintain inter-federal district uniformity may also account in part for the decreasing gravitational pull of the Federal Rules on the states.<sup>91</sup> A second contributing factor may be the dubious merit of some of the recent federal discovery amendments.<sup>92</sup> For instance, the 2000 amendment to Federal Rule 26(b) that presumptively narrowed the scope of discovery has been universally criticized by legal scholars.<sup>93</sup> As a result, Professor Oakley

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The Arizona Supreme Court maintained a discovery system closely modeled on the federal approach and essentially premised the Arizona Rules of Civil Procedure governing discovery on the federal analogues for a half-century. The Arizona Supreme Court only departed from this practice in meaningful ways during the 1990s when the Justices decided to institute significant reform of civil discovery. . . . [T]he Arizona provisions differed somewhat from the federal changes [instituted in 1993] apparently because of dissatisfaction with the federal modifications and because the Arizona Supreme Court seemingly wished to tailor the reform of discovery and the pretrial process more precisely to the perceived problems with discovery and the litigation system in the Arizona state courts.

87. *Id.* at 627.

88. *Id.*

89. See Moskowitz, *supra* note 12, at 599 (“[Texas, Arizona, Illinois and Colorado] are engaged in a variety of procedural experiments attempting to make civil litigation cheaper faster and more efficient.”).

90. See Moskowitz, *supra* note 12, at 619-32 (providing case studies of Texas, Arizona, Illinois, and Colorado).

91. See *supra* text accompanying notes 76-77.

92. Oakley, *supra* note 11, at 359 (admitting to a belief that “not all the ‘newest’ federal rules are ‘the best’” and speculating that “the states have elected to abstain from experimenting with dubious ‘new ways’ of adjudicating civil actions than that they have chosen ‘to return to . . . old ways’ that they have previously renounced.”).

93. See, e.g., Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 594 (2001), referring to the “good cause” burden on the party seeking subject matter relevant discovery:

The party who is the target of the discovery request generally has greater knowledge of what information is responsive under the subject-matter standard and of the degree

suggests that “[i]t is the Federal Rules that appear to have moved away from the states, rather than vice versa.”<sup>94</sup> Third, although local procedural experimentation on both the state and federal levels is nothing new and, as noted by Professor Resnik, has often informed federal rulemaking, the states may have caught a more intense form of discovery reform fever than that which stimulated federal district courts to experiment with cost and delay reduction measures.<sup>95</sup> State courts labor under a vastly heavier caseload than federal courts and have fewer resources.<sup>96</sup> While the civil caseload of state courts of general jurisdiction increased by 32 percent between 1984 and 1999, new cases filed in federal courts decreased.<sup>97</sup> A fourth contributing factor to declining federal influence on state rules may be the emerging perception among state rulemakers that federal rules solutions to cost and delay may not be sufficiently tailored to the different circumstances of state courts. For example, one writer suggests that resource-poor state judiciaries may be less receptive to hands-on, labor intensive judicial management, and more inclined to use resource-conserving techniques like presumptive limits,<sup>98</sup> standing

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to which this information is arguably minor, expensive, inconvenient, or sensitive. The resisting party is far better equipped to make a case for the exercise of judicial discretion limiting discovery. The party seeking discovery is to some extent “flying blind” when trying to make a “good cause” case for broad discovery.

See also Carl Tobias, *The 2000 Federal Civil Rules Revisions*, 38 SAN DIEGO L. REV. 875, 885 (2001) (providing additional criticisms of the discovery rules).

94. Oakley, *supra* note 11, at 359.

95. See Moskowitz, *supra* note 12, at 611 (“Similar to developments in federal procedure, the trend to limitations on discovery in state courts began in the 1970s.”).

96. See Moskowitz, *supra* note 12, at 612:

The high volume of cases, shortage of judges and courtrooms and other deficiencies in the infrastructure needed to handle cases are widely acknowledged today. In 1999, more than ninety-one million new cases were filed in state courts nationwide, almost the exact number filed in 1998.

Subrin, *supra* note 8 at 82-83 (“The federal court system has considerably more court personnel than in most, if not all, state trial courts.”); *National State Court Caseload Trends, 1984-1993*, 1 CASELOAD HIGHLIGHTS: EXAMINING THE WORK OF THE STATE COURTS 1 (Nat’l Cent. for State Courts ed., 1995) (“State courts accounted for over 98 percent of [90 million cases processed annually by federal and state courts combined from 1984 to 1993]. In 1993, state courts of general jurisdiction handled 85 times as many criminal cases and 27 times as many civil cases as the U.S. District Courts, with only 14 times as many judges.”), available at [http://www.ncsconline.org/D\\_Research/csp/Highlights/vol1no1.pdf](http://www.ncsconline.org/D_Research/csp/Highlights/vol1no1.pdf).

97. B. OSTROM ET AL., EXAMINING THE WORK OF STATE COURTS, 1999-2000: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 14 (Nat’l Cent. for State Courts ed., 2000), available at [http://www.ncsconline.org/D\\_Research/csp/1999-2000\\_Files/19992000\\_EWSC\\_Front.pdf](http://www.ncsconline.org/D_Research/csp/1999-2000_Files/19992000_EWSC_Front.pdf).

98. Subrin, *supra* note 6, at 2045 (“If the federal courts see their primary function as resolving complex disputes, they may tailor their procedures to fit that image; if the state courts are more concerned with routine cases, they may emphasize limiting, definitional procedural rules or summary processes with few procedural steps.”); *id.* at 2036-37:

case management orders (e.g., Colorado) and case tracking (e.g., Colorado's simplified procedures for cases under \$100,000<sup>99</sup>). As Professor Subrin suggests: "it may not make sense for state courts to use federal procedure as a model."<sup>100</sup> Finally, the political influence of the elite defense bar on federal rulemakers is counterbalanced in many states by the influence of the plaintiffs bar.<sup>101</sup>

### 3. The Problem of Uncoordinated Procedural Experimentation by States In an Era of Increasingly National State Court Litigation: A Crazy Quilt of Procedural Variation

During the last fifteen years, most states, like the federal district courts, have engaged in haphazard, uncoordinated procedural experimentation guided by little or no empirical data. Like the "Babel"<sup>102</sup> of local federal court procedure, state pretrial rules reflect a crazy quilt of confusing procedural variation that complicates state practice for out-of-state practitioners, especially counsel who defend corporations in state court litigation around the country.<sup>103</sup> Yet

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Many states have been reluctant to try to deal with discovery abuse by ad hoc, case-by-case judicial determinations. . . . '[T]he federal amendments are tailored to a federal system, which, unlike Massachusetts, relies on assigned rather than circuit judges, and on the availability of magistrates.' [quoting the Massachusetts Standing Advisory Committee of Civil Procedure Rules] . . . Massachusetts is by no means the only replica state to withhold its adoption of the new federal amendments. . . . Thus, very little of the population is covered by up-to-date Federal Rules in state court.

99. COLO. R. CIV. P. 16.1.

100. Subrin, *supra* note 8, at 83.

101. See, e.g., Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 614 (2001):

[E]lite lawyers have always had inordinate influence on national legal policy. The [federal] Rulemakers remain inordinately influenced by the procedural views of the elite bar, occasionally at the expense of other elements of the bar and the profession and society as a whole. If anything, the problem has become more pronounced as the private Corporate bar has taken on a greater role in Rulemaking.

Kevin Livingston, *Legislator's Ire Can't Stop the Trial Lawyers*, THE RECORDER, May 16, 2002, at 1 (referring to "the chummy relationship between the attorneys, who contribute a lot of money to campaigns, and the [California legislature's Judiciary] committee members, many of whom have a reputation for championing consumer causes"); Bill Ainsworth, *Silicon Valley's Political Coming of Age*, THE RECORDER, Oct. 31, 1996, at 2 ("The latest disclosure reports by the Consumer Attorneys of California show that the plaintiffs attorneys have raised \$1 million for legislative candidates this year—about twice as much as the California Technology Alliance."); Peter Scheer, *Plaintiffs Lawyers Are Their Own Worst Enemies*, THE RECORDER, Mar. 1, 1996, at 2 ("Whatever reserve of goodwill lawyers once enjoyed has been exhausted by the trial lawyers' relentless manipulation of the legislative process for their own advantage.").

102. See, e.g., Chemerinsky & Friedman, *supra* note 5 at 759 ("[T]oday the proliferation of local rules and the trend to local models of adjudication threaten to turn federal practice into a veritable Tower of Babel in which no court follows the process of any sister court.").

103. Moskowitz, *supra* note 12, at 599:

scholarly commentary on inter-district court disuniformity largely ignores similar problems caused by inter-state disuniformity. This blind spot is curious in light of the applicability of the critiques of localism in federal procedure<sup>104</sup> to inter-state procedural variation.<sup>105</sup>

Litigation in state court is increasingly national in scope. The National Center for State Courts reported in Spring 2003 that “98 percent of mass tort cases are ultimately resolved in state courts.”<sup>106</sup> One commentator has noted the “specter of ever-expanding large-scale litigation engulfing state and federal judicial systems. . . .”<sup>107</sup> Large-scale litigation, defined as “related cases involving numerous parties and spanning multiple forums,” includes simple multiparty accidents as well as complex toxic tort and product defect actions.<sup>108</sup> The American Law Institute has recognized that “huge multi-party, multiforum disputes have become a recurring feature of modern litigation.”<sup>109</sup> Increasingly, class actions—including those representing multistate classes—have been brought in state courts since the Supreme Court in *Snyder*,<sup>110</sup> *Zahn*<sup>111</sup> and *Eisen*<sup>112</sup> “knocked non-

Some [state court discovery rules] now utilize different discovery procedures in different types of cases, a departure from the “transsubstantive” nature of the federal rules. Mandatory disclosure is a central pretrial concept in many jurisdictions, with requirements far beyond those mandated in federal courts. A significant number limit the traditional discovery tools – depositions, interrogatories, requests for production of documents, etc. – in important ways. Some states now explicitly require judges to “manage” the pretrial process, and mandate or encourage the use of court drafted “standard discovery” in lieu of party-controlled information gathering.

(citations omitted)

104. See *supra* text accompanying notes 15, 61-71.

105. Cf. Main, *supra* note 7, at 324 (noting that intra-state disuniformity “has received very little attention in the past decade” and that “[t]his lack of attention is a curious phenomenon because much of the uniformity rhetoric devoted to the issue of inter-district uniformity is similarly applicable to intra-state uniformity.”).

106. *Mass Torts: Lessons in Competing Strategies and Unintended Consequences*, 2 CIVIL ACTION 1, 1-2 (Nat’l Ctr. for State Courts ed., 2003).

107. William W. Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529, 1536 (1995).

108. *Id.* at 1529; see also AMERICAN LAW INST., COMPLEX LITIGATION PROJECT 1-2 (Tentative Draft No. 3 1992) (“[A] wide variety of complex cases, such as a products liability, insurance coverage, and shareholder derivative suits, which do not involve federal questions, often must be brought in state courts” and noting that “the explosion in complex litigation extends to state courts. . . .”<http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> ) [hereinafter ALI Complex Litigation Project].

109. AMERICAN LAW INST., COMPLEX LITIGATION PROJECT 12 (1994).

110. *Snyder v. Harris*, 394 U.S. 332, 341 (1969) (plaintiffs may not aggregate damage claims of individual class members in order to satisfy the amount in controversy jurisdictional amount in diversity cases).

111. *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 301 (1973) (holding that in diversity class actions in federal court for money damages, each class member (not just the class representative) must satisfy the amount in controversy jurisdictional requirement). Since the enactment of the



federal question class actions out of the federal arena.”<sup>113</sup> Contributing to this phenomenon has been the perception that federal courts “have become less receptive to the class action device.”<sup>114</sup>

However, during the editing of this Article, Congress enacted the Class Action Fairness Act of 2005<sup>115</sup> (“CAFA”), on February 18, 2005, which expanded the diversity jurisdiction of federal courts over non-federal question class actions in which the aggregated damages exceed \$5 million, thereby partially overruling *Zahn*, and in which a member of the plaintiff class is a citizen of a state different from any defendant, thereby providing for minimal diversity.<sup>116</sup> It is too soon to assess the impact of CAFA on the volume of state-law based class actions that will be heard in state courts. As expressed by the Co-Chair of the Class Actions and Derivative Suits Committee of the ABA Section of Litigation:

Whether broadened federal jurisdiction over state-law based class actions will have its intended effect of limiting the types and numbers of cases that are able to proceed as class actions, of course, remains to be seen. In the meantime, however, we can expect to see defendants vigorously exercise the removal provisions while plaintiffs seek to work around them, testing the scope of the two-thirds/one-thirds provisions<sup>117</sup> and experimenting with new ways to bring “mass actions” that avoid the effect of the law.<sup>118</sup>

Also during the editing of this Article, in June 2005, the United States Supreme Court, in *Exxon Mobil Corporation v. Allapattah Services*<sup>119</sup>, expanded the reach of supplemental jurisdiction in diversity cases by holding that 28 U.S.C. §1367 statutorily overruled

Judicial Improvements Act of 1990, federal courts of appeal are split on the issue whether Section 1367 of the Act legislatively overrules *Zahn*. Compare *Free v. Abbott Labs.*, 51 F.3d 524, 527-29 (5th Cir. 1995) (*Zahn* overruled) and *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 930 (7th Cir. 1986) (same) with *Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 222 (3d Cir. 1999) (*Zahn* not overruled) and *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640 (10th Cir. 1998) (same).

112. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 179 (1974) (requiring individual notice to each class member identifiable through reasonable efforts in class actions brought under FED. R. CIV. P. 23(b) (3) regardless of the expense and also requiring the full cost to be borne by the plaintiffs).

113. Robert A Skirnick & Patricia I. Avery, *The State Court Class Action – A Potpourri of Differences*, 20 FORUM 750 (1985) (noting that *Snyder* and *Zahn* were intended “to relegate [small non-federal question cases] to state courts and thereby stem the rising tide of the federal court docket.”).

114. *Id.*

115. Class Action Fairness Act of 2005 § 4, Pub. L. No. 109-2, 119 Stat. 4 (“Federal District Court Jurisdiction for Interstate Class Actions”), amending 28 U.S.C. § 1332.

116. *Id.*

117. *Id.* Section 4 of CAFA provide exceptions to the expanded diversity provisions based, in part, on the percentage of class members who are citizens of the forum state. *Id.*

118. Scott L. Nelson, *The Class Action Fairness Act of 2005: An Analysis* (2005), available at [http://www.abanet.org/litigation/committee/classact/s5\\_analysis.pdf](http://www.abanet.org/litigation/committee/classact/s5_analysis.pdf).

119. 125 S. Ct. 2611 (2005)

*Zahn*.<sup>120</sup> Opting for a literal interpretation of Section 1367, the Court ruled that Congress authorized supplemental jurisdiction over jurisdictionally insufficient claims by plaintiffs permissively joined under Rule 20 and by certified class action members pursuant to Rule 23 so long as the “well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement.”<sup>121</sup>

The mushrooming asbestos litigation<sup>122</sup> illustrates the growing threat to the fair administration of civil justice posed by procedural diversity among state courts. Over the years, most asbestos litigation has migrated from federal to state courts.<sup>123</sup> A study by the Rand Institute for Civil Justice shows that, during the past two decades, asbestos cases have not only migrated from federal to state courts, but have also migrated inter-state to a new group of states procedurally friendly to large verdicts.<sup>124</sup> As a result, procedural variation among the states combined with substantive law variation to promote forum shopping by plaintiffs with the attendant risk “that similarly situated litigants may be treated differently and, as a result, unfairly.”<sup>125</sup> The Rand study confirms the link between differing state procedures and forum shopping across state lines:

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120. *Id.* at 2625.

121. *Id.* at 2620-2621.

122. A 2002 study by the Rand Institute for Civil Justice reports:

[T]he last few years have seen sharp increases in the number of asbestos claims filed annually, the number of firms named as defendants, and the costs of litigation to these defendants. These increases have led to growing burdens on the courts, greater costs to the firms named as defendants, and greater numbers of firms filing for bankruptcy. . . .

STEPHEN J. CARROLL ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION 11 (2002). “It is possible that millions of claims have yet to be made. . . . [W]e have seen only about half of the claims and roughly one-fourth to one-fifth of the eventual costs.” *Id.* at 86.

123. Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1745 (2002) (noting the volume of asbestos litigation in state courts and the disparity in verdicts: “The net effect of this decision has been to move all asbestos litigation to the state courts with no discernable federal-state interaction. The federal system is a substantially reduced force, except in the context of bankruptcy.”); CARROLL, *supra* note 122, at 29 (“Prior to 1988, 41 percent of the [asbestos] cases were filed in federal courts; by 1998, less than 20 percent were being filed in federal courts.”).

124. CARROLL, *supra* note 122, at 32:

“Forum shopping” is a term frequently used to refer to parties’ strategic efforts to find the most attractive forum to pursue their case. . . . In the early days of the [asbestos] litigation (1970-1987), 60 percent of asbestos personal injury cases filed in state courts were filed in four states: California, Pennsylvania, New Jersey, and Illinois. By 1998-2000, however, filings of asbestos cases in these states accounted for only 7 percent of the total. At the other extreme, five states – Mississippi, New York, West Virginia, Ohio, and Texas – that had accounted for 9 percent of the cases filed before 1988 accounted for 66 percent of filings between 1998 and 2000.

125. ALI Complex Litigation Project, *supra* note 108, § 4.02 at 51.

As a formal matter, the system frowns on such forum jockeying. The federal judiciary seeks to constrain forum shopping by applying the same procedural rules in all federal courts. Most states model their procedural rules upon the federal rules, but there are important differences between federal and state rules and among state rules. Because state substantive law and procedural rules differ – and because, in reality, informal practices differ across state and federal courts – our federal system provides strong incentives for plaintiffs to structure their lawsuits in ways that allow them to file in favorable forums. When defendants are able to do so, they in turn attempt to remove cases to forums that are favorable to them.<sup>126</sup>

Asbestos filings have migrated to states with joinder rules that permit large numbers of claims to be joined in one action.<sup>127</sup> (CAFA also takes aim at such multistate “mass actions” that it includes within the definition of “class actions.”<sup>128</sup>) Large-scale consolidation of asbestos claims “tilts the playing field against defendants” who frequently settle rather than risk a huge damage award on a single roll of the dice as well as the “potential for juries to peg the amount of a compensation award to the most injured plaintiff . . . however unrepresentative that plaintiff may be . . .”<sup>129</sup> For example, Mississippi’s liberal joinder rule “allows plaintiffs from out of state to join a lawsuit filed by in-state plaintiffs against out-of-state defendants.” According to the Rand report:

The result is something akin to a multistate class action, without the necessity for plaintiffs to meet the class certification requirement (F.R.C.P. 23[b][3]) that common issues predominate and without the protections against intra-class conflicts of interest required by the U.S. Supreme Court in *Amchem* (521 U.S. 591 [1997]).<sup>130</sup>

126. CARROLL, *supra* note 122, at 33.

127. McGovern, *supra* note 123, at 1740:

A fourth defendant theory to explain the recent increase in asbestos case filings is that asbestos litigation is proceeding manageably except in certain jurisdictions and that plaintiffs’ counsel have unfettered access to those jurisdictions for unlimited numbers of cases. By aggregating thousands of cases where juries will award large verdicts, plaintiffs’ counsel can create a dynamic that forces defendants to settle at exorbitant values. The mere act of appealing is unavailable if the bonding requirements alone would wreak financial havoc on a defendant. The solution to this kind of problem is to restrict the venue and consolidation rules to protect against the migration of large numbers of cases into unfriendly jurisdictions.

128. Class Action Fairness Act of 2005 § 4(a)(11)(A), Pub. L. No. 109-2, 119 Stat. 4:

For purposes of this subsection . . . , a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) . . . ) and (B) (“ . . . the term ‘mass action’ means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact . . . .

129. CARROLL, *supra* note 122, at 35:

In asbestos litigation, experience suggests that consolidation tilts the playing field against defendants, rather than against plaintiffs. As judges who favor mass consolidations as a calendar-clearing mechanism anticipate, defendants faced with a consolidated trial of thousands of cases are likely to settle.

130. *Id.* at 34.

Trial judges in Maryland, Mississippi and Virginia have “consolidated thousands of cases for trial” as a docket-clearing mechanism that promotes settlement.<sup>131</sup>

Different discovery rules can also produce different substantive outcomes in asbestos litigation.<sup>132</sup> For example, Mississippi’s rules do not authorize trial judges to order independent medical examinations of plaintiffs, which handicaps defendants’ efforts to refute plaintiffs’ allegations of asbestosis symptoms.<sup>133</sup>

The growing burden of mass tort litigation on state courts led to some tentative attempts at interstate cooperation among state judiciaries that stopped short of uniform procedural rules. In an effort to consolidate the burgeoning number of asbestos filings, states joined together to establish the Mass Tort Litigation Committee of the

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131. *Id.* at 35; see also Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1822 (1995):

When confronted by mass torts, many judges perceive an alluring commonality among cases that may lead them to make a critical shift in the balance of policies underlying tort law and civil procedure. Faced with seemingly repetitive trials and an unending queue of mass tort plaintiffs, some judges have decided that efficiency concerns call for a more collective rather than individual treatment of claims. More importantly, many of these same judges believe that fairness concerns—making sure that each individual receives some compensation in a reasonable period of time—also lead to a more collective approach. Thus, the balance of policies—between efficiency and corrective justice—shifts in the context of mass torts and leads to more nontraditional aggregative solutions to mass tort issues.

132. *Id.* at 1821:

Mass torts are different from normal torts. The sheer number of cases—the quantitative difference—inevitably leads to qualitative differences. The fundamental reasons for this qualitative shift can best be understood by examining the delicate tension among the policies underlying both substantive tort law and civil procedure. . . .

There is also a consensus that our standardized rules of civil procedure are driven by multiple policies: efficiency, fairness, and behavioral concerns. These policy goals are also not necessarily consistent in providing us with answers. In the area of discovery, for example, there is a constant tension among efficiency, fairness, and behavioral interests in the use or limitation of interrogatories, depositions, and motions to produce. The recent debate over Federal Rule of Civil Procedure 26(a)(1)(A) [mandatory disclosure] is an apt illustration.

133. The Rand Study cites other procedural variations that promote forum-shopping:

In Texas, where asbestos cases are dispersed over multiple jurisdictions and there are many different law firms now representing plaintiffs, defendants who are named on thousands of cases may be noticed on the same day for scores of trials in a dozen or more jurisdictions. This creates settlement pressures for defendants. In California, the Code of Civil Procedure § 340.2 gives priority for trial scheduling to all plaintiffs with a terminal illness, allowing plaintiffs with mesothelioma to get to trial quickly. Similarly, New York City has a special expedited trial schedule for asbestos plaintiffs with mesothelioma and other cancers. Elsewhere, plaintiffs with terminal illnesses sometimes die before their cases reach trial.

Conference of Chief Justices ("CCJ").<sup>134</sup> In light of the increasingly national scope of state court litigation and the problems created by inter-state procedural disuniformity, states should cooperate in formulating a comprehensive body of uniform civil procedure rules.

*B. The Benefits of Inter-State Procedural Uniformity: Toward a New Federalism in the Process of Crafting Rules of State Civil Procedure*

Civil litigation in state and federal courts is increasingly national and international in scope, crossing state lines as well as national boundaries.<sup>135</sup> For this reason, the aesthetic of the national procedural uniformity<sup>136</sup> that produced the Federal Rules in 1938 is even timelier today than it was in the first third of the Twentieth Century<sup>137</sup> and is applicable to both state and federal procedure. Procedural uniformity is assuming an international dimension as people, commerce, investment capital, and—through the worldwide web and satellite communications—ideas, move more freely across national boundaries. Drawing inspiration from the same Federal Rules that were intended to serve as a *national* model of procedural uniformity for the states, the American Law Institute ("ALI") recently drafted a model code of transnational civil procedure designed to apply to commercial disputes by courts of sovereign nations worldwide. To justify what might appear to be a utopian dream, the Introduction to the Principles and Rules of Transnational Civil Procedure cite the

134. Francis McGovern, *supra* note 123, at 1745-47 (citing JAMES G. APPLE ET AL., FEDERAL JUDICIAL CENTER, MANUAL FOR COOPERATION BETWEEN STATE AND FEDERAL COURTS 31-35 (1997)):

State judges also recognized the need to cooperate and formed the Mass Tort Litigation Committee ("MTLC") of the Conference of Chief Justices. During the 1980s and 1990s, judges consolidated massive numbers of asbestos claims in order to parry the strategy of some defendants who were slowing the velocity of settlements by refusing to settle until an individual case was set for trial.

135. Chemerinsky & Friedman, *supra* note 5, at 784 ("While it is certainly correct that much of the practice of law for many practitioners is local, it is also true that increasingly the practice of law is crossing not only state but national boundaries.")

136. See Mullenix, *supra* note 14, at 380 (citing Janice Toran, *'Tis A Gift To Be Simple: Aesthetics And Procedural Reform*, 89 Mich. L. Rev. 352 (1990)).

137. Subrin, *supra* note 6, at 2004 noted Federal Rules drafters' rationale for uniformity "tied to the needs of the business community":

The commercial need rationale was usually linked to an argument that the states had become more interrelated by the telephone, telegraph, train, and airplane. A 1928 Senate Judiciary Committee Minority Report favoring uniform federal rules asserted that:

State lines have not to-day the persuasive force of a hundred or fifty years ago. The development of the economic resources of the country has brought with it problems that know no boundaries, and a growing consciousness of the commercial necessity for national uniformity both in law and its administration.

“successful effort in the United States a half-century ago to unite many diverse jurisdictions under one system of procedural rules with the adoption of the Federal Rules of Civil Procedure”<sup>138</sup>:

The Federal Rules established a single procedure to be employed in federal courts sitting in 48 different semi-sovereign states, each with its own procedural law, its own procedural culture, and its own bar. The Federal Rules thereby accomplished what many thoughtful observers thought impossible – a single system of procedure for four dozen different legal communities. The project to establish Principles and Rules of Transnational Civil Procedure conjectures that a procedure for litigation in transactions across national boundaries is also worth the attempt.<sup>139</sup>

The list of persons associated with the ALI project reads like a “Who’s Who” of procedural scholars and jurists.<sup>140</sup> The effort to project the Federal Rules ethic of uniformity into the international legal arena lends credibility to a similar effort within the United States to realize the vision of the drafters of the Federal Rules of inter-state procedural uniformity. The transnational procedure project challenges the conventional wisdom “that national procedural systems are too different from each other and too deeply embedded in local political history and cultural tradition to permit reduction or reconciliation of differences among legal systems.”<sup>141</sup>

The globalization of business and, consequently, the internationalizing of litigation, have motivated the international legal community to reframe the role of sovereign national legal systems into cooperative players willing to move toward a common procedural system. An analogous process occurred in the United States during the twentieth century, prompted by the nationalization of business and, consequently, of litigation. Alongside the “historical conception of our system as a federal union of independent states”<sup>142</sup> developed a new conception of states as subdivisions of a “unitary community . . . in which all manner of transactions occur without much regard for state lines.”<sup>143</sup> The impact of this transformation of the American

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138. AMERICAN LAW INST., PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE 2 (Council Draft No. 2, 2003) [hereinafter TRANSNATIONAL CIVIL PROCEDURE].

139. *Id.*

140. U.S. scholars include Geoffrey Hazard, Jr. (University of Pennsylvania Law School), Stephen Burbank (University of Pennsylvania Law School), Mary Kay Kane (Hastings College of the Law), Benjamin Kaplan (Harvard Law School), Andreas Lowenfeld (New York University School of Law), and Harold Hongju Koh (Yale Law School). U.S. judges include Hon. Anthony Scirica (Court of Appeals for the Third Circuit), Hon. Diane Wood (Court of Appeals for the Seventh Circuit), and Hon. Lee Rosenthal (U.S. District Court for the Southern District of Texas).

141. TRANSNATIONAL CIVIL PROCEDURE, *supra* note 138, at 2.

142. JAMES, *supra* note 2, § 2.6..

143. *Id.*

economy on extending the jurisdictional reach of state courts beyond state lines was noted by the Supreme Court in *Hanson v. Denckla*:

As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdictions over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, to the flexible standard of *International Shoe*.<sup>144</sup>

*International Shoe's* lowering of the jurisdictional barriers of state borders laid the doctrinal foundation for factoring into the jurisdictional equation "the interstate judicial system's interest in obtaining the most efficient resolution of controversies."<sup>145</sup>

A new federalism in state court rulemaking emphasizes collaboration among members of a national system or federation of state courts similar in concept to the federal court system. The underlying premise of the federal courts—"that they reflect one court system doing the nation's business"<sup>146</sup>—should also guide the states to move toward collaborative rulemaking as state courts increasingly litigate much of the nation's business. Divergent state procedural rules are not the inevitable consequence of a federalism that "accords to each state great latitude in devising its own laws . . ."<sup>147</sup> The fact that states *can* constitutionally adopt widely divergent rules does not mean that, normatively, states *should* do so. The federal system dictates a *vertical* division of judicial power between federal and state courts. But in terms of the *horizontal* division of judicial authority among the states, the Constitution does not mandate the manner in which fifty separate judicial systems shall exercise their independent rulemaking authority. States can pool their judicial resources to develop a uniform model code of civil procedure. Uniform state procedure tailored to the shared needs of state courts would further the "interstate judicial system's interest in obtaining the most efficient resolution of controversies. . . ."<sup>148</sup>

The traditional concept of federalism "maintains that the inability of the states to secure important interstate interests on their own necessitates a centralized federal government endowed with broad, coercive authority."<sup>149</sup> The expectation of those who drafted the

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144. *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958) (citations omitted).

145. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

146. Chemerinsky & Friedman, *supra* note 5, at 784.

147. *Id.* at 781-82.

148. *World-Wide Volkswagen*, 444 U.S. at 292.

149. Note, *To Form A More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842, 843 (1989).

1938 Federal Rules that the states would replicate the Rules, thereby achieving intra-state and inter-state uniformity, is consistent with the view that solutions to national problems must originate in the federal government. As discussed previously, this expectation has not been realized. Rather than competing as procedural laboratories,<sup>150</sup> the states should embrace a new federalism of interstate cooperation in state court rulemaking to achieve the goal of procedural uniformity throughout the national system of state courts.<sup>151</sup>

Limited steps toward procedural uniformity in civil litigation have been taken through the years by the American Law Institute.<sup>152</sup> The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) has also tried to “simplif[y] the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state.”<sup>153</sup> As early as 1881, the Alabama State Bar Association recognized “the legal tangles created by wide variations in state laws.”<sup>154</sup> The following year, the New York State legislature authorized the governor to appoint three commissioners “to explore the best way to effect uniformity of law between increasingly interdependent states.”<sup>155</sup> ALI projects relating to procedural uniformity include the Restatement of Judgments (1940-1942) and the Restatement, Second, Judgments (1969-1982), the Restatement, Second, Conflict of Laws (1971), the Code of Criminal Procedure (1924-1930), the Model Code of Evidence (1939-1942), a Model Code of

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150. Bettman, *supra* note 32, at 663; Pryor, *supra* note 31, at 1181 (“[T]he Rehnquist Court has protected the principle that the states enjoy considerable freedom to compete as laboratories of social and economic policies.”); *id.* at 1173-74 (“This is the same kind of competition as is referenced by the more familiar (to lawyers) term, the “laboratory of the states,” but it is wider in scope than that phrase suggests.”).

151. See Note, *supra* note 149, at 863 (quoting Felix Frankfurter & James Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 YALE L.J. 685, 729 (1924)):

In an era in which the once heady and hopeful optimism about the ability of the federal government to redress social problems has faded and federal budget deficits loom large, the possibility of informal interstate cooperation is attractive. As Felix Frankfurter and James Landis noted more than sixty years ago, our polity must resist the attraction of facile phrases such as “States Rights” or “National Supremacy” and must not “deny ourselves new or unfamiliar modes in realizing national ideals . . . [Our] political thinking must respond [and] bring a fresh ferment of political thought whereby national aims may be achieved through various forms of political adjustments.”

152. The American Law Institute was incorporated on February 23, 1923. AMERICAN LAW INSTITUTE, THE AMERICAN LAW INSTITUTE – SEVENTY-FIFTH ANNIVERSARY 1923-1998 7 (1998).

153. National Conference of Commissioners on Uniform State Laws, About NCCUSL, at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last accessed Aug. 26, 2004).

154. *Id.*

155. *Id.*



Pre-Arrestment Procedure (1963-1975) and, most recently, a study dealing with Complex Litigation: Statutory Recommendations and Analysis (1984-1994). "Responding to the expanding interstate and intercourt nature of the practice of law," the NCCUSL drafted the Uniform Evidence Act<sup>156</sup> as well as the Model Class Actions [Act] [Rule] (1976), the Uniform Rules of Criminal Procedure,<sup>157</sup> the Uniform Conflict of Laws - Limitations Act (1982), the Uniform Declaratory Judgments Act (1922), Uniform Audio-Visual Deposition [Act] [Rule] (1978), and the Model State Administrative Procedures Act.

The Uniform Interstate and International Procedure Act<sup>158</sup> "recognizes the interstate aspects of civil litigation and the need to foster cooperative litigation efforts between the states."<sup>159</sup> Approved by the NCCUSL in 1962, the act "establishes a mechanism for the courts of enacting jurisdictions to provide out-of-state tribunals and litigants with assistance in obtaining discovery and service of process."<sup>160</sup> Although "relatively few states have enacted the Uniform Interstate and International Procedure Act," the ALI cites the Act to "demonstrate the feasibility of interstate cooperation in civil litigation . . . ."<sup>161</sup>

Most recently, a mass tort litigation crisis in state courts<sup>162</sup> has galvanized state jurists to cooperate in the development of uniform

156. UNIF. R. EVIDENCE ACT (1999):

It may be prudent to anticipate one area of inquiry arising from an earlier mandate directed to the Drafting Committee that concluded its work with the 1986 amendments adopted at the Boston Conference. Responding to the expanding interstate and intercourt nature of the practice of law, the Drafting Committee was charged with bringing the language of the Uniform Rules of Evidence into line with comparable provisions in the Federal Rules of Evidence, where reasonably possible. The underlying theory was, apparently, that a trial practitioner need master only one set of rules to comfortably practice in both federal and state forums located in various States, Districts, and Circuits. However, in practice, this theory does not seem to work as well as expected. In operation, the same words are often construed differently by different courts, even by sister federal circuits and state jurisdictions. Thus, the careful lawyer must continue to research certain rules of evidence on a case-by-case basis.

157. UNIF. R. CRIMINAL P. (1987).

158. 13 U.L.A. 355 (1986).

159. COMPLEX LITIGATION PROJECT, *supra* note 108, at 56.

160. *Id.*

161. *Id.*

162. See, e.g., William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1690 (1992) ("The proliferation of closely related cases spanning multiple forums, both state and federal, has created serious problems for the civil litigation process and confronted the judiciary with a management crisis."); see also COMPLEX LITIGATION PROJECT, *supra* note 108, at 50 ("The growing amount of complex litigation that is being managed and resolved in state courts has increased drastically the burden on state judicial systems.").

strategies including best practices and tentative steps toward uniform or model rules for complex litigation. In August 1991, the NCCUSL approved and recommended for enactment the Uniform Transfer of Litigation Act<sup>163</sup> to provide an inter-state court analog to the federal statute – 28 U.S.C. §1404 – that authorizes the transfer of cases among federal courts for the convenience of parties and witnesses. The Reporter for the ALI's Complex Litigation Project proposed a more ambitious mechanism – an Interstate Complex Litigation Panel – to facilitate the consolidation of large numbers of related cases. More finely tuned to address the problem of mass tort litigation management in state courts, the Reporter's proposal would establish a system of "mandatory state court consolidation" analogous to the federal system under the Judicial Panel on Multidistrict Litigation.<sup>164</sup>

The National Center for State Courts ("NCSC") launched a series of "Initiatives in the Management of Mass Torts" which began in the early 1990s with the establishment of a standing Mass Tort Litigation Committee of twenty state judges to "craft a national approach to dealing with mass tort litigation" in state courts.<sup>165</sup> Following a National Mass Tort Conference in 1995, the NCSC published a set of best practices for state judges in *Managing Mass Tort Cases: A Resource and Reference Book for State Court Judges*, which "served as a primary reference" for the NCSC's online *Benchbook on Mass Tort Litigation*.<sup>166</sup> The NCSC is currently developing "model rules and standards of practice" to "improve procedural uniformity and management in complex litigation."<sup>167</sup>

Geographic diversity in the United States does not justify rampant state court procedural diversity, especially in an era of increasing nationalization of civil litigation. The states no longer significantly reflect unique ethnic, cultural, or historical characteristics. Professors Rubin and Freely note that America's "ethnic and cultural differences do not correspond to geographic sections of the country, and thus cannot be regarded as political

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163. 14 U.L.A. 305.

164. COMPLEX LITIGATION PROJECT, *supra* note 108, at 229 ("This approach mirrors the proposed role of the federal Complex Litigation panel in the federal-to-federal and federal-to-state transfer procedures described in § 3.02 and § 4.01.").

165. NCSC *Initiatives in Management of Mass Torts*, 2 CIVIL ACTION 1, 3 (2003). The NCSC worked with the Conference of Chief Justices (CCJ) to set up the CCJ's Mass Tort Litigation Committee.

166. *Id.*

167. *Id.* (noting as one of the four critical functions of the NCSC's National Mass Tort Clearinghouse the development of "case management strategies and techniques, including *model rules and standards of practice* . . .") (emphasis added).

communities . . . .”<sup>168</sup> Professor Carrington’s critique of the proliferation of local rules—that they reflect “differences in the styles and values of particular groups of judges” rather than “variations in local conditions”<sup>169</sup>—applies equally to the proliferation of variations in state discovery procedure. There is no cultural or ethnic imperative that explains why some states adopt numerical limits on admissions requests while other states do not, or why states adopt different numerical limits on the same discovery device. Local political dynamics within the bench, bar, and legislature, as well as local custom, may explain procedural variations but do not justify them normatively.<sup>170</sup> The hodgepodge of discovery reforms adopted by the states, depicted in Part IV, is a reflection of state court rulemaking uninformed by empirical experience and not justified by diverse conditions among the states.

To the extent that material differences among the states may justify some local procedural variation, the nature and extent of these differences can be examined through empirical study. However, certain geographical differences that may affect court operations, such as varying caseloads in urban versus rural areas, exist *within* many states and are not coterminous with state boundaries. Empirical study might focus on the degree to which problems generated by crowded court dockets in urban areas across the country are similar enough to warrant uniform rules targeting those problems or whether rule amendments—as opposed to “best practices”—offer the most effective solutions.<sup>171</sup> Also, rather than assuming that procedural variation must conform to local legal culture, controlled experimentation may also explore the capacity of local legal cultures to adjust to uniform procedures.

State courts, through vehicles like the NCSC, are acting in concert to address their shared needs *as state courts* that, in many respects, are different from their federal counterparts. States are recognizing that federal rules, tailored to the characteristics of federal

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168. Edward L. Rubin & Malcom Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 945 (1994).

169. Carrington, *supra* note 12, at 946.

170. See Chemerinsky & Friedman, *supra* note 5, at 784 (arguing that local custom may explain “why local rules do exist than why they should.”); *id.* at 792 (“[T]he trends we observe [relating to local rules in federal court] are all the more disturbing because they are occurring without careful consideration or as a matter of political compromises unrelated to the goals of a functioning system.”).

171. See Jeffrey W. Stempel, *Complex Litigation at the Millenium: Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform,”* 64 LAW & CONTEMP. PROB. 197, 225 (2001) (“Changing the Rules has only limited power to remedy the legitimate problems with the litigation system.”).

courts, do not necessarily fit the circumstances in which state courts function.<sup>172</sup> For instance, many resource-poor state judicial systems have rejected hands-on, labor-intensive, case management techniques embraced by the federal rules “tailored to a federal system which . . . relies on assigned . . . judges, and on the availability of magistrates.”<sup>173</sup> State and federal courts differ in the volume and nature of their respective caseloads. Compared with the federal judiciary, state courts process the vast majority of civil litigation with fewer resources.<sup>174</sup> Some writers have noted that the different types of cases handled by state and federal courts may warrant different procedures<sup>175</sup> while others observe a different legal culture between state and federal courts.<sup>176</sup>

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172. Subrin, *supra* note 6, at 2045 (“If the federal courts see their primary function as resolving complex disputes, they may tailor their procedures to fit that image; if the state courts are more concerned with routine cases, they may emphasize limiting, definitional procedural rules or summary processes with few procedural steps.”); *id.* at 2036-37 (quoting Memorandum from Standing Advisory Committee on Rules of Civil Procedure to Massachusetts Supreme Judicial Court 2-3 (Dec. 9, 1983)):

Many states have been reluctant to try to deal with discovery abuse by ad hoc, case-by-case judicial determinations. . . . [T]he federal amendments are tailored to a federal system, which, unlike Massachusetts, relies on assigned rather than circuit judges, and on the availability of magistrates. . . . Massachusetts is by no means the only replica state to withhold its adoption of the new federal amendments. . . . Thus, very little of the population is covered by up-to-date Federal Rules in state court.

See also COMPLEX LITIGATION PROJECT, *supra* note 108, ch. 4 (Consolidation in State Courts), at 4:

[L]itigation in federal courts may not always be the most desirable means of handling complex litigation. First, as the persistent debate over the preservation of diversity jurisdiction in the federal courts demonstrates, see 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3601 (2d ed. 1984), some believe that federal courts should focus their attention and resources on those cases that involve federal interests, which federal courts are uniquely qualified to hear.

173. Subrin, *supra* note 6, at 2045 (quoting Memorandum from Standing Advisory Committee on Rules of Civil Procedure to Massachusetts Supreme Judicial Court 2-3 (Dec. 9, 1983)).

174. NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF THE STATE COURTS, 1 CASELOAD HIGHLIGHTS 1 (1995), available at [http://www.ncsconline.org/D\\_Research/csp/Highlights/vol1no1.pdf](http://www.ncsconline.org/D_Research/csp/Highlights/vol1no1.pdf):

State courts handle the vast majority of the nation's litigation. . . . State courts accounted for over 98 percent of [the 90 million cases processed annually by the state and federal courts from 1984 to 1993]. In 1993, state courts of general jurisdiction handled 85 times as many criminal cases and 27 times as many civil cases as the U.S. District Courts, with only 14 times as many judges.

See also Moskowitz, *supra* note 12, at 598 (“Civil filings in state courts of general jurisdiction increased by thirty-two percent between 1984 and 1999. In the federal courts, new cases filed actually decreased in the same time period.” (citing NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1999-2000 14)).

175. See, e.g., Subrin, *supra* note 6 at 2045 (If the federal courts see their primary function as resolving complex disputes, they may tailor their procedures to fit that image; if the state courts

### III. THE CASE FOR SYSTEMATIC EMPIRICAL RESEARCH THROUGH CONTROLLED EXPERIMENTATION

Besides procedural disuniformity, another common criticism leveled at federal discovery reform during the last twenty years is the lack of empirical research to verify the existence of problems in discovery practice and to evaluate the efficacy of the spate of reforms, most of which have retreated from liberal discovery.<sup>177</sup> Equally deserving of criticism, though largely ignored in the literature, is that the helter-skelter proliferation of widely divergent state discovery rules, demonstrated in Part IV, has also proceeded without benefit of sound empirical study. Two central theses of this Article are that the states are already engaged in procedural experimentation increasingly independent of the disintegrating federal model, and that these experiments need to be coordinated and harnessed<sup>178</sup> to provide empirical data that will inform the creation of model uniform rules of state civil procedure.

Many legal scholars have criticized the dearth of empirical data to justify, and to evaluate the efficacy of, federal rule changes,<sup>179</sup>

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are more concerned with routine cases, they may emphasize limiting, definitional procedural rules or summary processes with few procedural steps.”); see also *supra* note 172.

176. H.M. Kritzer et al., *Courts and Litigation Investment: Why Do Lawyers Spend More Time on Federal Cases?*, 9 JUST. SYS. J. 7, 15-16 (1984) (also pointing out the potential difference in legal culture between state and federal courts).

177. Tobias, *supra* note 10, at 567 (“More proposals for changing the federal rules must be based on actual experience involving careful experimentation and stringent assessment of measures’ effectiveness with the systematic collection, evaluation, and synthesis of applicable empirical information.”).

178. See, e.g., Levin, *supra* note 14, at 1582 (proposing that inter-district inconsistency among federal district court local rules be “harness[ed] and control[ed] . . . for the benefit of the judicial system as a whole.”)

179. See, e.g., *id.* at 1581-82:

[W]e have very busy laboratories, some ninety-four of them, but virtually no one is collecting data. With a few notable exceptions, results are reported on the basis of impressions: “We think this is working . . . the bar seems satisfied, or at least the bar can live with it.”

See also Stephen B. Burbank, *The Underlying Assumptions for the Federal Rules of Civil Procedure: Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841-42 (1993) (advocating a moratorium on rulemaking pending further empirical research to support the rulemaking process); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1940 (1989) [hereinafter Burbank, *Transformation*] (“We need fewer mind experiments and more field experiments, procedural rules as well as procedural theories that are ‘based on experience.’”); Galanter, *supra* note 44 at 185:

Improving the civil justice system requires thoughtful, objective analysis based on sound empirical data. The lack of systematic, cumulative data in this area makes it possible for far-reaching policy proposals to be advanced on the basis of tendentious anecdotes and numbers. A bias in which solutions to perceived problems are

particularly in civil discovery.<sup>180</sup> The CJRA's uncontrolled experimentation by ninety-four federal district courts has been faulted as bad science.<sup>181</sup> Although there have been some notable exceptions on the federal level—for example, the RAND Institute's evaluation of case management plans mandated by the CJRA<sup>182</sup> and the Federal Judicial Center's empirical study of federal discovery and disclosure practice under the 1993 Federal Rule amendments,<sup>183</sup>—“the debate over discovery reform has proceeded largely, but not entirely, with reference to salient personal experiences and not with the benefit of

developed by reference to unusual and atypical cases goes unchallenged. Not surprisingly, the effects of the resulting policies are often unanticipated.

Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 *BROOK. L. REV.* 761, 769-70, 794-800 (1993) (noting the problem of “empirical uncertainty.”); Tobias, *supra* note 10, at 615:

A special effort should be instituted to evaluate all of those local requirements receiving experimentation that RAND or the FJC did not assess. For example, the Judicial Conference, the Administrative Office, the FJC, individual districts, judges, and advisory groups should assemble, analyze, and synthesize the maximum relevant empirical data and forward that material to Congress for its consideration and action in light of the guidance above.

Walker, *supra* note 36, at 67 (criticizing “the lack of a systematic official plan to collect valid information about the likely impact of changes to the Rules before the adoption of general amendments to the Rules”); Richard Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 *U. CHI. L. REV.* 366, 367 (1986) (“Lawyers, including judges and law professors, have been lazy about subjecting their hunches – which in honesty we should admit are little better than prejudices – to systematic empirical testing.”); *see also* Sorenson, *supra* note 45, at 703-04:

[L]ittle empirical research has been done to objectify and quantify discovery abuse . . . [C]laims of discovery abuse have rested largely on nonevidence and may well be generally exaggerated. Frequently the assertions of the extent of discovery abuse do not rest on evidence, but only cite to another writer making a similar claim or simply make a conclusory statement that derives its strength from the fact that it has been repeated so frequently.

180. Thomas D. Rowe, Jr., *Repealing the Law of Unintended Consequences? Comment on Walker (2)*, 23 *J. LEGAL STUD.* 615, 622 (1994) (noting among the types of rule amendments that can benefit most from empirical research “amendments aspiring to cause or likely to effect significant changes in litigant behavior by either altering incentives (as with offer of settlement rules affecting attorney fee liability) or direct regulation (such as interrogatory limits).”)

181. Carrington, *supra* note 12, at 963:

Insofar as CJRA encourages experimentation, it is congruent with a long-held ambition of many judges and scholars to employ scientific methods to ascertain what works in procedure. Alas, there is very little science to be employed in these experiments. The experiments are uncontrolled; there is no scientific method employed in planning them; there are ninety-four experiments proceeding at once; and the experiments were to be completed within three years, long before secondary or tertiary effects can be experienced and measured. In this respect, the Act is further confirmation of the disjunction between the politics of court reform and the realities of what happens in court.

182. James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 *B.C. L. REV.* 613 (1998).

183. Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 *B.C. L. REV.* 525 (1998).

empirical evidence.”<sup>184</sup> Judges and practitioners tend to be resistant to empirical data, frequently “overvalu[ing] anecdotes and opinions about reform and . . . insufficiently attentive both to social science process and to the needs of court users.”<sup>185</sup> Judge Posner has chastised “[l]awyers, including judges and law professors [for being] lazy about subjecting their hunches—which in honesty we should admit are little better than prejudices—to systematic empirical testing.”<sup>186</sup> A few writers blame the legal academy for undervaluing empirical scholarship.<sup>187</sup>

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184. Judith A McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 787 (1998) (summarizing “the state of the legal system’s knowledge – and to a lesser extent, beliefs – about how the federal civil discovery system works.”); Walker, *supra* note 36, at 69 (commenting that “very little empirical study of the Federal Rules of Civil Procedure has been conducted” during their first fifty years). For a survey of the impact of available empirical data on the federal rulemaking process, see McKenna & Wiggins, *supra*.

185. Chemerinsky & Friedman, *supra* note 5, at 792; see also Maurice Rosenberg, *The Impact of Procedure-Impact Studies in the Administration of Justice*, 51 LAW & CONTEMP. PROB. 13, 29 (1988):

[T]his lack of influence [of empirical research on the functioning of procedural rules] is due to the unreceptiveness of the intended users. Many lawyers and judges appear to believe that thinking like a lawyer means relying on law books, logic, speculation, argument, and – when it comes to addressing questions of societal reality – invoking intuition. They act as if Holmes’ epigram about the life of the law being “experience” should be understood to refer to the random experience of the individual jurist. . . .

Experience in reporting findings to procedural revisers and rulemakers teaches a sobering lesson: Persuading them to accept empirical research results will be a formidable task even if the research speaks directly to precisely defined and topical questions. Data have great trouble piercing made-up minds. Some judges and lawyers believe there are only two kinds of research findings: those they intuitively agree with (“That’s obvious!”); and those they intuitively disagree with (“That’s wrong!”). Resistance to the counterintuitive is a formidable barrier to the acceptability of procedure-impact research findings.

186. Posner, *supra* note 179, at 367.

187. Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323, 335 (1991):

The law professoriate, as a whole, lacks the necessary training for empirical research and too often demonstrates something of an ennui toward the actual practice of law. . . . But our contributions are as anecdotal and normative as contributions of the judges and practitioners. . . . There needs to be a similar call for empirical work in judicial rulemaking, and law schools need to respond.

Robert G. Bone, *The Empirical Turn in Procedural Rule Making: Comment on Walker*, 23 J. LEGAL STUD. 595, 612 (1994) (noting the lack of potential sources of empirical research, including public funding (“prospect of major public funding is remote”), foundations, and university supported research (“despite recent interest in empirical work in procedure, most legal academics still tend to shun empirical research”)); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 778 (1998):

An empirical element is intrinsic to much rulemaking, but often it is difficult to develop an adequate empirical base—a topic that has received increased academic attention in recent years. As a general matter, the Federal Rules of Civil Procedure have been drafted without the benefit of detailed empirical input.

Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 361 (1995) (attributing lack of academic interest in

Too often, the vacuum left by the absence of empirical data is partly filled by political influence of the plaintiff's or defense bar on policymakers, leaving unrepresented the interests of potential litigants who lack direct access to the rulemaking process.<sup>188</sup> Procedure has become too politicized in recent years<sup>189</sup> for empirical data to be an antidote for special interest group jockeying for tactical advantage in the rulemaking process. By the late 1980s, the Research Director of the Rand Corporation's Institute for Civil Justice, a major resource for empirical research, commented on the "highly politicized world of policy research" that "challenges researchers to keep their political personae separate from their research analytic personae."<sup>190</sup> Empirical research can, however, temper the dominant influence of private interests over procedure as demonstrated by the significant

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empirical scholarship to lack of training). Burbank, *supra* note 179, at 1939 n. 80, 1963 (confirming that law professors' "lack of training and inclination" prevents them from conducting empirical work and, referring to empirical analysis of Rule 11, the need to inform rulemaking decisions "by experience beyond that of the people making it")

188. See Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 464 (1993) (contending that an empirical approach to rulemaking – a "comprehensive rationality model". . . "would halt the politicization of the rulemaking process" and would "distinguish Advisory Committee work from legislation"):

[I]n 'unstable environments,' comprehensive rationality is preferred where the 'intended beneficiaries' of regulatory programs 'have little access to political power, legal advice, and self-help' and, hence, 'are often unable to participate in any agency proceeding.' The synoptic model is superior because the decisionmaker 'must consider all interests.' The beneficiaries of civil rulemaking are the actual and potential parties to future cases – most of whom are unknown at the time of rulemaking – and society as a whole. A few 'repeat players' may participate in the Advisory Committee enterprise, but this can be only a handful of the thousands, perhaps millions, of persons whose interests are directly affected by major changes.

See also Robert G. Bone, *supra* note 187, at 612 ("Interest groups can provide useful information, and their participation can serve important process values. But when involvement becomes control and the dominance of private interest leads to rules seriously out of harmony with the public interest, there is cause for concern."). *But see* Mullenix, *supra* note 59, at 829 ("Yet, there should be more clear thinking about when such research truly will enhance rule revision.").

189. Concerning the pervasive influence of politics on rulemaking, see Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 580-81 (2001) (commenting that the federal civil rules advisory committee recommended the scope narrowing amendment, despite the lack of an empirical case for the amendment, "largely because of the political preferences of the leadership of the American College of Trial Lawyers and the ABA Litigation Section."); see also Mullenix, *supra* note 59, at 795 (chronicling the politicization of the federal rulemaking process); Glenn S. Koppel, *Politics, Populism and Procedure: The Saga of Summary Judgment and the Rulemaking process in California*, 24 PEPP. L. REV. 455, 473 (1997) (focusing on the political battle over the summary judgment statute in the California legislature); Wiggins, *supra* note 184, at 789 (discussing the influence of empirical data on federal rulemaking).

190. Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, 51 LAW & CONTEMP. PROB. 56, 65 (1988).



influence of the Federal Judicial Center's empirical studies on the federal rulemaking process.<sup>191</sup>

Empirical study also cannot relieve rulemakers of the difficult task of making hard choices among competing normative goals. However, "any value system one adopts is more likely to be promoted if one knows something about the consequences of the choices to be made."<sup>192</sup> For example, in balancing the tension between the competing procedural goals of judicial efficiency (e.g., speed and low cost) and fairness (e.g., accuracy in factfinding in individual cases),<sup>193</sup> empirical data can inform rulemakers about whether and to what extent a proposed rule change will reduce cost and delay and at what cost to fairness. Discovery reforms designed to cut back the availability of discovery<sup>194</sup> are premised on the empirically unsupported,<sup>195</sup> but widely-shared, assumption that discovery is "abusive, time-consuming, unproductive, and too costly."<sup>196</sup> But the 1998 FJC empirical study of federal court discovery concluded that "the typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation, and that discovery generally—but with notable exceptions—yields information that aids in the just disposition of cases."<sup>197</sup> Further, with the exception of the FJC study, no effort has been made to evaluate whether these "reforms" in fact, reduce cost and delay in litigation.

Some commentators have proposed harnessing the haphazard experimentation by federal district courts to realize their potential as

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191. See, e.g., Galanter, *supra* note 44, at 230 ("The absence of an adequate knowledge base . . . makes lawyers and courts vulnerable to political attacks. . . . [T]he absence of knowledge about the legal system provides a setting in which anger can be more easily mobilized politically and result in misguided policies."); Nard, *supra* note 187, at 361 (commenting that "decisions [based on empirical data] are not based on a judge's or legislator's personal bias, but on collective agreement within the community."); Walker, *supra* note 36, at 84 (1988) (noting that the "public interest" would benefit from restricted field experiments of proposed federal rule amendments before they are promulgated). For an assessment of the substantial impact of the Federal Judicial Center's empirical research on federal rulemaking, see Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1195 (2002)

192. Walker, *supra* note 188, at 480 (quoting James V. Delong, *Defending Cost-Benefit Analysis*, REG., Mar.-Apr. 1981, at 39).

193. See Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way": Litigation Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 847-48 (noting the "tradeoffs between fairness and efficiency").

194. See *infra* Part IV.

195. See, e.g., Sorenson, *supra* note 45, at 703-04 (noting lack of empirical support to substantiate claims of discovery abuse).

196. Willging et al., *supra* note 183, at 527.

197. *Id.* at 527.

laboratories<sup>198</sup> for yielding sound empirical data that can inform national rulemaking. They propose leveraging the potential of the local rules process through a system of coordinated, controlled field experiments.<sup>199</sup> Professor Laurens Walker, the most vocal advocate of a system of "restricted field experiments," criticizes "the lack of a systematic official plan to collect valid information about the likely impact of changes to the [Federal] Rules *before* the adoption of general amendments to the Rules."<sup>200</sup>

The same proposals for a system of controlled experimentation in the federal court system have equal application to the national system of state courts. A variety of methods exist for conducting controlled field experiments by participating states,<sup>201</sup> but the objective of any research design is to isolate the impact of a particular experimental variable on the behavior of individuals in a relevant jurisdictions,<sup>202</sup> for instance, the impact of a rule mandating initial

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198. See Richard Lempert, *Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypotheses*, 1 LAW & SOC'Y REV. 111, 131 (1966):

The United States federal system of government has furnished the experimenter with 50 states which, in the words of the Supreme Court, are "natural laboratories." Legal sociologists can take advantage of these natural laboratories and . . . start intensive investigations of exactly how certain laws influence specific behavioral patterns.

199. See Levin, *supra* note 14, at 1581-82:

The focus of our attention at this juncture should not be extirpating all inconsistency, but rather of harnessing and controlling it for the benefit of the judicial system as a whole. The district court forays speak to underlying problems and inform us of perceived solutions. We should affirmatively encourage useful experimentation, controlled experiments, because we need, and want, and can profit from them. One might suggest that we can achieve a greater measure of consistency in the long run by channeling and controlling, rather than fighting to eliminate inconsistency.

See also Willging, *supra* note 191, at 1197-1203; Tobias, *supra* note 10, at 618 ("More proposals for changing the federal rules must be based on actual experience involving careful experimentation and stringent assessment of measures' effectiveness with the systematic collection, evaluation, and synthesis of applicable empirical information."); Walker, *supra* note 36, at 67 ("A program of restricted field experiments should be adopted to predict the impact of proposed changes to the Federal Rules of Civil Procedure."); Walker, *supra* note 188, at 488 (calling for a comprehensive reform of federal civil rulemaking). *But see* Bone, *supra* note 187, at 595 (noting the limits of empirical research on rulemaking: "I agree with Walker that the federal rule-making process would benefit from more careful and systematic attention to empirical work. But Walker's proposal [that would make systematic empirical observation a *necessary* condition to federal civil rule making] constrains the rule-making process too much.").

200. Walker, *supra* note 36, at 67.

201. For a discussion of experimentation as a tool for improving the administration of justice on the federal level, see E. Alan Lind et al., *Methods for Empirical Evaluation of Innovations in the Justice System*, in EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW 81 (1981). See also Lempert, *supra* note 198, at 131-32 (Although the state-as-laboratory model is used throughout this article, legal variations among political subdivisions might also be used for conducting empirical research.).

202. *Id.* at 111-12; see also Lind et al., *supra* note 201, at 88:

The design of an evaluation is the overall strategy for extracting information from the test of a program. Although a great deal of scientific technique and experience has

disclosure of basic relevant information on the volume and duration of discovery in civil litigation in state courts. A research design with high internal validity must control for "plausible rival hypotheses," i.e., non-experimental variables "that could reasonably explain the behavioral change which the investigator would like to be able to attribute to the existence of the law."<sup>203</sup> Controlled field experiments, guided by a national coordinating body,<sup>204</sup> would assign proposed procedural rules to groups of states, controlling for the setting in which these procedures are introduced.<sup>205</sup>

A "simple randomized experiment"<sup>206</sup> exploring the effect of initial disclosure on reducing cost and delay in discovery would involve a comparison of a heterogeneous group of states utilizing an initial disclosure rule with a similar group of states not utilizing that rule.<sup>207</sup> The resulting data would be evaluated, using regression analysis, to compare of the level of discovery in each group. A more refined research design would utilize a "before-and-after randomized experiment"<sup>208</sup> in which discovery comparisons between the groups would be made before, during and after the experimental period.

In a "multi-group randomized experiment,"<sup>209</sup> various sets of procedures could be assigned to the experimental states to test how a particular rule change functions in combination with other procedures. For example, federal initial disclosure<sup>210</sup> is intended to function in tandem with a requirement that parties confer to develop a discovery plan.<sup>211</sup> Sanctions may be imposed on a party who fails to

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been developed in this matter, it is important to recognize that there is *only one*, quite simple matter that is the goal of all experimental design: to assure that the comparison upon which an inference of causation may be founded is in fact a sound comparison. . . . The object of research design is to construct a study that approaches, as closely as ethics, practicality, and ingenuity allow, the "all else being equal" specification needed to infer causality.

203. Lempert, *supra* note 198, at 112; *see also* Lind et al., *supra* note 201, at 89:

The quality of any research design lies in its capacity to eliminate or reduce the possibility of any explanation of the outcomes observed other than that the program caused the outcomes. Thus, any design can be assessed by adopting a skeptical frame of mind and seeking credible *rival hypotheses* that would explain potential results of the study without supposing that the results are due to the program.

204. *See supra* Part V.

205. *See* Lempert, *supra* note 198, at 116.

206. *See* Lind et al., *supra* note 201, app. B at 92.

207. *See* Lempert, *supra* note 198, at 121-22.

208. *See* Lind et al., *supra* note 201, app. B at 96

209. *Id.* at 95-96.

210. FED. R. CIV. P. 26(a)(1).

211. FED. R. CIV. P. 26(f); *see Transcript of the "Alumni" Panel on Discovery Reform*, 39 B.C. L. REV. 809, 836 (1998):

I do say this about the disclosure, and that is if you are going in the direction I was advocating, of trying to get the lawyers to manage this stuff, then you do have to put

cooperate in good faith in developing a discovery plan.<sup>212</sup> By contrast, Arizona imposes a more aggressive initial disclosure duty that is broader in scope than the federal rule but without a corresponding duty on counsel to meet and confer on a discovery plan.<sup>213</sup> In researching the efficacy of initial disclosure procedure, rules that vary according to the scope of information that must be disclosed could be assigned to groups of states. Some of these groups could be assigned a rule imposing a duty to meet and confer with and without a rule authorizing sanctions on counsel who fail to cooperate in good faith in fashioning a discovery plan. As an alternative to sanctions, other states could be assigned a rule that provides parties with incentives to cooperate, such as conditioning a party's right to seek judicial intervention to resolve discovery disputes on good faith cooperation.<sup>214</sup>

The federal court phenomenon of widespread local experimentation with discovery rules, unguided and uninformed by sound empirical research, is occurring within the national system of state courts. The proliferation of diverse state discovery rules has created fertile soil for empirical evaluation of these reforms to assess their efficacy. Yet no empirical evaluations have been forthcoming. I am not aware of any empirical study of recent state discovery reforms other than those implemented on a pilot basis. In Arizona, one of the leaders in aggressive discovery reform, no empirical assessment of the Zlaket Rules has been undertaken during the nine years these rules have been in effect.<sup>215</sup> Colorado has recently implemented on a

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some responsibility on them to be forthcoming early on or they never get anywhere. So you've got to state some kind of a duty to get the conversation going. And that was really the office of those disclosure requirements.

212. FED. R. CIV. P. 37(g).

213. See *infra* Appendix.

214. *Id.*

215. See Moskowitz, *supra* note 12, at 625 (referring to Arizona's drastic reform of its civil discovery rules, "no statistical confirmation of these premises [underlying the reforms] is available and no studies have been performed regarding the effect of the rules despite the fact that the rules have been in effect for more than nine years."); see also Tobias, *supra* note 13, at 629-30:

The Arizona Supreme Court should attempt to determine exactly how well its discovery reforms instituted during the 1990s have worked. . . . The Justices should carefully assemble, analyze and synthesize the maximum, feasible empirical data respecting these questions. Minimal empirical data currently exist because the Arizona Supreme Court has undertaken no formal attempt to study the impacts of the recent reforms generally, while baselines for comparing the effects of discovery devices' application have yet to be established specifically.

statewide basis<sup>216</sup> its Simplified Procedure Rules based on only sketchy data on the pilot program in two counties.<sup>217</sup>

The role of the several states as "laboratories" for procedural experimentation<sup>218</sup> can be fully realized through a system of centrally coordinated controlled experiments informing the development of model state rules that incorporate innovations empirically proven to be effective. In Part V, I propose that the states establish a national mechanism—analogue to the U.S. Judicial Conference—to coordinate an ongoing process of controlled experimentation in state procedure and formulation of uniform rules of state civil procedure.

#### IV. DISCOVERY REFORMS IN STATE AND FEDERAL JURISDICTIONS: HAPHAZARD EXPERIMENTATION AND PROCEDURAL CHAOS

Part IV takes a close look at recent discovery reforms to demonstrate graphically the extent to which states are engaging in robust rules experimentation. This detailed survey of the range and complexity of discovery rules across jurisdictions is intended to help the reader appreciate the magnitude of the problem of interstate disuniformity as well as the rich potential for harnessing this procedural diversity to improve state procedure.

##### *A. The Discovery Reform "Bandwagon"*

Liberal discovery, initiated by the federal courts in 1938, was a watershed litigation reform aimed at eliminating the element of surprise and hide-the-ball tactics common in adversarial litigation.<sup>219</sup> From 1938 through the 1970, the federal rules were amended to broaden and expand the availability of discovery and most states—

216. COLO. R. CIV. P. 16.1.

217. Moskowitz, *supra* note 12, at 633 (describing the beginning of the implementation process); COLORADO JUDICIAL BRANCH, TARGETED BASE REVIEW 2-3:

As part of the pilot program, the Judicial Branch has conducted a study of cases subject to Rule 1.1; and control group cases not subject to Rule 1.1 in the pilot locations. The study sought to determine what affect Rule 1.1 had on compliance with disclosures, case processing times, litigation expenses, and participants' satisfaction with the Rule 1.1 process.

218. Moskowitz, *supra* note 12, at 613 (referring to "the changes in the discovery provisions of the fifty state rules of civil procedure over the past fifteen years" as an illustration in the procedural arena of Justice Brandeis's characterization of states as "laboratories" in which experiments in the law might be conducted).

219. See Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 30 (1994) ("The hide the ball instinct was central to the "sporting theory of justice" which Dean Roscoe Pound condemned in the first decade of this century.").

including California—followed the federal lead.<sup>220</sup> Party-controlled discovery reached its zenith under the federal rules in the 1970s.<sup>221</sup>

Discovery amendments in federal and many state courts since the 1970s have effected a counter-reformation by curtailing civil discovery in an attempt “to try to contain the genie of broad discovery without killing it.”<sup>222</sup> Complaints about a “litigation explosion”<sup>223</sup> became commonplace and discovery abuse was branded as the culprit.<sup>224</sup> During this period, defense bar and business groups became more “aggressive and sophisticated” in lobbying to reduce access to the courts.<sup>225</sup> One critic of this latter-day discovery reform movement refers to the series of discovery “reform” amendments as the “post-1976 pattern of making discovery the convenient scapegoat for generalized complaints about the dispute resolution system.”<sup>226</sup> Another critic has referred to the “pervasive myth of discovery abuse.”<sup>227</sup>

The 1980 federal rules amendments introduced the discovery conference as a tool to facilitate discovery management. The 1983 federal rules amendments (1) introduced the concept of “proportionality” to encourage judges to tailor discovery to the circumstances of the individual case and gave them *sua sponte* authority to do so; (2) required attorneys to certify that they are

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220. See Marcus, *supra* note 187, at 748 (“In a sense, the 1970 amendments to the rules completed what one could call a cultural cycle in American procedural reform, a cycle that could be traced back to Pound (and before him to Field), and which was characterized by increased relaxation and expansion of procedure.”).

221. *Id.* at 749 (“Party-controlled discovery reached its high water mark in the 1970 amendments as far as rule provisions.”).

222. *Id.* at 747.

223. See generally WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991); see also Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 560 (1992) (describing the proliferation of litigation in the United States); Tobias, *supra* note 10, at 570 n.146 (citing, e.g., COMM.ON DISCOVERY, N.Y. STATE BAR ASS'N, REPORT ON DISCOVERY UNDER RULE 26(b)(1), in 127 F.R.D. 625 (1990)); Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992) (discussing the then-proposed amendments to certain federal discovery rules). But see Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1394 (1994) (documenting “the making and dispersion of . . . the myth of American litigiousness and pervasive discovery abuse”).

224. Stempel, *supra* note 93, at 542-43 (describing how, in the public law litigation context, broad discovery rules were seen as encouraging claims); see also Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough Is Enough*, 1981 B.Y.U. L. REV. 579, 592 (noting the “widespread criticism in recent years of the undue expense and burden of the civil discovery process”).

225. *Id.* at 614.

226. *Id.* at 532.

227. Mullenix, *supra* note 223, at 1393.

complying in good faith with the discovery rules;<sup>228</sup> and (3) attempted to promote judicial discovery management by, in effect, making the discovery conference mandatory in every case through the requirement that the court hold a pretrial conference.<sup>229</sup>

In 1992, Arizona's dramatic discovery reforms signaled a role reversal in the relationship between the states and the federal courts in procedural rulemaking by radically departing from, rather than merely tinkering with, the federal model of liberal discovery. Arizona's "Zlaket Rules," in the words of one writer, "turned the adversarial system of discovery on its head."<sup>230</sup> The Zlaket Rules implemented the concept of mandatory disclosure in its most drastic form virtually replacing routine formal discovery.<sup>231</sup> The federal courts followed Arizona's lead the following year with an attenuated version of mandatory disclosure and presumptive numerical limits on interrogatories and depositions.<sup>232</sup>

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228. Stempel, *supra* note 93, at 543-552 (chronicling the series of amendments to the federal rules from 1980 through 2000).

229. *Id.* at 545:

As a practical matter, the initial pretrial conference required by the 1983 Amendment to Rule 16(b) became a de facto mandatory discovery conference held in every case (not only where ordered by the court). The effect was to provide for mandatory discovery conferences during most of the life of the 1980 amendment, which was revised substantially as part of the 1993 disclosure amendments.

*See also* Sorenson, *supra* note 45, at 701-702 ("[T]he 1983 amendments to Rule 16 on pretrial scheduling and planning conferences reflected a view that increased judicial management was needed to address discovery abuse and the amendments were intended to create a mandatory 'process of judicial management that embraces the entire pretrial phase, especially motions and discovery.'" (quoting FED. R. CIV. P. 16(a) advisory committee's note)).

230. Alex Wilson Albright, *Introduction to Symposium on Innovations in Discovery*, 16 REV. LITIG. 249, 249 (1997)

231. ARIZ. R. CIV. P. 30(a) (presumptive prohibition of nonparty depositions), (d) (presumptive deposition duration of four hours); 33.1(a) (presumptive numerical limit of forty interrogatories); 34(b) (presumptive numerical limit of ten distinct items or categories in inspection demand); 26(b) (numerical limit of twenty-five admission requests).

232. *See* Stempel, *supra* note 93, at 544-56 (chronicling the series of amendments to the federal rules from 1980 through 2000); *see also* Jill Schachner Chanen, *Statics Considering Discovery Reform*, 81 A.B.A. J. 20, 20 (1995):

Despite lingering questions about the efficacy of discovery rules in Arizona designed to curb abuses and reduce the cost of litigation, the reform movement marches on.

Arizona led the nation in 1992 when it became the first state to adopt rules limiting discovery and requiring early, automatic disclosure of relevant information by parties in lawsuits. The federal courts jumped on board the bandwagon in December 1993 when similar requirements took effect, but with a provision allowing courts to opt out of the new rules.

Now Alaska is adopting and Illinois is considering such rules, much to the chagrin of some lawyers in those states who say the change will strain the attorney-client relationship by forcing lawyers to disclose damaging information on their own initiative. Besides those states, at least 15 others have inquired about Arizona's

In June, 1994, the Alaska Supreme Court adopted a set of discovery reforms that followed the more modest federal disclosure model, rejecting a more sweeping set of reforms based on the Arizona model.<sup>233</sup> In 1995, Colorado followed Arizona's lead by adopting comprehensive presumptive limits on discovery methods and early mandatory disclosure.<sup>234</sup> The state discovery reform movement gathered momentum in 1996 when Illinois implemented rule amendments to limit the duration of depositions to three hours<sup>235</sup> and to require courts to hold case management conferences in *every* case.<sup>236</sup> In cases under \$50,000, Illinois rules also provide for sweeping mandatory disclosure modeled on the Zlaket Rules and presumptively limit depositions to parties and expert witnesses.<sup>237</sup>

In 1997, the National Conference of State Trial Judges, affiliated with the American Bar Association, published a set of Discovery Guidelines designed to integrate the disparate elements of discovery reform into a coherent pretrial system.

In 1999, Texas instituted a three-track system of differential discovery limits denominated "discovery control plans."<sup>238</sup> The following year, the federal rules were amended again to scale back the scope of discovery from "subject matter" relevance to "claim or defense" relevance and by presumptively limiting the duration of each deposition to one seven-hour day.<sup>239</sup>

As depicted in detail in Part IV, many other states have implemented discovery reforms in a kaleidoscopic variety of combinations, picking and choosing from a wide range of discovery initiatives borrowed from the federal model or from one of the states just mentioned. This survey illustrates the degree to which state procedure has fragmented in an area where procedural differences can have major substantive effects. The various discovery regimes, which

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discovery rules, said Arizona Supreme Court Justice Thomas Zlaket, who chaired the court's rules committee that endorsed the discovery reforms.

But whether Arizona's rule changes have had the desired effect of reducing costs, curbing discovery abuses and increasing civility among lawyers remains to be seen.

233. Peggy E. Bruggman, *Reducing the Costs of Civil Litigation* 45-47 (Hastings C. of Law Pub. Law Research Inst., Working Paper Series, 1995).

234. Initial mandatory disclosures are due thirty days after the case is at issue. COLO. R. CIV. P. 26(a)(1). See also Albright, *supra* note 222, at 250 (noting that both Colorado and Arizona have adopted rules requiring mandatory disclosure).

235. ILL. SUP. CT. R. 206(d), 222(f) (2).

236. ILL. SUP. CT. R. 218(a).

237. ILL. SUP. CT. R. 222(f) (2).

238. TEX. R. CIV. P. 190.

239. Stempel, *supra* note 93, at 550-51 (describing the 2000 amendments to Rule 26(b)(1)).



complicate the increasing volume of national litigation in state courts, have not been justified by systematic empirical research.

### *B. Lawyer-Managed Discovery vs. Court-Managed Discovery*

The discovery reforms reviewed in Part IV fall into two categories: those that address “lawyer-managed” discovery (Section C) and those that address “court-managed” discovery (Section D).<sup>240</sup> Lawyer-managed discovery refers to “ordinary” discovery that is controlled by the parties and is available without court intervention. Court-managed discovery requires court intervention, either permitting discovery beyond presumed limits or imposing limits tailored to the individual case.

Recent discovery amendments to the federal rules of civil procedure were premised on the concept of a three-phase discovery process. Phase I involves automatic disclosure of information without the necessity of discovery requests. Formal discovery initiated by attorneys without court supervision, known as “lawyer-managed” discovery, occurs during Phase II. Rules designed to guide or regulate lawyer-managed discovery include (1) default “rules of the road”—rule-based presumptive limits on scope and volume of discovery that define “core” discovery—and (2) the requirement that counsel meet and confer outside of court to plan discovery. Phase III—court-managed discovery—is reserved for difficult cases in which the parties seek discovery in excess of the rule-based limits but cannot agree upon the extent of such discovery.<sup>241</sup>

### *C. Lawyer-Managed Discovery: Litigation “Rules of the Road”*

#### 1. Rule-Based Presumptive Limits: Across-the-Board or Differentiated by Case Category

Some jurisdictions have imposed across-the-board presumptive limits on the *scope* of discovery and presumptive limits on discovery *duration*. Most jurisdictions have imposed across-the-board limits on the *frequency and extent of use* of discovery methods (i.e., “volume limits”). A few jurisdictions, like California and Texas, have imposed

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240. *Id.* at 552 (describing the distinction between “lawyer-managed” and “court-managed” discovery).

241. Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 524 (1998) (the Chair of the Civil Rules Advisory Committee explains the three-level discovery process).

volume limits that vary according to the type of case, establishing “tracks” or “plans” that categorize cases according to the size of the case, usually defined by the amount in controversy. California’s so-called “three-track” system is an example of case-differentiated presumptive limits. Section 1.a first surveys rules that presumptively limit scope and Section 1.b reviews rules that presumptively limit the volume of discovery.

Critics of across-the-board discovery limits have argued that “one-size-fits-all” rules do not target the minority of high-stakes, complex cases where discovery problems most frequently arise.<sup>242</sup> According to one writer, such rules “change the rules in those very situations that should be left alone.”<sup>243</sup>

*a. Presumptive Limits Narrowing the “Scope” of Discovery:*

In 2000, amended Federal Rule 26(b)(1) narrowed the scope of routine discovery “available as of right to attorneys without court authorization” from matters “relevant to the *subject matter*” to matters “relevant to the *claim or defense* of any party.”<sup>244</sup> Discovery of information under the broader “relevant to the subject matter” standard requires a showing of good cause, or party stipulation.<sup>245</sup> Therefore, if the responding party objects to a discovery request on grounds that it calls for information not relevant to a claim or defense, the requesting party must move to compel production. The requesting party may then argue that the request *does* meet the “claim or

242. See Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 686 (1998) (“If complex litigation is the source of more problematic discovery practice, then rule reform ought to be tailored to the universe of this particular litigation that inspires complaint.”); see also Chanen, *supra* note 232, at 20:

Another concern is that limits on depositions, interrogatories or other kinds of discovery may not be workable for all kinds of lawsuits. As a result, opponents argue, lawyers will be forced to run to court for approval to stray from the rules, increasing litigation costs.

“We are . . . critical of one-size-fits-all discovery,” said Steve Tomashefsky, a lawyer with Jenner & Block in Chicago and president of the reform-minded Chicago Council of Lawyers. “Some of the Illinois rules are an attempt to put all discovery rules into a fairly narrow straightjacket. In general, our approach has been that discovery should be worked out according to a plan, supervised by a judge, not by some arbitrary rules.”

243. Elizabeth G. Thornburg, *Giving The “Haves” A Little More: Considering The 1998 Discovery Proposals*, 52 SMU L. REV. 229, 259 (1999)

244. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2008 (2d ed. 1994 & Supp. 2003); see also Stotler Memorandum, in 181 F.R.D. 18, 33 (1999) (“The scope of routine discovery is narrowed in some measure.”).

245. See Minutes, Civil Rules Advisory Committee, Nov. 12–13, 1998 (“[T]he present full scope of discovery remains available, as all matters relevant to the subject matter of the litigation, either when the parties agree or when a recalcitrant party is overruled by the court.”).

defense” standard and, if not, that good cause exists for discovery under the “relevant to the subject matter” standard.<sup>246</sup>

While acknowledging that the line between “claims and defenses” relevance and “subject matter” relevance is imprecise, the advisory committee drew this distinction to send two signals: (1) to the federal trial court—“that it has the authority to confine discovery to the claims and defenses asserted in the pleadings”—and (2) to the parties—“that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.”<sup>247</sup>

Most states have refused to follow the federal lead in this area of discovery reform.<sup>248</sup> Only six states have adopted rules that narrow scope definition: Arkansas (“relevant to the issues in the pending action”)<sup>249</sup>; Mississippi (“relevant to the issues raised by claims or defenses”)<sup>250</sup>; Colorado,<sup>251</sup> Connecticut,<sup>252</sup> and Oregon<sup>253</sup> (“relevant to claim or defense of any party”); and New York (“material and necessary in the prosecution or defense of an action”).<sup>254</sup> Even Texas, which recently overhauled its discovery rules, rejected scope narrowing.<sup>255</sup>

*b. Presumptive Limits on Frequency and Extent of Use of Discovery Methods in Federal and State Courts: Theme and Variations*

Most jurisdictions, including California and the federal courts, impose some form of rule-based limits on discovery volume. Out of a total of fifty-two jurisdictions, including the federal courts and the District of Columbia, the rules of procedure in thirty-four of these

246. Rule 26(b)(1) committee note, *in* 192 F.R.D. 340, 389 (2001):

Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties’ claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action.

247. *Id.*

248. *See infra* Appendix.

249. ARK. R. CIV. P. 26.

250. MISS. R. CIV. P. 26(b)(1).

251. COLO. R. CIV. P. 26(b)(1) (“relevant to the claim or defense of any party”).

252. CONN. R. SUPER. CT. CIV. § 13-2 (“material to the subject matter involved in the pending action, which are not privileged, whether the discovery or disclosure relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party”).

253. OR. R. CIV. P. 36(B)(1).

254. N.Y. C.P.L.R. § 3101(a) (McKinney 2004).

255. *See* Kenneth E. Shore, *A History of the 1999 Discovery Rules: The Debates & Compromises*, 20 REV. LITIG. 89, 101 (2000) (describing the Texas Supreme Court’s compromises in adopting a new rule).

jurisdictions impose some form of volume limits in general jurisdiction cases.

Of these thirty-four jurisdictions, thirty impose *across-the-board* volume limits that apply in general jurisdiction courts to all cases without regard to case type or amount in controversy. Many states have special rules that limit discovery in trial courts of limited jurisdiction. Some states—like Texas, Illinois, and California—have adopted a system of discovery limits that varies by case track. The following analysis of volume limits proceeds in two parts. Subsection i surveys—by *individual discovery method*—those jurisdictions that limit the volume of discovery. Subsection ii focuses on selected jurisdictions that impose volume limits on a case-differentiated basis.

i. Volume limits by Individual Discovery Method—Variations:

*Interrogatories*

More jurisdictions impose limits on interrogatories than any other discovery method. Thirty-three out of fifty-two jurisdictions impose some form of numerical limit on interrogatories.<sup>256</sup> A majority of these thirty-three jurisdictions—twenty-eight in number—impose *across-the-board* presumptive limits on interrogatories.<sup>257</sup> The remaining five jurisdictions (California, Connecticut, Illinois, Texas, and Kentucky) impose numerical limits on interrogatories that vary according to case tracks.<sup>258</sup> Of these five jurisdictions, Connecticut imposes volume limits *only* on so-called Expedited Process Track Cases involving damages less than \$75,000.<sup>259</sup> The other four states impose interrogatory limitations in *all cases*, but impose more restrictive volume limits on small cases, generally defined by amount in controversy. For example, California, in “limited cases” (i.e., cases under \$25,000), restricts the total number of interrogatories, admissions, and document requests to a “grab-bag”<sup>260</sup> of thirty-five and, in “unlimited cases” (i.e., cases over \$25,000), limits the total number of interrogatories to thirty-five and the total number of admission requests to thirty-five. Texas, another “three-track” state,

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256. Of the thirty-four jurisdictions that impose some form of volume limit, only Oregon does not limit interrogatories, choosing to limit only admission requests. *See infra* Appendix.

257. Federal courts, Alaska, Arizona, Colorado, District of Columbia, Florida, Georgia, Hawaii, Idaho, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Utah, Virginia, Wyoming. *See infra* Appendix.

258. *See infra* Appendix.

259. *See infra* Appendix.

260. *See* ROBERT I. WEIL & IRA A. BROWN, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 8:1810, at 8L-1 (2001).

limits interrogatories to twenty-five in cases assigned to Level 1 and Level 2 Discovery Control Plans.<sup>261</sup>

Colorado recently adopted an optional Simplified Procedure rule for cases not exceeding \$100,000 effective July 1, 2004. Designed to provide “just, speedy, and inexpensive determination of civil actions,” Rule 16.1 essentially replaces most formal discovery with early and far-reaching disclosure.<sup>262</sup> Parties may elect to be excluded from this Simplified Procedure.

Of the thirty-three jurisdictions that limit interrogatories, fifteen confine volume limits *solely* to *interrogatories*.<sup>263</sup> Of these thirty-three jurisdictions, another fifteen combine limits on interrogatories with numerical limits on *oral depositions* as well.<sup>264</sup> However, three of the fifteen jurisdictions that restrict the availability of depositions—California,<sup>265</sup> Connecticut<sup>266</sup> and Kentucky<sup>267</sup>—confine deposition limits *only to economic litigation* track cases, reducing to twelve the number of jurisdictions that combine numerical limits on depositions with numerical limits on interrogatories in substantial cases. All jurisdictions that restrict deposition availability also numerically limit interrogatories.<sup>268</sup>

Finally, three jurisdictions—Iowa, Nevada, and South Carolina—confine their volume limits to a combination of limits on interrogatories and admission requests.<sup>269</sup> California joins these three states if one considers only “unlimited” (non-economic) cases.

261. TEX. R. CIV. P. 190.2(c)(3), 190.3(c)(3).

262. COLO. R. CIV. P. 16.1(a)(2):

This Rule normally requires early, full disclosure of persons, documents, damages, insurance and experts, and early, detailed disclosure of witnesses' testimony, whose direct trial testimony is then generally limited to that which has been disclosed. Normally, no depositions, interrogatories, document requests or requests for admission are allowed, although examination under C.R.C.P. 34 (a) (2) and 35 is permitted.

263. Florida, Georgia, Hawaii, Idaho, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Rhode Island, Virginia. See *infra* Appendix.

264. Federal courts, Alaska, Arizona, California, Colorado Connecticut, District of Columbia, Illinois, Kentucky, Maine, Montana, Oklahoma, Texas, Utah, Wyoming. See *infra* Appendix. Although California limits the number of depositions to one in limited cases (cases under \$25,000), I did not include California among these twelve jurisdictions because there are no limits to the availability of oral depositions in unlimited cases (over \$25,000).

265. CAL. CIV. PROC. CODE § 94 (discovery rules under section confined to economic litigation for “limited civil cases”).

266. CONN. R. SUPER CT. CIV. § 23-6 (in expedited process cases “[d]epositions may be taken, but only of parties to the action.)

267. KY. R. CIV. P. 93.01 (describing depositions in the “special rules of the circuit court for the economic litigation docket”).

268. See *infra* Appendix.

269. *Id.*

Numerical limits on interrogatories also vary by jurisdiction, ranging from twenty-five in federal court,<sup>270</sup> Texas<sup>271</sup> and Utah,<sup>272</sup> to sixty in Hawaii.<sup>273</sup> The most popular numerical limit is thirty adopted in fifteen states.<sup>274</sup> Four jurisdictions—Arizona,<sup>275</sup> the District of Columbia,<sup>276</sup> Idaho,<sup>277</sup> and Nevada<sup>278</sup>—fix their numerical limit at forty and seven jurisdictions—Michigan,<sup>279</sup> Minnesota,<sup>280</sup> Montana,<sup>281</sup> Nebraska,<sup>282</sup> New Hampshire,<sup>283</sup> New Mexico,<sup>284</sup> and North Carolina<sup>285</sup>—set their limits at fifty interrogatories. By comparison, California’s limit of thirty-five interrogatories in unlimited cases<sup>286</sup> falls within the mainstream of jurisdictions. However, California’s presumptive limit can be exceeded by attaching a Declaration of Necessity<sup>287</sup> which requires the opposing side to move for a protective order. In federal court, and most jurisdictions that presumptively limit interrogatories, the requesting party can exceed the limits only by leave of court and only “to the extent consistent with the [proportionality] principles of Rule 26(b)(2).”<sup>288</sup>

### *Depositions*

The oral deposition ranks second in order of discovery devices subject to presumptive limits with fifteen jurisdictions restricting their availability (twelve if only non-economic cases are considered).<sup>289</sup> There are a variety of ways in which these jurisdictions have

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270. FED. R. CIV. P. 33(a).

271. TEX. R. CIV. P. 190.2(c)(3).

272. UTAH R. CIV. P. 33(a).

273. *See infra* Appendix.

274. Alabama, Colorado, Florida, Iowa, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Oklahoma, Rhode Island, South Carolina, Vermont, Virginia, and Wyoming. *See infra* Appendix.

275. *See infra* Appendix.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. CAL. CIV. PROC. CODE § 2030(c).

287. § 2030(c)(3).

288. FED. R. CIV. P. 33(a).

289. California, Connecticut and Kentucky confine depositions limits to economic litigation. *See infra* Appendix.

narrowed the frequency and extent of use of oral depositions, employing various combinations of limits on number of individual depositions, limits on the aggregate number of deposition hours and limits on duration of individual depositions.<sup>290</sup> Some jurisdictions—like Colorado, Utah, Wyoming, and Texas—limit only the *number* of depositions or the number of aggregate deposition *hours*,<sup>291</sup> while others—like Maine, Oklahoma and Illinois—limit only the *duration* of individual depositions.<sup>292</sup> Still other judicial systems limit *both the number and duration* of oral depositions, like the federal courts, Alaska and Arizona.<sup>293</sup>

Arizona imposes the most restrictive numerical limits, presumptively barring nonparty depositions (other than experts and document custodians).<sup>294</sup> Alaska and Colorado are next in line, presumptively limiting depositions to three in number, followed by the federal courts, the District of Columbia, Utah, and Wyoming which presumptively limit depositions to ten.<sup>295</sup> In terms of duration, Illinois imposes the shortest presumptive limit of three hours.<sup>296</sup> Alaska restricts depositions of parties and experts to six hours and other depositions to three hours.<sup>297</sup> Arizona imposes a four-hour limit, followed by Oklahoma and Texas (six hours), the federal courts, and the District of Columbia (seven hours) and Maine (eight hours).<sup>298</sup>

### *Request for Admissions*

Requests to admit rank third in order of discovery devices subject to volume limits. Nine states (including California) have imposed presumptive limits on admissions requests.<sup>299</sup>

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290. See *infra* Appendix.

291. *Id.*

292. *Id.* In cases under \$50,000, Illinois also limits oral depositions to parties, testifying treating physicians, and "opinion" witnesses. ILL. SUP. CT. R. 222(f)(2).

293. FED. R. CIV. P. 30(a)(2)(A) (ten depositions per side), 30(d)(2) (each deposition limited to one seven-hour day); ALASKA R. CIV. P. 30(a)(2) (three depositions per side), 30(d)(2) (each deposition limited to three hours; six hours to depose parties, independent experts, and treating physicians); ARIZ. R. CIV. P. 30(a) (presumptive prohibition of nonparty depositions, other than experts and document custodians), 30(d) (deposition duration limited to four hours).

294. ARIZ. R. CIV. P. 30(a).

295. See *infra* Appendix.

296. *Id.*

297. *Id.*

298. FED. R. CIV. P. 30(a); ARIZ. R. CIV. P. 30(d); D.C. SUPER. CT. R. CIV. P. 30(d)(2); ME. R. CIV. P. 30(d)(2); OKLA. STAT. ANN. tit. 12, § 3230(A)(3); TEX. R. CIV. P. 199.5(c).

299. Arizona, California, Colorado, Connecticut (in expedited process cases under \$75,000), Iowa, Nevada, Oklahoma, Oregon, and South Carolina. ARIZ. R. CIV. P. 33.1(a); CAL. CIV. PROC.

Across-the-board numerical limits on admissions requests range from twenty in Colorado and South Carolina to forty in Nevada.<sup>300</sup> Within this range fall Arizona (twenty-five), Florida, Iowa, Oklahoma and Oregon (thirty) and California (thirty-five in unlimited civil cases).<sup>301</sup> Connecticut bars admissions requests completely, but only in Expedited Process Cases under \$75,000.<sup>302</sup>

Of the twelve jurisdictions that place across-the-board presumptive limits on oral depositions and interrogatories, only three—Arizona, Colorado, and Oklahoma—also limit requests to admit.<sup>303</sup> These states are the “heavy-hitters” of volume limits. Oregon, on the other end of the spectrum, is the only state that confines its volume limits solely to admissions requests.<sup>304</sup>

### *Document Requests*

The FJC’s empirical study of federal civil discovery found that the most frequent form of discovery activity was document production.<sup>305</sup> The FJC study also found that the highest percentage of attorneys reported problems in their cases with document production.<sup>306</sup> Though reputed to be “one of the most costly parts of discovery and . . . fraught with difficulties,”<sup>307</sup> document requests are presumptively limited across-the-board in only two states—Arizona (ten distinct items or categories)<sup>308</sup> and Colorado (twenty inspection demands)<sup>309</sup>—which have implemented the most far-reaching set of

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CODE §§ 2030(c), 2033(c); COLO. R. CIV. P. 26(b)(2); CONN. R. SUPER. CT. CIV. § 23-6; IOWA R. CIV. P. 1.510(1); NEV. R. CIV. P. 36(C); OKLA. STAT. ANN. tit. 12, § 3236; S.C. R. CIV. P. 36(C).

300. COLO. R. CIV. P. 26(b)(2); NEV. R. CIV. P. 36(C); S.C. R. CIV. P. 36(C).

301. ARIZ. R. CIV. P. 33.1(a); CAL. CIV. PROC. CODE §§ 2030(c), 2033(c); FLA. R. CIV. P. 1.370(a); IOWA R. CIV. P. 1.510(1); OKLA. STAT. ANN. tit. 12, § 3236; OR. R. CIV. P. 45(F).

302. CONN. R. SUPER. CT. CIV. § 23-6.

303. See *infra* Appendix.

304. OR. R. CIV. P. 45(f).

305. Willging et al., *supra* note 183, at 544 (“Document production is the most frequent form of discovery, reported by 84% of attorneys who used some discovery or disclosure in their case, followed closely by interrogatories (81%).”).

306. *Id.* at 540.

307. *Id.*:

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

308. ARIZ. R. CIV. P. 34(b).

309. COLO. R. CIV. P. 26(b)(2).



discovery reforms. California presumptively limits document requests only in limited civil cases as part of the “grab-bag rule of 35.”<sup>310</sup> Connecticut places numerical limits on inspection demands in Expedited Process Track Cases under \$75,000.<sup>311</sup>

ii. Volume Limits on a Case-Differentiated Basis—Variations:

Each of the five jurisdictions that vary volume limits by case category has rules that streamline discovery for low-stakes, economic litigation, cases. Of these five jurisdictions, four—California, Colorado, Connecticut, Illinois, and Texas—define these cases by amount-in-controversy. Of these four jurisdictions, California’s amount-in-controversy cut-off is the lowest by a margin of \$25,000 to \$50,000. Kentucky’s Economic Litigation Docket includes specified classes of cases *regardless of amount in controversy*.<sup>312</sup>

*California*

California’s three tracks consist of small claims, limited and unlimited cases. In small claims cases (cases under \$5,000), discovery is barred; in “limited civil cases” (under \$25,000), discovery is limited to one deposition and a combination of thirty-five interrogatories, document requests and admission requests.<sup>313</sup> In “unlimited cases,” discovery is limited to thirty-five specially prepared interrogatories<sup>314</sup> and thirty-five admission requests.<sup>315</sup>

*Connecticut*

In Connecticut, discovery in Expedited Process Track Cases (under \$75,000) is limited to official form interrogatories and inspection demands and party depositions (excluding non-party depositions). Admission requests are completely excluded.<sup>316</sup> Connecticut imposes no discovery limits in non-expedited cases.

*Illinois*

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310. WEIL & BROWN, *supra* 260, § 8:1810, at 8L-1.

311. CONN. R. SUPER. CT. CIV. § 23-6.

312. KY. R. CIV. P. 89.

313. CAL. CIV. PROC. CODE § 94(a).

314. § 2030(c).

315. § 2033(c)(1).

316. CONN. R. SUPER. CT. CIV. § § 23-6, 13-6(c).

Illinois utilizes a two-track system of discovery limits which imposes across-the-board presumptive limits, applicable *in all cases*, on interrogatories (thirty)<sup>317</sup> and on deposition duration (three hours per deposition).<sup>318</sup> In cases under \$50,000, additional limits are imposed on depositions of parties, treating physicians and “opinion” witnesses.<sup>319</sup>

### *Kentucky*

Kentucky’s Economic Litigation Docket presumptively permits only parties to be deposed<sup>320</sup> and limits the number of interrogatories to twenty.<sup>321</sup> In all other cases, Kentucky imposes a presumptive numerical limit on interrogatories of thirty.<sup>322</sup>

### *Texas*

Texas employs a *three-track* system of presumptive “discovery control plans.” Every case must be governed by one of three discovery control plans denominated as Level 1, Level 2 or Level 3.<sup>323</sup>

Cases pleading damages *under \$50,000* are governed by the Level 1 discovery control plan which imposes the most restrictive presumptive limits: a maximum of six deposition hours per party within which to examine and cross-examine witnesses (which may be extended up to ten hours by stipulation) and a limit of twenty-five interrogatories.<sup>324</sup> Similar to California’s “limited case,” Level 1 is intended to provide plaintiffs filing modest cases with a “*safe haven*” from excessive discovery by defendants.<sup>325</sup> Unlike California, however, Texas does not require plaintiffs with smaller cases to utilize Level 1 if they desire broader discovery.<sup>326</sup>

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317. ILL. SUP. CT. R. 213(c), 222(f)(1).

318. R. 206(d), 222(f)(2).

319. R. 222(f)(2)(a)-(b).

320. KY. R. CIV. P. 93.91.

321. KY. R. CIV. P. 93.02.

322. KY. R. CIV. P. 33.01(3).

323. TEX. R. CIV. P. 190.

324. TEX. R. CIV. P. 190.2.

325. HON. NATHAN L. HECHT & ROBERT H. PEMBERTON, A GUIDE TO THE 1999 TEXAS DISCOVERY RULES REVISIONS G-8 (Nov. 18, 1998) (“Level 1 is expressly designed as a ‘safe haven’ enabling plaintiffs with smaller cases to avoid being overtaxed by their opponent’s discovery.”), available at <http://www.supreme.courts.state.tx.us/rules/tdr/disccl37.pdf> (last visited Apr. 6, 2005).

326. *Id.*

Level 2 is the “basic ‘default’ discovery track intended to govern most cases.”<sup>327</sup> Depositions in Level 2 are limited to fifty hours per party, and only parties and expert witnesses may be deposed. Interrogatories are restricted to twenty-five. The Level 2 Discovery Plan also imposes a discovery period cut-off.<sup>328</sup>

Level 3 regulates *court-managed* discovery . . . “designed for more complex cases that would not easily fit into the framework of Levels 1 or 2.”<sup>329</sup> Level 3 discovery proceeds under a court-ordered discovery plan tailored to the individual case.<sup>330</sup> A Level 3 discovery plan may incorporate a process of phased discovery.<sup>331</sup> Texas’s three-track system is flexible, allowing parties in a Level 1 case to stipulate to Level 2 discovery and allowing either party in a Level 1 plan to move the court for an individually-tailored discovery control plan under Level 3. The court may also act, *sua sponte*, to order an individually tailored Level 3 discovery control plan.<sup>332</sup>

*c. Presumptive Limits on Discovery Duration: Discovery Cut-Offs*

In addition to presumptive limits on scope and frequency of discovery, several jurisdictions have attempted to reduce cost and delay by shortening the amount of time available for discovery, i.e., presumptive discovery cut-offs.

California imposes a time limit to complete discovery of thirty days before the date initially set for trial.<sup>333</sup> The court has the discretion to extend the discovery period or to reopen discovery upon

327. *Id.*

328. TEX. R. CIV. P. 190.3(b)(1):

All discovery must be conducted during the discovery period, which begins when suit is filed and continues until: . . . (B) in [cases not arising under the Family Code], the earlier of (i) 30 days before the date set for trial, or (ii) nine months after the earlier of the date of the first oral deposition or the due date of the first response to written discovery.

329. Hecht & Pemberton, *supra* note 325, at G-9.

330. A Level 3 court-ordered discovery plan must include, *inter alia*: (1) a trial date or a date for a conference to set the trial date, (2) a discovery cut-off date either for the *entire case* or for discreet phases of discovery, and (3) volume limits. TEX. R. CIV. P. 190.4(b)(1)–(4).

331. TEX. R. CIV. P. 190.4(b)(2); *see also* TEX. R. CIV. P. 190.4(b)(2) comment to 1999 change, legislative note 1 (“Separate Level 3 plans for phases of the case may be appropriate.”).

332. One year into the operation of the 1999 Texas discovery rules, it was observed that “in urban jurisdictions and in larger cases, courts are tending to enter their own Level 3 discovery plans or parties are seeking entry of such orders by agreement.” ROBERT H. PEMBERTON, RULES ATTORNEY, SUPREME COURT OF TEXAS, THE FIRST YEAR UNDER THE NEW DISCOVERY RULES: THE BIG ISSUES THUS FAR 5 (2000), available at <http://www.supreme.courts.state.tx.us/rules/tdr/disc1yr.pdf> (last visited Apr. 6, 2005).

333. CAL. CIV. PROC. CODE § 2024(a) (also requires discovery motions be heard no later than the fifteenth day before the date initially set for trial.).

motion accompanied by a “declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.”<sup>334</sup> However, because CCP §2924’s discovery time limit is expressed as an “*entitlement as of right*” to complete discovery up to the thirty-days-before-trial cut-off date, the trial judge is effectively denied discretion to impose a more restrictive discovery time limit suited to the needs of the individual case.

Several states set earlier time limits for discovery than California. Illinois prescribes a presumptive discovery completion deadline of sixty days before commencement of trial,<sup>335</sup> Colorado’s Presumptive Case Management Order establishes a presumptive discovery deadline of fifty days before the beginning of trial,<sup>336</sup> and Nevada’s Rule 26(1) mandates completion of discovery forty-five days before trial.<sup>337</sup>

Two states—New Jersey<sup>338</sup> and Utah<sup>339</sup>—set fixed presumptive time limits for discovery completion that run forward from a point earlier in the lawsuit (i.e., filing of the first answer or after the first defendant is served) rather than running backward from the date set for the commencement of trial. Texas and New Jersey mandate different discovery time limits for different discovery tracks.<sup>340</sup> Texas’ system of discovery tracks combines presumptive time limits with volume limits.

New Jersey has a four-track case management system which imposes the following discovery completion deadlines counting from the date the first answer is filed or from 90 days after the first defendant is served, whichever occurs first: Track I—150 days; Track II—300 days; Tracks III and IV—450 days.<sup>341</sup> Parties may consent to extend the time for discovery for an additional 60 days and may move the court for additional time for good cause shown.<sup>342</sup>

Under Texas’s rules, the Level 1 Discovery Control Plan requires completion of discovery thirty days before trial, like California.<sup>343</sup> However, Level 2’s default discovery control plan imposes a presumptive discovery completion deadline of nine months

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334. § 2024(e).

335. ILL. SUP. CT. R. 218.

336. COLO. R. CIV. P. 16(b)

337. NEV. R. CIV. P. 26(1).

338. N.J. R. SUPER. CT. CIV. 4:24-1(a).

339. UTAH R. CIV. P. 26(d) (discovery to be completed within 240 days after the first answer is filed, unless otherwise stipulated or ordered by the court).

340. TEX. R. CIV. P. 190.1-190.3; N.J. R. SUPER. CT. CIV. 4:24-1(A).

341. N.J. R. SUPER. CT. CIV. 4:24-1(a).

342. N.J. R. SUPER. CT. CIV. 4:24-1(c).

343. TEX. R. CIV. P. 190.2.

commencing from the date of the first deposition or due date of the first written discovery request served in the case.<sup>344</sup> The Level 3 Discovery Control Plan, designed for complex cases that require court-managed discovery, requires the judge to set discovery time limits for the entire case or for an appropriate phase of it.<sup>345</sup>

The District of Columbia requires the court, after an initial scheduling conference, to “place the case on one of several alternative time tracks and [to] enter a scheduling conference order which will set dates for future events in the case” including discovery deadlines.<sup>346</sup>

Maine’s Rule 16 requires the automatic entry of a standard form scheduling order that includes a discovery completion deadline.<sup>347</sup> In complex cases, the rule permits customized scheduling and pretrial orders on motion by a party or the court.

The federal rules advisory committee declined to recommend an early discovery cut-off amendment.<sup>348</sup>

## 2. Mandatory Disclosure: Theme and Variations

Mandatory disclosure, as distinguished from formal discovery, imposes a duty to exchange specific categories of information without waiting for discovery requests.<sup>349</sup> Early disclosure, as originally conceived by Judge William Schwarzer and Magistrate Wayne Brazil, was intended as an antidote to excessive adversarial sparring by lawyers over formal discovery requests.<sup>350</sup>

344. TEX. R. CIV. P. 190.3.

345. TEX. R. CIV. P. 190.4.

346. D.C. SUPER. CT. R. CIV. P. 16(b).

347. ME. R. CIV. P. 16 & advisory committee’s note (1999).

348. For a summary of the grounds for rejecting early discovery cutoffs, see Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT’L & COMP. L. 153, 178-79 (1999) (conflicting empirical finds regarding the impact of early discovery cutoffs on reducing cost and delay and noting that early discovery cutoffs required setting early trial dates, which is impractical in courts with crowded dockets; concluding a one-size-fits-all discovery cut-off date “would not work”).

349. See FED. R. CIV. P. 26(a) advisory committee’s note (1993) (“[T]his subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement.”).

350. The concept of mandatory disclosure has its roots in the law review articles written by federal bench officers Wayne D. Brazil and William W. Schwarzer. See Kuo-Chang Huang, *Mandatory Disclosure: A Controversial Device With No Effects*, 21 PACE L. REV. 203, 209 (2000):

The two authors also played an important role in implementing this idea in the 1993 FRCP amendments. These two authors, Wayne D. Brazil and William W. Schwarzer, challenged the appropriateness of the adversary nature of the pretrial process and advocated to transform it into a non-adversary system. These ideas formed the basic philosophical foundation of their mandatory disclosure proposals.

Only nine jurisdictions have embraced comprehensive disclosure procedures—the federal judiciary, Alaska, Arizona, Colorado, Illinois, Kentucky, Nevada, Texas, and Utah.<sup>351</sup> California could arguably be considered the tenth jurisdiction because its case questionnaire procedure, applicable only in limited cases,<sup>352</sup> is essentially a form of optional disclosure. California's procedure is similar to Texas's Request for Disclosure,<sup>353</sup> which is also limited to small-stakes cases. With the exception of Arizona, most disclosure requirements fall far short of Judge Schwarzer's ambitious goal.

In 1992, Arizona seized the initiative from federal rule-makers by implementing the first—and most ambitious<sup>354</sup>—version of mandatory disclosure<sup>355</sup> accompanied by severe limitations on formal discovery.<sup>356</sup> In 1993,<sup>357</sup> Federal Rule 26(a) implemented a diluted version of mandatory disclosure.<sup>358</sup> In response to intense and widespread opposition,<sup>359</sup> the Federal Rule was amended in 2000 to limit disclosure to information *supporting* the claims and defenses of the disclosing party.

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351. These eight jurisdictions do not include states that require disclosure of specified documents. *See, e.g.*, New York, which requires disclosure of accident reports, and South Carolina, which requires disclosure of relevant medical statements or records if a pre-trial hearing is held. N.Y. C.P.L.R. § 3101(g) (McKinney 2004); S.C. R. Civ. P. 26(a).

352. CAL. CIV. PROC. CODE § 93.

353. TEX. R. CIV. P. 194.1, 194.2.

354. Paul D. Carrington, *Learning From the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 306 (1994) ("The Supreme Court of Arizona took the idea its full length, substantially replacing its discovery practice with a disclosure practice.").

355. Anthony R. Lucia, *The Creation and Evolution of Disclosure in Arizona*, 16 REV. LITIG. 255, 255, 257-58 (1997).

356. ARIZ. R. CIV. P. 30.

357. Prior to the 1993 federal rules amendment adopting mandatory disclosure, several district courts implemented variations on mandatory disclosure under the Civil Justice Reform Act. *See, e.g.*, Randall Samborn, *Derailing the Rules*, NAT'L L.J., May 24, 1993, at 1, 33.

358. *See Lucia, supra* note 355, at 262 ("In 1993, the Federal Rules of Civil Procedure were amended to establish a more limited form of disclosure than that adopted in Arizona.").

359. *See Marcus, supra* note 348, at 170:

[T]he controversy over the adoption of mandatory initial disclosure in 1993 was probably the most vigorous in the history of the Federal Rules. Although opponents had a variety of grounds for opposing the addition of this new requirement, a constant refrain was the belief of many lawyers that forcing them to reveal harmful information without a formal discovery request, contravened the credo of the advocate in America. Opposition to mandatory disclosure was not limited to corporate defendants.

*See also Sorenson, supra* note 45, at 687 ("Opposition to the disclosure rule has come from all quarters—the organized bar, individual practitioners, legal scholars, and some judges—and has been motivated by politics, pragmatism, and fundamental theory."); Tobias, *supra* note 10, at 575 ("No formal rule amendment has received so much criticism from such a broad spectrum of federal court users.").

Mandatory disclosure typically encompasses three categories of information: (1) basic relevant information other than trial witnesses and documentary evidence, typically denominated "*initial disclosures*;" (2) information relating to *expert trial testimony*; and (3) other trial evidence, including lay witness testimony and documentary evidence, called "*pretrial disclosures*". Under the federal rules, disclosure of each of these categories of basic information proceeds in three successive stages: (1) initial disclosures to be completed during the first few months after defendant is served and has appeared,<sup>360</sup> (2) disclosure of expert testimony at least ninety days before trial,<sup>361</sup> and (3) disclosure of other trial evidence at least thirty days before trial.<sup>362</sup> Alaska, Colorado, and Utah emulate the federal three-phase mandatory disclosure process.<sup>363</sup>

Departing from the federal approach, Arizona collapses disclosures into a single initial disclosure requirement which mandates that *all* disclosures be made within forty days of the filing of the answer, subject to a continuing duty to disclose "whenever new information is discovered or revealed."<sup>364</sup> Similarly, Illinois requires the disclosure of all information falling within the scope of the duty to disclose, including information relating to expert testimony, within 120 days after the answer is filed.<sup>365</sup> Texas's Request for Disclosure, which can be served up to thirty days before the end of the discovery period, likewise encompasses expert witness information along with witness statements and a statement of the legal theories and factual bases of the responding party's claims and defenses.<sup>366</sup>

Subsections a. and b. review the variety of approaches to initial disclosures and disclosure of expert testimony.

#### a. *Four Models of Initial Disclosures*

Federal and state jurisdictions have experimented with four distinct models of initial disclosure.

360. The Federal Rules of Civil Procedure require initial disclosures to be completed at or within fourteen days of the Rule 26(f) discovery planning conference unless otherwise stipulated or ordered by the court. FED. R. CIV. P. 26(a)(1). Rule 26(f) provides that the parties confer "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b). Rule 16(b) requires the scheduling order to issue "as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant."

361. FED. R. CIV. P. 26(a)(2).

362. FED. R. CIV. P. 26(a)(3).

363. ALASKA R. CIV. P. 26(a); COLO. R. CIV. P. 26(a)(1); UTAH R. CIV. P. 26(a)(1).

364. ARIZ. R. CIV. P. 26.1.

365. ILL. SUP. CT. R. 222(a) and (d).

366. TEX. R. CIV. P. 194.2.

i. Federal Rule 26(a)(1): Mandatory; narrow scope; case exemptions

Rule 26(a)(1) imposes a narrowly focused duty to disclose witnesses and documents “that the disclosing party intends to *support* its claims or defenses,”<sup>367</sup> as well damage computations<sup>368</sup> and insurance agreements.<sup>369</sup> Because mandatory disclosure may not be suitable for all cases<sup>370</sup>—for example, “big” cases<sup>371</sup>—the rule exempts certain categories of cases deemed unsuited to initial disclosure,<sup>372</sup> permits the parties to waive the requirement by stipulation,<sup>373</sup> and authorizes the court to modify or eliminate disclosure obligations in a particular case.<sup>374</sup> To facilitate discovery planning and management by counsel, initial disclosures must be made at, or within fourteen days of, the Rule 26(f) conference at which the parties must discuss settlement and attempt to agree on a discovery plan.<sup>375</sup> Rule 26(a)(1) requires parties to make initial disclosures based on “information then reasonably available to it”<sup>376</sup> and expressly declines to excuse a party from its disclosure duty based on the failure of another party to make its disclosures.<sup>377</sup> The rule also defers formal discovery until the

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367. FED. R. CIV. P. 26(a)(1)(A) (“[T]he name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses”) and (B) (“a copy of, or a description by category and location of, all documents, data compilations, and tangible things . . . that the disclosing party may use to support its claims or defenses . . .”).

368. FED. R. CIV. P. 26(a)(1)(B)

369. FED. R. CIV. P. 26(a)(1)(C).

370. FED. R. CIV. P. 26(a)(1) committee notes (1993), *in* 146 F.R.D. at 629 (“The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.”).

371. *See* COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES, *in* 181 F.R.D. 24, 32 (1998):

It does not seem useful to draft a rule that exempts ‘big discovery’ or ‘problem discovery’ cases. The resolution is to allow the parties to stipulate that there is to be no initial disclosure, or to allow any party to object during the Rule 26(f) conference that disclosure is not appropriate.

372. FED. R. CIV. P. 26(a)(1)(E).

373. Carrington, *supra* note 354, at 307 (“The rulemakers also recognized that the disclosure requirement might be unsuitable to some cases. Thus, it is provided that the requirement may be waived by the parties or dissolved by order of the court.”).

374. FED. R. CIV. P. 26(a)(1).

375. Initial disclosures are linked to the Rule 26(f) conference in order to facilitate discovery planning and management by counsel. *See* Paul D. Carrington, *Recent Efforts to Change Discovery Rules: Advice for Draftsmen of Rules for State Courts*, 9 KAN. J.L. & PUB.POL’Y 456, 460 (2000) (noting that Rule 26(a)(1)’s early initial disclosure requirement “was introduced into the rules in 1993 as a device for enabling lawyers to plan and to manage discovery”).

376. FED. R. CIV. P. 26(a)(1).

377. *Id.*



parties have conferred as required by Rule 26(f)<sup>378</sup> which can effectively bar parties from engaging in formal discovery for as long as three months from defendant's appearance or four months after service of the complaint.<sup>379</sup>

Both Colorado<sup>380</sup> and Utah<sup>381</sup> model their mandatory disclosure rules after the federal rules. Nevada's mandatory disclosure requirement is somewhat broader in scope than the federal model, encompassing the identity of all persons with information relevant to the allegations of any pleading, whether or not the information supports the disclosing party's claims or defenses.<sup>382</sup>

ii. Arizona: Mandatory; broad scope; no case exemptions

Arizona's disclosure rule is far more ambitious in scope and applicability than the federal version. Arizona imposes a broad duty to disclose core information in writing—through a disclosure statement—and promptly—within forty days after the filing of a responsive pleading. Parties must disclose the factual basis and legal theory underlying each claim or defense, the identity of all persons with relevant information (whether helpful or harmful to the disclosing party), the “nature of the knowledge or information each such individual is believed to possess,” and a list of documents that may be relevant to the subject matter of the action.<sup>383</sup> Disclosure in Arizona does not proceed in stages; therefore, the disclosure statement must also include information relating to both lay and expert trial witnesses.<sup>384</sup> Arizona also imposes a continuing duty to make amended or additional disclosures “whenever new or different information is discovered or revealed.”<sup>385</sup> To put teeth into the disclosure requirements,<sup>386</sup> the disclosure rules provide for the

378. FED. R. CIV. P. 26(d). Colorado defers discovery until submission by counsel of the case management order “which normally occurs 45 days after the case is at issue.” David R. DeMuro, *Colorado's Approach to Discovery and Pretrial Reform in Civil Cases*, 16 REV. LIT. 271, 286 (1997). Utah follows federal rule 26(d). *Id.*

379. A pretrial conference is discretionary with the judge who must, nevertheless, issue a scheduling order “as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant.” FED. R. CIV. P. 16(a), (b).

380. COLO. R. CIV. P. 26(b)(2) (Initial disclosures must occur earlier than under federal rules, i.e., “[n]o later than 30 days after the case is at issue”).

381. UTAH R. CIV. P. 26(a)(1).

382. NEV. R. CIV. P. 26(g).

383. ARIZ. ST. R.C.P.R. 26.1(A)(1), (2), (4).

384. ARIZ. ST. R.C.P.R. 26.1(A)(6).

385. ARIZ. ST. R.C.P.R. 26.1(b)(2).

386. *Bryan v. Riddell*, 875 P.2d 131, 135 (Ariz. 1994).

mandatory exclusion as trial evidence of information that was not timely disclosed.<sup>387</sup> Like the federal rules, Arizona's mandatory evidence exclusion sanction provides an exception for harmless failure to disclose.<sup>388</sup>

Unlike the federal rules, Arizona's disclosure rules apply across-the-board to all cases without exemptions. Arizona also imposes an affirmative duty of reasonable inquiry and investigation<sup>389</sup> that is, on its face, more onerous than the duty imposed under the federal rules to make initial disclosures "based on the information then reasonably available to [the disclosing party]."<sup>390</sup> However, federal Rule 26(g)(1), in effect, imposes an affirmative duty of reasonable inquiry by requiring each disclosure to be signed by an attorney of record which constitutes a certification that "to the best of the signer's knowledge . . . , *formed after a reasonable inquiry*, the disclosure is complete and correct as of the time it is made."<sup>391</sup>

A comparison of presumptive limits imposed by Arizona and the Federal Rules indicates the extent to which Arizona's disclosure rules have displaced formal discovery. In Arizona, oral depositions are presumptively limited to party and expert witnesses, thus excluding non-party lay witnesses unless *all* parties otherwise stipulate, upon court order for good cause shown, or following a Comprehensive Pretrial Conference.<sup>392</sup> By contrast, the federal rules permit non-party depositions,<sup>393</sup> but set a numerical limit of ten oral depositions per side.<sup>394</sup> Arizona limits the length of depositions to four hours<sup>395</sup> compared with seven hours under the federal rules.<sup>396</sup> Arizona presumptively limits document production requests to a maximum of "ten distinct items or categories of items" which can be exceeded by party stipulation or court order for good cause shown; the federal rules

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387. ARIZ. R.C.P.R. 37(c)(1).

388. *Id.* ("[U]nless such failure [to timely disclose information] is harmless"); *cf.* FED. R. CIV. P. 37(c) ("A party that without substantial justification fails to disclose information [as required] is not, unless such failure is harmless, permitted to use as evidence at trial . . . any witness or information not so disclosed.").

389. ARIZ. R. CIV. P. 26.1(b)(3) ("All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.").

390. FED. R. CIV. P. 26(a)(1).

391. FED. R. CIV. P. 26(g)(1) (emphasis added).

392. ARIZ. R. CIV. P. 30(a).

393. FED. R. CIV. P. 30(a)(1) ("A party may take the testimony of any person, including a party, by deposition upon oral examination . . .").

394. FED. R. CIV. P. 30(a)(2)(A).

395. ARIZ. R. CIV. P. 30(d).

396. FED. R. CIV. P. 30(d)(2) ("Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours.").

impose no limitation on document production. Arizona presumptively limits admission requests to twenty-five,<sup>397</sup> the federal rules do not limit the number of admission requests. Interrogatories are the only discovery device in which the federal rules' presumptive limit—twenty-five<sup>398</sup>—exceeds Arizona's limit of exceeds.<sup>399</sup>

Alaska's disclosure requirement—which includes the factual bases of claims and defenses and the identity of persons and documents “relevant to disputed facts alleged with particularity,”<sup>400</sup> both favorable and unfavorable to the disclosing party's case—is more sweeping in scope than the federal model but less comprehensive than Arizona's.

iii. Illinois: Mandatory; broad scope; limited to cases under \$50,000

Illinois adopted mandatory disclosure provisions that are almost identical to Arizona's in scope but, unlike Arizona's model, are limited in application to cases not exceeding \$50,000 in damages.<sup>401</sup> Like Arizona's disclosure rules, Illinois imposes a continuing duty of disclosure “whenever new or different information or documents become known to the disclosing party” and an affirmative duty of “reasonable inquiry and investigation.”<sup>402</sup>

As a tradeoff to expansive mandatory disclosure, Illinois also imposes presumptive limits on discovery that are more restrictive than those set by the federal rules but which are not quite as restrictive as Arizona's. Whereas Arizona presumptively limits oral depositions to parties and expert trial witnesses in *all cases*,<sup>403</sup> Illinois limits oral depositions *in cases under \$50,000* to parties, treating physicians and expert trial witnesses and presumptively prohibits so-called “evidence depositions” unless a good cause showing is made that the witness will likely be unavailable for trial or other exceptional circumstances exist.<sup>404</sup> Illinois also prescribes presumptive limits on interrogatories (thirty compared with forty in Arizona)<sup>405</sup> and deposition duration (three hour limit per depositions compared with

397. ARIZ. R. CIV. P. 36(b).

398. FED. R. CIV. P. 33(a).

399. ARIZ. R. CIV. P. 33.1(a).

400. ALASKA R. CIV. P. 26(a)(1).

401. ILL. SUP. CT. R. 222 (a), (d). Illinois' disclosure deadline – 120 days after the answer is filed – is later than Arizona's deadline of 40 days after the answer is filed. ILL. SUP. CT. R. 222(c).

402. ILL. SUP. CT. R. 222(c).

403. ARIZ. R. CIV. P. 30(a).

404. ILL. SUP. CT. R. 222(a), (f)(2).

405. ILL. SUP. CT. R. 213(c), 222(f)(1).

four hours in Arizona).<sup>406</sup> As in Arizona, these limits apply to all cases, not just to cases under \$50,000. Unlike Arizona, Illinois' rules do *not* limit the availability of admission or document requests.

Kentucky's mandatory disclosure rules are applicable to Economic Litigation Cases defined by type of case rather than amount in controversy.<sup>407</sup>

iv. Texas: Optional; broad scope; no case exemptions

Texas rejected the federal model of mandatory disclosure,<sup>408</sup> opting instead for "standardized requests for basic discoverable information that would be presumptively unobjectionable"<sup>409</sup> and available in all cases. Mandatory disclosure was opposed by both the plaintiff and defense bars<sup>410</sup> primarily because it would impose discovery costs on cases that typically do not use discovery.<sup>411</sup>

Rule 194.2, as promulgated in 1998, struck a compromise between plaintiffs' and defendants' attorneys. Responding to the plaintiffs' attorneys' concerns over the breadth of the disclosure obligation, the final version narrowed the scope of the request to require "the legal theories and, *in general*, the factual bases of the responding party's claims or defenses" adding, in parentheses, "the responding party need not marshal all evidence that may be offered at trial."<sup>412</sup> Rule 194.2 also broadened the scope of the request to include, *inter alia*, the identity of "persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case" as well as request for witness statements, which are not protected by Texas's work product rule.

Texas's disclosure rule lies somewhere between the federal and Arizona models. Although Texas rejected the mandatory feature of disclosure embraced by both the federal and Arizona rules, the Texas disclosure request is broader in scope than the federal mandatory disclosure duty, approaching that of Arizona's disclosure statement. Unlike federal disclosure, Arizona's disclosure statement and Texas's

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406. ILL. SUP. CT. R. 206(d), 222(f)(2).

407. KY. R. CIV. P. 89 (contracts, personal injury, property damages, property rights and termination of parental rights).

408. See Kenneth E. Shore, *A History of the 1999 Discovery Rules: The Debates & Compromises*, 20 REV. LITIG. 89, 159 (2000) ("The Discovery Task Force, the CRC [State Bar of Texas Court Rules Committee], and the SCAC [Supreme Court Advisory Committee] all rejected the Federal Rules' notion of mandatory disclosure.").

409. *Id.*

410. *Id.*

411. *Id.*

412. TEX. R. CIV. P. 194.2.

disclosure request both include legal theories and factual bases of the responding party's claims or defenses, as well as identity of persons with knowledge of relevant information, both favorable and unfavorable. In one significant respect, the Texas disclosure request—by omitting identification of relevant documents—is narrower in scope than both federal mandatory disclosure and Arizona's disclosure statement

### *b. Expert Witness Disclosure*

#### *i. Mandatory Expert Witness Disclosure in Federal Court*

The federal rules implement one of the most comprehensive expert witness disclosure schemes designed to reduce the number of costly expert witness depositions and to help parties prepare for those expert depositions that are conducted.<sup>413</sup> Federal Rule 26(a)(2) requires “a complete statement of all opinions to be expressed and the basis and reasons therefor,” the “data or other information considered by the witness in forming the opinions,” and “any exhibits to be used as a summary of or support for the opinions.”<sup>414</sup> Instead of a brief narrative statement of the qualifications of each expert, the Federal Rule requires detailed disclosure of “all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.”<sup>415</sup>

#### *ii. Expert Witness Disclosure in State Jurisdictions*

Only seven states—Alaska,<sup>416</sup> Arizona,<sup>417</sup> Colorado,<sup>418</sup> Connecticut,<sup>419</sup> Kansas,<sup>420</sup> Maine,<sup>421</sup> and Utah<sup>422</sup>—have adopted *mandatory* disclosure of expert witnesses. Most of the remaining states provide for optional disclosure through interrogatories and oral

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413. Advisory committee's note, 146 F.R.D. 535, 634 (1993).

414. FED. R. CIV. P. 26(a)(2)(B).

415. *Id.*

416. ALASKA R. CIV. P. 26(a)(2).

417. ARIZ. R. CIV. P. 26.1.

418. COLO. R. CIV. P. 26(a)(2).

419. CONN. R. SUPER. CT. CIV. § 13-4 (4).

420. KAN. R. CIV. P. § 60-226(b)(6).

421. ME. R. CIV. P. 16.

422. UTAH R. CIV. P. 26(a)(3).

depositions.<sup>423</sup> Alaska,<sup>424</sup> Colorado<sup>425</sup> and Utah<sup>426</sup> follow the federal model that requires the expert to prepare and sign a detailed report. The content of Alaska's and Colorado's expert report is the same as that required by the federal disclosure rule. Utah's expert report is slightly less detailed and omits the federal disclosure requirements of "the data or other information considered by the witness in forming the opinions" and "any exhibits to be used as a summary of or support for the opinions."<sup>427</sup> Arizona's expert disclosure requirement is similar to Utah's but requires less detailed information about the expert's qualifications.<sup>428</sup> Disclosure procedure in both Connecticut and Kansas omits all reference to the expert's qualifications. Maine requires "an automatic disclosure of expert witness information required by M.R.Civ. P. 26(b)(4)(A)(i)"<sup>429</sup> which copies the former federal *discovery* rule 26(b)(4)(A)(i)—now superseded by the more comprehensive federal *disclosure* of expert witness information—authorizing the optional use of specified interrogatories directed to expert testimony.

In contrast with the eight jurisdictions that have implemented mandatory expert witness disclosure, California, through its optional procedure, provides very limited expert trial witness information, placing the burden on oral depositions to flesh out the details.<sup>430</sup>

The deadline for completing expert witness disclosure varies among the seven mandatory disclosure state jurisdictions. Arizona requires the earliest disclosure of expert information, which is part of the "initial disclosure" to be made within 40 days after the answer is filed,<sup>431</sup> followed by Colorado (120 days before the trial date),<sup>432</sup> Utah

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423. *See infra* Appendix.

424. ALASKA R. CIV. P. 26(a)(2)

425. COLO. R. CIV. P. 26(a)(2)

426. UTAH R. CIV. P. 26(a)(3).

427. *Compare* UTAH R. CIV. P. 26(a)(3) ("[T]he subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion"), with FED. R. CIV. P. 26(a)(2), ALASKA R. CIV. P. 26(a)(2) and COLO. R. CIV. P. 26(a)(2) ("[A] complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions . . .").

428. Arizona merely requires the disclosure of "the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert." ARIZ. R. CIV. P. 26.1(a)(6).

429. ME. R. CIV. P. 16 advisory committee's note (1999).

430. CAL. CIV. PROC. CODE § 2034(f)(2)(D) ("[The expert witness] declaration . . . shall contain, . . . . (D) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial.")

431. ARIZ. R. CIV. P. 26.1(b).

432. COLO. R. CIV. P. 26(b)(2)(C)(l).

(30 days after expiration of “fact discovery”<sup>433</sup> which must be completed within 240 days after the first answer is filed), and Kansas (at least 90 days before trial unless otherwise directed by the court).<sup>434</sup> Connecticut rules require disclosure within “a reasonable time prior to trial.”<sup>435</sup> In Alaska<sup>436</sup> and Maine,<sup>437</sup> the court sets the deadline. Among the states that authorize formal discovery of expert witness information, Illinois requires the court to set deadlines for disclosure of opinion witnesses and their opinions, through interrogatory answers, sufficiently early to assure completion of oral depositions more than sixty days before trial.<sup>438</sup> Under the federal rules, mandatory expert disclosure must be made ninety days before trial unless otherwise directed by the court.<sup>439</sup>

### 3. Discovery Planning by Counsel

Nineteen jurisdictions, including federal court, have adopted a variety of rules that either require, or utilize incentives to encourage, counsel to confer on crafting discovery plans tailored to the needs of the individual case.<sup>440</sup> Such rules are designed to relieve courts of the burden of convening discovery conferences in every case.<sup>441</sup> As discussed below, some of these jurisdictions require judicial follow-up

433. UTAH R. CIV. P. 26(b)(3)(C).

434. KAN. R. CIV. P. § 60-226(b)(6).

435. CONN. R. SUPER. CT. CIV. § 13-4(4).

436. ALASKA R. CIV. P. 26(a)(2)(C).

437. ME. R. CIV. P. 16(a).

438. ILL. SUP. CT. R. 218(c):

All dates set for the disclosure of witnesses, including rebuttal witnesses, and the completion of discovery shall be chosen to ensure that discovery will be completed not later than 60 days before the date on which the trial court reasonably anticipates that trial will commence, unless otherwise agreed by the parties.

*Id.* committee notes (“For example, opinion witnesses should be disclosed, and their opinions set forth pursuant to interrogatory answer, at such time or times as will permit their depositions to be taken more than 60 days before trial.”).

439. FED. R. CIV. P. 26(a)(2)(C).

440. The federal courts, Alaska, Colorado, District of Columbia, Maryland, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming.

441. Carrington, *supra* note 375, at 463. Presumptive limits are supposed to facilitate discovery planning by providing counsel with the litigation rules-of-the-road. To exceed these limits, the parties must submit to the court a discovery plan for additional – customized – discovery. See Niemeyer, *supra* note 241, at 524 (discussing customized discovery); see also Carrington, *supra* note 375, at 464 (“[A]s an aid to parties and counsel in planning, a state’s rules might provide some presumptive parameters to be extended by agreement whenever good cause is shown.”).

through the entry of scheduling orders,<sup>442</sup> while others contemplate judicial intervention only where the parties cannot agree.<sup>443</sup>

*a. Mandatory Discovery Plans Automatically Entered by the Court:  
Standard Pretrial Scheduling Orders*

Some jurisdictions mandate discovery planning by the parties in every case without burdening the courts with routine hands-on discovery management duties.

Colorado's Presumptive Case Management Order prescribes a pre-trial schedule that sets deadlines for disclosure, settlement discussions and discovery and requires the parties to meet and confer to discuss the need for a Modified Case Management Order.<sup>444</sup> Maine's Rule 16 also provides for a standard pre-trial scheduling order automatically entered by the court, but subject to modification by court order.<sup>445</sup>

*b. Mandatory Discovery Plans Submitted to the Court for Approval*

Mandatory discovery planning in federal court,<sup>446</sup> Alaska,<sup>447</sup> Nevada,<sup>448</sup> and Utah<sup>449</sup> requires the parties to confer on discovery matters and to submit a proposed discovery plan to the court, in the form of a "report," for incorporation into a scheduling order. The court may, but is not required to, convene a discovery conference before entering the scheduling order.<sup>450</sup>

The Federal Rules provide a well-developed mechanism for discovery planning. Federal Rule 26(f) requires the parties to "confer"

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442. *See, e.g.*, FED. R. CIV. P. 16(b).

443. *See, e.g.*, NEV. R. CIV. P. 16.1 (providing for court intervention through a "dispute resolution conference" only on party motion or *sua sponte*.)

444. COLO. R. CIV. P. 16b(10) (discovery to commence forty-five days after case is at issue and must be completed fifty days before the trial date)

445. ME. R. CIV. P. 16 (standard pre-trial scheduling order includes an eight-month discovery completion deadline).

446. FED. R. CIV. P. 26(f).

447. ALASKA R. CIV. P. 26(f), 16.

448. *See* NEV. R. CIV. P. 16.1 ("Within thirty (30) days after each case conference, the parties must file a joint case conference report or, if the parties are unable to agree upon the contents of a joint report . . .").

449. UTAH. R. CIV. P. 26(f).

450. The District of Columbia rules require the parties to meet three weeks before a mandatory pre-trial conference, but does not specify developing a proposed discovery plan among the matters to be considered. D.C. R. CIV. P. 16(c). The parties must submit a joint pre-trial statement one week prior to the pre-trial conference. D.C. R. CIV. P. 16(e).



as soon as practicable to develop a proposed discovery plan<sup>451</sup> and specifies in detail the contents of the discovery plan.<sup>452</sup> Cases exempt from initial disclosure are likewise exempt from the requirements of Rule 26(f). Although Federal Rule 16(b) requires the court, in each case, to enter a scheduling order, the federal scheme eases the discovery management burden on judges in two ways. First, the court is not required to convene a case management conference. Second, the parties must attempt "in good faith" to agree on a discovery plan that becomes the basis for the court's scheduling order.<sup>453</sup> A party or a party's attorney who "fails to participate in good faith in the development and submission of a proposed discovery plan" is subject to sanctions at the court's discretion.<sup>454</sup>

To reinforce the key role of the Rule 26(f) conference as a "discovery planning event,"<sup>455</sup> federal Rule 26(d) defers formal discovery until the parties have conferred.<sup>456</sup> The Advisory Committee

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451. FED. R. CIV. P. 26(f) ("[T]he parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due . . . , confer to . . . develop a proposed discovery plan . . .").

452. FED. R. CIV. P. 26(f). The discovery plan should

indicate the parties' views and proposals concerning: (1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made; (2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues; (3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and (4) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The parties must submit to the court a "written report outlining the plan." FED. R. CIV. P. 26(f).

453. See advisory committee's note to 1993 Amendments to Rule 26, 8 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE 36 (2d ed. 1994):

The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

454. FED. R. CIV. P. 37(g).

455. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE ADVISORY COMMITTEE ON CIVIL RULES (1998), *in* 181 F.R.D. 24, 34 ("This moratorium continues to be desirable despite the narrowing of initial disclosure requirements. The moratorium not only ensures that disclosure is not superseded by earlier discovery, but—and perhaps more important—also preserves the role of the Rule 26(f) conference as a discovery-planning event.").

456. FED. R. CIV. P. 26(d).

pronounced the Rule 26(f) conference “one of the most successful changes made in the 1993 amendments.”<sup>457</sup>

*c. Optional Discovery Planning Encouraged Through Incentives*

As an alternative to mandatory discovery planning, the District of Columbia and seventeen states—Delaware, Hawaii, Iowa, Maryland, Minnesota, Mississippi, Montana, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Vermont, Washington, West Virginia, and Wyoming—have adopted rules that *encourage, but do not expressly require*, counsel to engage in discovery planning. To motivate counsel to plan discovery, all but two of these jurisdictions—North Carolina and the District of Columbia<sup>458</sup>—require the court to convene a scheduling or discovery conference *if* the moving party represents that the parties have been unable, in good faith, to agree on a discovery plan<sup>459</sup> and (except in Maryland) submits a proposed discovery plan.<sup>460</sup> In addition, all but

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457. FED. R. CIV. P. 26(f) advisory committee’s note on 2000 amendments. “The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide.” *Id.*

458. In North Carolina and the District of Columbia, the court *may*, but is not required to, convene a discovery conference on a party’s motion that included a proposed plan and schedule of discovery and a statement that the movant has made reasonable effort to reach agreement with opposing counsel. N.C. GEN. STAT. § 1a-1, Rule 26(f); D.C. R. CIV. P. 26(g).

459. MD. R. 2-401(c) (parties “encouraged to reach agreement on a plan for the scheduling and completion of discovery”), 2-504.1:

*When Required.* In any of the following circumstances, the court shall issue an order requiring the parties to attend a scheduling conference: . . . (3) in an action, in which a party requests a scheduling conference and represents that, despite a good faith effort, the parties have been unable to reach an agreement (i) on a plan for the scheduling and completion of discovery . . .

460. DEL. SUPER. CT. R. CIV. P. 26(f); HAW. R. CIV. P. 26(f) (duty to participate in good faith in framing a discovery plan if proposed by any party; court must convene discovery conference if requesting party submits a proposed discovery plan and schedule and certifies to reasonable effort to agree); IOWA CT. R. 1.507(1); MINN. R. CIV. P. 26.06 (requiring the court to convene a discovery conference if the party’s motion includes, *inter alia*, “(b) A proposed plan and schedule of discovery; . . . (e) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion”); MISS. R. CIV. P. 26(c) (court may convene discovery conference and must do so if requested by a party, but only if request certifies that counsel has “conferred, or made a reasonable effort to confer, with opposing counsel” and “shall include: 1. a statement of the issues to be tried; 2. a plan and schedule of discovery; 3. limitations to be placed on discovery, if any; and 4. other proposed orders with respect to discovery.”); MONT. R. CIV. P. 26(f); N.D. R. CIV. P. 26(f) (requiring the court to convene a discovery conference if the party’s motion includes, *inter alia*, “(2) A proposed plan and schedule of discovery; . . . [and] (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.”); N.M. DIST. CT. R. CIV. P. 1-026(f) (court may convene discovery conference *sua sponte* and must do so on motion if motion includes, *inter alia*,

two of these eighteen jurisdictions (New Mexico and Maryland), as well as Nevada, impose a duty on parties or their attorneys to participate in good faith in framing a discovery plan and authorize the court to sanction counsel who violate that duty.<sup>461</sup>

*d. Court-Mediated Discovery Planning: Illinois*

Illinois mandates discovery planning *in court* but without the benefit of a prior meeting by the parties outside of court. Of all the variations on the theme of discovery planning, Illinois' scheme places the greatest burden on the courts.<sup>462</sup>

*e. Meet and Confer/Discovery Planning under Current California Rules*

California Rule of Court 212(f) requires parties to meet and confer out-of-court, but the rule places less emphasis on the meeting as a discovery planning event than federal Rule 26(f) in several ways. First, Rule 212(f) does not *require* the parties to develop a discovery plan but merely encourages them to "consider" setting a discovery

a proposed plan and schedule of discovery; attorneys obligated to participate in good faith in framing of discovery plan, but only if a plan is proposed by attorney for any party); OKLA. STAT. ANN. tit. 12, § 3226(f) (requiring the court to convene a discovery conference if the party's motion includes, *inter alia*, "2. A proposed plan and schedule of discovery; . . . [and] 5. A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion."); S.C. R. CIV. P. 26(f) (mandatory discovery conference *only if* motion includes a proposed plan and schedule of discovery; purpose of discovery conference is to "prevent discovery abuse by encouraging the court to intervene when abuse occurs, or when attorney has failed to obtain the cooperation of opposing counsel . . . Routine matters should be resolved by Rule 26 (c) Motions"); TENN. R. CIV. P. 26.06 (court may convene a discovery conference and must do so pursuant to motion that includes, *inter alia*, a proposed plan and schedule of discovery); VT. R. CIV. P. 26(f) (court must convene discovery conference only if motion includes, *inter alia*, a proposed plan and schedule of discovery); WASH. SUPER. CT. CIV. R. 26(f) (court must convene discovery conference if motion includes, *inter alia*, a proposed plan and schedule of discovery); W. VA. R. CIV. P. 26(f); WYO. R. CIV. P. 26(f) (court must convene discovery conference if motion by party includes, *inter alia*, a plan and schedule of discovery).

461. DEL. SUPER. CT. R. CIV. P. 26(f) ("Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party."); D.C. SUPER. CT. R. CIV. P. 26(g); HAW. R. CIV. P. 26(f); IOWA CT. R. 1.507(2); MINN. R. CIV. P. 26.06; MISS. R. CIV. P. 26(c) & 37(e); MONT. R. CIV. P. 26(f); NEV. R. CIV. P. 26(f) (authorizing sanctions for counsel who fail or refuse to engage in framing a discovery plan); N.C. GEN. STAT. § 1A-1, Rule 26(f)(5) & 37(g); N.D. R. CIV. P. 26(f); OKLA. STAT. ANN. tit. 12, §§ 3226(F) & 3237(F); S.C. R. CIV. P. 26(f) & 37(e); TENN. R. CIV. P. 26.06 & 37.05; VT. R. CIV. P. 26(f) & 37(e); WASH. SUPER. CT. CIV. R. 26(f) & 37(e); W. VA. R. CIV. P. 26(f); WYO. R. CIV. P. 26(f) & 37(e).

462. See ILL. SUP. CT. R. 218 (mandating that court participate in discovery plan).

schedule.<sup>463</sup> By contrast, federal Rule 26(f) requires the parties to develop a comprehensive proposed discovery plan that addresses timing and form of disclosures and timing and scope of discovery requests (including phased discovery and limiting discovery to particular issues). Second, California rules do not suspend discovery pending the meet and confer by which time some or most discovery may have already occurred.<sup>464</sup> Under federal practice, all discovery is deferred until the parties have conferred and developed a discovery plan which governs all discovery in the case. Thus, the federal meet-and-confer rule channels the attention of the parties to discovery *planning* rather than discovery *completion* and anticipation and resolution of discovery *issues*,<sup>465</sup> as under Rule 212(f).

#### D. Court-Managed Discovery

Section D briefly surveys reforms that promote court-managed discovery through direct court intervention to tailor discovery to the circumstances of the individual case.

Federal and state court rules governing court-managed discovery employ various combinations of optional or mandatory scheduling orders, in-court discovery conferences that focus exclusively on discovery management, and pretrial scheduling or case management conferences that touch more casually on discovery as only one of several pretrial events. Additionally, some jurisdictions embrace the proportionality principle, which explicitly confers judicial discretion to weigh the burdens and benefits of discovery on an *ad hoc* basis.

The Federal Rules give judges considerable authority to control discovery in individual cases, including setting deadlines for completion of discovery.<sup>466</sup> Federal judges frequently impose discovery time limits as a discovery management tool.<sup>467</sup> State courts, however,

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463. CAL. R. CT. 212(f) ("Unless the court orders another time period, no later than 30 calendar days before the date set for the case management conference, the parties must meet and confer, in person or by telephone, to consider each of the issues identified in (e) and, in addition, to *consider* the following: (1) Resolving any discovery disputes and setting a discovery schedule. . .").

464. Topics to be considered at the meet and confer include "[w]hether discovery has been completed and, if not, the date by which it will be completed." CAL. R. CT. 212(e)(8).

465. CAL. R. CT. 212(f) (parties to consider, *inter alia*, "(1) Resolving any discovery disputes").

466. FED. R. CIV. P. 16(b) ("[T]he district judge, . . . shall, . . . enter a scheduling order that limits the time . . . (3) to complete discovery.").

467. See Willging, *supra* note 183, at 580:

Of the instances in which attorneys reported some court involvement in discovery or disclosure, the court imposed time limits on the completion of discovery in 80% of

may be less receptive to routine judicial involvement in discovery matters that may unacceptably tax scarce judicial resources.<sup>468</sup> State judges labor under heavier caseloads than their federal counterparts without the support of magistrates to share the discovery management burden. Also, in master calendar jurisdictions where, as in many California trial courts, judges are not assigned cases for all purposes, the effectiveness of discovery management may be impaired by the judge's lack of familiarity with the case.

Rules governing scheduling orders, discovery conferences, and pre-trial, case management or scheduling conferences vary considerably across the nation. Fifteen states do not have procedures that explicitly address judicial management of discovery.<sup>469</sup> Nineteen states have adopted rules that authorize, but do not generally require, courts to enter orders limiting discovery.<sup>470</sup> In some of these states, such orders are required only if the court decides to convene a conference dealing with discovery.<sup>471</sup> Among the nineteen states where scheduling orders are generally optional, twelve—Arizona,<sup>472</sup> Iowa,<sup>473</sup> Minnesota,<sup>474</sup> Mississippi,<sup>475</sup> Montana,<sup>476</sup> New Mexico,<sup>477</sup>

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those instances. The median time limit imposed by the court was six months; 75% of the limits were shorter than eight months and 25% were four months or less.

468. See NAT'L CTR. FOR STATE CTS., NCSC Annual Report 2002 3 ("Like other branches of government, courts are faced with massive budget shortfalls while simultaneously confronting the need to expend more resources on security and improve operations to better serve the public."), available at [www.ncsconline.org/D\\_Comm/Images/NCSC\\_AnnlRpt2002.pdf](http://www.ncsconline.org/D_Comm/Images/NCSC_AnnlRpt2002.pdf). (last visited Aug. 6, 2004).

469. Arkansas, Connecticut (required only in Expedited Process Track Cases), Georgia, Indiana, Kentucky (mandatory discovery conference only in Economic Litigation Docket Cases), Massachusetts (optional pre-trial conference but not a tool for discovery scheduling or planning), Missouri (optional pre-trial conference but not a tool for discovery scheduling or planning), Nebraska, New Jersey (only presumptive cut-offs by track), New York, Ohio, Oregon, Pennsylvania, Rhode Island (optional pre-trial conference but not a tool for discovery scheduling or planning), and Wisconsin. See *infra* Appendix.

470. ALA. R. CIV. P. 16(b); ARIZ. R. CIV. P. 16(b); FLA. R. CIV. P. 1.200(a); KAN. R. CIV. P. § 60-216(b) (West 2004); LA. CODE CIV. PROC. ANN. art. 1551 (West 2004); MISS. R. CIV. P. 26(c); NEV. R. CIV. P. 16.1(d); N.M. DIST. CT. R. CIV. P. 1-016b; N.C. GEN. STAT. § 1A-1, R. 26(f) & (f1); N.D. R. CIV. P. 26(f), 16(b); OKLA. STAT. ANN. tit. 12, § 3226F (West 2004); S.C. R. CIV. P. 26(a); S.D. R. CIV. P. § 15-6-16; TENN. R. CIV. P. 16.01; TEX. R. CIV. P. 190.4; VT. R. CIV. P. 26(f); VA. SUP. CT. R. 4:13; WASH. R. SUPER. CT. CIV. P. 26(f); WYO. R. CIV. P. 16(b)(3).

471. See, e.g., KAN. R. CIV. P. § 60-216(b) (West 2004), LA. CODE CIV. PROC. ANN. art. 1551, MISS. R. CIV. P. 26(c).

472. ARIZ. R. CIV. P. 16(a) (pre-trial conference at court's discretion); 16(b) ("comprehensive" pre-trial conference mandatory upon written request of any party).

473. IOWA R. CIV. P. 1.507(1) (discovery conference within court's discretion or a party's request).

474. MINN. R. CIV. P. 26.06 (Court *may* convene discovery conference; must do so upon motion by any party).

Oklahoma,<sup>478</sup> South Carolina,<sup>479</sup> Tennessee,<sup>480</sup> Vermont,<sup>481</sup> Washington,<sup>482</sup> and Wyoming<sup>483</sup>—require the court to convene a discovery conference only when requested by parties who cannot agree upon a discovery plan. Of these 12 states, New Mexico, South Carolina, Tennessee, Vermont, Washington, and Wyoming require the motion to be accompanied by a proposed discovery plan.

Scheduling orders are mandatory, with or without discovery or pre-trial conferences, in eighteen jurisdictions.<sup>484</sup> In five of these—

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475. MISS. R. CIV. P. 26(c) (Court may hold “discovery conference” and *must* do so if requested by any party; court may impose sanctions “for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement.”).

476. MONT. R. CIV. P. 26(f) (Court may convene a “discovery conference” and *must* do so on motion by any party.); 16(b) (Court must enter a “scheduling order” that, *inter alia*, limits the time to complete discovery.).

477. N.M. DIST. CT. R. CIV. P. 1-026F (Court may convene “discovery conference” *sua sponte* and must do so on motion if motion includes, *inter alia*, a proposed plan and schedule of discovery; attorneys obligated to participate in good faith in framing of discovery plan but only if a plan is proposed by attorney for any party.); 1-016 (pre-trial conference at court’s discretion).

478. OKLA. STAT. ANN., tit. 12, § 3226(f) (West 2004) (Court may convene “discovery conference” *sua sponte* and must do so on motion if motion includes, *inter alia*, a proposed plan and schedule of discovery; attorneys obligated to participate in good faith in framing of discovery plan if a plan is proposed by an attorney for any party.).

479. S.C. R. CIV. P. 26(f) (Court may convene “discovery conference” and must do so pursuant to motion if motion includes, *inter alia*, a proposed plan and schedule of discovery; purpose of discovery conference is to “prevent discovery abuse by encouraging the court to intervene when abuse occurs, or when an attorney has failed to obtain the cooperation of opposing counsel. . . . “Routine matters should be resolved by Rule 26(c) Motions for protective orders or Rule 37 Motions to compel.”)

480. TENN. R. CIV. P. 26.06 (Court may convene a “discovery conference” and must do so pursuant to motion if motion includes, *inter alia*, a proposed plan and schedule of discovery.; 26.02(1) (similar to FED. R. CIV. P. 26(b)(2), requires court to limit the “frequency or extent of use” of discovery methods proportional to the needs of the individual case; court may act *sua sponte* or pursuant to motion).

481. VT. R. CIV. P. 26(f) (Court may convene a “discovery conference” and must do so pursuant to motion if motion includes, *inter alia*, a proposed plan and schedule of discovery.); 26(b)(1).

482. WASH. SUPER. CT. CIV. R. 26(f) (Court may convene a “discovery conference” and must do so pursuant to motion if motion includes, *inter alia*, a proposed plan and schedule of discovery).

483. WYO. R. CIV. P. 26(f) (Court may convene a “discovery conference” and must do so pursuant to motion if motion includes, *inter alia*, a proposed plan and schedule of discovery).

484. FED. R. CIV. P. 16(b); ALASKA R. CIV. P. 16(a); CAL. R. CT. 212(b); COLO. R. CIV. P. 16(b); DEL. SUPER. CT. R. CIV. P. 16(b)(3); DEL. SUPER. CT. R. CIV. P. 26(d) (time limits for discovery set by court order); D.C. SUPER. CT. R. CIV. P. 26(d); HAW. R. CIV. P. 16(b); IDAHO R. CIV. P. 16(b); ILL. SUP. CT. R. 218 (mandatory scheduling conference at which court shall consider, *inter alia*, “deadlines for the disclosure of witnesses and the completion of written discovery and depositions”; also provides presumptive discovery completion deadline of sixty days before commencement of trial); IOWA R. CIV. P. 1.602(2) (scheduling order required on party’s application or court’s own motion); ME. R. CIV. P. 16 (standard pre-trial scheduling order automatically entered by court; includes eight-month discovery completion deadline, subject to modification by court order); MD. CIRC. CT. R. 2-504(a); MD. CIRC. CT. R 16-202(b) (requires

Alaska,<sup>485</sup> California,<sup>486</sup> Illinois,<sup>487</sup> Maryland,<sup>488</sup> and New Hampshire<sup>489</sup>—a discovery, case management or scheduling conference is also mandatory. In the District of Columbia, a discovery conference is optional but a scheduling conference is mandatory.<sup>490</sup> In twelve of the eighteen jurisdictions that mandate scheduling orders—federal court,<sup>491</sup> Colorado,<sup>492</sup> Delaware,<sup>493</sup> Hawaii,<sup>494</sup> Idaho,<sup>495</sup> Iowa,<sup>496</sup> Maine,<sup>497</sup> Michigan,<sup>498</sup> Minnesota,<sup>499</sup> Montana,<sup>500</sup> Utah,<sup>501</sup> West Virginia<sup>502</sup>—a conference dealing with discovery is discretionary with the court. In seven of these twelve jurisdictions, the discovery conference becomes mandatory if requested by a party.<sup>503</sup> As

county administrative judge to implement and monitor a case management plan “for prompt and efficient disposition of actions in the circuit court,” including a system of differential case management”); MICH. R. CIV. P. 2.401(b)(2)(a); MINN. R. CIV. P. 16.02 (court shall enter scheduling order on motion of a party); MONT. R. CIV. P. 26(f); N.H. SUPER. CT. R. 62 (mandatory structuring order to include discovery deadlines); UTAH R. CIV. P. 16(b) (court shall enter scheduling order on motion of a party); W. VA. R. CIV. P. 16(b)(3).

485. ALASKA R. CIV. P. 16(a) (scheduling conference mandatory unless waived by the parties and judge decides conference unnecessary).

486. CAL. R. CT. 212(b).

487. ILL. SUP. CT. R. 218 (mandatory scheduling conference at which court shall consider, *inter alia*, “deadlines for the disclosure of witnesses and the completion of written discovery and depositions”; also provides presumptive discovery completion deadline of sixty days before commencement of trial).

488. MD. CIRC. CT. R. 2-504.1(a)(3) (scheduling conference required in specified circumstances).

489. N.H. SUPER. CT. R. 62 (mandatory structuring order to include discovery deadlines).

490. D.C. SUPER. CT. R. CIV. P. 26(g).

491. FED. R. CIV. P. 16(a).

492. COLO. R. CIV. P. 16(b).

493. DEL. SUPER. CT. R. CIV. P. 26(f).

494. HAW. R. CIV. P. 26(f).

495. IDAHO R. CIV. P. 16(b) (court shall consult with attorneys for parties “by a scheduling conference, telephone, mail or other suitable means.”).

496. IOWA R. CIV. P. 1.602 (optional pretrial conference), 1.507(1) (optional discovery conference, but required at party’s request).

497. ME. R. CIV. P. 16 (optional trial management conference in cases requiring “special management”).

498. MICH. R. CIV. P. 2.401(a).

499. MINN. R. CIV. P. 26.06.

500. MONT. R. CIV. P. 26(f) (discovery conference optional but required at party motion), 16(a) (optional pre-trial conference).

501. UTAH R. CIV. P. 16(b) (optional Scheduling and Case Management Conference).

502. W. VA. R. CIV. P. 26(f) (court may convene a discovery conference and must do so pursuant to motion if motion includes, *inter alia*, a proposed plan and schedule of discovery), 16(a) (optional pretrial conference).

503. COLO. R. CIV. P. 16(b) (Case Management Conference required if party files notice to obtain a disputed Modified Case Management Order); DEL. SUPER. CT. R. CIV. P. 26(f) (discovery conference required at party’s request); HAW. R. CIV. P. 16(f); MINN. R. CIV. P. 26.06 (same); MONT. R. CIV. P. 26(f); UTAH R. CIV. P. 26(f)(3) (“If the parties are unable to agree to the terms of a discovery plan . . . the plaintiff shall, and any party may, move the court for entry of a

mentioned earlier, Maine<sup>504</sup> and Colorado<sup>505</sup> utilize presumptive or standard discovery orders subject to modification by the parties or the court in order to conserve judicial resources.

In addition to states that impose presumptive discovery cut-offs, twelve jurisdictions, including federal, require their courts to enter scheduling or pre-trial orders that impose limits on discovery duration on a case-by-case basis.<sup>506</sup>

Finally, twenty-five jurisdictions—federal,<sup>507</sup> Alabama,<sup>508</sup> Alaska,<sup>509</sup> Arizona,<sup>510</sup> Delaware,<sup>511</sup> Hawaii,<sup>512</sup> Kansas,<sup>513</sup> Maryland,<sup>514</sup> Minnesota,<sup>515</sup> Montana,<sup>516</sup> Nevada,<sup>517</sup> New Mexico,<sup>518</sup> North Carolina,<sup>519</sup> North Dakota,<sup>520</sup> Rhode Island,<sup>521</sup> South Carolina,<sup>522</sup>

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discovery order on any topic on which the parties are unable to agree.”); W. VA. R. CIV. P. 26(f) (Court must convene discovery conference if motion includes, *inter alia*, a proposed plan and schedule of discovery.).

504. ME. R. CIV. P. 16 (standard pre-trial scheduling order automatically entered by court; includes eight-month discovery completion deadline; subject to modification by court order).

505. COLO. R. CIV. P. 16(b) provides for a Presumptive Case Management Order that lays out a prescribed pre-trial schedule, including a mandatory “Meet and Confer” during which counsel discuss, *inter alia*, whether a Modified Case Management Order is necessary, and that sets forth deadlines for disclosure, settlement discussions, and discovery (discovery to commence forty-five days after case is at issue and be completed fifty days before the trial date). Presumptive discovery limits can be modified for good cause by the entry of a Modified Case Management Order approved by the court. *Id.* The parties are entitled to a Case Management Conference to resolve disagreement about any aspect of the proposed Case Management Order. *Id.*

506. FED. R. CIV. P. 16(b); ALASKA R. CIV. P. 16(a); DEL. SUPER. CT. R. CIV. P. 16(b); D.C. SUPER. CT. R. CIV. P. 26(d); HAW. R. CIV. P. 16(b); IDAHO R. CIV. P. 16(b); ME. R. CIV. P. 16(a) (“Scheduling Order. After the filing of the answer . . . , the court shall enter a scheduling order setting deadlines for the joinder of additional parties, the exchange of expert witness designations and reports, the scheduling and completion of an alternative dispute resolution conference . . . , the completion of discovery, the filing of motions, and the placement of the action on the trial list.”) (emphasis added); MD. CIRC. CT. R. 2.504(a); MICH. R. CIV. P. 2.401(b)(2)(a); MONT. R. CIV. P. 16(b); UTAH R. CIV. P. 16(b); W. VA. R. CIV. P. 16(b)(3).

507. FED. R. CIV. P. 26(b)(2).

508. ALA. R. CIV. P. 26(b)(1).

509. ALASKA R. CIV. P. 26(b)(2).

510. ARIZ. R. CIV. P. 26(b).

511. DEL. SUPER. CT. R. CIV. P. 26(b)(1).

512. HAW. R. CIV. P. 26(b)(1).

513. KAN. R. CIV. P. § 60-226(b)(2).

514. MD. CIRC. CT. R. 2-402(b).

515. MINN. R. CIV. P. 26.02(a).

516. MONT. R. CIV. P. 26(b)(1).

517. NEV. R. CIV. P. 26(b)(1).

518. N. M. DIST. CT. R. CIV. P. 1-026(b)(2).

519. N. C. GEN. STAT. § 1A-1, R. 26(B)(1).

520. N. D. R. CIV. P. 26(b)(1).

521. R. I. SUPER. CT. R. CIV. P. 26(b)(1).

522. S. C. R. CIV. P. 26(a).



South Dakota,<sup>523</sup> Tennessee,<sup>524</sup> Texas,<sup>525</sup> Utah,<sup>526</sup> Vermont,<sup>527</sup> Virginia,<sup>528</sup> Washington,<sup>529</sup> West Virginia,<sup>530</sup> and Wyoming<sup>531</sup>—have proportionality rules that expressly authorize or require courts *sua sponte* to customize discovery limits. The proportionality rules in California<sup>532</sup> and Colorado<sup>533</sup> do not appear to authorize courts to act *sua sponte*.

The foregoing survey of state and federal discovery reform demonstrates that the wide range of diverse combinations of discovery reforms adopted by the states provides a rich medium for empirical research. Part V proposes a means to realize the potential for coordinated and controlled rules experimentation leading to a uniform state discovery code informed by the collective experience of state courts.

## V. PROPOSAL

This Article proposes a vision of state judicial systems that collaborate—through a mechanism analogous to the Civil Rules Advisory Committee of the U.S. Judicial Conference—to develop a national code of state civil procedure based on empirical data developed through coordinated and controlled experimentation in state courts. The state civil rules advisory committee could be established within the framework of the National Center for State Courts (“NCSC”), reporting its recommendations to the NCSC’s Conference of Chief Justices (“CCJ”) in the same way that the federal civil rules advisory comments reports to the U.S. Judicial Conference. This proposal addresses the twin defects of existing rule-making practice previously discussed: (1) the inequities and inefficiencies of procedural disuniformity throughout the national system of state courts and (2) the paucity of empirical data to support rules reform.

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523. S.D. R. CIV. P. § 15-6-26(b)(1)(a).

524. TENN. R. CIV. P. 26.02(1).

525. TEX. R. CIV. P. 192.4.

526. UTAH R. CIV. P. 26(b)(2).

527. VT. R. CIV. P. 26(b)(1).

528. VA. SUP. CT. R. CIV. P. 4:1(b)(1).

529. WASH. SUPER. CT. CIV. R. 26(b)(1).

530. W. VA. R. CIV. P. 26(b)(1).

531. WYO. R. CIV. P. 26(b)(1)(B).

532. CAL. CIV. PROC. CODE 2017(c).

533. COLO. R. CIV. P. 26(b)(2).

Unlike the NCCUSL or ALI, which undertake projects that are relatively limited in scope,<sup>534</sup> the state civil rules advisory committee would be dedicated exclusively to drafting and amending a comprehensive code of state civil procedure. Also unlike the NCCUSL or ALI, the state civil rules advisory committee would be charged with continuing responsibility to evaluate the efficacy of existing rules and to coordinate and conduct controlled experiments in participating state courts designed to improve these rules. The work of the advisory committee would be supported by a staff of experts in empirical research, similar to the research support provided by the Federal Judicial Center to the U.S. Judicial Conference.<sup>535</sup> The NCSC currently provides research and consulting services to state courts.<sup>536</sup> By operating within the framework of the NCSC, the advisory committee could be established without the necessity of an interstate compact.<sup>537</sup> Rules approved by the Conference of Chief Justices would

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534. See *supra* text accompanying notes 145-160 (outlining some of the proposed rules from the ALI and NCCUSL).

535. See Letter from Professor Benjamin Kaplan, Harvard Law School, to Dean Acheson (Mar. 2, 1967) concerning the establishment of a "judicial center" within the Administrative Office of United States Courts to conduct research and tests in judicial administration: "Under the terms of the bill, I believe the judicial center could perform effectively notwithstanding the fact that the deepest and most resistant problems lie on the State rather than on the Federal level." Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1967 app. (1989).

536. See National Center for State Courts (NCSC), Welcome (serving state courts "[t]hrough original research consulting services, publications, and national educational programs, NCSC offers solutions that enhance court operations with the latest technology; collects and interprets the latest data on court operations nationwide; and provides information on proven 'best practices' for improving court operations"), at <http://www.ncsconline.org/> (last visited Apr. 6, 2005).

537. The ALI considered two consent-based mechanisms to facilitate transfer of litigation among state courts: an interstate compact and a uniform act. See COMPLEX LITIGATION PROJECT, *supra* note 108, at 16-17 (discussing inter-state compacts in connection with the Uniform Transfer of Litigation Act):

Of the many ways to facilitate transfer among state courts, § 4.02 focuses on two consent-based mechanisms: an Interstate Complex Litigation Compact and a Uniform Complex Litigation Act. . . . The Compact Clause of the Constitution provides that "[n]o State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . ." U.S. Const. art. I, § 10, cl.3. However, the Supreme Court has held that only those compacts that "increase . . . political power in the States, which may encroach upon or interfere with the just supremacy of the United States" require congressional consent. *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). Section 4.02 suggests consideration of a compact, to be joined by two or more states. As one model, the Compact could create an Interstate Complex Litigation Panel composed of state judges from ratifying states. If created, the Panel might hear petitions for transfer and consolidation of state court complex cases and determine where, when, and how much of any case to consolidate. . . . If the compact is thought to increase the political power of the states, the requisite congressional consent could be sought before or after its negotiation.

The second mechanism set out in § 4.02 to foster interstate consolidation is a Uniform Interstate Transfer and Consolidation Act, which would be similar in structure and function to a

be recommended to the states for adoption in a fashion similar to the Uniform Commercial Code.

The NCSC and CCJ, in partnership with the State Justice Institute (SJI), are logical vehicles to advance this initiative. The NCSC's mission—"to improve the administration of justice through leadership and service to state courts"<sup>538</sup>—is comprehensive enough to embrace the twin features of my proposal: a collaborative rulemaking process to fashion uniform state civil procedure rules and controlled experimentation to empirically inform the rulemaking process. This mission presupposes the existence of a national state court community<sup>539</sup> with a shared interest in state civil justice reform and seeks to serve this common interest, in part, through "reengineering procedures to ensure that litigants experience an efficient, fair, and equitable process"<sup>540</sup> and through experimentation<sup>541</sup> conducted by a staff of researchers collaborating with court leaders.<sup>542</sup>

The CCJ works in partnership with the NCSC "to provide an opportunity for consultation among the highest judicial officers of the several states, commonwealths, and territories, concerning matters of importance in *improving the administration of justice, rules and*

compact. However, a uniform act would not require the consent of Congress. The best known example of a uniform act is the Uniform Commercial Code. In the civil procedure field there is the Uniform Interstate and International Procedure Act, which deals with jurisdiction and judicial assistance, and the Uniform Class Action Act, which prescribes uniform rules for state class actions. See Skirnick & Avery, *The State Court Class Action – A Potpourri of Differences*, 20 FORUM 750, 759 (1985). Although these have not been widely adopted, they have been used as models by a number of states.

538. NAT'L CTR. FOR STATE CTS., STRATEGIC PLAN 2002-2004 4 ("The mission of The National Center for State Courts is to *IMPROVE THE ADMINISTRATION OF JUSTICE* through LEADERSHIP and SERVICE to state courts, and courts around the world."), available at [http://www.ncsconline.org/D\\_About/Images/Strategic%20Plan%202002-2004final.pdf](http://www.ncsconline.org/D_About/Images/Strategic%20Plan%202002-2004final.pdf) (last visited Apr. 6, 2004) [hereinafter NCSC STRATEGIC PLAN].

539. *Id.* ("The National Center will continue to be the premier provider of quality services meeting the current and future needs of the U.S. state court community, and courts around the world.")

540. NAT'L CTR. FOR STATE CTS., CIVIL JUSTICE REFORM INITIATIVE: ADVANCING CIVIL JUSTICE REFORM, at [http://64.233.167.104/search?q=cache:gNQ1L8U\\_1RkJ:www.ncsconline.org/WC/Publications/Res\\_CtComm\\_CJRIpub.pdf+Civil+Justice+Reform+Initiative&hl=en](http://64.233.167.104/search?q=cache:gNQ1L8U_1RkJ:www.ncsconline.org/WC/Publications/Res_CtComm_CJRIpub.pdf+Civil+Justice+Reform+Initiative&hl=en) (last visited May 24, 2005).

541. NCSC STRATEGIC PLAN, *supra* note 538, at 4 ("The National Center will . . . serve as a NATIONAL THINK TANK to anticipate new developments, identify best practices, promote experimentation . . ."); *id.* at 11 ("Best practices emerge from a process of continuous experimentation, innovation, assessment, implementation, and reassessment of court policies, procedures, and practices.") (emphasis added).

542. See NAT'L CTR. FOR STATE COURTS, CONFRONTING TODAY'S CHALLENGES: ANNUAL REPORT 2002 5 (2002) ("NCSC researchers collaborate with court leaders in the federal and state government to design and implement applied research projects that deal with the expressed needs of state courts."), available at [http://www.ncsconline.org/D\\_Comm/Images/NCSC\\_AnnlRpt2002.pdf](http://www.ncsconline.org/D_Comm/Images/NCSC_AnnlRpt2002.pdf) (last visited Apr. 6, 2005).

*methods of procedure*, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on such matters.”<sup>543</sup> Like the NCSC, the CCJ exists “to develop and advance policies in support of common interests and shared values of state judicial systems.”<sup>544</sup> As a forum for consultation among the states’ chief judicial officers, the CCJ is an appropriate vehicle to evaluate uniform rules proposed by an advisory committee of judges, lawyers and academics. Also, the CCJ’s members are strategically positioned to promote the implementation in their respective state court systems of uniform rules approved by the CCJ.

Funding could come from a variety of sources. Congress created the SJI in 1984, with the backing of the CCJ, to fund efforts “to improve the quality of justice in State courts.”<sup>545</sup> SJI funding is typically matched by state, local and private sources.<sup>546</sup> SJI’s exclusive mission to fund state court improvement work as well as its mandate “to share the success of one State’s innovations with every State court system”<sup>547</sup> make it a potential channel for federal funding of the uniform rules project.<sup>548</sup> However, Congress drastically reduced

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The purpose of the Conference is to provide an opportunity for consultation among the highest judicial officers of the several states, commonwealths, and territories, concerning matters of importance in *improving the administration of justice, rules and methods of procedure*, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on such matters.

Bylaws of the Conference of Chief Justices, Article II—“Purpose,” § 2.1 (1983), *available at* <http://ccj.ncsc.dni.us/bylaws.pdf> (last visited Apr. 7, 2005) (emphasis added). The CCJ’s mission is

to improve the administration of justice in the states, commonwealths and territories of the United States. The conference accomplishes this mission by the effective mobilization of the collective resources of the highest judicial officers of the states, commonwealths and territories to, inter alia, develop, exchange, and disseminate information and knowledge of value to state judicial systems; develop and advance policies in support of common interests and shared values of state judicial systems.

Conference of Chief Justices, Mission Statement, *available at* <http://ccj.ncsc.dni.us/mission.html> (last visited Apr. 7, 2005).

544. *Id.*

545. STATE JUSTICE INSTITUTE, WHAT IS SJI? (2002), *available at* <http://www.statejustice.org/pdf/factsht.pdf> [hereinafter SJI] (last visited Apr. 7, 2005).

546. CONFERENCE OF CHIEF JUSTICES, CCJ RESOLUTION 12, COSCA RESOLUTION 4, IN SUPPORT OF THE STATE JUSTICE INSTITUTE (2002), *at* <http://ccj.ncsc.dni.us/resol12SJI.html> (last visited Apr. 7, 2005) [hereinafter CCJ RESOLUTION 12].

547. WHAT IS SJI?, *supra* note 545 (“Only SJI has the authority to assist all State courts . . . and the mandate to share the success of one State’s innovations with every State court system as well as the Federal courts.”).

548. The State Justice Institute is a non-profit corporation, established by Congress in 1984:

[T]o award grants to improve the quality of justice in State courts, facilitate better coordination between State and Federal courts, and foster innovative, efficient solutions to common problems faced by all courts. Since becoming operation in 1987,

the SJI's budget which was almost eliminated in 2003.<sup>549</sup> Minimal funding of \$3 million was salvaged in fiscal year 2003, largely due to the efforts of the NCSC and the CCJ who continue to urge Congress to restore the originally authorized funding amount of \$25 million.<sup>550</sup> Congressional awareness of the federal interest in supporting a "fair and efficient" state court system needs to be raised.<sup>551</sup> Funding for the uniform rules initiative could also come from state contributions and private sources including corporations and nonprofit foundations. Corporations, foundations and law firms currently contribute to the NCSC<sup>552</sup> and those entities that litigate on a national scale may have a particular interest in eliminating needless procedural complexity.

The NCSC and CCJ have already taken tentative, but significant, steps in the direction of developing uniform or model rules. The NCSC's Civil Justice Reform Initiative ("CJRI"), launched in 2000, is "dedicated to setting an agenda for further reform of the civil justice system" including civil discovery.<sup>553</sup> The CJRI aims at achieving "greater predictability and uniformity of procedure."<sup>554</sup> The NCSC's 2002-2004 Strategic Initiative seeks to "improve the efficiency, effectiveness, and outcomes of the civil justice system" by promoting uniform procedures including model rules for electronic discovery.<sup>555</sup>

Precedent also exists for a standing rules advisory committee reporting to the CCJ. In the early 1990s, the CCJ, with the support of

SJI has awarded \$120 million to support more than 1,000 projects benefiting the nation's judicial system and the public it serves.

SJI, at <http://www.statejustice.org> (last visited Mar. 26, 2005).

549. See CONFERENCE OF CHIEF JUSTICES, RESOLUTION 12, POLICY STATEMENTS & RESOLUTIONS 2, ("[I]n the report on PL 107-77 Congress has stated its intention to terminate federal funding of SJI at the conclusion of Fiscal Year 2002."), available at <http://ccj.ncsc.dni.us/resol12SJI.html> (last visited Mar. 26, 2005).

550. See CONFERENCE OF CHIEF JUSTICES RESOLUTION 16, ("SJI has operated at a funding level of \$3 million in fiscal year 2003 and will continue at the same level in 2003, which has resulted in a dramatic cutback in programs."), available at <http://ccj.ncsc.dni.us/resol16SJIFundingIncrease.html> (last visited Mar. 26, 2005).

551. Congress recognized the national interest in improving the "fair and effective administration of justice" in state courts when it created the SJI to provide federal support and assistance to State courts. This national interest is based on the premise that state courts comprise a national state civil justice system that is the "backbone of the American system of justice." CONFERENCE OF CHIEF JUSTICES, RESOLUTION 16, available at <http://ccj.ncsc.dni.us/resol16SJIFundingIncrease.html> (last visited March 26, 2005). The national interest in improving this system is served by "assuring consistency, information-sharing and cooperation among state judiciaries." CCJ RESOLUTION 12, *supra* note 546.

552. NCSC, Support the National Center for State Courts, at [http://www.ncsconline.org/D\\_Dev/Friendsfirst.htm](http://www.ncsconline.org/D_Dev/Friendsfirst.htm)

553. NCSC STRATEGIC PLAN, *supra* note 538, at 29.

554. CIVIL JUSTICE REFORM INITIATIVE *supra* note 542.

555. STRATNCSC STRATEGIC PLAN, *supra* note 538, at 30.

the NCSC and the SJI, established the Standing Committee on Mass Torts “to craft a national approach to dealing with mass tort litigation.”<sup>556</sup> At its 2003 mid-year meeting, the CCJ called for the establishment of a National Mass Torts Clearinghouse within the NCSC which would “[d]evelop case management strategies and techniques, including model rules and standards of practice, . . .”<sup>557</sup> To launch the National Clearinghouse, funding was provided by SJI and sought from business entities, law firms, private nonprofit foundations and other interested organizations and associations.<sup>558</sup>

I acknowledge that politics is a formidable obstacle to the universal adoption of a uniform code of state civil procedure. I also acknowledge that empirical data can be interpreted to serve political ends<sup>559</sup> and do not insulate procedural rules from the importuning of interest groups. Adoption of a uniform code of civil procedure will face an uphill battle in state legislatures like California’s which exercise the dominant rulemaking power and in which procedure is the political coin of the realm. However, empirical research by the Federal Judicial Center has significantly impacted the federal rulemaking process.<sup>560</sup> Ideally, the successful implementation of the uniform rules by an expanding core of states—demonstrated by sound empirical evidence—will create a momentum that will influence rule-makers in other jurisdictions.

## VI. CONCLUSION

The goal of a national code of state procedure may seem utopian. I draw inspiration, however, from the many gifted scholars, jurists and practitioners who continue to pursue the American Law Institute’s vision of a code of transnational civil procedure applicable across national boundaries, undeterred by “skeptics who think the idea premature at best that there can be ‘universal’ procedural

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556. “The National Center for State Courts (NCSC) has made important contributions in the area of mass torts through its work with the Conference of Chief Justices (CCJ) and with the support of the State Justice Institute (SJI). In the early 1990s, NCSC helped to develop and support CCJ’s Mass Tort Litigation Committee, a standing committee of 20 state judges recognized for its efforts to craft a national approach to dealing with mass tort litigation.” NAT’L CENTER. FOR STATE COURTS, NCSC INITIATIVES IN MANAGEMENT OF MASS TORTS, CIVIL ACTION, 3 (2003).

557. *Id.*

558. *Id.* at 4.

559. See Hensler, *supra* note 190, at 56 (“It is not uncommon for media and interest groups to draw inferences regarding a policy question from data gathered to address altogether different questions.”)

560. See Willging, *supra* note 191, at 1195 (“In general, empirical research appears to have had a substantial impact on the drafting of amended rules.”).

rules.”<sup>561</sup> The drafting and formal approval of these rules by the ALI and UNIDROIT are the first steps toward the realization of this vision.<sup>562</sup> So, too, the vision of uniform state rules of civil procedure, applicable across state boundaries, begins with drafting those rules and is a worthy endeavor.

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561. PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE xv (Council Draft No. 2 2003).

562. The final version of the Principles and Rules of Transnational Civil Procedure will be submitted for formal approval by the ALI and UNIDROIT in 2004. PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE 10 (Council Draft No. 2 2003).

**APPENDIX  
SELECTED DISCOVERY REFORMS IN FEDERAL AND STATE JURISDICTIONS  
Professor Glenn S. Koppel**

Jurisdiction	Rule-Based Limits on Volume	Presumptive Discovery Cut-offs	Rule-Based Narrowing of Scope of Discovery 1	Discovery Planning By Counsel 2	Judicial Management of Discovery 3	Proportionality Rules	Deferral of Discovery	Initial Disclosure 4	Expert Witness Disclosure	Certification of Compliance 5
Federal	Ten depositions per side 6 Depositions limited to one day of seven hours 7 Limited to twenty-five interrogatories per party 8	NONE	Presumptively limited to any matter "relevant to the claim or defense of any party" 9	Mandatory "conference of parties" 10	Optional Pretrial Conference; mandatory Scheduling Order (court required to limit time to complete discovery) 11	Proportionality rules exist and judge can act <i>sponte</i> 12	Deferred until parties "confer" 13	Mandatory 14	Mandatory 15	Yes 16
Alabama	Limited to forty interrogatories 17	NONE	NOT NARROWED	NONE	Optional Pretrial Conference but required on written notice by party. Optional Scheduling Order (court may limit time to complete discovery) 18	Proportionality rules exist and judge can act <i>sponte</i> 20	NONE	NONE	On request 21	NONE



Alaska	Three depositions per side <sup>22</sup> Depositions limited to three hours. <sup>23</sup> Limit of thirty interrogatories. <sup>24</sup> Special limits for personal injury and property damage cases under \$100,000. <sup>25</sup>	NONE	NOT NARROWED	Mandatory "meet and confer" <sup>26</sup>	Mandatory Scheduling Conference (unless waived by the parties and the judge decides conference unnecessary); mandatory Scheduling Order (court required to limit time to complete discovery) <sup>27</sup>	Proportionality rules exist and judge can act <i>qua sponte</i> . <sup>28</sup>	Deferred until parties "meet and confer" <sup>29</sup>	Mandatory <sup>30</sup>	Mandatory <sup>31</sup>	NONE
Arizona	Presumptive prohibition of nonparty depositions <sup>32</sup> Depositions limited to four hours. <sup>33</sup> Limit of 40 interrogatories. <sup>34</sup> Inspection demands are limited to ten distinct items or categories. <sup>35</sup> Limit of twenty-five admission requests <sup>36</sup> Presumptive limits on # of experts: in all cases each side limited to only one independent expert witness and in medical malpractice cases, each party is limited to one standard-of-care expert. <sup>37</sup>	NONE	NOT NARROWED	NONE	Optional Pretrial Conference; <sup>38</sup> Optional Comprehensive Pretrial Conference but required at party's request (court may order a schedule for additional discovery and set dates for disclosure); <sup>39</sup> Mandatory Comprehensive Pretrial Conference and scheduling order in medical malpractice cases <sup>40</sup>	Proportionality rules exist and judge can act <i>qua sponte</i> . <sup>41</sup>	In medical malpractice cases only limited discovery allowed until after pre-trial conference <sup>42</sup>	Mandatory in all cases <sup>43</sup> and mandatory exchange of records in medical malpractice cases <sup>44</sup>	Mandatory <sup>45</sup>	NONE
Arkansas	NONE	NONE	"relevant to the issues in the pending action" <sup>46</sup>	NONE	NONE <sup>47</sup>	NONE	NONE	NONE	On request <sup>48</sup>	NONE

California	Three Tracks: Numerical limits vary by type of case classified by amount in controversy <sup>49</sup>	Up to thirty days before trial <sup>50</sup>	NOT NARROWED	Mandatory "meet and confer to consider resolving discovery disputes and setting a discovery schedule." <sup>51</sup>	Mandatory case management conference and mandatory "case management plan" <sup>52</sup>	Proportionality rules exist but judge can only act once motion filed by party or affected person <sup>53</sup>	NONE	Yes, but only at plaintiff's request and limited to cases under §25,00064	On request <sup>55</sup>	No equivalent
Colorado	Depositions limited to three per side. 60 days before trial. Interrogatories limited to thirty. <sup>57</sup> Inspection demands limited to twenty. <sup>58</sup> Admission requests limited to twenty. <sup>59</sup> "Simplified Procedure" (optional), applicable to cases under \$100,000, normally does not permit depositions, interrogatories, document requests or requests for admission.	Discovery can take place up to fifty days before beginning of trial. <sup>60</sup>	"relevant to the claim or defense of any party" <sup>61</sup>	Mandatory "meet and confer" <sup>62</sup>	Presumptive Case Management Order (subject to modification by stipulation or court order); optional Case Management Conference, but required if party files notice to obtain a disputed Modified Case Management Order. <sup>63</sup>	Proportionality Rules exist: Unclear but seems to require motion claiming good cause to modify limitation—no specific mention that judge may act <i>sua sponte</i> <sup>64</sup>	Deferred until submission of case management order, <sup>65</sup> except in cases under \$50,000 <sup>66</sup>	Mandatory <sup>67</sup>	Mandatory <sup>68</sup>	cs69
Connecticut	Discovery in Expedited Process Track Cases under \$75,000 limited to official form interrogatories and inspection demands, depositions only of parties, and no admissions requests. <sup>70</sup>	NONE	relevant to "claim or defense" <sup>71</sup>	NONE	In "Expedited Process Track Cases" under \$75,000, mandatory case management conference in court <sup>72</sup>	NONE	NONE	NONE	On request (through interrogatories, <sup>73</sup> and mandatory <sup>74</sup> )	NONE

Delaware	NONE	NONE	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if submits proposed discovery plan and schedule and certifies reasonable effort to agree. <sup>75</sup>	Optional Discovery Conference, but required at party's request; order required following conference. <sup>76</sup> Optional Pretrial Conference; Scheduling Order (court required to limit time to complete discovery) <sup>77</sup>	Proportionality rules exist & judge can act <i>via sponte</i> <sup>78</sup>	NONE	NONE	On request <sup>79</sup> Yes <sup>80</sup>
D.C.	Limited to ten depositions <sup>81</sup> and deposition length limited to one day of seven hours. <sup>82</sup> Limit of forty interrogatories. <sup>83</sup>	NONE	Narrowed—"relevant to the claim or defense of any party" <sup>84</sup>	Duty to participate in good faith in framing a discovery plan if proposed by any party; court may convene discovery conference if party's motion includes proposed plan and schedule of discovery and statement of good faith effort to agree. <sup>85</sup>	Optional Discovery Conference; optional order following conference. <sup>86</sup> Mandatory Initial Scheduling Conference and Order <sup>87</sup> (court required to limit time to complete discovery) <sup>88</sup>	Proportionality rules exist & judge can act <i>via sponte</i> <sup>89</sup>	NONE	NONE	On request <sup>90</sup> Yes <sup>91</sup>
Florida	Limit of thirty interrogatories <sup>92</sup> Limit of thirty requests for admission <sup>93</sup>	NONE	NOT NARROWED		Optional Case Management Conference, but required if party serves notice; court may "limit, schedule, order, or expedite discovery." <sup>94</sup>	NONE	NONE	NONE	On request <sup>95</sup> NONE

Georgia	Limit of fifty interrogatories96	NONE	NOT NARROWED	NONE	NONE97	NONE	NONE	On request98	NONE
Hawaii	Limit of sixty interrogatories99	NONE	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if submits proposed discovery plan and schedule and certifies reasonable effort to agree.100	Optional Discovery Conference, but required following conference.101 Optional Pretrial Conference;102 Scheduling Order (court required to complete discovery)103	Proportionality rules exist & judge can act <i>qua sponte</i> 104	NONE	On request105	Yes 106
Idaho	Limit of forty interrogatories107	NONE	NOT NARROWED	NONE	Mandatory Scheduling Order that, inter alia, limits time to complete discovery.108	NONE	NONE	On request109	Yes110
Illinois	In cases under \$50,000, permits depositions only of parties and testifying treating physicians and opinion witnesses111 In all cases deposition length limited to three hours.112 Limit of thirty interrogatories113 in all cases. NONE	Must be completed sixty days before commencement of trial114	NOT NARROWED	NONE	Mandatory scheduling conference in which counsel required to consider limitations to discovery115	NONE	Deferred until defendants appear116 and/or personal jurisdiction is established over defendant that makes a motion regarding lack of personal jurisdiction.117	On request119	NONE
Indiana	NONE	NONE	NOT NARROWED	NONE	NONE120	NONE	NONE	On request121	NONE

Iowa	Limit of thirty interrogatories <sup>122</sup> Limit of thirty admission requests <sup>123</sup>	NONE	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; <sup>124</sup> Discovery Conference if submits proposed discovery plan and schedule and certifies reasonable effort to agree. <sup>125</sup>	Optional Pretrial conference; <sup>126</sup> Optional Scheduling Order (required on party motion) that limits time to complete discovery. <sup>127</sup> Optional Discovery Conference, but required at party's request; <sup>128</sup> order required following Discovery Conference; <sup>129</sup>	NONE	NONE	NONE	On request <sup>130</sup> or court's discretion <sup>131</sup>	NONE	
Kansas	NONE	NONE	NOT NARROWED	NONE	Optional Case Management Conference, but required at party's request; "consideration shall be given, and the court shall take appropriate action, with respect to," establishing a discovery plan and schedule and setting a discovery completion date. <sup>132</sup>	Proportionality rules exist & judge can act <i>sua sponte</i> <sup>133</sup>	If Case Management Conference is held, no depositions, other than of the parties, until after conference. <sup>134</sup>	NONE	Mandatory <sup>135</sup> Yes	Yes	
Kentucky	Limit of thirty interrogatories <sup>136</sup> In <i>Economic Litigation Docket</i> cases <sup>137</sup> depositions presumptively limited to parties <sup>138</sup> and interrogatories limited to twenty. <sup>139</sup>	NONE	NOT NARROWED	NONE	Mandatory Discovery and Status conference <i>only in Economic Litigation Docket</i> cases. <sup>140</sup>	NONE	NONE	NONE	On request <sup>142</sup>	Mandatory <i>only in Economic Litigation Docket</i> cases. <sup>141</sup>	NONE

<b>Louisiana</b>	Limit of thirty-five interrogatories143	NONE	NOT NARROWED	NONE	Optional Pretrial and Scheduling Conference to consider, inter alia, "control and scheduling of discovery," mandatory order reciting action taken.144	NONE	NONE	On request145	Yes146
<b>Maine</b>	Limit of five depositions per party147 and length of deposition limited to eight hours148 Limit of thirty interrogatories149	Standard pre-trial scheduling order automatically entered by court includes 8-month discovery cutoff.150	NOT NARROWED	NONE	Optional trial management conference in cases requiring "special management;" mandatory scheduling order (in most cases, court automatically enters standard scheduling order setting discovery deadlines.)151	NONE	Judge approval required for filing of written motions for discovery.152	Mandatory153	NONE
<b>Maryland</b>	Length of deposition limited to one seven-hour day154 Limit of thirty interrogatories155	NONE	NOT NARROWED	Parties encouraged to agree on discovery plan;156 party entitled to Discovery Conference if she represents that, despite a good faith effort, the parties unable to agree on discovery plan.157	Scheduling conference required in specified circumstances, including inability of parties to agree on discovery plan;158 mandatory Scheduling Order that limits time to complete discovery159and "case management plan"160	Proportionality rules exist & judge can act <i>via sponte</i> 161	NONE	On request162	NONE
<b>Massachusetts</b>	Limit of thirty interrogatories163	NONE	NOT NARROWED	NONE	NONE164	NONE	NONE	On request165	NONE
<b>Michigan</b>	NONE	NONE	NOT NARROWED	NONE	Optional pre-trial conference166 and mandatory scheduling order limiting time to complete discovery167	NONE	Judgment required to begin discovery and motions for discovery cannot be filed unless previous request for discovery has been refused168	On request170	Yes171

Minnesota	Limit of fifty interrogatories172	NONE	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if submits proposed discovery plan and schedule and certifies reasonable effort to agree.173	Optional discovery conference, but requested party's optional scheduling order that limits time to complete discovery (required at party's Request).175	Proportionality rules exist & judge can act <i>sua sponte</i> 176	NONE	NONE	On request177	Yes178
Mississippi	Limit of thirty interrogatories179	NONE	relevant to "issues raised by claims or defenses"180	Party entitled to Discovery Conference if she submits proposed discovery plan and schedule and certifies "reasonable effort to confer," court may impose sanctions for failure to cooperate in discovery planning.181	Optional Discovery Conference, but required at party's request; mandatory discovery schedule if conference is held.182	NONE	NONE	NONE	On request183	NONE
Missouri	NONE	NONE	NOT NARROWED	NONE	NONE184	NONE	NONE	NONE	On request185	NONE
Montana	Length of deposition limited to one day of seven hours186 Limit of fifty interrogatories187	NONE	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if submits proposed discovery plan and schedule and certifies reasonable effort to agree. 188	Optional Discovery Conference (required on motion by party).189 optional Pretrial Conferences;190 mandatory Scheduling Order limiting the time to complete discovery. 191	Proportionality rules exist & judge can act <i>sua sponte</i> 192	NONE	NONE	On request193	Yes194
Nebraska	Limit of fifty interrogatories195	NONE	NOT NARROWED	NONE	NONE	NONE	NONE	NONE	On request196	NONE

Nevada	Limit of forty interrogatories per party197 Limit of forty admission requests198	Discovery must be completed forty-five days before trial.199	<b>NOT NARROWED</b>	Mandatory "Case Conference;" attorneys must propose discovery plan and make reasonable effort to agree to provide all requested discovery, sanctions for failure to participate in Case Conference.200 Also, duty to participate in good faith in framing discovery plan, if proposed by any party; party entitled to "Discovery Conference;" if submits proposed discovery plan and schedule and certifies reasonable effort to agree.201	Optional202 "dispute resolution conference," before court or discovery commissioner, and mandatory discovery schedule if conference held203	Proportionality rules exist and judge may act <i>sua sponte</i> 204	Deferred until case conferences reports filed205	Mandatory206	On request207	Yes208
New Hampshire	Limit of fifty interrogatories209	NONE	<b>NOT NARROWED</b>	NONE	Mandatory "Structuring Conference" to "set schedules for discovery and other case preparation"; Conference followed by mandatory Structuring Conference Order that <i>may</i> include discovery deadlines.210	NONE	NONE	NONE	On request211	NONE



New Jersey	In specified tort actions, presumptive limit of ten specially prepared interrogatories 212	Based on which time track the case is on: (All counting from date first answer filed or from 90 days after first served, whichever comes first) Track 1: 150 days Track 2: 300 days Track 3 & 4: 450 days <sup>213</sup>	NOT NARROWED	NONE	See presumptive deadlines for discovery based on system of "tracks" <sup>214</sup>	NONE	NONE	NONE	On Request <sup>215</sup>	NONE
New Mexico	Limit of fifty interrogatories 216	NONE	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if submits proposed discovery plan and certifies reasonable effort to agree. <sup>217</sup>	Optional Pretrial Conference <sup>218</sup> and Scheduling Order that limits time to, inter alia, complete discovery. <sup>219</sup> Optional Discovery Conference, but required on motion by party. <sup>220</sup>	Proportionality rules exist & judge can act <i>sua sponte</i> . <sup>221</sup>	NONE	NONE	On request <sup>222</sup>	NONE
New York	Limited use of interrogatories in action to recover damages for personal injury, or wrongful death based solely on negligence 223	In dental, podiatric and medical malpractice actions "disclosure" must be completed 12 months after notice of complaint is filed. <sup>224</sup>	[A]ll matter material and necessary in the prosecution or defense of an action. <sup>225</sup>	NONE	Preliminary disclosure conference on request <sup>226</sup> and parties can also ask for referee of disclosure procedures. <sup>227</sup> Mandatory filing and pre-calendar conference in dental, podiatric, and medical malpractice actions. <sup>228</sup>	NONE	NONE	Mandatory for accident reports. <sup>229</sup>	On request. <sup>230</sup>	NONE

North Carolina	Limit of fifty interrogatories231	In medical malpractice cases, discovery must be completed 150 days after court issues scheduling order232	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; "effort to reach agreement" and proposed discovery plan required to file motion for discovery conference.233	Optional Discovery Conference (except in medical malpractice where it is required) and mandatory scheduling order if held234	Proportionality rules exist & judge can act <i>via sponte</i> 235	NONE	On request237	Yes238
North Dakota	NONE	NONE	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if submits proposed discovery plan and schedule and certifies reasonable effort to agree.239	Optional Discovery Conference (required at party's request)240 following mandatory order establishing discovery plan.241 Optional Pretrial Conference at which court may control and schedule discovery.242	Proportionality rules exist & judge can act <i>via sponte</i> 243	NONE	On request244	Yes245
Ohio	Limit of forty interrogatories246	NONE	NOT NARROWED	NONE	NONE247	NONE	NONE	On Request248	NONE
Oklahoma	Length of deposition limited to six hours249 Limit of thirty interrogatories250 Limit of thirty admission requests251	NONE	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if submits proposed discovery plan and schedule and certifies reasonable effort to agree.252	Optional Discovery Conference (required at party's request); following mandatory order establishing discovery plan.253	NONE	NONE	On request254	Yes255
Oregon	Limit of thirty admission requests256 NONE	NONE	"relevant to claim or defense" of any party257	NONE	NONE	NONE	NONE	NONE	NONE
Pennsylvania	NONE	NONE	NOT NARROWED	NONE	NONE258	NONE	NONE	On request260	Yes261

Rhode Island	Limit of thirty interrogatories262	NONE	NOT NARROWED	NONE	NONE263	Proportionality rules exist and judge can act <i>sua sponte</i> 264	NONE	NONE	On request265	Yes266
South Carolina	Limit of fifty interrogatories plus seven official form interrogatories267 Limit of twenty admission requests268	NONE	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if submits proposed discovery plan and schedule and certifies reasonable effort to agree.269	Optional Discovery Conference (required at party's request); following mandatory order establishing discovery plan. 270	Proportionality rules exist & judge can act <i>sua sponte</i> 271	NONE	Must disclose relevant medical statements or records and damage calculations if pre-trial hearing is held272	On request273 unless pre-trial hearing is held— mandatory 274	Yes275
South Dakota	NONE	NONE	NOT NARROWED	NONE	Optional Pretrial Conference and optional scheduling order that can limit the time for discovery276	Proportionality rules exist & judge can act <i>sua sponte</i> 277	NONE	NONE	On request278	NONE
Tennessee	NONE	NONE	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if submits proposed discovery plan and schedule and certifies reasonable effort to agree.279	Optional Discovery Conference (required at party's request); following mandatory order establishing discovery plan.280 Optional Scheduling and Planning Conference and optional Scheduling Order that limits time to complete discovery.281	Proportionality rules exist & judge can act <i>sua sponte</i> 282	NONE	NONE	On request283	Yes284

Texas	Three Tracks: volume limits vary by type of case classified by amount in controversy; <sup>285</sup> Length of depositions limited to six hours in <i>all</i> cases <sup>286</sup>	Based on "Level" Case is Classified As: Level 1: Up to 30 days before trial (period commences when suit is filed) <sup>287</sup> Level 2: 9 months (period commences from date of first deposition or due date of first written discovery request served in case) <sup>288</sup> Level 3: judge sets discovery time limits for entire case or appropriate phase of it; <sup>289</sup>	NOT NARROWED	NONE	In Level 3 cases, court must, on party's motion, and may, on own initiative, enter a discovery control plan "tailored to the circumstances of the specific suit" that must include limit on time to complete discovery and appropriate limits on amount of discovery. <sup>290</sup>	Proportionality rules exist & judge can act <i>sua sponte</i> <sup>291</sup>	NONE	Upon request <sup>292</sup> On request <sup>293</sup> Yes <sup>294</sup>	
Utah	Limit of ten depositions per side <sup>295</sup> Limit of twenty-five otherwise stipulated or ordered by the court <sup>297</sup>	After first answer is filed, unless otherwise stipulated or ordered by the court <sup>297</sup>	NOT NARROWED	Mandatory meeting of the parties to develop a stipulated discovery plan <sup>298</sup>	Mandatory Discovery Conference if parties unable to agree on discovery plan. <sup>299</sup> Optional "Scheduling and Management Conference," on party motion, court shall enter Scheduling Order that "governs the time to complete discovery." <sup>300</sup>	Proportionality rules exist & judge can act <i>sua sponte</i> <sup>301</sup>	Deferred until parties have met and conferred <sup>302</sup>	Mandatory <sup>303</sup> Mandatory <sup>304</sup>	Yes <sup>305</sup>
Vermont	NONE	NONE	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if submits proposed discovery plan and schedule and certifies reasonable effort to agree. <sup>306</sup>	Optional Discovery Conference (required at party's mandatory order establishing discovery plan. <sup>307</sup>	Proportionality rules exist & judge can act <i>sua sponte</i> <sup>308</sup>	NONE	On request <sup>309</sup> NONE	Yes <sup>310</sup>

Virginia	Limit of thirty interrogatories311	NONE	"Relevant to subject matter" (exception exists for divorce cases)312	NONE	Optional Pretrial Conference to consider a discovery plan and any limitations on discovery scope and methods.313	Proportionality rules exist & judge can act <i>via sponte</i> 314	NONE	On request315	Yes316
Washington	NONE	NOT NARROWED	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if it submits proposed discovery plan and schedule and certifies reasonable effort to agree.317	Optional Discovery Conference (required at party's request); following Conference, mandatory order establishing discovery plan.318	Proportionality rules exist & judge can act <i>via sponte</i> 319	NONE	On request320	Yes321
West Virginia	NONE	NOT NARROWED	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if it submits proposed discovery plan and schedule and certifies reasonable effort to agree.322	Optional discovery conference (required at party's request); following Conference, mandatory order establishing discovery plan.323	Proportionality rules exist & judge can act <i>via sponte</i> 326	NONE	On request327	Yes328
Wisconsin	NONE	NOT NARROWED	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if it submits proposed discovery plan and schedule and certifies reasonable effort to agree.322	Optional Pretrial Conference;324 Scheduling Order that limits time to complete discovery. 325	NONE	NONE	On request329	NONE

Wyoming	Limit of ten depositions per side <sup>330</sup> Limit of thirty interrogatories <sup>331</sup>	NONE	NOT NARROWED	Duty to participate in good faith in framing a discovery plan if proposed by any party; party entitled to Discovery Conference if submits proposed discovery plan and schedule and certifies reasonable effort to agree. <sup>332</sup>	Optional Discovery Conference <sup>333</sup> (required at party's request); following mandatory order establishing discovery plan. <sup>334</sup> Optional Pretrial Conference <sup>335</sup> and Scheduling Order that limits time to complete discovery. <sup>336</sup>	Proportionality rules exist & judge can act <i> sua sponte</i> <sup>337</sup>	NONE	NONE	On request <sup>338</sup>	Yes <sup>339</sup>
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1 This column indicates those jurisdictions that have adopted a scope of discovery standard that varies from the broad "relevant to the subject matter" standard.

2 "Discovery Planning by Counsel" includes jurisdictions that require "meet and confer" sessions among counsel outside of court.

3 "Judicial Management of Discovery" includes scheduling conferences, pre-trial conferences, case management conferences, and discovery conferences. Unless otherwise indicated, "optional" means "within the court's discretion."

4 The term "disclosure," as distinct from "discovery," is used herein to mean exchange of information *without discovery requests*.

5 States listed in this column with a "yes" have promulgated rules similar to FED. R. Civ. P. 26(g), a certification rule which, unlike FED. R. Civ. P. 11, expressly targets "disclosures, discovery requests, discovery responses and objections" and is designed to enforce good faith compliance with disclosure and discovery rules. "In many other states, however, the general certification requirements of their equivalent to Rule 11 would appear to apply to discovery." Gregory S. Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 MCGEORGE L. REV. 1051, 1067 (2001).

6 FED. R. Civ. P. 30(a) (amended Apr. 22, 1993, effective Dec. 1, 1993).

7 FED. R. Civ. P. 30(d)(2) (amended Apr. 22, 1993, effective Dec. 1, 1993).

8 FED. R. Civ. P. 33(a) (amended Apr. 22, 1993, effective Dec. 1, 1993).

9 "Relevant to claims or defenses" is a presumptive standard, subject to court-ordered discovery of any matter "relevant to subject matter" for good cause.

10 FED. R. Civ. P. 26(f) (1993) (amended 2000) (Conference of Parties; Planning for Discovery; requires parties to "confer" and develop a "proposed discovery plan" for submission to the court).  
11 FED. R. Civ. P. 16(a) provides for an optional pre-trial conference, and Rule 16(b) provides for a mandatory scheduling order that, *inter alia*, limits the time to complete discovery and that may include modifications of disclosure deadlines and of the extent of discovery.

12 FED. R. Civ. P. 26(b)(2) requires the court to "limit the frequency or extent of use of discovery methods otherwise permitted" *proportional* to the needs of the individual case; *in contrast to California*, the federal court is authorized to act *sua sponte*.

13 FED. R. Civ. P. 26(d).

14 FED. R. Civ. P. 26(a)(1) (requires identity of individuals, and copies of or description of documents, that disclosing party may use to support claims or defenses).

- 15 FED. R. CIV. P. 26(a)(2) (Disclosure of Expert Testimony).
- 16 FED. R. CIV. P. 26(g).
- 17 ALA. R. CIV. P. 33(a) (effective Oct. 1, 1990 and largely drawn from a 1989 amendment to the Ohio Rules of Civil Procedure).
- 18 ALA. R. CIV. P. 16.
- 19 ALA. R. CIV. P. 26(f) ("Following the discovery conference, the court may enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action.'").
- 20 ALA. R. CIV. P. 26(b)(1).
- 21 ALA. R. CIV. P. 26(4)(A)(i) (interrogatories).
- 22 ALASKA R. CIV. P. 30(A)(2)(a) (figure does not include the depositions of parties and testifying experts).
- 23 ALASKA R. CIV. P. 30(d)(2). The three-hour depositions apply to all deponents other than parties to the case, independent experts, and treating physicians. ALASKA R. CIV. P. 30(d)(2). There is a six-hour limit for these latter parties. ALASKA R. CIV. P. 30(d)(2).
- 24 ALASKA R. CIV. P. 33(a) (also providing that leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2)).
- 25 ALASKA R. CIV. P. 26(g).
- 26 ALASKA R. CIV. P. 26(f) (mandatory meet and confer; parties meet to, *inter alia*, develop a proposed discovery plan).
- 27 ALASKA R. CIV. P. 16(a). Small claims cases and many other specific categories of cases are exempted from this requirement. ALASKA R. CIV. P. 16(g).
- 28 ALASKA R. CIV. P. 26(b)(2).
- 29 ALASKA R. CIV. P. 26(d)(1) ("Timing of Discovery"); ALASKA R. CIV. P. 26(b)(2) (stating a principle that is very similar to Fed. R. Civ. P. 26(b)(2) because it requires the court to limit the "frequency or extent of use" of discovery methods *proportional* to the needs of the individual case).
- 30 ALASKA R. CIV. P. 26(a).
- 31 ALASKA R. CIV. P. 26(a)(2).
- 32 ARIZ. R. CIV. P. 30(a) (amended Dec. 20, 1991, effective July 1, 1992). This presumptive prohibition, however, does not include the depositions of experts and custodians of documents. ARIZ. R. CIV. P. 30(a).
- 33 ARIZ. R. CIV. P. 30(d) (amended Dec. 20, 1991, effective July 1, 1992).
- 34 ARIZ. R. CIV. P. 33.1(a) (added Dec. 20, 1991, effective July 1, 1992) (including official interrogatories [but not subparts] within the limit).
- 35 ARIZ. R. CIV. P. 34(b).
- 36 ARIZ. R. CIV. P. 36(b).
- 37 ARIZ. R. CIV. P. 26(b)(4)(D) (amended Dec. 20, 1991, effective July 1, 1992).
- 38 ARIZ. R. CIV. P. 16(a).
- 39 ARIZ. R. CIV. P. 16(b).
- 40 ARIZ. R. CIV. P. 16(c).
- 41 ARIZ. R. CIV. P. 26(b).
- 42 ARIZ. R. CIV. P. 26.2(a).
- 43 ARIZ. R. CIV. P. 26(b)(5) (providing for a more extensive approach than does the federal rule because it requires factual bases and legal theories of a claim or defense).
- 44 ARIZ. R. CIV. P. 26.2(a)(1).
- 45 ARIZ. R. CIV. P. 26.1(a)(6).
- 46 AR. R. CIV. P. 26.
- 47 AR. R. CIV. P. 16 (providing for optional pre-trial conference but not a tool for discovery scheduling or planning).
- 48 AR. R. CIV. P. 26(b)(4) (interrogatories).
- 49 Discovery limits vary depending on the applicable track determined by a suit's amount in controversy: small claims—suits under \$5,000 (no discovery) (CAL. CIV. PROC. CODE § 116.310(b) (effective October 1991)); "limited civil case"—suits under \$25,000 (volume limits of one oral deposition and a combination of thirty-five interrogatories; document demands, and requests for admissions) (CAL. CIV. PROC. CODE § 94 (effective July 1987)) and "unlimited civil case" (presumptive limit of thirty-five specially prepared interrogatories and any additional number of official form interrogatories and presumptive limit of thirty-five admission requests [not including those addressed to document authenticity], which limits can be exceeded by attaching a declaration supporting additional interrogatories; no limits on other discovery methods) (CAL. CIV. PROC. CODE §§ 2030(c) and 2033(c) (both effective July 1987)).
- 50 CAL. CIV. PROC. CODE § 2024(a).
- 51 CAL. R. CT. 212(f).

52 CAL. R. CT. 209 (a “differential case management” rule, requiring the court to evaluate each case considering thirteen factors, which include “nature and extent of discovery anticipated,” and to assign each case to one of three “case management plans” classified by specified “time(s) of disposition”), CAL. R. CT. 212(b) (“In each case, the court must set a case management conference to review the case.”), CAL. R. CT. 212(e) (“[P]arties must address, and the court may take appropriate action with respect to,” *inter alia*, “(8) Whether discovery has been completed and, if not, the date by which it will be completed. [and] (9) What discovery issues are anticipated”); CAL. R. CT. 212(f) (requires that parties “meet and confer” before case management conference to consider issues identified in Rule 212(c) and, *inter alia*, “resolve[e] any discovery disputes.”). These rules do not confer authority on the court to impose limits on volume of discovery, which are addressed by statute. In scheduling discovery, courts are also constrained by statute: for example, Rule § 2024 gives any party the “right” to complete discovery “on or before the 30<sup>th</sup> day ... before the date initially set for trial ...” CAL. CIV. PROC. CODE § 2024. By statute, courts have the authority to tailor the scope and frequency of discovery *proportional* to the needs of the individual case, but not *sub sponte*. CAL. CIV. PROC. CODE §§ 2017(e), 2019(b).

53 CAL. CIV. PROC. CODE § 2017(c).

54 CAL. CIV. PROC. CODE § 93 (case questionnaire).

55 CAL. CIV. PROC. CODE § 2034(a) (exchanges of expert trial witness information).

56 COLO. R. CIV. P. 26(b)(2) (effective July 2001). These include one deposition of an adverse party and two of other persons in cases less than \$50,000 under 26.3(d)(1)(A) (effective July 2000) (repealed effective July 1, 2004) (“Prior to the ADR required by subsection (e), the only deposition a party may take is that of the adverse party.”).

57 COLO. R. CIV. P. 26(b)(2) (including official form interrogatories [but not subparts] within the limit) (adopted May 24, 2001, effective July 1, 2001).

58 COLO. R. CIV. P. 26(b)(2) (adopted May 24, 2001, effective July 1, 2001).

59 COLO. R. CIV. P. 26(b)(2).

60 COLO. R. CIV. P. 16(b)(10).

61 COLO. R. CIV. P. 26(b)(1).

62 COLO. R. CIV. P. 16(b) (providing for a Presumptive Case Management Order, which lays out a prescribed pre-trial schedule that includes a mandatory “Meet and Confer,” during which counsel discuss, *inter alia*, whether a Modified Case Management Order is necessary, and that sets forth deadlines for disclosure, settlement discussions, and discovery (discovery to commence forty-five days after case is at issue and to be completed fifty days before the trial date). Presumptive discovery limits (*see* COLO. R. CIV. P. 26(b)(2) *supra*) can be modified for good cause by the entry of a Modified Case Management Order approved by the court. COLO. R. CIV. P. 16(b). The parties are entitled to a Case Management Conference to resolve disagreement about any aspect of the proposed Case Management Order. COLO. R. CIV. P. 16(b).

63 COLO. R. CIV. P. 16(b).

64 COLO. R. CIV. P. 26(f).

65 COLO. R. CIV. P. 26(a)(2).

66 COLO. R. CIV. P. 26.3(d)(1)(B).

67 COLO. R. CIV. P. 26(a)(1). In cases involving less than \$50,000, initial disclosure must take place twenty-one days after case is at issue. COLO. R. CIV. P. 26.3(c). In personal injury cases, “plaintiff shall disclose all health care providers and employers for the past ten years, and the defendant shall disclose the present claim case file, including any evidence supporting affirmative defenses and provide a copy of all insurance policies including each declaration page.” COLO. R. CIV. P. 26.3(c). Colorado also recently adopted a Simplified Procedure for cases not exceeding \$100,000 which essentially replaces most formal discovery with early and far-reaching disclosure. Parties may opt out of this procedure. COLO. R. CIV. P. 16.1.

68 COLO. R. CIV. P. 26(a)(2).

69 COLO. R. CIV. P. 26(g).

70 CONN. R. SUPER. CT. CIV. § 23-6 (expedited process cases) (amended August 24, 2001, effective January 1, 2002). In personal injury cases involving operation or ownership of a motor vehicle or on real property, interrogatories are presumptively limited to official form interrogatories and inspection demands are limited to official form demands. CONN. R. SUPER. CT. CIV. 13-6(e).

71 CONN. R. SUPER. CT. CIV. § 13-2.

72 CONN. R. SUPER. CT. CIV. § 23-9 (statute makes no mention of mandatory or optional scheduling orders).

73 CONN. R. SUPER. CT. CIV. § 13-4 (1)(A).

74 CONN. R. SUPER. CT. CIV. § 13-4 (4) (“In addition to and notwithstanding the provisions of subdivisions (1), (2) and (3) of this rule, any plaintiff expecting to call an expert witness at trial shall disclose the name of that expert, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion, to all other parties within a reasonable time prior to trial.”).

75 DEL. SUPER. CT. R. CIV. P. 26(f).

76 DEL. SUPER. CT. R. CIV. P. 26(f) (unless ordered by the court).

77 DEL. SUPER. CT. R. CIV. P. 16(b)(3).

78 DEL. SUPER. CT. R. CIV. P. 26(b)(1).



- 79 DEL. SUPER. CT. R. CIV. P. 26(b)(4)(A) (interrogatories).
- 80 DEL. SUPER. CT. R. CIV. P. 26 (g).
- 81 D.C. SUPER. CT. R. CIV. P. 30(a)(2)(A).
- 82 D.C. SUPER. CT. R. CIV. P. 30 (d)(2).
- 83 D.C. SUPER. CT. R. CIV. P. 33(a) (effective July 1, 1997).
- 84 D.C. SUPER. CT. R. CIV. P. 26(b)(1).
- 85 D.C. SUPER. CT. R. CIV. P. 26(g).
- 86 D.C. SUPER. CT. R. CIV. P. 26(g) (“The Court may enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, [and] setting limitations on discovery, if any.”).
- 87 D.C. SUPER. CT. R. CIV. P. 16(b).
- 88 D.C. SUPER. CT. R. CIV. P. 26(d).
- 89 D.C. SUPER. CT. R. CIV. P. 26(b)(1).
- 90 D.C. SUPER. CT. R. CIV. P. 26(b)(4)(A) (interrogatories).
- 91 D.C. SUPER. CT. R. CIV. P. 26(h).
- 92 Fla. R. Civ. P. 1.340(a) (including official form interrogatories within the limit) (amended Oct. 6, 1988, effective Jan. 1, 1989).
- 93 Fla. R. Civ. P. 1.370(a) (including subparts) (amended Oct. 23, 2003, effective Jan. 1, 2004).
- 94 Fla. R. Civ. P. 1.200(a). Rule 1.200 also provides for an optional pre-trial conference, required on party motion.
- 95 Fla. R. Civ. P. 1.280(b)(4)(A)(i) (interrogatories).
- 96 GA. CODE ANN. § 9-11-33(a)(1) (2004).
- 97 GA. CODE ANN. § 9-11-16(a) & (b) (2004) (providing for optional pre-trial conference but not a tool for discovery scheduling or planning.).
- 98 GA. CODE ANN. § 9-11-26(b)(4)(A) (2004).
- 99 HAW. R. CIV. P. 33(a).
- 100 HAW. R. CIV. P. 26(f).
- 101 HAW. R. CIV. P. 26(f).
- 102 HAW. R. CIV. P. 16(a).
- 103 HAW. R. CIV. P. 16(b).
- 104 HAW. R. CIV. P. 26(b)(2).
- 105 HAW. R. CIV. P. 26(b)(4)(A).
- HAW. R. CIV. P. 26(f).
- 107 IDAHO R. CIV. P. 33(a)(3) (amended effective July 1, 1997).
- 108 IDAHO R. CIV. P. 16(b) (court shall consult with attorneys for parties “by a scheduling conference, telephone, mail or other suitable means.”).
- 109 IDAHO R. CIV. P. 26(b)(4)(A).
- 110 IDAHO R. CIV. P. 26(f)(1).
- 111 ILL. SUP. CT. R. 222(f)(2)(a)–(b) (adopted June 1, 1995, effective Jan. 1, 1996).
- 112 ILL. SUP. CT. R. 206(d) & 222(f)(2) (amended June 1, 1995, effective Jan. 1, 1996).
- 113 ILL. SUP. CT. R. 213(c) & 222(f)(1) (amended June 1, 1995, effective Jan. 1, 1996).
- 114 ILL. SUP. CT. R. 218(c).
- 115 ILL. SUP. CT. R. 218 (court shall consider, inter alia, “limitations on discovery including: (i) the number and duration of depositions which may be taken; (ii) the area of expertise and the number of expert witnesses who may be called; and (iii) deadlines for the disclosure of witnesses and the completion of written discovery and depositions”).
- 116 ILL. SUP. CT. R. 201(d).
- 117 ILL. SUP. CT. R. 201(f).
- 118 ILL. SUP. CT. R. 222(a) & (d).
- 119 ILL. SUP. CT. R. 213(f)(2)(3) (interrogatories requesting identity and testimony of witnesses).
- 120 IND. ST. R. TRIAL P. 16(A)(4) (procedure for pre-trial conference but not a tool for discovery scheduling or planning).
- 121 IND. ST. R. TRIAL P. 26(B)(4).

- 122 IOWA R. CIV. P. 1.509(1).
- 123 IOWA R. CIV. P. 1.510(1).
- 124 IOWA R. CIV. P. 1.507(1)–(2).
- 125 IOWA R. CIV. P. 1.507(1).
- 126 IOWA R. CIV. P. 1.602(1).
- 127 IOWA R. CIV. P. 1.602(2)(a)(3).
- 128 IOWA R. CIV. P. 1.507(1) (discovery conference is within court’s discretion or at a party’s request).
- 129 IOWA R. CIV. P. 1.507(3).
- 130 IOWA R. CIV. P. 1.508(1)(a) (interrogatories).
- 131 IOWA R. CIV. P. 1.508(5) (“Court’s discretion to compel disclosure of experts”).
- 132 KAN. CIV. PROC. CODE ANN. § 60-216(b) (West 2004).
- 133 KAN. CIV. PROC. CODE ANN. § 60-226(b)(2) (West 2004).
- 134 KAN. CIV. PROC. CODE ANN. § 60-216(b)(8) (West 2004).
- 135 KAN. CIV. PROC. CODE ANN. § 60-226(b)(6) (West 2004):

(6) Disclosure of expert testimony. (A) A party shall disclose the identity of any person who may be used at trial to present expert testimony. (B) Except as otherwise stipulated or directed by the court, this disclosure, with respect to a witness (i) whose sole connection with the case is that the witness is retained or specially employed to provide expert testimony in the case or (ii) whose duties as an employee of the party regularly involve giving expert testimony, shall state the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (b)(6)(B), within 30 days after the disclosure made by the other party. The party shall supplement these disclosures when required under subsection (e)(1).

- 135 KAN. CIV. PROC. CODE ANN § 60-226(f) (West 2004).
- 136 Ky. R. Civ. P. 33.01(3) (excluding interrogatories requesting identity of witnesses).
- 137 The Economic Litigation Docket consists of the following categories of cases, regardless of the amount in controversy: contracts, personal injury, property damages, property rights, and termination of parental rights. KY. R. CIV. P. 89.
- 138 Ky. R. Civ. P. 93.01 (effective Oct. 1, 1982).
- 139 Ky. R. Civ. P. 93.02 (effective Oct. 1, 1982).
- 140 Ky. R. Civ. P. 90(1) (mandatory discovery and status conference, with no specific mention made of a scheduling order).
- 141 Ky. R. Civ. P. 93.04(1).
- 142 KY. R. CIV. P. 26.02(d)(a)(i) (through interrogatories).
- 143 LA. CODE. CIV. PROC. ANN. Art. 1457(B) (West 2000) (amendment effective 1993).
- 144 LA. CODE. CIV. PROC. ANN. Art. 1551(A)–(B) (at court’s discretion, subjects to be considered include “control and scheduling of discovery”).
- 145 LA. CODE. CIV. PROC. ANN. Art. 1425(A) (interrogatories or by deposition).
- 146 LA. CODE. CIV. PROC. ANN. Art. 1420(A).
- 147 ME. R. CIV. P. 30(a) (amended effective May 1, 1999).
- 148 ME. R. CIV. P. 30(d)(2) (amended effective May 1, 1999).
- 149 ME. R. CIV. P. 33(a) (amended effective May 1, 1999).
- 150 ME. R. CIV. P. 16.
- 151 ME. R. CIV. P. 16 (standard pre-trial scheduling order automatically entered by court; includes eight-month discovery completion deadline; subject to modification by court order).
- 152 ME. R. CIV. P. 26(g)(1).
- 153 MD. R. CIV. P. 16 (standard Scheduling Order requires designation of expert witnesses that includes all information required by Rule 26(b)(4)(A)(i)).
- 154 MD. CIRC. CT. R. 2-411 (amended Nov. 12, 2003, effective Jan. 1, 2004).
- 155 MD. CIRC. CT. R. 2-421(a).

- 156 MD. CIRC. CT. R. 2-401(c) (parties “encouraged to reach agreement on a plan for the scheduling and completion of discovery”).
- 157 MD. CIRC. CT. R. 2-504.1(a) (“In any of the following circumstances, the court shall issue an order requiring the parties to attend a scheduling conference: \* \* \* (3) in an action in which a party requests a scheduling conference and represents that, despite a good faith effort, the parties have been unable to reach an agreement (i) on a plan for the scheduling and completion of discovery . . . .”).
- 158 MD. CIRC. CT. R. 2-504.1(a) (3).
- 159 MD. CIRC. CT. R. 2-504(a).
- 160 MD. CIRC. CT. R. 2-504.1 (scheduling conference in court “required” in specified circumstances and “permitted” in others); 16-202(b) (requires County Administrative Judge “to implement and monitor a case management plan for the prompt and efficient scheduling and disposition of actions in the circuit court,” including a system of *differentiated case management*).
- 161 MD. CIRC. CT. R. 2-402(b).
- 162 MD. CIRC. CT. R. 2-402(e)(1) (through interrogatories).
- 163 MASS. R. CIV. P. 33(a)(2) (amended March 5, 2002, effective May 1, 2002).
- 164 MASS. R. CIV. P. 16 (procedure for pre-trial conference but not a tool for discovery scheduling or planning).
- 165 MASS. R. CIV. P. 26(b)(4)(A)(i) (through interrogatories).
- 166 MICH. R. CIV. P. 2.401(a).
- 167 MICH. R. CIV. P. 2.401(b)(2)(a) (“At an early scheduling conference under subrule (B)(1), a pre-trial conference under subrule (C), or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for events the court deems appropriate, including . . . (iii) the completion of discovery.”).
- 168 MICH. R. CIV. P. 2.302(A)(2).
- 169 MICH. R. CIV. P. 2.401(1)(1).
- 170 MICH. R. CIV. P. 2.302(B)(4)(a) (interrogatories and depositions).
- 171 MICH. R. CIV. P. 2.302(G).
- 172 MINN. R. CIV. P. 33.01(a) (adopted Nov. 14, 1974, effective Jan. 1, 1975; 2004 electronic update expressly rejects adopting FED. R. CIV. P. limit of twenty-five interrogatories).
- 173 MINN. R. CIV. P. 26.06.
- 174 MINN. R. CIV. P. 26.06 (court may convene discovery conference, but *must* do so upon motion by any party).
- 175 MINN. R. CIV. P. 16.02.
- 176 MINN. R. CIV. P. 26.02(a).
- 177 MINN. R. CIV. P. 26.02(d)(1)(A) (through interrogatories).
- 178 MINN. R. CIV. P. 26.07.
- 179 MISS. R. CIV. P. 33(a) (amended effective April 13, 2000).
- 180 MISS. R. CIV. P. 26(b)(1).
- 181 MISS. R. CIV. P. 26(c).
- 182 MISS. R. CIV. P. 26(c) (court may hold discovery conference, but *must* do so if requested by any party; court may impose sanctions “for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement”).
- 183 MISS. R. CIV. P. 26(b)(4)(A)(i) (through interrogatories).
- 184 MO. R. CIV. P. 62.01(4) (procedure for pre-trial conference but not a tool for discovery scheduling or planning).
- 185 MO. R. CIV. P. 56.01(b)(4) (through interrogatories and depositions).
- 186 MONT. R. CIV. P. 30(d)(2) (amended effective Dec. 31, 2001).
- 187 MONT. R. CIV. P. 33(a).
- 188 MONT. R. CIV. P. 26(f).
- 189 MONT. R. CIV. P. 26(f) (court may convene a discovery conference, but *must* do so on motion by any party).
- 190 MONT. R. CIV. P. 16(a).
- 191 MONT. R. CIV. P. 16(b) (court must enter a “scheduling order” that, *inter alia*, limits the time to complete discovery).
- 192 MONT. R. CIV. P. 26(b)(1).
- 193 MONT. R. CIV. P. 26(b)(4)(A)(i) (through interrogatories).
- 194 MONT. R. CIV. P. 26(g).
- 195 NEB. R. DISC. 33(a) (adopted Feb. 14, 1996).
- 196 NEB. R. DISC. 26(b)(4)(A)(i) (through interrogatories).

- 197 NEV. R. CIV. P. 33(a) (added effective Jan. 13, 1986).
- 198 NEV. R. CIV. P. 36(c) (amended effective Jan. 1, 1988) (not including requests that address document authenticity).
- 199 NEV. R. CIV. P. 26(f).
- 200 NEV. R. CIV. P. 16.1 (mandatory early case conference ["meet and confer"] convened by attorneys for the parties within thirty days after service of the answer by the first answering defendant, during which specified disclosures must be made, documents exchanged that support allegations or defenses, and a proposed discovery plan and discovery schedule agreed upon).
- 201 NEV. R. CIV. P. 26(f).
- 202 NEV. R. CIV. P. 16.1(d) ("dispute resolution conference" on party motion or *sua sponte*).
- 203 NEV. R. CIV. P. 16.1(d) ("Upon receipt of a discovery commissioner's report . . . , the court shall enter an order establishing a plan and schedule of discovery").
- 204 NEV. R. CIV. P. 26(b)(1).
- 205 NEV. R. CIV. P. 26(a) ("At any time after the filing of a joint case conference report, or upon the entry of an order waiving compliance with Rule 16.1(c), or not sooner than ten (10) days after a party has filed his own case conference report, any party who has complied with Rule 16.1 may obtain additional discovery").
- 206 NEV. R. CIV. P. 16.1(b).
- 207 NEV. R. CIV. P. 26(b)(4) & (5) (interrogatories; in addition, any party may serve a demand to exchange lists of expert witnesses and all discoverable reports and writings concerning expert witnesses' proposed testimony).
- 208 NEV. R. CIV. P. 26(g).
- 209 N.H. SUPER. CT. R. 36 ("[T]he total number of interrogatories shall not exceed fifty, unless the Court otherwise orders for good cause shown after the proposed additional interrogatories have been filed.").
- 210 N.H. SUPER. CT. R. 62 (emphasis added).
- 211 N.H. SUPER. CT. R. 35(b)(3) (interrogatories), N.H. SUPER. CT. R. 35(f) ("disclosure of expert witnesses" on request of party or by court order following a discovery conference).
- 212 N.J. R. SUPER. CT. CIV. 4:17-1(b)(1) (in addition to official form interrogatories listed in rule appendices).
- 213 N.J. R. SUPER. CT. CIV. 4:24-1(a).
- 214 N.J. R. SUPER. CT. CIV. 4:24-1 (listing the times limits based on specified time tracks).
- 215 N.J. R. SUPER. CT. CIV. 4:10-2(d)(1) ("A party may through interrogatories require any other party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness").
- 216 N.M. DIST. CT. R. CIV. P. 1-033(A).
- 217 N.M. DIST. CT. R. CIV. P. 1-026(F).
- 218 N.M. DIST. CT. R. CIV. P. 1-016A.
- 219 N.M. DIST. CT. R. CIV. P. 1-016B ("[T]he judge may . . . enter a scheduling order that limits the time . . . (3) to complete discovery.") (emphasis added).
- 220 N.M. DIST. CT. R. CIV. P. 1-026(f) (court may convene "discovery conference," *sua sponte* and must do so on motion if motion includes, inter alia, a proposed plan and schedule of discovery).
- Attorneys are obligated to participate in good faith in the framing of a discovery plan, but only if a plan is proposed by the attorney for any party. N.M. DIST. CT. R. CIV. P. 1-016 (discussing pre-trial conference at court's discretion).
- 221 N.M. DIST. CT. R. CIV. P. 1-026(b)(2).
- 222 N.M. DIST. CT. R. CIV. P. 1-026(b)(5) (allowing discovery of witness names through interrogatories).
- 223 "In the case of an action to recover damages for personal injury, injury to property or wrongful death predicated solely on a cause or causes of action for negligence, a party shall not be permitted to serve interrogatories on and conduct a deposition of the same party pursuant to rule 3107 without leave of court." N.Y. C.P.L.R. § 3130(1) (McKinney 2005) (effective Aug. 20, 1986). Also, a party may not serve written interrogatories on another party and also demand a bill of particulars of the same party. N.Y. C.P.L.R. § 3130(1) (McKinney 2005) (effective Aug. 20, 1986). With these exceptions, "CPLR 3102 does not specifically limit a party seeking disclosure to a choice of any one or more of the methods on its menu. There is no express limit on the number of times a device may be used. Abuse, either willful or due to incompetence, may be checked by a protective order under CPLR 3103." Weinstein, Korn & Miller, 6 NY CIVIL PRACTICE: CPLR P 3102.01.
- 224 N.Y. C.P.L.R. § 3406(b) (McKinney 2005).
- 225 Although the "phrase 'material and necessary' was chosen because it was seen as more limiting, . . . *Allen v. Crowell-Collier Publ'g Co.*, a relatively early Court of Appeals decision, came down squarely on the side of an expansive reading of 'material', a reading, indeed, that makes any claimed distinction from the federal ["relevant to the claim or defense" of any party] test even more difficult to defend." Weinstein, Korn & Miller, 6 NY CIVIL PRACTICE: CPLR P 3101.07.
- 226 *Id.* at 3102.05:

In all actions assigned to a judge where disclosure has not been completed prior to the assignment, ... upon a party's request for judicial intervention along with a request for a preliminary conference, or upon a motion relating to disclosure, the assigned judge must order a preliminary conference within 45 days after the request or return date of the motion, as the case may be. ... The preliminary conference is designed, *inter alia*, to establish a timetable for pre-trial disclosure. Disclosure, in any event, must be completed within 12 to 15 months of the request for judicial intervention/conference, unless otherwise shortened or extended by the court.

227 N.Y. C.P.L.R. § 3104(a) (McKinney 2005).

228 N.Y. C.P.L.R. § 3406(b) (McKinney 2005).

229 N.Y. C.P.L.R. § 3101(g) (McKinney 2005).

230 N.Y. C.P.L.R. § 3101(d)(1) (McKinney 2005).

231 N.C. GEN. STAT. § 1A-1, R. 33(a).

232 N.C. GEN. STAT. § 1A-1, R. 26(f).

233 N.C. GEN. STAT. § 1A-1, R. 26(f)(5).

234 N.C. GEN. STAT. § 1A-1, R. 26(f) & (f1).

235 N.C. GEN. STAT. § 1A-1, R. 26(b)(1).

236 "Counsel are required to begin promptly such discovery proceedings as should be utilized in each case, and are authorized to begin even before the pleadings are completed. Counsel are not permitted to wait until the pre-trial conference is imminent to initiate discovery." N.C. SUPER. CT. R. 8.

237 N.C. GEN. STAT. § 1A-1, R. 26(b)(4) (interrogatories).

238 N.C. GEN. STAT. § 1A-1, R. 26(g).

239 N.D. R. CIV. P. 26(f)(5).

240 N.D. R. CIV. P. 26(f)(5).

241 N.D. R. CIV. P. 26(f) (court *may* convene discovery conference, but *must* do so on motion if motion includes, *inter alia*, a proposed plan and schedule of discovery; attorneys obligated to participate in the framing of a discovery plan but only if a plan is proposed by counsel for any party).

242 N.D. R. CIV. P. 16(b)(6) (emphasis added). Note that N.D. Court Order 03 (March 2004) amended Rule 16 by amending subdivision (a) and adding new subdivisions (b), (c) and (e) to incorporate a mechanism to trigger scheduling and planning conferences when certain events occur in an action (e.g., if disposition does not occur within six months of filing).

243 N.D. R. CIV. P. 26(b)(1) (similar to FED. R. CIV. P. 26(b)(2), requires court to limit the "frequency or extent of use" of discovery methods proportional to the needs of the individual case; court may act *sua sponte* or pursuant to motion).

244 N.D. R. CIV. P. 26(b)(4)(A) (interrogatories and depositions).

245 N.D. R. CIV. P. 26(f);

246 OHIO ST. R. CIV. P. 33(A) (effective July 1, 1999).

247 OHIO ST. R. CIV. P. 16 (provides for optional pre-trial conference but not a tool for discovery scheduling or planning).

248 OHIO ST. R. CIV. P. 26(b)(4)(B) (through interrogatories).

249 OKLA. STAT. ANN. tit. 12, § 3230(a)(3).

250 OKLA. STAT. ANN. tit. 12, § 3233(a).

251 OKLA. STAT. ANN. tit. 12, § 3236.

252 OKLA. STAT. ANN. tit. 12, § 3226(f).

253 OKLA. STAT. ANN. tit. 12, § 3226(f) (court may convene "discovery conference" *sua sponte* and must do so on motion if motion includes, *inter alia*, a proposed plan and schedule of discovery; attorneys obligated to participate in good faith in framing of discovery plan if a plan is proposed by an attorney for any party).

254 OKLA. STAT. ANN. tit. 12, § 3226(b)(3) a (interrogatories and depositions).

255 OKLA. STAT. ANN. tit. 12, § 3226(g).

256 OR. R. CIV. P. 45(f).

257 OR. R. CIV. P. 36.

258 PA. R. CIV. P. 212.3(a) (provides for optional pre-trial conference but not a tool for discovery scheduling or planning).

259 PA. R. CIV. P. 1042.5 (except for the production of documents and things or the entry upon property for inspection and other purposes).

260 PA. R. CIV. P. 4003.5(a)(1) (interrogatories).

261 PA. R. CIV. P. 1023.

262 R.I. SUPER. CT. R. CIV. P. 33(b) (amended effective September 5, 1995).  
263 R.I. SUPER. CT. R. CIV. P. 16 (provides for optional pre-trial conference but not a tool for discovery scheduling or planning).  
264 R.I. SUPER. CT. R. CIV. P. 26(b)(1) (similar to FED. R. CIV. P. 26(b)(2), requires court to limit the "frequency or extent of use" of discovery methods proportional to the needs of the individual case; court may act *sua sponte* or pursuant to motion).  
265 R.I. SUPER. CT. R. CIV. P. 26(b)(4)(A) (interrogatories).  
266 R.I. SUPER. CT. R. CIV. P. 26(f).  
267 S.C. R. CIV. P. 33(b)(8) (amended effective May 1, 1986) (in cases less than \$25,000, limited to only official form interrogatories).  
268 S.C. R. CIV. P. 36(c) (not including requests addressing document authenticity).  
269 S.C. R. CIV. P. 26(f).  
270 S.C. R. CIV. P. 26(f) (court may convene discovery conference and must do so pursuant to motion if motion includes, *inter alia*, a proposed plan and schedule of discovery; purpose of discovery conference is to "prevent discovery abuse by encouraging the court to intervene when abuse occurs, or when an attorney has failed to obtain the cooperation of opposing counsel . . . . Routine matters should be resolved by Rule 26(c) Motions for protective orders or Rule 37 Motions to compel").  
271 S.C. R. CIV. P. 26(a).  
272 S.C. R. CIV. P. 16 ("The attorneys at such pre-trial hearing shall be prepared, as to each party, to[, *inter alia*,] . . . : (3) State with particularity all items of damages claimed and the measure of the damages; [and] (4) Provide copies of all relevant medical statements or records").  
273 S.C. R. CIV. P. 26(b)(4)(B) (using any discovery method).  
274 S.C. R. CIV. P. 16 (The attorneys at such pre-trial hearing shall be prepared, as to each party, to[, *inter alia*,] . . . : (6) Exchange lists of witnesses, including expert witnesses").  
275 S.C. R. CIV. P. 26(g).  
276 S.D. R. CIV. P. § 15-6-16 ("[T]he court, either on its own motion or the motion of any party, shall, after consulting with the attorneys for the parties and any unrepresented parties, enter a scheduling order that limits the time . . . : (3) [t]o complete discovery.").  
277 S.D. R. CIV. P. § 15-6-26(b)(1)(A)(i)-(iii).  
278 S.D. R. CIV. P. § 15-6-26(b)(4)(A)(i) (through interrogatories).  
279 TENN. R. CIV. P. 26.06.  
280 TENN. R. CIV. P. 26.06 (court may convene a "discovery conference" and must do so pursuant to motion if motion includes, *inter alia*, a proposed plan and schedule of discovery).  
281 TENN. R. CIV. P. 16.01.  
282 TENN. R. CIV. P. 26.02(1) (similar to FED. R. CIV. P. 26(b)(2), requires court to limit the "frequency or extent of use" of discovery methods proportional to the needs of the individual case; court may act *sua sponte* or pursuant to motion).  
283 TENN. R. CIV. P. 26.02(4)(A) (interrogatories and depositions).  
284 TENN. R. CIV. P. 26.07.  
285 TEX. R. CIV. P. 190.1-4 (190.2 added Aug. 5, 1998 and Nov. 9, 1998, effective Jan. 1, 1999; 190.3 added Aug. 5, 1998 and Nov. 9, 1998, effective Dec. 31, 1998, effective Jan. 1, 1999; 190.4 added Aug. 5, 1998 and amended Nov. 9, 1998, effective Jan. 1, 1999). These rules provide that every case must be governed by one of three discovery control plans. Level 1—suits involving \$50,000 or less; imposes a time limit to complete discovery and volume limits of six hours per party to conduct oral depositions and twenty-five written interrogatories. Level 2—suits not governed by Level 1 or Level 3; imposes a discovery period and volume limits of fifty hours of oral depositions per side and twenty-five written interrogatories. Level 3—requires court (on party's motion) and authorizes court (*sua sponte*) to craft a discovery order "tailored to the circumstances of the specific suit." TEX. R. CIV. P. 190.4.  
286 TEX. R. CIV. P. 199.5(G).  
287 TEX. R. CIV. P. 190.2(G)(1).  
288 TEX. R. CIV. P. 190.3(b)(1)(B)(ii) (exceptions exist).  
289 TEX. R. CIV. P. 190.4(b).  
290 TEX. R. CIV. P. 190.4(a) (By Order; permits parties proceeding under Level 3 Discovery Control Plan to submit an agreed order to the court for its consideration, but the parties are not required to meet and confer).  
291 TEX. R. CIV. P. 192.4 (similar to FED. R. CIV. P. 26(b)(2), states that court "should" limit discovery methods proportional to the needs of the individual case; court may act *sua sponte* or pursuant to motion).  
292 TEX. R. CIV. P. 194.1-2 (Request and Content). Because this rule includes "the factual bases of the responding party's claims or defenses," 194.2 is one of the most extensive of all state initial disclosure rules, but it is *not mandatory*. TEX. R. CIV. P. 194.2(c).  
293 TEX. R. CIV. P. 192.3(e).

- 294 TEX. R. CIV. P. 193.3(a)(1).
- 295 UTAH R. CIV. P. 30(e)(2)(A) (amended November 1, 1999) (follows the federal approach).
- 296 UTAH R. CIV. P. 33(a) (amended November 1, 1999).
- 297 UTAH R. CIV. P. 26(d).
- 298 UTAH R. CIV. P. 26(f)(1)
- 299 UTAH R. CIV. P. 26(f)(3) (“If the parties are unable to agree to the terms of a discovery plan . . . , the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree.”).
- 300 UTAH R. CIV. P. 16(b)(3).
- 301 UTAH R. CIV. P. 16(b) (similar to FED. R. CIV. P. 26(b)(2), states that court “should” limit discovery methods proportional to the needs of the individual case; court may act *sua sponte* or pursuant to motion).
- 302 UTAH R. CIV. P. 26(d) (sequence and timing of discovery)
- 303 UTAH R. CIV. P. 26(a)(1) (initial disclosures). Exemptions exist—including contract cases where party is pleading less than \$20,000. UTAH R. CIV. P. 26(a)(2).
- 304 UTAH R. CIV. P. 26(a)(3) (Disclosure of expert testimony).
- 305 UTAH R. CIV. P. 26(g).
- 306 VT. R. CIV. P. 26(f).
- 307 VT. R. CIV. P. 26(f) (court may convene a “discovery conference” and must do so pursuant to motion if motion includes, *inter alia*, a “proposed plan and schedule of discovery”).
- 308 VT. R. CIV. P. 26(b)(1) (similar to FED. R. CIV. P. 26(b)(2), requires court to limit the “frequency or extent of use of” discovery methods proportional to the needs of the individual case; court may act *sua sponte* or pursuant to motion).
- 309 VT. R. CIV. P. 26(b)(4)(A) (interrogatories and depositions) Rule 26(b)(4) has been amended by Vermont Order 04-16 to extend discovery of expert opinion to cover all experts and to clarify the discovery of expert reports and attorney work product communicated to experts. The amendments are based in part on provisions of FED. R. CIV. P. 26(a)(2) & (b)(4) not previously adopted in Vermont.
- 310 VT. R. CIV. P. 26(g).
- 311 VA. SUP. CT. R. CIV. P. 4:8(g).
- 312 VA. SUP. CT. R. CIV. P. 4:1(b)(5) (the general scope rule standard is “relevant to subject matter”; a narrower standard, stating that “the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged,” is applicable only in specified actions, e.g., divorce).
- 313 VA. SUP. CT. R. CIV. P. 4:13.
- 314 VA. SUP. CT. R. CIV. P. 4:1(b)(1) (similar to FED. R. CIV. P. 26(b)(2), requires court to limit the “frequency or extent of use” of discovery methods proportional to the needs of the individual case; court may act *sua sponte* or pursuant to motion).
- 315 VA. SUP. CT. R. CIV. P. 4:1(b)(4)(A) (interrogatories and depositions).
- 316 VA. SUP. CT. R. CIV. P. 4:1(g).
- 317 WASH. SUPER. CT. CIV. R. 26(f).
- 318 WASH. SUPER. CT. CIV. R. 26(f) (court may convene a “discovery conference” and must do so pursuant to motion if motion includes, *inter alia*, a “proposed plan and schedule of discovery”).
- 319 WASH. SUPER. CT. CIV. R. 26(b)(1) (similar to FED. R. CIV. P. 26(b)(2), requires the court to limit the “frequency and extent of use of” discovery methods proportional to the needs of the individual case; court may act *sua sponte* or pursuant to motion for protective order).
- 320 WASH. SUPER. CT. CIV. R. 26(b)(5)(A) (interrogatories and depositions).
- 321 WASH. SUPER. CT. CIV. R. 26(g).
- 322 W. VA. R. CIV. P. 26(f).
- 323 W. VA. R. CIV. P. 26(f) (court may convene a “discovery conference” and must do so pursuant to motion if motion includes, *inter alia*, a “proposed plan and schedule of discovery”).
- 324 W. VA. R. CIV. P. 16(a).
- 325 W. VA. R. CIV. P. 16(b)(3).
- 326 W. VA. R. CIV. P. 26(b)(1).
- 327 W. VA. R. CIV. P. 26(b)(4).
- 328 W. VA. R. CIV. P. 26(g).
- 329 WIS. STAT. ANN. § 804.01(2)(d) (West 2004).
- 330 WYO. R. CIV. P. 30(a)(2)(A). Like Utah, Wyoming follows the federal approach.
- 331 WYO. R. CIV. P. 33(a).

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- 332 WYO. R. CIV. P. 26(f).  
333 WYO. R. CIV. P. 26(f) (court may convene a “discovery conference” and must do so pursuant to motion if motion includes, inter alia, a “proposed plan and schedule of discovery”).  
334 WYO. R. CIV. P. 26(f).  
335 WYO. R. CIV. P. 16(a).  
336 WYO. R. CIV. P. 16(b)(3).  
337 WYO. R. CIV. P. 26(b)(1)(B) (similar to FED. R. CIV. P. 26(b)(2), requires the court to limit the “frequency and extent of use of” discovery methods proportional to the needs of the individual case; court may act *exa sponte* or pursuant to motion for protective order).  
338 WYO. R. CIV. P. 26(b)(4)(A) (interrogatories and depositions).  
339 WYO. R. CIV. P. 26(g).



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