MANDATORY DISCLOSURE AND EQUAL ACCESS TO JUSTICE: THE 1993 FEDERAL DISCOVERY RULES AMENDMENTS AND THE JUST, SPEEDY AND INEXPENSIVE DETERMINATION OF EVERY ACTION†

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INTRODUCTION

Discovery abuse, sometimes defined as "what your opponent is doing to you,"[1] has long been perceived as a persistent and intractable problem in the federal courts.[2] Some observers have insisted that discovery abuse, "like the story of Mark Twain's death, is greatly exaggerated."[3] One judge, however,

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1. *See* ARTHUR R. MILLER, FEDERAL JUDICIAL CENTER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 31 (1984). Arthur R. Miller is Professor of Law, Harvard Law School, and served as Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States [The Advisory Committee] in drafting the 1983 amendments to the Federal Rules of Civil Procedure. He is also a member of the Advisory Committee that produced the 1993 amendments.

2. FED. R. CIV. P. 26 (1983) advisory committee's notes [hereinafter 1983 Advisory Committee's Notes] ("Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems."), *reprinted in* 97 F.R.D. 165, 216-20 (1983); FED. R. CIV. P. 26 (1993) advisory committee's notes (advising that "litigants should not indulge in gamesmanship with respect to the disclosure obligations"), *reprinted in* 146 F.R.D. 401, 627-31 (1993) [hereinafter 1993 Advisory Committee's Notes]; *see also* Alexander Holtzhoff, *The Elimination of Surprise in Federal Practice*, 7 VAND. L. REV. 576, 576-81 (1954) (Federal Rules of Civil Procedure restrict adversary's ability to withhold evidence, while providing trial judges with discretionary power to curb discovery abuse); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 798 n.8 (1991) (FED. R. CIV. P. 26(f) is evidence of rule drafter's repeated attempts to curtail discovery abuse) (Professor Mullenix was a Judicial Fellow from 1989-1990 at the Federal Judicial Center headed by Judge Schwarzer); Helen H. Stern Cutner, *Discovery - Civil Litigation's Fading Light: A Lawyer Looks at the Federal Discovery Rules After Forty Years of Use*, 52 TEMP. L.Q. 933, 985-86 (1979) (discovery rules in effect for 40 years "have been more abused than used").

3. Mary M. Schroeder & John P. Frank, *The Proposed Changes in the Discovery Rules*, 1978 ARIZ. ST. L.J. 475, 476; *see* PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY 35 (1979) (suggesting that to extent discovery abuse exists, it does not permeate vast majority of federal filings); MILLER, *supra* note 1, at 31 ("When abuse does occur, it can be very significant and frustrating, . . . [but] it would be wrong to say that abuse is a pervasive problem or that it is easy to define or to identify."); Julius B. Levine, *"Abuse" of Discovery: or Hard Work Makes Good Law*, 67 A.B.A. J. 565, 566-67 (1981) (asserting that empirical studies show reports of abuse have been exaggerated, and abuse occurs primarily in complex, protracted lawsuits).

observed that instead of being a "a domesticated bird dog [intended] to help flush out evidence," discovery has become a "voracious wolf . . . eating everything in sight."[4]

It has been said that, "[t]he history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms."[5] Indeed, decades of amendments to the Federal Rules of Civil Procedure have failed to alleviate either discovery abuse or the perceived congestion of the federal courts.[6] Nevertheless, self-styled reformers continue to restrict allowable discovery and create other procedural hurdles to litigants, despite the historical failure of such measures to cure the problem, and despite potentially grave side effects. The 1993 amendments to the Federal Rules of Civil Procedure,[7] including a "mandatory initial disclosure" rule, are the latest offering in this vein.

These new rules severely impair access to the courts for information-poor litigants, and create serious ethical problems for the counsel of information-rich litigants who want to comply in good faith with the new rules' requirements.[8] Ostensibly adopted for the purpose of counteracting discovery abuse in civil litigation, these amendments were enacted over the objections of liberal and conservative critics alike, including some of the more conservative Justices of the United States Supreme Court.[9]

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4. Edward F. Sherman, *The Judge's Role in Discovery*, 3 REV. LITIG. 89, 196-97 (1982) (reporting on National Conference on Discovery Reform, November 18-20, 1982, at University of Texas School of Law in Austin, Texas) (quoting Judge Gerard L. Goettel).

5. Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 624 (1985).

6. *See, e.g.*, Priscilla Anne Schwab, *Interview With Edward Bennett Williams*, LITIG., Winter 1986, at 28, 30 ("[D]iscovery today is not used primarily to uncover facts. It's used to delay, to obfuscate and, too often, to replace real investigation.") (comments of Edward Bennett Williams); *cf.* Wayne D. Brazil, *Views from the Front Lines: Observations By Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 226-27 (discussing lawyers' perceptions of civil discovery in both routine and complex litigation); Arthur R. Miller, *The Adversary System, Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 23 (1984) (no discovery is employed in 50% of federal lawsuits while excessive discovery or unwarranted failure to produce is not an issue in most of the remaining actions).

7. FED. R. CIV. P. 26, *reprinted in* 146 F.R.D. 401, 606-27 (1993), as amended in 1993; *Rules Announced April 22, 1993*, 61 U.S.L.W. 4365, 4372-76 (April 27, 1993). See 146 F.R.D. 401, 431-47 (1993) for the text of the 1993 version of Rule 26 without additions or deletions. See *infra* Appendix A for the text of both the previous rule and amendments.

8. *See New Procedural Rules Take Effect, Move To Stop Voluntary Discovery Fizzles*, 62 U.S.L.W. 1077 (Nov. 30, 1993) (efforts in Congress to scrap the controversial voluntary discovery provision did not make it to the Senate floor before Congress adjourned for the 1993 holidays).

9. On April 22, 1993, the Supreme Court of the United States, acting on the Judicial Conference's proposed amendments to the civil discovery rules, ordered that the Federal Rules of Civil Procedure be amended, and pursuant to 28 U.S.C. § 2074 (Supp. 1993), submitted the amendments to Congress. 146 F.R.D. 401, 403-04 (1993). The Chief Justice noted:

> While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Id. at 403.

Three dissenting justices questioned, *inter alia*, the wisdom of putting into effect a "radical alteration" to the discovery rules without any prior "significant testing on a local level." *Id.* at

Aptly described as "the triumph of hope over experience,"[10] the mandatory disclosure rule codifies a suggestion by United States District Judge William W. Schwarzer, director of the Federal Judicial Center, for what he called a "self-executing system of full disclosure."[11] The mandatory disclosure rule is touted as an "intentional erosion of the adversary process . . . which promotes fairness, efficiency and credibility, and thus . . . strengthens the adversary system by confining it to its proper role of testing the facts and issues at trial."[12] In their quest to save the adversary system by destroying it, however, the drafters have destroyed much and saved little.

It is simply unrealistic to suppose that the 1993 rules amendments will reduce the volume or intensity of discovery (or disclosure) disputes. Eliminating virtually all discovery, and replacing discovery with what amounts to an honor system of information exchange,[13] is unlikely to reduce significantly the more prevalent forms of abuse. More likely, "litigation over a party's compliance may take on a life of its own,"[14] generating more delays.

Of far graver concern, however, is the danger that the mindless pursuit of speed and low cost may be achieved at the expense of justice for relatively powerless litigants. The amended discovery rules will have the effect, whether intended or not, of advancing a conservative agenda[15] by sharply

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511 (part II of Justice Scalia's dissenting opinion, in which Justices Thomas and Souter joined); *see* Griffin Bell et al., *Automatic Disclosure In Discovery—the Rush To Reform*, 27 GA. L. REV. 1, 3 (1992) (Advisory Committee developed automatic disclosure proposal in June 1990 and defended it over the next two years against opposition from lawyers, litigants, and trial judges, who urged the Committee to withdraw or modify its proposal. The Advisory Committee finally rejected the public comments and adopted radical and untested change to Rule 26.).

10. Mullenix, *supra* note 2, at 820 (also title of article).

11. *Federal Rules: Major Changes Sought By Judicial Conference Working Group*, 60 U.S.L.W. 2158, 2158 (Sept. 10, 1991); *see* William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721-23 (1989) (advocating rule requiring disclosure of material documents and information by all parties at commencement of action), *cited with approval in* 1993 Advisory Committee's Notes, *supra* note 2, at 628.

12. Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 64 (1988).

13. *See* FED. R. CIV. P. 26, *infra* Appendix A (instituting mandatory disclosure rule). Some defense counsel, active in the redrafting of the discovery rules, have advocated going beyond the above restrictions and abolishing discovery entirely. *See, e.g.*, Loren Kieve, *Commentary: Discovery Reform*, A.B.A. J., Dec. 1991, at 79, 81 (advocating elimination of discovery to streamline litigation and prevent filing of frivolous lawsuits). Kieve, a partner in the Washington D.C. office of Debevoise & Plimpton, has represented such litigants as Mobil Oil in Christopher v. Mobil Oil, 950 F.2d 1209 (5th Cir. 1992), an ERISA suit by a former employee.

14. Victoria E. Brieant, *The August, 1991 Proposed Amendments to the Federal Rules of Civil Procedure: How Are These Sweeping Proposals Likely to Affect Antitrust Litigation in the 1990s?*, ALI-ABA Course of Study, Dec. 21, 1991, *available in* WESTLAW, C695 ALI-ABA 459, 467.

15. *See* Mullenix, *supra* note 2, at 824-25 (describing resultant "litigation imbalance" that favors corporate or governmental institutions over litigants with lesser resources). Ironically, the call for further empirical research on the effects of the disclosure rule on certain categories of litigants has been criticized as part of a "partisan political agenda[ ] . . . infusing the rulemaking process and challenging the longstanding trans-substantive philosophy of the federal rules. The accepted premise of the Federal Rules of Civil Procedure is that they are rules of general appli-

limiting the ability of non-institutional litigants to protect their rights in court. This is particularly true in the areas of employment discrimination, civil rights, and toxic torts where the defendant controls most of the information the plaintiff needs to prove the case. As of December 1, 1993, a defendant need only disclose information relevant to matters "alleged with particularity" in the pleadings. With this effective abolition of notice pleading for anyone whose adversary possesses most of the necessary information, "[t]he burden . . . that will be imposed . . . [on such litigants] should not be underestimated."[16]

This drastic curtailment of access to the courts for disadvantaged litigants is part of a trend identified several years ago by Professor Eric K. Yamamoto, whereby "recent federal procedural reforms have subtly, yet measurably, discouraged judicial access for those outside the political and cultural mainstream, particularly those challenging accepted legal principles and social norms."[17] Creating a smoothly functioning pretrial process[18] (like

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cability, without regard to kinds of cases or litigants; thus, they transcend particular substantive law application. This trans-substantive theory of the federal rules has been under attack . . . ." *Id.*

16. Brieant, *supra* note 14, at 467. *See, e.g.*, FED. R. CIV. P. 26(a)(1)(A), *infra* Appendix A (limiting disclosure to matters alleged "with particularity" in pleadings); 1993 Advisory Committee's Notes, *supra* note 2, at 631, acknowledging that

> [t]he initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence "*relevant to disputed facts alleged with particularity in the pleadings.*" . . . Broad, vague, and conclusory allegations sometimes tolerated in notice pleading—for example, the assertion that a product with many component parts is defective in some unspecified manner—should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, *the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions.*

Id. (emphasis added). In other words, the information-rich party (usually the defendant) may wait for the conference, see what the plaintiff already knows well enough to plead *with specificity*, and then disclose only that which the plaintiff already knows about. The plaintiff, however, must disclose complete evidentiary support for every claim, prior to disclosure or discovery, or face dismissal of its claims before the defendant has even responded under the rules.

17. Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 344-45 (1990). "That the reformed procedural system operates acceptably in individual cases doesn't mean, however, that the sustained, cumulative impact of the reforms is litigant-neutral. Procedures may operate well in many cases and yet discretely prejudice the interests of certain groups in others." *Id.* at 359; *see also* Geoffrey C. Hazard, Jr., *The Federal Rules Fifty Years Later: Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237-47 (1984) (discussing Federal Rules of Civil Procedure 50 years after initial promulgation). Professor Hazard also pointed out:

> [T]he Federal Rules have come to be defended on the ground that they afford better access to courts and thereby facilitate greater social justice . . . . Reference is made of the uses of civil litigation to remedy racial discrimination, gender discrimination, environmental pollution, and other injustices. That the Rules do facilitate such social jus-

making the trains run on time) is no doubt desirable, but at what cost? Care must be taken that the "speedy[ ] and inexpensive determination"[19] of cases does not supersede the "*just* . . . determination of *every* action."[20]

The impact of the 1993 amendments on those disadvantaged litigants who most need fair and free access to the courts is reason enough to reject the tender mercies of contemporary tinkerers[21] and to repeal the 1993 discovery rules amendments, but they should also be repealed because they will exacerbate the very problems they purport to solve. Hoping against experience to eliminate discovery abuse by eliminating discovery for litigants in unequal positions is a violation of the fundamental principles of fair play that are the foundation of our legal system. It is time to ask whether there isn't another, better way to address these problems.

This article examines the 1993 amendments to the Federal Rules of Civil Procedure affecting discovery, and recommends that they be repealed. This article further recommends that until the 1993 amendments are repealed, district courts should "opt out" of the amendments' application under the options for local modification built into the 1993 amendments and the Civil

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tice litigation seems little in doubt . . . . Further, the remediation of these injustices, at least up to a point, is essential even for one whose political premises are conservative, as I consider mine to be. The examples of Northern Ireland, Lebanon, South Africa, India, and now Israel remind us of the social costs of being indifferent to effective microcosmic remedies for macrocosmic social injustice.

The Federal Rules have been an effective instrument of social justice because they reduce the barriers to the formulation and proof of claims against the existing systems of authority. Formulation of new theories of legal rights is simpler, virtually by definition, under a pleading system that is not constructed in terms of old legal categories, as was code pleading and common law pleading. Proof of new theories of liability likewise is simpler with the aid of comprehensive discovery.

This relationship between civil justice and social justice was not anticipated in 1938. The social wrongs whose remediation is assisted by the Federal Rules in the present era had not then appeared on the civil litigation agenda. The emergence of civil rights and environmental litigation hardly could have been anticipated.

If these commentators are correct, then the 1993 amendments' effective return to code pleading may well sound the death knell for plaintiffs seeking to redress societal, as opposed to commercial, wrongs, and this denial of access will fall primarily on information-poor plaintiffs, inasmuch as the information-rich plaintiffs, as in much business litigation, are not so heavily dependant on information in their opponent's control and are freer to exercise their right to use notice pleading.

18. *See* MILLER, *supra* note 1, at 18-30 (noting that pretrial process still requires judicial involvement).

19. FED. R. CIV. P. 1.

20. *Id.* (emphasis added).

21. *See* Amendments to the Fed. R. Civ. P., 85 F.R.D. 521, 523 (1980) (Powell, J., joined by Stewart, J., and Rehnquist, J., dissenting from adoption of 1980 amendments) ("Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms . . . . Meanwhile, the discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs."); *see also* Warren E. Burger, *Agenda for 2000 A.D. - A Need For Systematic Anticipation*, Keynote Address of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976) (quoting Roscoe Pound), *in* 70 F.R.D. 83, 83 (1976).

Justice Reform Act.[22] Instead of further misguided attempts at reinventing discovery, this article also recommends that all federal district courts adopt an approach to case management patterned after that used by the United States District Court for the Eastern District of Virginia,[23] so that it will again be possible to achieve the "just, speedy, *and* inexpensive determination of *every* action,"[24] for *all* classes of claimants, not just the powerful.

I. THE HISTORICAL CONTEXT OF THE DISCOVERY RULES: THE EVOLUTION OF DISCOVERY RULES IN THE FEDERAL RULES OF CIVIL PROCEDURE

> In 1938, when the Federal Rules of Civil Procedure were drafted, two-party law suits were still the rule, most forms of complex litigation . . . were still unthought of, and record keeping, even by large enterprises, was still manageable by a small number of clerical employees. Thus information compilation or document production was not thought to impose any greater burden than responding to a deposition or other routine forms of discovery.[25]

As litigation grew more complex, civil discovery was incorporated into the Federal Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action,"[26] by providing "a mechanism for making relevant information available to the litigants."[27] Discovery was intended to flesh out the information provided by modern "notice pleading."[28]

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22. Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (Supp. 1992) (enacted as Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650 § 103(a), 104 Stat. 5089, 5090-96 (1990)).

23. *See* E.D. Va. R. 11.1 & 12 (setting forth court's rules on discovery and case management); see also *infra* notes 240-67 and accompanying text for a discussion of the United States District Court for the Eastern District of Virginia's approach to case management.

24. FED. R. CIV. P. 1 (emphasis added).

25. Edward F. Sherman & Stephen O. Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 2 REV. LITIG. 9, 12 n.8 (1981), *reprinted in* 95 F.R.D. 245, 248 n.8 (1982).

26. FED. R. CIV. P. 1. The Supreme Court has ruled that the Federal Rules of Civil Procedure must be construed in accordance with the language of FED. R. CIV. P. 1, "to secure the just, speedy, and inexpensive determination of every action." Foman v. Davis, 371 U.S. 178, 181-82 (1962).

27. 1983 Advisory Committee's Notes, *supra* note 2, at 216.

28. *See* United States v. Purdome, 30 F.R.D. 338 (W.D. Mo. 1962) (relying on *Hickman*) ("[N]otice pleading . . . makes no sense unless considered in relation to the broad philosophy of full disclosure."). Until the passage of the 1993 discovery amendments, modern notice pleading required, among other things, a "short and plain statement of the claim." FED. R. CIV. P. 8(a)(2); *see, e.g.*, Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (reversing the district court's dismissal of Dioguardi's "inartistically" drawn complaint); *cf.* O.L. McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123, 125-26, 174-75 (1952) (criticizing liberal "notice pleading" view espoused in *Dioguardi*).

The *Dioguardi* court's affirmation of the fairness of notice pleading was cited with approval in Conley v. Gibson, 355 U.S. 41, 46 n.5 (1957), in which the Supreme Court said, "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.* at 48.

Proponents believed that discovery would "make a trial less a game of blindman's buff and more a fair contest, with the basic issues and facts disclosed to the fullest practicable extent."[29] In 1947 the Supreme Court endorsed a general policy of liberal discovery in *Hickman v. Taylor*,[30] saying that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[31] *Hickman* has been described as opening a "Pandora's box of discovery abuse,"[32] and was the apparent starting point for

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Under amended Rule 26, however, this fairness principle no longer applies to litigants such as Mrs. Dioguardi who will need information from their opponents. Such litigants must plead all claims "with particularity," because if they lack sufficient information to plead a claim with particularity, the defendant is under no obligation to disclose the material that would make such particularized pleading possible. *See* FED. R. CIV. P. 26(a)(1)(A), *infra* Appendix A. *See generally* JOSEPH HELLER, CATCH-22 47 (Dell ed. 1961) (explained *infra*, note 108).

This newly created requirement of particularity for information-poor litigants is a stringent standard that formerly applied only to the pleading of such quasi-criminal civil matters as fraud. See FED. R. CIV. P. 9(b) (emphasis added), which provides:

> FRAUD, MISTAKE, CONDITION OF MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake *shall be stated with particularity*. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Even when the plaintiff has this sort of information, compliance with the particularity standard has its own problems. *See, e.g.*, Gordon v. Green, 602 F.2d 743, 744-47 & n.13 (5th Cir. 1979) (dismissing complaint without prejudice, where complaint and amendments thereto comprised approximately 4,000 pages, filling 18 volumes, and required a cart or hand truck to transport it; in dismissing the complaint with leave to refile, the court advised the plaintiff's counsel that they were lucky not to suffer the discipline inflicted by the English Chancellor in 1596, who ordered a hole to be cut through the center of a particularly prolix document, had counsel's head stuffed into the hole, and directed court officers to lead the counsel around as an example to all in attendance at court) (citing Richard C. Wydick, *Plain English for Lawyers*, 66 CAL. L. REV. 727, 727 (1978)).

29. United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958); *see* Nichols v. Sanborn Co., 24 F. Supp. 908, 910 (D. Mass. 1938) (referring to intent of drafters of Federal Rules on discovery). *See generally* James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1179, 1180 (1938) ("[T]he new federal deposition-discovery practice affords the greatest opportunity for adequate trial preparation in the history of civil procedure."); Edson R. Sunderland, *Improving the Administration of Justice*, 167 ANNALS 60 (1933); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 869-73 (1933) (discussing wide variation among United States jurisdictions in scope of discovery).

Professor Sunderland was an early proponent of courts taking a hand in the pretrial discovery process. *See, e.g.*, Edson R. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 218-19 (1937) (advocating pretrial judicial hearings by which all matters not in dispute may be withdrawn).

30. 329 U.S. 495 (1947).

31. *Id.* at 507.

32. Margaret L. Weissbrod, Comment, *Sanctions Under Amended Rule 26 - Scalpel or Meatax? The 1983 Amendments to the Federal Rules of Civil Procedure*, 46 OHIO ST. L.J. 183, 184 (1985) (alleging that *Hickman v. Taylor* opened door to abusive tactics not contemplated by drafters). *Hickman*'s permissive policies, coupled with the inherently adversarial character of civil litigation, provided opportunities to use otherwise proper discovery tactics to delay and harass one's opponents. *See* 1983 Advisory Committee's Notes, *supra* note 2, at 217; *see, e.g.*, Ferguson v. Ford Motor Co., 92 F. Supp. 868 (S.D.N.Y. 1950) (in a suit alleging patent infringement, unfair competition and antitrust violations, depositions of 173 persons consumed more than 100,000 pages (before the advent of word-processors); more than 700,000 pages of docu-

succeeding waves of discovery rules amendments.

A. Discovery in the 1970s

The 1970 amendments may have started a landslide when they introduced provisions allowing a party to respond to interrogatories by making records available from which the discoverer could determine the answer.[33] The 1970 amendments also attempted to deter abuse by encouraging the use of sanctions and protective orders,[34] though studies showed that sanctions and protective orders did not deter abuse, and that attorneys and judges rarely invoked them.[35] Discovery costs continued to mount.[36]

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ments were produced for inspection, with 45,000 marked as exhibits; stenographic costs for the depositions alone reportedly ran to approximately $500,000 in 1950 dollars). *See* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1315-48 (1978) (discussing how attorneys use specific discovery tools to limit and distort flow of information). Discovery tools became tactical weapons, violating the spirit (and sometimes the letter) of the rules, as litigants engaged in disproportionately costly and time-consuming discovery activities and evasive responses. 1983 Advisory Committee's Notes, *supra* note 2, at 216-17. Professor [later Magistrate Judge] Brazil's recommendations, along with those of United States District Judge Schwarzer, heavily influenced the 1993 amendments. *See* 1993 Advisory Committee's Notes, *supra* note 2, at 628 (acknowledging Brazil and Schwarzer as proponents of duty of disclosure).

33. FED. R. CIV. P. 33(c) (1970) provided:

> OPTION TO PRODUCE BUSINESS RECORDS
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> Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served . . . and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

This provision remains intact in the 1993 amendments, although it is renumbered 33(d). FED. R. CIV. P. 33(d), *reprinted in* 146 F.R.D. 401, 675 (1993). See *infra* Appendix B for the remaining 1993 amendments to Rule 33.

34. *See* FED. R. CIV. P. 33 (1970) advisory committee's notes (noting that failure to respond or object to interrogatories without applying for protective order will trigger sanctions) [hereinafter 1970 Advisory Committee's Notes], *reprinted in* 48 F.R.D 485, 522-25 (1970).

35. *See* Sherman & Kinnard, *supra* note 25, at 248 (protective orders not used to shift burdens or costs incident to discovery); Note, *Federal Discovery Rules: Effects of the 1970 Amendments*, 8 COLUM. J.L. & SOC. PROBS. 623, 641-43 (1972) (judges reluctant to impose sanctions for discovery abuses).

36. *See* Brazil, *Adversary Character*, *supra* note 32, at 1307 (increase in discovery increased litigation costs). Professor Brazil argued that the nature of the adversary system and "competitive economic impulses" conflict with the primary objectives of the discovery process. *Id.* at 1303-05. As Professor Brazil noted, the assumption underlying the modern discovery rules was that the "gathering and sharing of evidentiary information should (and would) take place in an essentially nonadversarial environment." *Id.* at 1303. Thus, "[e]ffective reform . . . must include institutional changes that will curtail substantially the impact of adversary forces in the pretrial stage of litigation." *Id.* at 1297. Professor Brazil proposed a replacement of the adversary system of discovery in civil litigation with a system of automatic disclosure of relevant information:

> [S]hifting counsel's principal obligation during the investigation and discovery stage away from partisan pursuit of clients' interests and toward the court; imposing a duty on counsel to investigate thoroughly the factual background of disputes; imposing a

During the 1970s, United States Magistrate Wayne Brazil[37] identified a wide range of tactical uses of discovery, most of which can be characterized as "abuse."[38] In 1978, he proposed a form of mandatory disclosure as one means of eliminating much of the adversarial nature of civil discovery.[39] Justice Powell also noted in his 1979 concurring opinion to *Herbert v. Lando*[40] that "discovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice."[41] The majority agreed, noting that "until and unless there are major changes in the present Rules of Civil Procedure, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse."[42]

B. The Federal Courts' Traditional Powers

The federal courts' traditional powers to control discovery abuse were indeed ample,[43] both under the existing rules,[44] and under 28 U.S.C. § 1927

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duty on both counsel and client to disclose voluntarily, and at all stages of trial preparation, all potentially relevant evidence and information; narrowing the reach of the attorney-client privilege and the work product doctrine; making early discovery conferences mandatory; substantially expanding the role of the court in monitoring the execution of discovery; and requiring thorough judicial review of, or participation in, all settlements that exceed a specified dollar amount.

Id. at 1349.

37. United States Magistrate, N.D. Cal., and former Director of the Federal Judicial Center. *See generally* Brazil, *Adversary Character*, *supra* note 32, at 1326-27 ("winning at all costs" mentality of attorneys who lied to adversary and trial judge about discoverable documents); *see also* Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 798 (failure to respond to interrogatories and providing evasive or incomplete answers considered normal or "the nature of the beast," rather than difficulty).

38. *See* Brazil, *Front Lines*, *supra* note 6, at 239 (attributing much discovery abuse to the fact that people with perfectionist-compulsive tendencies often perform very well in law school and are likely to be attracted by the challenges and rewards of big case litigation. Litigators with these psychological characteristics are especially anxious about making errors, and are particularly prone to develop "elaborate systematic procedures for attacking all litigation problems").

39. Brazil, *Adversary Character*, *supra* note 32, at 1349-61.

40. 441 U.S. 153, 177 (1979) (Powell, J., concurring).

41. *Id.* (Powell, J., concurring); *see also* 1983 Advisory Committee's Notes, *supra* note 2, at 216-18 (attempt to use rules as tactical weapons results in exploitation to disadvantage of justice) (quoting *Herbert*, 441 U.S. at 179 (Powell, J., concurring)); Richard W. Sherwood, *Curbing Discovery Abuse: Sanctions Under the Federal Rules of Civil Procedure and the California Code of Civil Procedure*, 21 SANTA CLARA L. REV. 567, 571 (1981) (misuse of discovery has been subject of concern to both bar and bench).

42. *Herbert*, 441 U.S. at 177 (White, J.).

43. *See* 1970 Advisory Committee's Notes, *supra* note 34 (conferring broad powers on courts to regulate or limit discovery through protective orders, but focusing on work-product and privilege rather than on discovery abuse); *cf.* United States v. I.B.M. Corp., 79 F.R.D. 378, 380-81 (S.D.N.Y. 1978) (court order forbidding counsel to instruct deponent not to answer or to suggest to deponent that question was appropriate, did not affect parties' substantial rights and ensured fair and efficient completion of ongoing depositions); Annotation, *Work Product Privilege as Applying to Material Prepared for Terminated Litigation or for Claim Which Did Not Result in Litigation*, 27 A.L.R. 4th 568 (1986).

44. *See, e.g.*, 1970 Advisory Committee's Notes, *supra* note 34, at 525 (notes to Rule 33(c)

and the concept of "inherent power."[45] Nevertheless, the "American Rule"[46] that litigants must pay their own costs and fees, absent express statutory authorization,[47] may have reinforced attorneys' traditional reluctance to

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(referring to courts' "usual power" to require reimbursement for assembling records and making them intelligible, and using "devices," such as a computer, to translate data into usable form); *id.* (notes to Rule 34(a)) (courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs or by shifting costs of "check[ing] the electronic source itself" where data compilation has been discovered); *see also* FED. R. CIV. P. 26(b)(4)(C) (1970) (requiring discovering party to pay opponent's expert a "reasonable fee for time spent in responding to discovery").

45. 28 U.S.C. § 1927 (1988). Section 1927 reads as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Section 1927 has been used to assess sanctions against an attorney who employed delaying tactics during discovery, consistently failed to meet scheduled filing deadlines, and abused discovery privileges, among other improprieties. *See, e.g.*, Lipsig v. National Student Marketing Corp., 663 F.2d 178, 181 (D.C. Cir. 1980) (advocacy simply for sake of burdening opponent with unnecessary expenditures of time and effort warrants recompense for extra outlay attributable thereto). Likewise, in Pfister v. Delta Air Lines, Inc., 496 F. Supp. 932 (N.D. Ga. 1980), an attorney was held personally liable for his opponent's costs resulting from the attorney's numerous abuses, including his failure to initiate discovery for four years and his failure timely to serve documents and file appeal bonds. *Id.* at 933, 936-37.

For a discussion of the inherent powers of federal courts to control their proceedings, see, e.g., Link v. Wabash R.R. Co. 370 U.S. 626, 628-33 (1962) (affirming dismissal of plaintiff's cause of action for failure of plaintiff's counsel to appear at pretrial conference; trial court has inherent power, of ancient origin, to prevent undue delays in disposition of pending cases and to avoid congestion), *reh'g denied*, 371 U.S. 873 (1962); *see also* Roadway Express v. Piper, 447 U.S. 752, 766 (1980) (affirming *Link*, and noting that federal courts had inherent power to assess costs against lawyers who "willfully" abuse judicial processes); Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CAL. L. REV. 264, 268-69 (1981) (discussing inherent authority from judge's perspective). *Roadway* implied that sanctions cannot be imposed unless a court finds bad faith. *Id.* at 767 & n.13. The district court had relied on FED. R. CIV. P. 37(b) and 28 U.S.C. § 1927, read in conjunction with 42 U.S.C. §§ 1988, 2000e-5(k) (Civil Rights Attorneys Fees Awards Act) to assess costs and fees and to dismiss the suit after plaintiffs failed to answer interrogatories and disobeyed a court order compelling compliance. *Id.* at 755. The Supreme Court affirmed the Court of Appeals' reversal of the trial court's award of attorney's fees, holding that "costs" in 28 U.S.C. § 1927 are implicitly limited to costs enumerated in 28 U.S.C. § 1920. *Id.* at 756-57, 767. Thus, awards under § 1927 may be assessed against either counsel or client, but may include only costs, not fees. *See generally* William H. Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1142-45 (1951) (discussing usefulness, popularity, and versatility of written interrogatories).

46. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) (attorney's fees are not recoverable as damages by a prevailing party); *see also* Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (prevailing litigant ordinarily not entitled to collect reasonable attorney's fee from loser). *See generally* 1 STUART M. SPEISER, ATTORNEY'S FEES § 13.1, at 618 n.5 (1973) (collecting many of the significant cases affirming American rule); Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792, 793 (1966) (calling for reform of American rule); Calvin A. Kuenzel, *The Attorney's Fee: Why Not A Cost of Litigation?*, 49 IOWA L. REV. 75, 78 (1963) (if one party takes advantage of court delay to put financial pressure on adversary, solution requiring payment for advantage would be appropriate).

47. *See, e.g.*, 42 U.S.C. § 1988. Courts have also carved out some exceptions to the "Ameri-

ask for monetary sanctions and the reluctance of courts to grant them.[48] Courts did, historically, exercise some control over discovery,[49] occasionally

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can Rule," particularly when a litigant has acted in bad faith. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 691 (1978) (court's award of attorney's fees did not violate Eleventh Amendment and was adequately supported by finding of bad faith); William A. Harrington, Annotation, *Award of Counsel Fees to Prevailing Party Based on Adversary's Bad Faith, Obduracy, Or Other Misconduct*, 31 A.L.R. FED. 833, 842 (1977) (federal district courts may, as exception to American rule, award attorney's fees where losing party acted in bad faith). This power to levy fees has been recognized as an inherent power of the federal courts. *See Roadway Express*, 447 U.S. at 766 (acknowledging "inherent power" of courts to assess attorney's fees when losing party acts in bad faith) (quoting *Alyeska Pipeline*, 421 U.S. at 258-59)). For an analysis of the historical development of this power, see Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233, 241-46 (8th Cir. 1928) (tracing progression of authorities that clearly establish federal courts' jurisdiction to allow, in proper cases, costs "as between solicitor and client"), *rev'd on other grounds*, 281 U.S. 1 (1930); Joan Chipser, Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319, 323-24 (1977) (discussing historical development of bad faith exception, from English Courts of Chancery through early federal equity cases to present day application). *See generally* Jane P. Mallor, *Punitive Attorney's Fees For Abuses of the Judicial System*, 61 N.C. L. REV. 613, 652-53 (1983) (listing contempt, bad faith, and prior frivolous litigation as bases for fee awards under American common law).

However, the bad faith exception authorizes fee awards to prevailing parties only, which does not help if the prevailing party is the one who engages in the discovery abuse. *See, e.g.*, F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974) (court may award attorney's fees to a *successful* party whose opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons).

48. *See* Levine, *supra* note 3, at 567; *see also* MILLER, *supra* note 1, at 14:

> Now let us face facts, if lawyers don't ask for sanctions, they don't ask for sanctions because of the golden rule . . . . Judges don't like sanctions, in part because they are self-inflicted wounds. Who wants the extra work of a sanction proceeding? Let's face it, all judges practiced law, and maybe some judges used to engage in that kind of behavior. So it is a sort of "well, boys will be boys" kind of thing. So they don't sanction it. That has been the traditional view.

See generally Cutner, *supra* note 2, at 933-37 (providing illustration of courts' reluctance to sanction attorneys, indicating that proposed amendments will not result in great judicial use of available sanctions, and concluding that purpose of Federal Rules will not be met if judges fail to use sanctions); John J. Kennelly, *Pretrial Discovery - The Courts and Trial Lawyers Are Finally Discovering That Too Much of It Can Be Counterproductive*, 21 TRIAL LAW. GUIDE 458, 458-74 (1978) (discussing Identiseal Corp. of Wisconsin v. Positive Identification Sys., Inc., 550 F.2d 298 (7th Cir. 1977), in which court held that trial judge may not compel counsel to conduct any pretrial discovery, but advocating need for rules where discovery is needed) (citing FEDERAL JUDICIAL CENTER, SURVEY OF LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS (1978)).

49. For example, some courts have limited discovery to a reasonable time period or to specific records to ease the burden of a party's searching years of records. *See, e.g.*, Houdry Process Corp. v. Commonwealth Oil Ref. Co., 24 F.R.D. 58, 63 (S.D.N.Y. 1959) (courts should order discovery of documents relating to specific subject if subject designated with some "reasonable degree of particularity," and period of discovery, if indefinite, should be limited to relevant periods); Hercules Powder Co. v. Rohm & Haas Co., 4 F.R.D. 452, 454 (D. Del. 1944) (limited inspection of documents to those within two years of commencement of suit); A. W. Gans, Annotation, *Necessity and Sufficiency, Under Statutes and Rules Governing Modern Pretrial Discovery Practice, of "Designation" of Documents, etc., In Application or Motion*, 8 A.L.R. 2d 1134, §§ 4, 6, 7, at 629, 630, 631 (1949 & Supp. 1985) (presenting tests or criteria indicating whether documents sufficiently designated or specified in pretrial discovery request); W. R. Frothingham, Annotation, *Discovery or Inspection of Trade Secret, Formula, Or The Like*, 17 A.L.R. 2d 383,

invoking dismissal as the ultimate sanction for discovery abuse.[50]

In 1976, the Supreme Court endorsed the use of sanctions as a deterrent to discovery abuse in *National Hockey League v. Metropolitan Hockey Club, Inc.*[51] Also in 1976, the American Bar Association, the Conferences of Chief Justices, and the Judicial Conference co-sponsored a national conference, "The Causes of Popular Dissatisfaction With the Administration of Justice,"[52] on the 70th Anniversary of Roscoe Pound's famous address of the same name.[53] The Pound Conference explored complaints that significant numbers of federal trial judges and attorneys viewed burdensome discovery as a problem,[54] and made recommendations for further rules amendments, including the increased use of sanctions.[55]

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§§ 5, 8, at 393-94, 401 (1951) (when discovery or inspection will disclose trade secrets, courts favor societal interest in facilitating trial and promoting justice over individual interest in matintaining screcy).

50. See, e.g., Gates v. United States, 752 F.2d 516, 517 (10th Cir. 1975), in which a tax refund plaintiff twice failed to appear for noticed depositions. The court then ordered the deposition to take place on a specific date, and dismissed the complaint when plaintiff again failed to appear. The circuit court upheld the dismissal, blaming the lack of notice on the plaintiff's failure to contact his attorney during a 60 day period, and said, "In the past, Rule 37 may have been considered a paper tiger, but the time has now come to put teeth in the tiger." *Id.*

51. 427 U.S. 639 (1976) (per curiam). In *National Hockey League*, 17 months after the district court had ordered them to answer the defendants' interrogatories, the plaintiffs had not given meaningful answers. Finding that such inaction amounted to flagrant bad faith, the trial court wrote, "If the sanction of dismissal is not warranted, then the Court can envisage no set of facts whereby that sanction should ever be applied," and dismissed the case pursuant to Rule 37. *Id.* at 640-41.

The Supreme Court upheld the dismissal, emphasizing that "the most severe in the spectrum of sanctions provided . . . must be available . . . not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Id.* at 643. This endorsement of sanctions as deterrents, rather than as remedies for misconduct, reflected a major change of attitude toward the imposition of sanctions, and encouraged trial courts to make more frequent use of sanctions. *See generally* Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1041 (1978) (speculating that courts hesitate to punish discovery abuse because they perceive constitutional limitations on power to punish sanctions).

52. Hereinafter cited as The Pound Conference. Former Chief Justice Warren Burger also appointed an Advisory Committee on Civil Rules to conduct hearings on discovery abuse. *See* Burger, *supra* note 21, at 96.

53. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906), *reprinted in* 35 F.R.D. 241, 273-91 (1964).

54. *See, e.g.*, Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1986) (discussing problems associated with burdensome discovery in complex civil litigation), *in* 70 F.R.D. 79, 202-03 (1976); *cf.* Alexander v. Parsons, 75 F.R.D. 536, 539 (W.D. Mich. 1977) (mere fact that discovery is burdensome is not sufficient to bar such discovery, provided information sought may lead to discovery of admissible evidence).

55. *See, e.g.*, Burger, *supra* note 21, at 95-96; *see also* A.B.A. REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE, 74 F.R.D. 159, 191-94 (1976) (recognizing need to fashion appropriate remedies for discovery abuse and recommending evaluation of programs making appropriate use of sanctions); Griffin B. Bell, *The Pound Conference Follow-Up: A Response From the United States Department of Justice*, 76 F.R.D. 320, 328-39 (1978) (one deterrent to

C. The 1980 Amendments

When the 1980 rules amendments were adopted, Justice Powell, joined by Justices Stewart and Rehnquist, denounced them as mere "tinkering changes" which would "create complacency and encourage inertia" that could "postpone effective reform for another decade."[56] The 1980 amendments ignored the failure of the Rule 30 protective order and existing sanction provisions to curb abuse,[57] and did nothing about abuses of the interrogatory process.[58] Little was accomplished,[59] and almost as soon as the 1980 amendments took effect, work started on what would become the 1983 amendments.[60]

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needless extension of appeals being considered by Justice Department is imposing monetary sanctions on party or attorney); William H. Erikson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288-90 (1978) (if overuse of and resistance to discovery were both subject to sanctions, such discovery abuses would be curbed). Subsequent studies conducted for the Justice Department's Office for Improvements in the Administration of Justice supported the findings of the Pound Conference. *See* C. Ronald Ellington, *A Study of Sanctions For Discovery Abuse* (May 11, 1979) (report submitted to Office for Improvements in the Administration of Justice), *cited in* Frank F. Flegal & Steven M. Umin, *Curbing Discovery Abuse in Civil Litigation: We're Not There Yet*, 1981 B.Y.U. L. REV. 597, 600-01 & nn.12 & 14, 602 n.16, 603 nn.20-23.

56. *See* Amendments to the Fed. R. Civ. Pro., 446 U.S. 995, 997, 998, 1000 (1980) (Powell, J., dissenting); *see also* Ruth Marcus, *Abuses Uncurbed? Court OK's Changes in Discovery - But Dissenters Argue Reforms in Civil Rules Don't Go Far Enough*, NAT'L L.J. May 12, 1980, at 1, col. 4; Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 818 (1981) (ability of plaintiffs' attorneys to obtain corporate defendant's records, to depose corporate employees, and to send searching interrogatories has had a substantial impact in particular areas of law).

Judge Friedenthal noted that "[i]t would be a sad irony if reforms ultimately prevented the less affluent litigant from presenting a valid case that without discovery he could not prove." *Id.* at 813. "If discovery abuse is confined to a relatively few cases, a call for across-the-board limitations is in reality no more than a covert call for a fundamental policy change that would deter litigants from obtaining vital information in the many cases where no abuse exists." *Id. See generally* Mark A. Nordenberg, *The Supreme Court and Discovery Reforms: The Continuing Need for an Umpire*, 31 SYRACUSE L. REV. 543 (1980) (general description and history of the amendment process); A.B.A. Section of Litigation, *Second Report of the Special Committee for the Study of Discovery Abuse (Jan. - Nov. 1980)*, 92 F.R.D. 137-48 (1980).

57. Flegal & Umin, *supra* note 55, at 616.

58. *See* Schroeder & Frank, *supra* note 3, at 489 (the proposed 1980 amendments are not much more than general threats of thunder and lightening against "abuses," and will not help evasion or overproduction problems in discovery).

59. *See* Joy A. Chapper, *Limiting Discovery*, 20 JUDGES J. 20 (1981) (proposals considered by trial courts to reduce costs and delays of civil litigation have left traditional litigation process unchanged).

60. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 90 F.R.D. 451 (1981); EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN; AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (no date given), *in* 97 F.R.D. 165, 189-241 (1983).

D. The 1983 Amendments

By 1983, despite the failure of previous sanctions to curb abuses, many believed that the "just, speedy and inexpensive determination of every action" could only be achieved by introducing mandatory sanctions.[61] The 1983 amendments, described by one commentator as "radical surgery,"[62] were intended to prompt more aggressive judicial control and supervision in the pretrial process.[63]

Amended Rule 26 (1983) provided for mandatory sanctions and was intended to counteract judges' perceived reluctance to impose sanctions on attorneys[64] by explicitly requiring judges to limit redundant or disproportionate discovery,[65] based on the circumstances of the particular case.[66] As a result, sanctions were imposed in large numbers, fulfilling one commentator's prediction that sanctions would be like "a snowball coming down the hill."[67]

The 1983 amendments' mandatory sanctions provisions have been compared both to a scalpel and to a meat ax,[68] but despite these cutting edge innovations, abuses have proliferated like the hydra's heads.[69] The most radical of the 1983 discovery rule innovations was the amended Rule 26(b)(1).[70]

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61. FED. R. CIV. P. 1; *see* 1983 Advisory Committee's Notes, *supra* note 2, at 217.

62. Stanley J. Levy, *A Defense of Meaningful Pre-trial Discovery*, 14 FORUM 781, 782 (1978).

63. The Federal Rules were amended effective August 1, 1983. For the complete text of the 1983 amendments as they were proposed and adopted, see Amendments to the Fed. R. Civ. Pro., 97 F.R.D. 165, 166-88 (1983); *see also* 1983 Advisory Committee's Notes, *supra* note 2, at 220; A.C.F. Indus., Inc. v. EEOC, 439 U.S. 1081, 1087-88 (1979) (Powell, J., dissenting from denial of *certiorari*), *cited with approval* in 1983 Advisory Committee's Notes, *supra* note 2, at 220. Rules 26, 7, 11, and 16 incorporated new, mandatory sanctions against attorneys and parties who violate the rules. *Id.* at 190-93.

64. 1983 Advisory Committee's Notes, *supra* note 2, at 220 (citing Brazil, *Civil Discovery*, *supra* note 37; Ellington, *supra* note 55).

65. *See* Sherman & Kinnard, *supra* note 25; at 46, *cf.* MILLER, *supra* note 1, at 32 ("In a $10,000 damage case, spending $50,000 on discovery is disproportionate.")

66. Miller, *Dinosaur*, *supra* note 6, at 23.

67. *See* MILLER, *supra* note 1, at 38:

> [T]he truth of the matter is that there are more sanctions being awarded out there than ever before . . . . There are a lot of reasons to believe that we are entering an era in which cost-shifting sanctions are going to become more and more normative. So I think it is a mistake for anyone to believe that sanctions really can't be. They may prove to be ineffective, but the case for their ineffectiveness has not been made by the dearth of sanctions from 1938 to the present. I sense that there is a snowball coming down the side of the hill.

See also Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 364 (Mar. 1983) (1983 amendments stimulated use of sanctions).

68. Weissbrod, *supra* note 32, at 184 (quoting Sherman & Kinnard, *supra* note 25, at 36).

69. The hydra, in Greek mythology, was the fabulous many-headed snake of the marshes of Lerna, slain by Heracles. When one of the hydra's heads was cut off, nine more grew in its place. THE OXFORD UNIVERSAL DICTIONARY (3d ed. 1955).

70. William W. Schwarzer, *Query: Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178 (Dec.-Jan. 1991) [hereinafter

A close second was the creation of Rule 26(g), which parallels amended Rule 11 but applies solely to discovery matters.[71] Rule 26(b)(1) was amended "to give trial judges extensive discretionary power to manage discovery,"[72] but, like the 1993 disclosure rules, the 1983 amendments focused only on burdensome requests, not responses. Nevertheless, the 1983 amendments as a whole were presented as an important step toward checking abuses by requiring attorneys to stop and think before acting, or be subject to sanctions.[73]

The 1983 rule changes appeared to give judges all the tools they needed to deal with discovery abuses,[74] but it has become painfully clear that Rule 26(g),[75] like Rule 37,[76] is not the panacea that was promised less than a dec-

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Schwarzer, *Monsters*]. United States District Judge William Schwarzer is, at the time of this writing, Director of the Federal Judicial Center, and a chief proponent of replacing discovery with mandatory disclosure.

71. FED. R. CIV. P. 11 (1983). *See generally* William W. Schwarzer, *Sanctions Under The New Federal Rule 11 - A Closer Look*, 104 F.R.D. 181 (1985). Rule 26(g)'s certification requirement closely parallels that of its more notorious cousin, rule 11 for pleadings and motions, in requiring a "reasonable" pre-filing inquiry to determine that the document or motion meets the rule's requirements. 1983 Advisory Committee's Notes, *supra* note 2, at 219.

72. Schwarzer, *Monsters*, *supra* note 70, at 178. See also FED. R. CIV. P. 26(b)(1)(ii), prohibiting discovery not otherwise barred by subsections (i) and (ii), but which is "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." 1983 Advisory Committee's Notes, *supra* note 2, at 218. This disproportionality standard has generated considerable satellite litigation as judges struggled to interpret the meaning of the terms "unduly burdensome" and "disproportionate" in a given lawsuit without depriving litigants of a fair opportunity to develop and prepare the case. *See* Marcus, *supra* note 67, at 368-69 (rule creates difficult questions about extent to which judges, rather than litigants, should decide how to prepare case). At least one commentator has observed that the proportionality standard requires a court to use "either a crystal ball or a large amount of guesswork." Weissbrod, *supra* note 32, at 198.

73. *See* Miller, *Dinosaur*, *supra* note 6, at 19 (message of 1983 amendments, that lawyers must stop and think before acting, is clear; experience will determine whether rules represent more than just wishful thinking).

74. Schwarzer, *Monsters*, *supra* note 70, at 178.

75. Under Rule 26(g), the signer has an affirmative duty to engage in discovery, "consistent with the spirit and purposes of Rules 26 through 37." 1983 Advisory Committee's Notes, *supra* note 2, at 218. Rule 37 was amended in 1980 to provide that sanctions were available for violations of pretrial orders. However, none of Rule 37's provisions addresses the specific concerns of amended Rule 26.

76. Under Rule 37, a court may order a variety of sanctions, including: issuing an order designating certain facts as established for purposes of the action, *see, e.g.*, Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée, 456 U.S. 694, 704-05 (1982) (establishing personal jurisdiction over defendant who refused to cooperate with discovery aimed at establishing requisite "minimum contacts"); ordering the disobedient party not to support or oppose designated claims; ordering that pleadings be stricken; dismissing the action or rendering a judgment by default; or treating as contempt of court any failure to obey court orders. FED. R. CIV. P. 37(b)(2)(A)-(D). The court may also require the offending party or attorney to pay reasonable expenses, including attorney's fees. FED. R. CIV. P. 37(b)(2)(E); *see* Societé Internationale v. Rogers, 357 U.S. 197, 208, 212 (1958) ("refusal" encompassed any failure to comply, but dismissal unwarranted when "failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner").

One of the few pre-1983 cases assessing Rule 37 sanctions against a misbehaving attorney

ade ago.[77] Clearly, the experience of the past decade establishes that sanctions do not prevent discovery abuse.

II. THE 1993 MANDATORY DISCLOSURE RULE

Amended Rule 26, *Duty of Disclosure*,[78] is the latest proffered panacea, and is supposed to reduce the cost of litigation by all but eliminating discovery.[79] Amended Rule 30 now limits the number of interrogatories to twenty-

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personally is Braziller v. Lind, 32 F.R.D. 367 (S.D.N.Y. 1963), in which the defendant's attorney instructed the defendant to refuse to answer 35 questions asked in an oral deposition, then refused the opposing attorney's suggestion that they seek an *ex parte* ruling on the questions' propriety. *Id.* at 367-68. Finding the objections "utterly groundless," and finding the failure to obtain an *ex parte* ruling "inexcusable," the court imposed sanctions for the "unnecessary and unreasonable" expenses caused by the unjustified actions against defendant's attorney. *Id.* at 368.

77. By the late 1970s and early 1980s, Rule 37 sanctions against attorneys and litigants became more frequent. *See, e.g.*, Roadway Express Inc. v. Piper, 447 U.S. 752, 764-66 (1980) (court imposed attorney's fee sanction directly against counsel for failing to comply with court order to respond to discovery request; court claimed authority under Rule 37(b) and its inherent power to supervise proceedings before it); United States v. Sumimoto Marine & Fire Ins. Co., 617 F.2d 1365, 1370-71 (9th Cir. 1980) (imposing monetary sanctions on government attorney personally under Rule 37 despite inability to impose them directly against the United States for failure to respond to a discovery order); Ciné Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1067-68 (2d Cir. 1979) (willfulness not required to support district court order precluding evidence); Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp., 80 F.R.D. 433, 436-37 (E.D. Pa. 1978) (plaintiffs precluded from using evidence at trial because of failure to answer interrogatories on time); *see also* Larry Tell, *Magistrate Threatens U.S. Over Delays in Discovery*, NAT'L L.J., Apr. 26, 1982, at 34; Larry Tell, *Legal Fee Axed for Litton Case Discovery Abuse*, NAT'L L.J., Oct. 12, 1981, at 2; Joseph P. Tybor, *"Runaway Discovery" Draws Appellate Rebuke*, NAT'L L.J. Aug. 24, 1981, at 29.

The rising tide of discovery abuse made it clear that Rule 37 was not fulfilling its intended role. *See, e.g.*, *In re* Itel Sec. Litig., 596 F. Supp. 226, 235 (N.D. Cal. 1984) (referring to attorney Isaak Walton Bader's history in this type of litigation), *aff'd*, 791 F.2d 672 (9th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *In re* Corrugated Container Antitrust Litig., 659 F.2d 1332, 1335 (5th Cir. 1981) (reporting lower court's finding that Bader had tried to disrupt multidistrict proceedings "by filing and threatening to file duplicative and harassing litigation"), *cert. denied*, 456 U.S. 936 (1982); Jackson v. Bader, 74 A.2d 621, 622, (N.Y. 1980) (listing examples of "I. Walton Bader's cavalier attitude towards the spirit and letter of the SPLR"); Independent Investor Protective League v. Touche Ross & Co., 607 F.2d 530, 534 n.5 (2d Cir.) (affirming discovery sanctions against Bader and characterizing his conduct as "utterly intolerable and reprehensible"), *cert. denied*, 439 U.S. 895 (1978); Slumbertogs, Inc. v. Jiggs, Inc., 353 F.2d 720 (2d Cir. 1965) (per curiam) (affirming sanction of dismissal as appropriate "[i]n view of the dilatory and contumacious conduct of plaintiffs and their counsel in virtual defiance of the rules and orders of at least six judges in the district court"), *cert. denied*, 383 U.S. 969 (1966); *see also* John Riley & Mary Anne Galante, *Mr. Outside - A Fiasco Over Fees*, NAT'L L.J. Nov. 19, 1984, at 1.

78. FED. R. CIV. P. 26, *infra* Appendix A.

79. *See* Mullenix, *supra* note 2, at 803 (citing 1990 Advisory Committee's Notes). The Advisory Committee on Civil Rules which drafted the 1993 amendments was appointed by Chief Justice Rhenquist, and consisted of Chief Judge Sam C. Pointer, Jr., Chairman; Judge Ralph K. Winter, Jr.; Judge James Dickson Phillips, Jr.; Judge Mariana R. Pfaelzer; Judge Joseph E. Stevens, Jr; Justice Michael D. Zimmerman of the Supreme Court of Utah; U.S. Magistrate Wayne D. Brazil; Dennis G. Linder, Esq.; Dean Mark A. Wordenberg; Professor Arthur R. Miller; Larrine S. Molbrooke, Esq.; James Powers, Esq.; and Professor Paul D. Carrington, Reporter.

five and the number of depositions to ten per side (not per party),[80] while amended Rule 26 now requires all parties to make "initial disclosure" according to a rather complicated schedule[81] of facts, witnesses, documents, and other materials "relevant" to all matters alleged "with particularity" in the pleadings, without any request being made by the opposing party.[82]

Judge Schwarzer recommended that a party seeking discovery under the 1993 amended discovery rules have the burden of showing a need for specific information, after first making its own full disclosure, and recommended that no further discovery be allowed without a showing of "particularized need."[83] As amended in December 1993, Rule 37 penalizes parties who move with less than complete success to compel supplementation of incomplete disclosures, while providing numerous loopholes and imposing significantly lighter penalties on the non-responsive opponent.[84]

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80. FED. R. CIV. P. 30. The Reporter's Note to the March 1990 draft of proposed amendments stated:

> This draft contemplates significant revisions in the discovery rules occasioned by the *reduced reliance on discovery to secure information*. Except by leave of court, interrogatories would be limited in number, perhaps to a number as small as five or ten. Depositions would be presumptively limited in both number and length.

Mullenix, *supra* note 2, at 803 n.28 (emphasis added). See *infra* Appendix C for the text of the amended rule with additions and deletions. See 146 F.R.D. 535, 648-61 (1993) for the text of the 1993 version of Rule 30 without additions or deletions.

81. FED. R. CIV. P. 16, *infra* Appendix F; see also *infra* Appendix D for the 1993 Advisory Committee's Notes to Rule 26.

82. FED. R. CIV. P. 26, *infra* Appendix A.

83. Schwarzer, *Monsters*, *supra* note 70, at 181. Judge Schwarzer pointed out:

> The disclosure system would not enlarge the power of the court to dismiss a pleading on the basis of deficiencies demonstrated by a party's disclosure since it would preserve *a 'qualified' right to discovery*. But, *to exercise that right, a party will be required to make a showing of a reasonable basis for asserting the claim or defense, and . . . this will often entail demonstrating that the party has used available means of investigation short of discovery*.

Id. (emphasis added).

84. Under amended Rule 37(a)(2) the party who succeeds in obtaining a motion to compel disclosure in cases of incomplete or evasive disclosure is entitled only to an award of "reasonable expenses incurred in *making the motion*," but if the moving party is less than completely successful in its motion to compel, subparagraph (B) authorizes the court to assess against the moving party or attorney, or both, "the reasonable expenses *incurred in opposing the motion, including attorney's fees*." FED. R. CIV. P. 37, *infra* Appendix E.

Only in cases of total non-disclosure does Rule 37 (subsection 4(c)) authorize an "additional sanction," for the benefit of the movant, which "may" include "attorney's fees *caused by the failure*" to disclose, unless there was "substantial justification" for the non-disclosure. Thus, if an obstructive defendant goes through the motions of some form of disclosure, it is safe from the imposition of serious sanctions, because it will certainly be less expensive to pay the expenses (not including fees) incurred in "making a motion" than to give the plaintiff the information it needs to win the suit. The plaintiff in such a case must accept the incomplete or evasive disclosure or risk incurring the full weight of the defendant's attorney's fees and expenses if it is less than completely successful in obtaining a more complete disclosure. The attorney also faces potential malpractice liability if the attorney's actions cause the plaintiff to have to pay sanctions resulting from an unsuccessful attempt at obtaining more complete disclosure from the defendant.

Under the originally proposed mandatory disclosure rule, each plaintiff would have been required, at the time of filing the complaint, to serve each defendant with copies of all material documents and things, the names and addresses of all persons believed to have material information, and statements informing the opposing party of the material information possessed by persons under its control, such as the individual parties and their managing agents.[85] The December 1993 amended rule is only slightly less onerous in terms of time, requiring "a party" (although in practice this will usually be the plaintiff) to provide to other parties, the name, address and telephone number of anyone "likely" to have discoverable information, copies or descriptions of all documents, data compilations, and tangible things as well as

> a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material not privileged or protected from disclosure, on which such a computation is based, including materials bearing on the nature and extent of injuries suffered . . . [insurance agreements must also be disclosed]. Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties . . . .[86]

Each disclosure must be certified as to completeness, based on a reasonable investigation, and is subject to a continuing duty to update the disclosures.[87] Defendants, however, need not disclose any material unless the plaintiffs have alleged the relevant claims "with particularity," and defendants need not make their disclosures until as long as sixty days after the meeting of the parties, which meeting does not occur until some time after the defendants file their formal appearance in the case.[88]

Under the amended rules, plaintiffs are not required to do any investigation beyond that required by Rule 11.[89] However, the threat of Rule 11 sanctions, and the new ability of judges to "dispose of" claims at the Rule 16 pretrial conference, make it likely that under the December 1993 amendments, plaintiffs will have to try their cases at the pretrial conference before receiving any disclosures from the defendant.[90] The defendant initially must

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The disparity in these standards is clear when the rule is read in context with other portions of the rules authorizing fee awards in connection with disclosure, all of which refer to fees and expenses resulting from the opponent's conduct. Only the information-poor plaintiff faced with incomplete and evasive disclosure is subject to a different standard.

85. Schwarzer, *Monsters*, *supra* note 70, at 180.

86. FED. R. CIV. P. 26, *infra* Appendix A.

87. 1993 Advisory Committee's Notes, *supra* note 2.

88. Schwarzer, *Monsters*, *supra* note 70, at 180; 1993 Advisory Committee's Notes, *supra* note 2, at 631; *see also infra* Appendix D.

89. Schwarzer, *Monsters*, *supra* note 70, at 180; *see* 1993 Advisory Committee's Notes, *supra* note 2 (rule does not demand exhaustive investigation, but one that is reasonable under circumstances).

90. An "issue based" discovery scenario would likely require judges to "get into the trenches in the front lines of discovery wars, [and] to evaluate the merits of cases before trial." Diana Huffman, *Protracted Litigation, Abuses of Discovery Targeted by Judge*, LEGAL TIMES, July 26, 1982 at 1, 32 (interview with Judge John F. Grady, N.D. Ill.).

disclose only what it has assembled in the course of preparing its answer, and then only if the material is relevant to matters "alleged with particularity" in the pleadings.[91]

Defendants are not required to read all of their documents, and may still produce "properly identified" files as they are maintained in the ordinary course of business in accordance with the provisions of the pre-1993 Rule 33.[92] Of course, the drafters intended that defendants and their counsel not be allowed to feign ignorance of matters known or available to them.[93] However, defendants can still obstruct the exchange by moving for protective orders under the rules governing privilege and work product, and are provided a considerable safe haven by the provision excusing them from disclosing information relevant to any matters not pled with sufficient "particularity."[94]

Judge Schwarzer also recommended that parties be permitted to file motions for clarification of the scope of their disclosure obligations before making disclosure.[95] Even a cursory reading of the 1993 amendments will reveal numerous opportunities for parties to force their opponents into satellite litigation in the form of a series of "mini-trials" while delaying their own disclosure. The resulting rounds of motions practice will likely be at least as extensive (and expensive) as those which prompted the adoption of the 1993 amendments.

III. Some Problems With the 1993 Mandatory Disclosure Amendments

H.L. Mencken once observed, "For every problem there is some solution which is simple, neat and wrong."[96] The 1993 amendments come dangerously close to Mencken's description, and are a

> logical outgrowth of views of the sort expressed by Chief Justice Warren Burger and Harvard president Derrick Bok. Each has strongly and repeatedly attacked the U.S. legal profession and the role of litigation in our society. Their remarks and those of other influential commentators portray lawyers as distrusted and lawsuits as social pathology.[97]

However, lawsuits can also be potent forces for social change, and for eradicating institutionalized pathology from American life,[98] a function which is

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91. Fed. R. Civ. P. 26, *infra* Appendix A.

92. Schwarzer, *Monsters*, *supra* note 70, at 180; Fed. R. Civ. P. 33, *infra* Appendix B.

93. Schwarzer, *Monsters*, *supra* note 70, at 180.

94. *Id.*; Fed. R. Civ. P. 26, *infra* Appendix A.

95. Schwarzer, *Monsters*, *supra* note 70, at 181.

96. Frank Daily, *Preserve The Lawyer's Tools*, 7 A.B.A. J., Feb. 1986, at 38, 40 (quoting H. L. Mencken).

97. Theodore Tetzlaff, *Federal Courts, Their Rules and Their Roles*, Litig., Spring 1991, at 1, 68.

98. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944), *later proceeding coram nobis*, 584 F. Supp. 1406 (N.D. Cal. 1984) (vacating petitioner's 1942 conviction for being in place where persons of Japanese ancestry were not allowed). *See generally* Eric K. Yamamoto, Korematsu *Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial*

seriously threatened by the adoption of the mandatory disclosure rules.

A. *The Mandatory Disclosure Rule Will Have a Negative Effect on Access to Court for Disadvantaged Minorities and Other Litigants with Unequal Resources*

The most serious problem with the 1993 amendments is that even if they were to promote efficiency in "disposing of" cases, efficiency, in and of itself, does not assure fairness for all litigants, and does not ensure that the public interest[99] and minority interests[100] will be treated equally with the interests of more mainstream and powerful litigants.[101] Judge Schwarzer dismissed this concern, arguing that traditional discovery is unnecessary and can be dispensed with in favor of mandatory disclosure because "[p]arties have available to them a range of investigatory resources and techniques which should be utilized before the burdens of adversary discovery are imposed upon the courts and parties."[102]

This is, of course, theoretically true, but this argument is overly simplistic in that it ignores the realities of cases between parties with grossly unequal financial and informational resources. There are many categories of cases, including civil rights,[103] employment,[104] products liability,[105] and mass toxic

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Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties, 26 SANTA CLARA L. REV. 1 (1986) (arguing that for courts to avoid making same mistake as *Korematsu*, they must recognize that standard of review of government restrictions of civil liberties is not altered by government claims of "national security" unless martial law is legitimately in force); *see also, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (overturning long-standing "separate but equal" doctrine).

99. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (analyzing role of public law litigation in establishing regime of regulation that governs society at large).

100. *See* Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 165 (Oct./Nov. 1991) ("[I]t is a good thing that rulemakers be confirmed in their understanding that they are not the 800-pound gorilla that can sit wherever it pleases. Indeed, if a special interest group correctly states that it has a large and particular interest in the text of a rule, that serves as a useful caution to rule makers that they should be alert to the risk that a rule may be substantive and hence invalid under the Rules Enabling Act."); *see also* Eric K. Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation*, 9 U. HAW. L. REV. 395, 412-20 (1987) (discussing balancing need for efficiency with need for fairness in case management).

101. *See* Yamamoto, *Efficiency's Threat*, *supra* note 17, at 352-53 & n.59 (public interest litigants and minorities pay high price for efficiency).

102. Schwarzer, *Monsters*, *supra* note 70, at 181. Judge Schwarzer takes pains to point out that the restrictions on 'fishing expeditions' apply both to plaintiffs seeking a claim and to defendants seeking to fish for a defense to a claim. *Id.*

103. *See* Hazard, *supra* note 17, at 2246-47 ("How far would the NAACP have gotten if it had tried to tailor Rule 23 to its purpose in 1938, or in 1956, for that matter? The dynamic of social justice litigation has been the use of existing general forms of procedure for new substantive purposes.").

104. *See* John R. Myer, *Development of a Plaintiff's Fair Employment Practices Case*, LITIG., Winter 1979, at 8 (discussing vital role of discovery in establishing plaintiff's employment discrimination case); Robert S. Carr, *Discovery Overview*, C517 ALI-ABA 253 (1990) ("However, to apply the discovery rules more narrowly and to place stringent limits on discovery would

tort, for example, in which a defendant will control substantially all of the information. Assuming that a plaintiff in these kinds of cases will have enough information to meet the "particularity" standard, the plaintiff must then depend on the good faith of the defendant to provide, through voluntary disclosure, the information that will secure the judgment against that defendant.[106] To expect this to occur is optimistic, at best. If the good faith of litigants and their attorneys were sufficient to prevent discovery abuse, there would be no abuse, and no need for a mandatory disclosure rule. The 1993 amendments' radical curtailment of discovery is impossible to implement without depriving "information-poor" plaintiffs of access to information reasonably necessary to develop and prepare their cases whenever their opponent controls most of the available information.[107]

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be to put 'a potent weapon in the hands of employers who have no interest in voluntarily complying with [discovery], and who wish instead to delay as long as possible investigations by the EEOC.'") (citing EEOC v. Shell Oil Co., 466 U.S. 54, 81 (1984)).

105. *See* Friedenthal, *supra* note 56, at 818 (lawyers would not have pushed in the courts and in the legislatures for expanded causes of action hinged on proof that defendants knew or should have known of a product's danger, if such proof were normally unavailable).

The fact that in so many cases the defendant will control most of the information makes the new "particularity" pleading requirement set forth in amended Rule 26 particularly unfair to information-poor plaintiffs. It is clear that this change was deliberately made for the purpose of discouraging such plaintiffs. *See* 1993 Advisory Committee's Notes, *supra* note 2, at 631 ("Broad, vague, and conclusory allegations sometimes tolerated in notice pleading . . . should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture and assembly of the product.").

106. The 1983 Advisory Committee specified that employment and free speech cases, among others, may merit a balancing of factors, including public policy importance, which may far outweigh the monetary amount involved as measured in philosophical, social, or institutional terms, and directed that "[t]he court must apply the standards [of Rule 26(b)(1)] in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent." *See* 1983 Advisory Committee's Notes, *supra* note 2, at 218. Unfortunately, the 1993 Advisory Committee's Notes have no such provisions. *See* 1993 Advisory Committee's Notes, *supra* note 2.

107. *See* Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time For Reform?*, 138 F.R.D. 155, 162-63 (1991) (criticizing Judge Schwarzer's proposal for mandatory disclosure). Professor Mengler noted:

> A second, more serious problem with Judge Schwarzer's disclosure scheme is that it is not only untargeted; it may also be mistargeted. . . . Schwarzer's proposal, if promulgated, would affect plaintiffs more than defendants . . . in at least two ways. First, as Schwarzer himself explains, "[b]y shifting the burden of persuasion from the party objecting to discovery to the party seeking it, it would reduce the amount of discovery." . . . Second, by defining the disclosure requirement in terms of "materiality," the proposal would [establish] a more stringent standard than the present scope of discovery under Rule 26(b)(1). Because, as noted above, plaintiffs typically—though certainly not always—have a greater need than defendants for obtaining information from the other side, a reduction in the amount and scope of information disclosed will disproportionately injure plaintiffs. This likely consequence of Schwarzer's proposal is particularly troublesome because there is as yet no empirical evidence to suggest that plaintiffs as a class of litigants engage in discovery excess, delay, and abuse significantly more than defendants do—that the "discovery problem" is peculiarly or primarily a "plaintiff problem." Indeed, . . . defendants have a greater economic incentive to delay the

In such cases, the 1993 amendments will put plaintiffs in a classic "Catch-22"[108] paradox. If the defendant controls most of the evidence and chooses not to disclose it, the plaintiff will be precluded by Rule 11's stringent requirements from filing legitimate claims for which it does not have control of supporting discovery materials at the time of filing, even if it knows of their existence. They will likewise be precluded by the 1993 amendments from receiving disclosure and conducting discovery into any issues not "alleged with particularity" in the pleadings.

For example, a plaintiff who has been terminated wrongfully may not know at the outset whether the reason was age, race, gender, disability, or some other factor. Before December 1993, discovery in such a case would frequently disclose facts supporting valid claims that the plaintiff was unable to plead at the outset because of lack of documentation. Under the 1993 amendments, however, such a plaintiff will effectively be barred from obtaining the factual support necessary to amend the complaint to add additional, valid claims that would have been revealed by legitimate discovery.[109] Furthermore, the 1993 amendments provide for Rule 16 conferences within ninety days of a defendant's appearance (regardless of whether all defendants have been served).[110] Under the new rules, the judge can foreclose such issues as limitations on expert testimony, and can even adjudicate some claims at the pre-trial conference, under Rule 16(c)(5),[111] rendering the plaintiff's lack of discovery even more devastating to the fair adjudication of its claim.

Open discovery is essential when the evidence is under the opponent's control, if only because in many cases a party cannot trust its adversary to comply fully with mandatory disclosure. Under the new rules, however, the party seeking discovery will have to carry a heavy burden of persuasion in order to justify inquiring further, and will pay severe penalties if it is less than

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payment of damages through delays and abuses associated with discovery, by making plaintiffs bear the brunt of the discovery reduction burden, Schwarzer's proposal might target too heavily one class of litigants.

Id. (footnotes omitted).

108. The term "Catch-22" is derived from the 1955 novel of the same name by Joseph Heller, and refers to a paradoxical situation in which the "only solution [to a problem] is denied by a circumstance inherent in the problem." WEBSTER'S DICTIONARY 215 (9th ed. 1986). *See generally* HELLER, *supra* note 28.

109. *See* Friedenthal, *supra* note 56, at 811, 818 ("The ability of plaintiffs' attorneys to obtain a corporate defendant's records, to depose corporate employees, and to send searching interrogatories has had a substantial impact in particular areas of law."); *see also* Myer, *supra* note 104, at 8 (discussing vital role of discovery in employment discrimination case); Morton R. Galane, *Proving Punitive Damages in Business Tort Litigation*, LITIG., Spring 1976, at 24 (pointing out importance of discovery in proving claims of bad faith in suits for commercial torts).

110. FED. R. CIV. P. 16, *infra* Appendix F.

111. Under amended Rule 16(c)(5) the court's pretrial order, issued before defendants have made disclosure or plaintiffs have obtained discovery, could adjudicate claims and defenses, and resolve other issues, and could modify the time for "disclosure" to take place, and determine the extent of permissible discovery. *See id.*

completely successful. The hearing on the motion for additional discovery will thus effectively become a trial on the merits under the 1993 rules.

One of the strongest arguments for permitting open discovery is that the denial of discovery as to matters deemed irrelevant at the pretrial stage may prove extremely prejudicial if those matters become material at trial.[112] Judge Schwarzer argued that in such cases

> a party seeking discovery will not only have received disclosure, but will have conducted its own investigation. In an employment discrimination case, for example, the plaintiff will have received material statistical and other employment data and will have been able to conduct interviews and seek other information. A request for additional discovery, therefore, can be specific and confined to essentials.[113]

However, Judge Schwarzer's position seems to rest on several unwarranted assumptions. If a company is, in fact, engaging in illegal discrimination or other tortious conduct, it seems foolish to suppose that it will be ethical in complying with mandatory disclosure rules, particularly in light of the concurrent restriction on the plaintiff's right to inquire further through legitimate discovery.[114] Now that the plaintiff's right to probe these areas is effectively curtailed, defendants will be able to find out what plaintiff already knows, and then destroy or "lose" inculpatory material, the existence of which the plaintiff is unaware,[115] with little concern that their misconduct will

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112. *See, e.g.*, Paul Kadair, Inc. v. Sony Corp., 88 F.R.D. 280, 284-89 (M.D. La. 1980) (plaintiff precluded from undertaking any discovery partly because of lack of factual allegations to support plaintiff's conspiracy theory), *aff'd*, 694 F.2d 1017 (5th Cir. 1983); Wallace v. Brownell Pontiac-GMAC Co., 703 F.2d 525, 526-28 (11th Cir. 1983) (summary judgment for defendant before plaintiff had begun discovery upheld where applicable case law undermines plaintiff's substantive contentions); Willmar Poultry Co. v. Morton-Norwich Prods., Inc., 520 F.2d 289, 291 (8th Cir. 1975) (summary judgment for defendant before discovery upheld where statute of limitations bars action), *cert. denied*, 424 U.S. 915 (1976); *cf.* Shaklee Corp. v. Gunnell, 748 F.2d 548, 550 (10th Cir. 1984) (defendants denied due process when trial court denied discovery on matters deemed irrelevant during discovery, but which became relevant at trial).

113. Schwarzer, *Monsters*, *supra* note 70, at 182.

114. Additionally, even if disclosure is made fully, and in good faith, the restrictions on discovery may well prevent a plaintiff who has, in fact, been the victim of illegal discrimination, from discovering the basis for additional, legitimate claims. The author once represented a plaintiff in such a case. The plaintiff had been employed by a large company for many years, with regular raises and promotions, and consistently good evaluations. She was fired after returning to work from a company-approved hospitalization for spinal meningitis, and sued for age discrimination. During the course of depositions, it became clear that in addition to the ADEA claim, the plaintiff had a legitimate ERISA claim. As a result of the discovery, the plaintiff was able to amend her complaint to include the ERISA claim. Rule 11 prevented her from pleading it initially, since she lacked hard evidence to support it. The amended rules on mandatory disclosure would not have called for disclosure of the ERISA material based on an ADEA complaint, and she would have been precluded from discovering the documents and information that supported the ERISA claim. (Identifying details on this case, which was settled in plaintiff's favor, are withheld on behalf of the former client.)

115. In some recent cases of flagrant spoliation of evidence, only the availability of broad discovery has brought the defendants' misconduct to light. *See* Letter from George S. Gray, Esq. to Virginia E. Hench, Esq. (Oct. 9, 1990) *Re*: Honda Discovery Abuse and Document De-

come to light. Expecting such a defendant voluntarily to disclose inculpatory material is as unrealistic as expecting it to contact victims of its past discrimination and offer reparations without the need for the victims to bring suit. Both would alleviate pressure on court calendars, but neither is likely to occur. More likely, vital information that is critical to obtaining a fair day in court for the plaintiff will never come to light.[116]

Some apologists for mandatory informal disclosure, such as Professor Mullenix, disparage what she terms "the public interest critique"[117] on the grounds that such criticisms "jeopardize the Advisory Committee's work by falsely imbuing [the] proposed rules with political content," arguing that "if these criticisms gain public currency, the legitimacy of the Advisory Committee will be undermined in its rule reform efforts."[118] This criticism misses the point.

The point is that the Committee's motives are not the issue. The issue is that the effect of the rulemakers' efforts will be to deny plaintiffs effective access to the courts by cutting them off from the discovery needed to prove, for example, a defendant's knowledge of a product's danger, or discriminatory intent[119] or discriminatory practices in civil rights cases.[120] The point is

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struction, (with attachments) detailing judicial proceedings concerning Honda Motor Company's intentional destruction of inculpatory documents related to All-Terrain Vehicle [ATV] litigation in Mullins v. Kretchmar (No. 384,282, 200th D. Ct. Travis City, TX) filed Aug. 12, 1985 (on file with author); Julie G. Shoop, *Suit Says Honda Destroyed Documents on ATV Safety*, TRIAL, Nov. 1990, at 14. In *In re* Connair Air Disaster Litig., No. 79-104 (E.D. Ky., Dec. 4, 1986), sanctions were imposed on Piper Aircraft for adopting in bad faith a document retention program under which the company routinely destroyed all flight records and test data sheets if the equipment being tested did not meet minimum standards. Jan Lewis, *Discovery Abuse, Plaintiffs Fight Back*, TRIAL, Oct. 1990, at 70 (discussing *Connair* and other cases involving destruction or suppression of evidence); Kay Latona & A. Hinda Klein, *Discovery Abuse: Making Piper Pay*, TRIAL, Feb. 1987, at 69 (encouraging courts to consider seriously imposing dismissal as a sanction in cases such as *Connair*).

116. Judge Schwarzer dismissed this potential outcome:

It may be that in the disclosure system, on occasion, some information helpful to a party that exhaustive discovery would uncover will not come to light. But the question must be asked whether the marginal value of preventing such occasional failures is worth the great cost of unrestrained discovery. As Donald Elliott has observed, "Nourishing the fiction that justice is a pearl beyond price has its own price." Schwarzer, *Monsters*, supra note 70, at 182 (footnote omitted) (quoting E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 321 (1986)).

117. Mullenix, *supra* note 2, at 823.

118. *Id.* at 824.

119. *Cf.* Sherman & Kinnard, *supra* note 25, at 50 (addressing 1983 amendments to Rule 26) (issue of discriminatory intent in civil rights suits might be seen as deserving broad discovery to find cumulative evidence of intent; on the other hand, another judge might limit such discovery on the theory that additional discovery is unlikely to shed further light on the issues).

120. In one such case, the author represented the widow of an African-American factory worker who had a mental breakdown during which his automobile collided with a tree in the town of Franklin, in Johnson County, Indiana. Police found him wandering nearby, incoherent, and took him to jail instead of to the hospital. He died hours later of a condition that the medical examiner said had a 99% statistical probability of being cured, had he received prompt medical attention.

that by implementing these rules the Advisory Committee and Congress are effectively denying those plaintiffs meaningful access to the courts,[121] regardless of the stated intentions.[122]

Further, as Judge A. Leon Higginbotham has so eloquently noted, the Supreme Court held in *Norris v. Alabama*[123] "[i]n words that would later haunt those who attempted to hide racist motives behind the veil of 'objective factfinding,' . . . [that it] must determine not only whether a federal right has been denied 'in express terms,' but also whether it has been denied 'in

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During the course of discovery in the 42 U.S.C. § 1983 lawsuit against city and county officials, the police department's own records reflected a pattern of police conduct under which white persons who were picked up after a fight or other disturbance were routinely taken to the hospital (which, in Johnson County, is across the street from the jail), while African Americans were taken to jail without medical treatment. This material helped the plaintiff to survive summary judgment, and to obtain a settlement before trial. Day v. Johnson County et al., Cause #IP-88-1280-C (S.D. Ind. 1990).

121. *See* Yamamoto, *Efficiency's Threat*, *supra* note 17, at 344-45 (available evidence suggests recent federal procedural reforms have discouraged judicial access for those outside political and cultural mainstream); *see also* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989). Public interest litigation, for purposes of Professor Tobias' analysis, is that which "seek[s] to vindicate important social values that affect numerous individuals and entities." *Id.* at 270 n.1. He noted:

> Born of the need of large numbers of people who individually lack the economic wherewithal or the logistical capacity to vindicate important social values or their own specific interests through the courts, these litigants now participate actively in much federal civil litigation: public law litigation. Despite the pervasive presence of public interest litigants, the federal judiciary has accorded them a mixed reception, particularly when applying the Federal Rules of Civil Procedure. Many federal courts have applied numerous Rules in ways that disadvantage public interest litigants, especially in contrast to traditional litigants, such as private individuals, corporations, and the government.

Id. at 270.

122. Indeed, indifference can be as harmful as intentional discrimination. *See* Douglas O. Linder, *Journeying Through The Valley of Evil*, 71 N.C. L. REV. 1111 (1993). Professor Linder noted:

> Docket management problems rival overidentification as a cause of evil in our legal system. There is no dispute that the volume of cases in our court system has reached a crisis level. In response, the legal system has placed great importance on caseload reduction. In an effort to meet these demands, many courts have elevated docket management concerns above concerns for individual's rights.
>
> . . . .
>
> Distance from the human consequence of one's decisions can breed the indifference and lack of imagination that Hannah Arendt found so closely linked to evil. Empathy, which is the enemy of evil, comes from our ability to imagine the details of another's life. When knowledge of another's life is reduced to a paragraph or two in a written brief, opportunities for empathy are limited, if not foreclosed altogether.
>
> . . . .
>
> The temptation is often strong to turn what should be questions of fairness and justice into questions of expediency or personal interest.

Id. at 1137, 1147 (citing HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 287 (2d ed. 1965) (reporting on banality and "ordinaryness" of many Nazi war criminals)).

123. 294 U.S. 587 (1935) (one of the notorious "Scottsboro Rape" cases).

substance and effect.'"[124] The proper analysis of the 1993 rules (and any criticisms of those rules) must be directed at their substance and effect, not on the parochial standard that such criticisms "undermine" attempted reforms.

Because the 1993 rules amendments will limit access of legitimate, disadvantaged claimants to the fair adjudication of their claims, the 1993 rules amendments should be repealed. Otherwise, as former Justice Thurgood Marshall wrote, the federal courts "can only reinforce in the hearts and minds of our society's less fortunate members the unsettling message that their pleas are not welcome here."[125]

B. Reliance on the Adversaries to Police Themselves May Create New Problems and Abuses

In a perfect world, adoption of the 1993 amendments would result in the immediate abandonment of all obstructive and delaying tactics. In this imperfect world, however, the mandatory disclosure rule will likely increase the number of pretrial motions. The resulting hearings will exacerbate the incidence of pretrial abuse as parties seize upon ambiguities and loopholes in the new standards as fertile new weapons for delay and obstruction.[126]

One problem with the mandatory disclosure rule is that it seeks to deter abuses by, in effect, wishing them away. Magistrate Judge Brazil has warned that factors such as professional pressures are to blame for a large amount of abuse; he believes that abuses "cannot be reduced significantly without restructuring the professional pressures which in large measure provoke these

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124. A. Leon Higginbotham, *The William B. Lockhart Lecture: The Hughes Court and the Beginning of the End of the "Separate But Equal" Doctrine*, 76 MINN. L. REV. 1099, 1101, 1114 n.67 (1992) (Higginbotham is Chief Judge Emeritus, United States Court of Appeals for the Third Circuit; Senior Fellow, University of Pennsylvania Law School).

125. *In re* Demos, 111 S. Ct. 1569, 1571-72 (1991) (Marshall, J., dissenting) (majority's decision prohibited indigent litigant from proceeding *in forma pauperis*).

126. *See* Letter to Hon. Robert Keeton, Chair, Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States, from members of the defense bar (July 12, 1991), including a document dated May 1, 1992, entitled *Comments on Proposed Amendments To Rule 26 To The Standing Committee on Civil Rules On Behalf of Lawyers for Civil Justice and the Product Liability Advisory Counsel, reprinted sub nom Issues and Changes in* 146 F.R.D. 521, Attachment B, *and reprinted in* FED. R. CIV. P. 527 (West 1992-93 Educational Ed.) (copy on file with author). Judge Keeton's letter warned that the addition of a disclosure requirement (without a return to "fact pleading")

> is likely to result in a significant increase in motions for more definite statement under Rule 12(c) . . . and in order to allow the court to rule on motions for protective orders to protect confidential information identified in disclosure. This increase in motion practice will call for increased judicial involvement, increased paperwork, and delays in the discovery process . . . at the outset of the litigation, thereby exacerbating the systemic inefficiency and the drain on judicial resources.

Id. at 5. *See generally* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) (advocating case management and summary judgment to avoid trend toward return to "fact pleading").

abuses."[127] If Judge Brazil is correct, it is probably unrealistic to expect trained litigators to engage in discovery (or disclosure) in a cooperative spirit, or as one commentator put it, according to the Marquess of Queensberry's rules.[128]

Merely requiring disclosure, without a more effective system of case management, will not eliminate these problems, nor will wishful thinking about "summon[ing] lawyers to the highest degree of professional conduct."[129] It is inconceivable that those litigants and attorneys who now engage in dilatory and obstructive tactics will change their stripes merely because they are told, in effect, to shape up, cooperate with each other, and reveal all that they know that might be of interest to their adversary.[130]

1. The "Alleged with Particularity" Standard

An inherent weakness of the 1993 Rule 26 mandatory disclosure rule is that it relies on the adversaries to determine what matters have been "alleged with particularity" and what is sufficiently "relevant" to those allegations as to be subject to mandatory disclosure.[131] In theory, a party may not resolve doubts against disclosure.[132] However, a party having (or professing to have) reasonable doubts as to the extent of its disclosure obligation under the new rules will almost certainly follow Judge Schwarzer's advice to file a motion to clarify that obligation and to define which issues have been pled with sufficient particularity, and will likely also seek rulings on the relevance of available information and the applicability of various privileges.[133] These motions

127. Brazil, *Adversary Character*, *supra* note 32, at 1332.

128. Miller, *Dinosaur*, *supra* note 6, at 16 ("Attorneys, steeped in the grand tradition of the litigator, are trained to be aggressive, adversarial animals and to employ every weapon in their arsenal to achieve the aims of their clients and to frustrate those of their opponents.").

129. Mullenix, *supra* note 2, at 827.

130. Even Professor Mullenix concedes that in cases where a major institutional defendant "withholds information under the informal discovery rule, disregards the continuing disclosure requirement, and further does not cooperate in formal discovery," the criticism that the informal discovery rules will encourage nondisclosure and gamesmanship "seems valid in instances in which a defendant decides to withhold harmful information that would not be needed [by the defense] at trial and . . . would be effective only to the extent that a defendant's defenses or counterclaims depended on withheld information." *Id.* at 826-27. This, of course, would encompass the majority of civil rights, mass-tort, and employment cases. *See generally* Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 71 (1991) (in some jurisdictions, plaintiffs must show both prima facie case and intent).

131. *See* FED. R. CIV. P. 26, *infra* Appendix A.

132. Schwarzer, *Monsters*, *supra* note 70, at 181.

133. *See id.* Judge Schwarzer noted:

> A party having a reasonable doubt as to the extent of its disclosure obligation may make a motion to clarify, seeking an order defining issues or ruling on the materiality of information in the context of specific issues. A party may combine its disclosure with such a motion, explaining the rationale for the extent and limitations of its disclosure, and seeking an appropriate ruling. Thus, a defendant may reasonably interpret a claim as bringing into issue only a certain period of time, or line of products, or segment of the workforce. A motion for clarification would serve as a vehicle for resolving

will surely generate endless rounds of satellite proceedings.

2. Satellite Proceedings

The 1993 discovery rule amendments will provide an obstinate litigant with fresh new sources of dilatory tactics through motions for clarification, objections and hearings to interpret every nuance of the new rules. In order to avoid endless rounds of "satellite proceedings,"[134] and the constant potential for attorney-client conflict,[135] a different approach to pretrial procedure

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a dispute over disclosure, but it would be decided in the context of the facts and issues of the case rather than in the abstract as is now often done in discovery disputes.

Id.

134. Professor Miller predicted that "the great cottage industry of the 1980s [would] be sanctions proceedings—which, of course, means satellite proceedings and more work for the judges, which arguably may completely chew up the efficiencies and the economies that [the 1983 Amendments] might have produced." MILLER, *supra* note 1, at 40. Professor Miller added:

> I wake up in the middle of the night and what I have dreamed is that in a complicated case one of the parties has made a gigantic discovery request, and the other party leaps up and says; "I move to sanction my opponent for violation of the certification requirement in rule 26, because that discovery request is disproportionate, it is redundant, it violates this or that." The judge holds a hearing. At the end of the hearing the court rules that it was an enormously complex and detailed discovery request, but it did not violate rule 26. The sanction motion is denied, at which point the discovering party leaps up and says: "Your Honor, I hereby move to sanction the sanction motion." As Kurt Vonnegut would say, "and so it might go."

Id. at 41.

For cases in which moving for sanctions or moving to compel discovery has resulted in sanctions against the moving party, see Hayes v. National Gypsum Co., 38 Fed. R. Serv. 2d 645, 647 (E.D. Pa. 1984) (sanctions imposed on attorney for, *inter alia*, serving duplicative motions to compel); Jenkins v. Toyota, 40 Fed. R. Serv. 2d 1125, 1126-27 (W.D.N.Y. 1984) (sanctions imposed on both client and attorney for moving to compel without first seeking informal resolution and for moving for sanctions without first learning why plaintiff had not complied with consent order).

135. The 1993 discovery amendments place an attorney at odds with the traditional professional role of advocate, presenting serious questions concerning the work-product and attorney-client privilege issues. It is incongruous with the accepted model of attorney-client confidentiality to place upon an attorney the burden of producing everything necessary without the necessity of a request from the opposing counsel. *Cf.* Peter M. Fishbein, *New Federal Rule 26: A Litigator's Perspective*, 57 ST. JOHN'S L. REV. 739, 745-46 (1983) (commenting on then-proposed Rule 26 limitations on "burdensome" discovery) ("[I]t is incongruous to require a lawyer to advise his client that, although the information is relevant, material, and may be helpful in formulating his case, the information should not be sought because it would be too burdensome on the other party.")

The availability of sanctions directed at the attorney personally means that an attorney must be prepared, in the event that requested discovery (or resistance to proposed discovery) is ruled improper, to show the court that the client was responsible for the misconduct. *See, e.g.*, Watkinson v. Great Atlantic & Pacific Tea Co., Inc., 38 Fed. R. Serv. 2d 1310, 1314 (E.D. Pa. 1984) (fees assessed against attorney in absence of showing that party was aware of tardiness and evasion). An attorney is permitted to break confidentiality when necessary to defend against charges of misconduct, but the prospect of converting the attorney-client relationship to an adversary relationship has serious implications. This problem is heightened by the fact that good faith is apparently no defense under the new rules, for attorney or client. Even under the existing rules, the

is needed. Ironically, even though the effects of the 1993 amendments are likely to fall most heavily upon the less powerful litigants in the system, counsel representing "repeat players" have also criticized the proposals. Kent S. Hofmeister, Chair of the Federal Rules of Procedure committee of the Federal Bar Association, noted in a letter distributed to committee members that "[b]y far the greatest discussion, concern and, quite frankly, overwhelming disapproval has centered on the 1993 amendments to Rule 26."[136] One Committee member commented:

> The proposal appears to be based on the assumption that all parties have knowledge of relatively equal usefulness at the outset of the litigation which they can share with their opponents to reduce costs. This assumption is unwarranted.
>
> First, because the federal rules provide for only notice pleading, a defendant often does not have sufficient information about the plaintiff's claim, before discovery from the plaintiff has begun, to determine what the basis for the claim is, who the relevant witnesses are, and what the relevant documents are. . . .[137]

These defense-oriented comments were written about an earlier draft,

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Federal Circuit in 1985 upheld a district court's imposition of sanctions for failure to respond to discovery, even though the respondent company had gone out of business while discovery was pending, and was therefore unable to respond. Minnesota Mining & Mfg. Co. v. Eco Chem., Inc., 757 F.2d 1256, 1258, 1261 (Fed. Cir. 1985). Although in *3-M* there was a pattern of delay and other misconduct before the sanctions were imposed, neither good intentions nor practical inability appears to be an acceptable defense. *See* Samuel Adams & Christopher E. Nolin, *Pretrial Abuses Now Punished By U.S. Courts*, NAT'L L.J., Mar. 17, 1986. The 1993 amendments will provide further traps for the unwary.

136. Letter from Kent S. Hofmeister 10 (Jan. 31, 1992) (on file with author). According to Mr. Hofmeister, the Oregon Chapter of the Federal Bar Association

> unanimously opposed those proposed amendments to Rule 26(a) that would require early disclosure of information . . . . [A] common sentiment expressed was that although laudable in purpose, the changes to this provision likely would lead to new motion practice concerning whether material produced by initial disclosure "bears significantly on" any claim or defense.

Id. at 11. Mr. Hofmeister noted, "[a]lmost uniformly, different chapters and individuals characterize the proposed amendments relating to voluntary disclosure as unworkable, unrealistic, unnecessary and potentially counter-productive." *Id.*

137. Comments of Committee member Joyce Ann Harpole. She added:

> [E]ven if the defendant has some understanding about the claim, the standard for disclosure . . . is different from that applicable to discovery, and is so vague as to cause the parties to provide a very broad response, lest they be accused of violating the rule. Broad responses are, however, not helpful in focusing discovery, which the rule is intended to aid. The party receiving the broad response will, of course, be inclined to request discovery from every identified witness and every document category, out of fear of overlooking the critical piece of evidence. Thus, discovery is likely to become more, rather than less expansive under this proposal . . . .
>
> Finally, the proposed disclosure requirements seem contrary to the notions underlying the work product doctrine — that one party may not take advantage of another party's thoughts and work. Requiring one party's attorney to decide what is relevant to the other party's case and disclose it seems to be a classic invasion of an attorney's work product.

Id. at 11-12.

which did not contain the provision limiting the defendant's disclosure obligation to material relevant to matters alleged with particularity in the pleadings. Nevertheless, these concerns are still valid. The 1993 amendments will put ethical defense attorneys into an intolerable dilemma by forcing them to use their professional skills to help the opposition, and by giving no guidance as to how to balance their attorney-client and work-product privileges against their obligation to make full and fair disclosure. Less than ethical defense counsel, on the other hand will be able to spoliate evidence and obstruct access to information with little danger of their misconduct coming to light.

Another perceived problem from the defense perspective is the arbitrary response time. While the Advisory Committee optimistically suggests that there be "agreement" to extend the response time, the likelihood is that this issue will become the battleground for yet another "mini-trial." Members of the defense bar have complained that a plaintiff knows in advance that it will file suit, and is therefore able to

> plan in detail its case and related strategies long before the filing of a complaint, [while] [t]he defendant . . . is at a distinct disadvantage in trying to marshall its resources to comply with what the proposed amendments would require . . . . [T]he predictable result would seem to be a glut of routine motions for enlargement of time filed by defendants.[138]

C. *Mandatory Disclosure Fails to Address Many Common Abuses*

Besides adding another layer to the existing discovery structure, the 1993 amended rules, like their predecessors, leave untouched (and may even encourage) such common discovery abuses as over-response to legitimate discovery requests, evasive or misleading responses, frivolous objections to requests for discovery, and failure to respond, which have frequently been directed by the party with greater resources against the party with fewer resources. The 1993 amendments are therefore unlikely to achieve their ostensible purpose of reducing costs and delay.[139]

1. Over-Response to Reasonable Discovery Requests

Discovery (or disclosure) is abused when it is used as a weapon to burden, discourage or exhaust the opponent, rather than to obtain (or provide)

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138. *Id.* at 13.

139. Professor Mullenix concedes that "[t]he Advisory Committee is going forward with a proposed universal informal discovery rule without having done thoughtful analysis on [various] issues. Rather, the Committee is proceeding with a new federal rule based largely on the Committee's good intentions and anecdotal information from a handful of practitioners and judges." Mullenix, *supra* note 2, at 821.

Professor Mullenix criticizes Professor Laura Macklin's call for empirical studies, *id.* at 828-29 & n.172 (citing Letter from Professor Laura Macklin to Reporter Paul Carrington), but concedes that "[s]urely the Committee does not have to invoke the research apparatus of social science to prove that institutional defendants outspend and delay in litigation against less well-heeled adversaries. Thus, the called-for empirical study would validate the obvious." *Id.* at 829.

needed information.[140] A major weakness in the 1993 amendments is that by leaving the obligation to disclose open-ended, and by retaining the "look at my files" option under Rule 33,[141] the 1993 amendments effectively institutionalize the classic harassing technique of burying an opponent in a sea of paper in response to a reasonable discovery request.[142]

Under the amended rules, a plaintiff whose case depends on obtaining evidence under the defendant's control risks sanctions for filing discovery motions which may later be deemed frivolous.[143] The defendant, meanwhile, is encouraged by Judge Schwarzer's influential views to file dilatory motions for clarification of what it must produce, and, in accordance with the un-

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140. *See* Schwarzer, *Monsters*, *supra* note 70, at 178.

141. *See* FED. R. CIV. P. 33(d) (formerly 33(c)), *infra* Appendix B.

142. *See, e.g.*, Consolidated Equip. Corp. v. Associates Commercial Corp., 104 F.R.D. 101 (D. Mass. 1985) (plaintiff offered to let defendant look at some 47 feet of files, purportedly including the information sought; district court dismissed suit as sanction). *See* FED. R. CIV. P. 26, *infra* Appendix A; FED. R. CIV. P. 33(d), *infra* Appendix B. Amended Rule 34, Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes, retains the former provisions in subsection (b), which state, in part: "A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." 146 F.R.D. at 678-79. Amended Rules 26 and 33 are likewise devoid of any requirement that the disclosed or discovered materials be organized or labelled in any way to correspond to the categories of the request, if any.

143. *Cf.* John J. Kennelly, *Effective Discovery Vis-a-Vis Abuse of Discovery—Which Is Which?*, TRIAL LAWYER'S GUIDE 261, 279-83 (John J. Kennelly ed., 1985). Recounting an experience in an airplane crash case where one piece of evidence, obtained under duress from the defendant through discovery, was the turning point of the plaintiff's case, Kennelly explained:

> The "reformers" of the discovery rules would have precluded any further discovery. We have always felt that it is not enough to simply ask for production of documents. Plaintiffs, in some cases, sometimes must go further, even though there is nothing more disheartening to a lawyer's efforts to get to the truth of a case than to have a judge peremptorily dispose of a motion for discovery of documents because an objection is made that it is a "fishing expedition," or that the defendant "does not know" what documents are desired, or that it would take a "truck to bring them in." These trite generalities are consistently employed.

Id. at 281. Kennelly noted further:

> [O]ur concern is that under the guise of "reform," there will be too much curtailment of discovery. What if a pretrial judge ruled that plaintiffs were "harassing" the defendants, or engaging in "excessive discovery" in seeking to examine all inter-company correspondence and all preliminary drafts of this postaccident article, which was issued by the manufacturer? The court and the jury would have been precluded from hearing the truth.

Id. at 283.

> How inane it is to be told to file an interrogatory asking the defendant to list specific documents "which are relevant." Such an interrogatory is immediately met by an objection to the effect that a party should not be required to examine voluminous documents to determine relevancy and "to search through all their massive files to ascertain what documents will help the other side."

Id. at 281. Inane it is, yet that is the gist of the 1993 amendments: that the defendant will sift through its massive files and will voluntarily, and without evasions, provide the plaintiff with the crucial, "relevant" evidence the plaintiff needs to win its case.

changed provisions of rule 33(d), (formerly Rule 33(c)), to inundate the plaintiff with warehouses full of unsorted documents as kept in the ordinary course of business, under the guise of "disclosure."[144]

In employment discrimination, civil rights, securities litigation, and products liability cases, in particular, a relatively poor plaintiff may need specific information from the defendant's voluminous files, but may lack the resources to sift and interpret the discovered material.[145] The rigid limits on interrogatories and depositions may impose additional hardships, because these devices will not be as readily available for purposes of locating and identifying the particular records needed to be produced.[146] Defendants can bury the plaintiff in irrelevant materials, giving the illusion of compliance, and forcing plaintiffs to risk severe sanctions if they seek an order compelling a more forthright response.

2. Delay and Evasiveness

When winning a case may turn on a party's ability to endure discovery,[147] rather than the merits of the claim or defense, costly and time-consuming discovery activities (including evasive answers) become tactical weapons with which to delay and harass one's opponents.[148] Sanctions have historically had little effect on delay and evasiveness,[149] and the mandatory disclosure proposal will likely exacerbate the results of the previous tinkering changes.

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144. *See* Schroeder & Frank, *supra* note 3, at 478 (indicating that over-production of documents is common example of abuse of discovery rules); Brazil, *Adversary Character, supra* note 32, at 1325 (discussing obstructive maneuver of burying significant document in mounds of irrelevant or innocuous material, a technique recently immortalized in the movie "Class Action").

145. *See* Schroeder & Frank, *supra* note 3, at 478.

146. *See* Hazard, *supra* note 17, at 2239-40 ("[B]road access to document repositories is the most powerful weapon in the Rules discovery armory, particularly in cases involving conduct by business or government . . . because it feeds the deposition process by providing clues as to whom to question and what questions to ask; . . . without documents discovery, depositions would be far less effective and interrogatories would have much less purpose.").

147. *See* Schwarzer, *Monsters, supra* note 70, at 178; MILLER, *supra* note 1, at 11 ("[T]here is also the possibility that if one lasts long enough in the dance marathon contest, the ravages of time and expense may cause the opponent to give up and go away."); *see also* S.C.M. Società Commerciale S.P.A. v. Industrial & Commercial Res. Corp., 72 F.R.D. 110, 113 (N.D. Tex. 1976) ("[D]iscovery is often used vexatiously in an effort to obtain a settlement . . . . [M]any defendants instruct their attorneys to delay the litigation as much as possible thus making the plaintiff lose money and interest in his suit."); *see also* Warren E. Burger, *Abuses of Discovery, Judges Are Correcting The Problem*, TRIAL, Sept. 1984, at 18, 20.

148. Schwarzer, *Monsters, supra* note 70, at 178; *see* 1983 Advisory Committee's Notes, *supra* note 2, at 217.

149. *See* Brazil, *Civil Discovery, supra* note 37 ("[I]t would be difficult to exaggerate the pervasiveness of evasive practices or their adverse impact on the efficiency or effectiveness of civil discovery."); *see also, e.g.*, Olga's Kitchen of Haywood, Inc. v. Papo, 108 F.R.D. 695 (E.D. Mich. 1985) ($21,600 in costs and fees and penalty of $1,000 imposed on both defendant and attorney for misconduct and non-responsiveness including, *inter alia*, a "fatuous" valuation approach in discovery), *rev'd in part*, 815 F.2d 79 (6th Cir. 1987) (table) (text available at 1987 WL 36385, at *40) (reducing the amount of sanctions to $16,012.66).

There is little reason to think that a products liability defendant, for example, will be more forthcoming about other injuries under the new disclosure system than under the traditional methods of discovery, where evasiveness is a standard tactic.[150] The Advisory Committee's "particularity" requirement, and its use of products liability cases as an example of cases in which a defendant need not disclose if the allegations are not sufficiently particular, give new life to this time-worn tactic.[151]

Mandatory disclosure will not change the fact that delays remain extremely profitable. Economic pressures, including defense firms' hourly billing practices,[152] will still give defendants economic incentives to postpone payment of a judgment or settlement,[153] profiting from delays by allowing money that would otherwise be paid out in damages to accrue substantial interest. Delays are also a time-dishonored method of wearing down a less well-funded opponent's will to continue the struggle,[154] while the defense pays out only its tax-deductible legal fees.[155]

Occasionally such tactics may rise to the level of contempt,[156] criminal

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150. For a classic example of evasive answers, see, e.g., Dollar v. Long Mfg., 561 F.2d 613, 615-17 (5th Cir. 1977) (when asked about similar accidents defendants answered that there were no *prior* accidents, concealing two subsequent accidents), *cert. denied*, 435 U.S. 996 (1978).

151. *See* FED. R. CIV. P. 26, 1993 Advisory Committee's Notes, *infra* Appendix D.

152. *See* Brazil, *Front Lines*, *supra* note 6, at 235. Magistrate Judge Brazil noted that

> none of our respondents admitted to "meter running," though many insisted that such practices were widespread among other lawyers. Several lawyers who complained about "meter running" primarily represented plaintiffs against insurance companies. They accused some counsel for carriers of more than occasionally refusing a reasonable settlement demand early in the pretrial period solely to run up sizeable fees by conducting and responding to discovery. In support of this accusation, at least one plaintiff's lawyer contended that attorneys for carriers often settle cases just before trial for approximately the same amount that had been demanded *before* costly discovery was undertaken.
>
> Another respondent opined that larger firms are guilty of meter running because "they have young lawyers, paralegals, and researchers who they must keep busy and bill time for."

Id. at 235 & n.36; *see* Levy, *supra* note 62, at 784 ("Many plaintiff's counsel, after being subjected to extensive interrogatories by defense counsel, improper directions not to answer questions, frivolous motion practice and frequent delaying tactics long ago concluded that the per diem - hourly compensation has been a major cause of pre-trial discovery abuses.").

153. Brazil, *Front Lines*, *supra* note 6, at 229 (two motives for excess discovery are to force an adversary to settle or to dismiss a claim this postponing payment of judgment or settlement); *see* Sherwood, *supra* note 41, at 569-70 (well-heeled parties coerce impecunious parties into settling or dismissing claims by using discovery to prolong litigation).

154. *See* Brazil, *Adversary Character*, *supra* note 32, at 1325-26 (self-conscious and systematic procrastination imposes additional financial strains on opponents, may undermine their will to pursue the litigation, and gives the defense attorney time to negotiate a favorable settlement before the damaging evidence is disclosed).

155. *See* Miller, *supra* note 6, at 18 ("[T]he tax deductibility of litigation expenses makes it cheaper in some cases for defendants to pay legal fees in order to defer the payment of a monetary judgment or the imposition of injunctive relief as long as possible.").

156. The federal contempt statute, 18 U.S.C. §§ 401, 402, 3691 (1982), is seldom useful in curbing discovery abuse because it provides fines only for specified misconduct, and because the procedural protections of FED. R. CRIM. P. 42 must be provided when the contempt power is

misconduct,[157] or disciplinary violations.[158] In the average case, however,

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invoked. *See, e.g., In re* McConnell, 370 U.S. 230, 236 (1962) (counsel's statement of intention to press legal claim "unless some bailiff stops us" does not constitute obstruction of justice). 18 U.S.C. § 401 (1982) provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as-
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
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> . . . [Subsection (2) of this section has been held inapplicable to attorneys. Cammer v. United States, 350 U.S. 399 (1956)].
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Even the most serious discovery abuses are unlikely to rise to the level of criminal contempt. *But see* Marrese v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488, 1497 (7th Cir. 1983) (holding defendant in criminal contempt for repeated refusal to obey orders to produce documents). *See generally Civil and Criminal Contempt in the Federal Courts*, 17 F.R.D. 167, 169 (1955) (discussing statutory and rule provisions defining criminal contempt); Comment, *The Application of Criminal Contempt Procedures to Attorneys*, 64 J. CRIM. L. & CRIMINOLOGY 300 (1973) (questioning necessity of such power).

157. *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (1977), in which one of Kodak's attorneys concealed the existence of copies of certain documents he had received from one of Kodak's expert witnesses. Walter Kiechel III, *The Strange Case of Kodak's Lawyers*, FORTUNE, May 8, 1978, at 188. The magistrate judge ordered production of the documents, 74 F.R.D. at 614, but the Kodak attorney falsely claimed that the documents had been destroyed, and reaffirmed that statement in a sworn affidavit. *Damages Voted Against Kodak of $37.6 million*, WALL ST. J., Mar. 23, 1978, at 5. Eventually Kodak's lawyer admitted that he had known all along that the documents had not been destroyed, despite his perjured affidavit to the contrary. Kiechel, *supra*, at 188, 190-94; *Kodak Replaces Counsel in Berkey Suit, Cites Erroneous Affidavit by Attorney*, WALL ST. J., Mar. 30, 1978, at 5; Roger B. May, *Judge's Letter Spurs Investigation By Prosecutor of Kodak's Lawyer*, WALL ST. J., Apr. 11, 1978, at 1. The trial judge, denouncing Kodak's attorney's "single-minded interest in winning, winning, winning," referred the matter to the United States Attorney for prosecution. *Id.* at 23. The Kodak attorney, a 59-year-old full partner in a prestigious New York law firm, pled guilty to criminal contempt charges. *Former Attorney for Eastman Kodak Sentenced to Prison*, WALL ST. J., Oct. 18, 1978, at 3; Kiechel, *supra*, at 188; WALL ST. J., Mar. 30, 1978, at 5.

158. *See, e.g.*, Standing Comm. on Discipline v. Ross, 735 F.2d 1168, 1170 (9th Cir.) (disciplinary action for violation of professional canons pursuant to local rule was valid exercise of court's inherent power), *cert. denied sub nom.* Frontier Prop's v. Elliott, 469 U.S. 1081 (1984). The *Model Code of Professional Responsibility* restricts attorneys from engaging in over-zealous discovery, but provides no clear guidelines for determining what conduct is excessive. For example,

> [t]he advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 (1980). *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1983) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.") *with* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1)(1980) ("A lawyer shall not: (1) file a suit, assert a position, conduct a defense, [or] delay a trial . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."). The Model Rules further prohibit lawyers from "mak[ing] a frivolous discovery request or fail[ing] to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." MODEL RULES OF

there is often little that the opposing party can do, and the 1993 amendments will, if anything, tend to encourage, rather than deter abuses.

The adoption of the 1993 amendments thus means business as usual for those whose practice is to object to discovery (or disclosure), and to file motions for clarification and endless quibbling objections.[159]

3. Disputes over Interrogatories and Requests for Production

There is no doubt that justice can be frustrated and litigation enormously protracted when there are no limits on interrogatories.[160] The sheer volume of some requests raises serious doubts that the requested responses could have any real usefulness other than to burden the opponent.[161] Amended Rule 33 limits written interrogatories to no more than twenty-five, including discrete subparts, per side (not per party) without leave of court.[162] This ignores the reality that not everyone on the same side of the "vs." necessarily has identical interests, and seems certain to involve the court in still more mini-trials, as it forces the court to micro-manage the discovery process.

The twenty-five interrogatory limit, on its face, appears to free litigants from the burdens of "shadowboxing interrogatories,"[163] and it is at least possible that imposing limits will help to unify the discovery procedure. Indeed, many districts impose similar limits through local rules, though they normally limit the number available per party, not per side.[164] However, the limit of

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PROFESSIONAL CONDUCT Rule 3.4(d)(1983). However, disciplinary proceedings are of no direct help in moving the discovery process forward, and raise the specter of protracted satellite hearings to resolve them.

159. See, e.g., Società Commerciale v. Industrial & Commercial Research, 72 F.R.D. 110, 111 (N.D. Tex. 1976) in which the District Court for the Northern District of Texas observed:

> Once again this court has been called in to arbitrate the no show and no tell discovery games engaged in by the parties to this lawsuit. I should emphasize at the outset that this is not the only game in town. The fact pattern hereinafter recited has repeatedly surfaced in other litigation during my tenure on the bench. In fact, I have often thought that if the Federal Rules of Civil Procedure were in effect in 1492 the Indians undoubtedly would have made a motion to suppress Columbus' discovery.

Id.

160. *See* Brazil, *Adversary Character*, *supra* note 32, at 1322 (interrogatories often used to harass, to fish for evidence to support new claims, and to uncover opponent's secrets); *see also*, *e.g.*, *In re* Beef Ind. Antitrust Litig., 419 F. Supp. 720 (J.P.M.L. 1976) (155 numbered interrogatories subdivided into about 1,800 separate parts, with extensive cross-referencing bringing the total number of questions posed into the tens of thousands); B. Thomas McElroy, *Federal Pre-Trial Procedure in an Antitrust Suit*, 31 Sw. L.J. 649, 682 (1977).

161. *See* Schroeder & Frank, *supra* note 3, at 478 (discussing costly and time-consuming misuse of interrogatories). The Arizona State University conferees considered a case where one written interrogatory had 2,720 parts and another case where the Department of Justice reported that 10,000 interrogatories had been filed. *Id.* at 478 n.18.

162. *See* FED. R. CIV. P. 33(a), *infra* Appendix B.

163. Brazil, *Front Lines*, *supra* note 6, at 233.

164. *See*, *e.g.*, *Revised Report of the Special Comm. on Effective Discovery in Civil Cases for the E.D.N.Y. to the Hon. Jack B. Weinstein, Chief Judge*, *reprinted in* 102 F.R.D. 357 (1984) (proposing standing orders and sanctions for non-compliance with August 1983 amended Federal Rules of Civil Procedure), *in* United States District Court for the Eastern District of New

twenty-five interrogatories per side is as arbitrary as the limit of ten depositions per side, and will be equally costly in terms of increased court involvement, without an appropriate revision of court management procedures.

If efficiency is the goal, it would be more efficient for the court to set limits only if a party feels that it is being abused.[165] Otherwise, without an effective pretrial mangement system, the question of whether additional interrogatories, depositions, or requests for production are excessive in a particular case becomes another delaying tactic. This will be especially true under the 1993 rules amendments, where the court will apparently have to take the time to pick and choose among the parties and the interrogatories submitted to ascertain whether additional interrogatories are warranted, and, if so, which party on a given side may propound them.

Judges under the 1993 amendments will not be able to avoid this type of micro-management unless they arbitrarily strike all proposed additional interrogatories,[166] or unless they simply specify a maximum, fixed number of interrogatories that will be permitted per requesting party.[167] The 1993 amendments thus provide additional chores for the judges, but accomplish nothing that was not already possible under the existing rules.[168]

If combined with effective overall court management, there is nothing inherently wrong with a reasonable limit on interrogatories.[169] The Federal

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York, *Standing Orders of the Court on Effective Discovery in Civil Cases*, *reprinted in* 102 F.R.D. 339 (1984); *see also* Christine E. Sherry, *Section Forms Task Force on Civil Justice Reform Act*, LITIG. NEWS, Dec. 1991, No. 2, at 1 (ABA task force seeks to reduce expense and delay in civil actions, in part by improving discovery rules); Spencer M. Punnett, *Half of Pilot Districts Turn to Automatic Disclosure*, LITIG. NEWS, Oct. 1992, No. 1, at 7 (discussing proliferation of automatic disclosure rules in local rules under a pilot program of Civil Justice Reform Act of 1990).

165. *See* Brieant, *supra* note 14, at 466 (under proposed amendments, courts will be responsible for determining what discovery is necessary).

166. *See, e.g.*, Frost v. Williams, 46 F.R.D. 484, 485 (D. Md. 1969) (court struck entire group of two hundred form interrogatories in ordinary rear-end collision case).

167. *See* Schroeder & Frank, *supra* note 3, at 490 (proposing that courts be permitted to cap number of interrogatories); *see also In re* U.S. Fin. Secs. Litig. 74 F.R.D. 497, 498 (S.D. Cal. 1975) (large number of interrogatories struck *sua sponte* by court); S.C.M. Società Commerciale v. Industrial & Commercial Research, 72 F.R.D. 110, 113 n.5 (N.D. Tex. 1976) (criticizing wide use of "canned" or "form" interrogatories).

168. FED. R. CIV. P. 26(f), enacted as part of the 1980 amendments to Rule 26, provides that counsel who has attempted without success to effect a reasonable program or plan for discovery and whose dispute cannot be resolved by resort to Rules 26(c) or 37(a), is entitled to the assistance of the court through a special discovery conference, or as part of a pretrial conference under Rule 16. *See* FED. R. CIV. P. 26(f) Advisory Committee's Notes (1980).

169. Before the 1983 amendments, Rule 26(a)(1) provided that unless the court ordered otherwise, the "frequency of use" of permitted discovery methods was not to be limited. *See* FED. R. CIV. P. 26, *infra* Appendix A. The 1983 Advisory Committee deleted this provision in an attempt to reduce the problems of duplicative, redundant and excessive discovery. 1983 Advisory Committee's Notes, *supra* note 2, at 217. The Advisory Committee intended to encourage district judges to identify and limit needless discovery by deleting the old rule's provision for virtually unlimited discovery while giving courts express authority under Rule 25(b) to limit the amount of discovery on matters that are otherwise proper subjects of inquiry. 1983 Advisory Committee's Notes, *supra* note 2, at 216.

Rules authorize courts to impose such limits,[170] and many courts, including the Eastern District of Virginia, impose limits on interrogatories,[171] or other forms of discovery.[172] In a court with efficient pretrial case management, reasonable numerical limits on some forms of discovery tend to limit certain types of discovery abuse, and are unlikely to work a serious hardship so long as litigants are free to seek leave of court to exceed the numerical limit in an appropriate case without the severe penalties contemplated by the 1993 amendments.[173] Arbitrary limits alone are useless in deterring abuse. Without a more effective (and not just more efficient) pretrial management system throughout the federal courts, however, this restriction should be left to the individual district courts, which know what types of cases predominate in their districts, and what limits are therefore appropriate.[174]

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170. 1983 Advisory Committee's Notes, *supra* note 2, at 218.

171. Rule 11.1 DISCOVERY of the Local Rules of The Eastern District of Virginia provides:

> (A) LIMITS ON INTERROGATORIES: Unless otherwise permitted by the Court for good cause shown, such permission being granted only upon written motion to the Court pursuant to Local Rule 11 [Motions - Continuances] no party shall serve upon any other party, at any one time or cumulatively, more than 30 written interrogatories, including all parts and sub-parts. This limit may not be waived by agreement of counsel.

E.D. VA. LOCAL RULES OF PRACTICE, 11.1.

172. E.D. VA. LOCAL RULE 11.1(B) provides:

> Unless otherwise permitted by the Court for good cause shown, such permission being granted only upon written motion to the Court pursuant to Local Rule ll [Motions - Continuances], no party shall take more than five depositions . . . upon non-parties. Any party may be deposed. This limit may not be waived by agreement of counsel.

173. Most of the local rules are not absolutes, providing instead that the maximum number of interrogatories may be exceeded with the permission of the court. In practice, however, "the courts have often refused a larger number of interrogatories." Sherman & Kinnard, *supra* note 25, at 264. Sherman and Kinnard note that reported cases indicate allowance of additional interrogatories in complex cases. *Id.* at 264 n.77; *see* M.P.L., Inc. v. Cook, 90 F.R.D. 570, 573 (N.D. Ill. 1981) (where plaintiffs did not answer defendant's interrogatories, court permitted defendants to exceed limit in local rule); Crown Center Redev. Corp. v. Westinghouse Elec. Corp., 82 F.R.D. 108 (W.D. Mo. 1979) (discussion of history and rationale for local limitation rules); *see also* 1983 Advisory Committee's Notes, *supra* note 2 (courts may restrict number of interrogatories "in an appropriate case," but must be careful not to deprive a party of discovery that is reasonably necessary to give it a fair opportunity to develop and prepare its case).

Local rules limiting the number of interrogatories to 30 have been adopted in a number of districts. *See, e.g.*, Rule 230-1 (S.D. Cal.); Rule 3.03(a) (M.D. Fla.); Rule 10-I(1) (S.D. Fla.); Rule 7.4 (S.D. Ga.); Rule 9.(6) (N.D. Ill.); Rule 12(c) (S.D. Ind.); Rule 15(d) (D. Kan.); Rule 6(B) (D. Md.); Rule 3(B) (D. Minn.); Rule C-12 (D. Miss.); Rule 8 (E.D. Mo.); Rule 2(e) (W.D. Mo.); Rule 10(e) (D.N.M.); Rule 12(B)(4) (S.D. Tex.); Rule 26(d)(1) (W.D. Tex.); Rule 11-1(A) (E.D. Va.); Rule 7(f)(D. Wyo.). This approach remains controversial, and opponents point out that the number "30," or any other number, is arbitrary and might deny a litigant with limited resources an inexpensive method of discovery.

A number of state courts have also adopted interrogatory limitations, *e.g.*, TEXAS R. CIV. P., R. 168(5) (1981) (may not require more than 30 answers or serve more than two sets of interrogatories); RULES OF THE CIRCUIT COURT OF COOK COUNTY, ILL., R. 3.1(a) (interrogatories limited to 35) (cited in Sherman & Kinnard, *supra* note 25, at 263).

174. Brieant, *supra* note 14, at 465-66.

4. Abuse of Depositions

The 1993 amendments also seem unlikely to have any significant effect on the abuse of depositions. Amended Rule 30 establishes a presumptive limit of ten depositions per side (not per party),[175] while Rule 26(b)(2)(B) precludes more than one deposition of a given witness.[176] While evenhanded on its face, this rule, like the limitation of twenty-five interrogatories, is a bed of Procrustes which will frustrate litigants in unequal bargaining positions by failing to address the many obstructive tactics available in defending depositions.[177] Judge Schwarzer proposed limiting all depositions to no more than six hours on the record, asserting that

> [t]he need to obtain a court order [for additional depositions or to continue a deposition for more than six hours on the record] will concentrate the attorneys' attention on how to minimize the number, length and scope of depositions. Having previously received all material documents, witness statements and experts' reports, attorneys should be prepared to propose streamlined discovery programs involving minimum time and expense.[178]

Even without the mandatory six-hour limit, this assumption may prove overly optimistic. Under the 1993 amendments, deponents are still able to wander off onto harmless, tangential subjects to distract and consume time.[179]

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175. *See* FED. R. CIV. P. 30, *infra* Appendix C. Amended Rules 30(a)(2)(A) and (B) require court permission to take more than ten depositions *per side* in a given case, or to depose any person more than once. Amended Rule 30(a)(2)(C) requires court permission for a party to take a deposition before its disclosures have been made, unless the notice contains a certification, with supporting facts, that the proposed deponent is expected to leave the country and be unavailable for examination after the time that disclosures are due. However, as Ms. Brieant points out,

> The ten-deposition limit is arbitrary, and will not change the number of depositions in any given case that are truly necessary. It will merely burden the court with determining if every deposition over ten needs to be taken, and would thus increase the time and costs of litigation.
>
> [Also, t]he proposed amendments do not take into account the possibility of multiparty actions where defendants are not united in a defense strategy. In any such case, the defendants would not be able to agree on how to use their "allotment" of depositions, and the matter would end up before the court. The Notes indicate that the parties should be able to resolve this issue amicably, but such a pleasant resolution is doubtful in many cases. The rules also make no provisions for situations where a party joins the action after ten witnesses have already been deposed.
>
> With the limit on the length of depositions, depositions which would otherwise have been handled by more junior (and less expensive) lawyers may now be handled by more senior (and more expensive) lawyers, defeating the intended purpose of this proposed amendment.

Brieant, *supra* note 14, at 483.

176. *See* FED. R. CIV. P. 26(b)(2)(B), *infra* Appendix A.

177. *Id.* Procrustes, whose name means "he who stretches," was a mythical Greek robber who made his victims fit the length of his bed by amputating the legs of those who were too tall, and stretching the short victims on the rack until they reached a suitable size. *See, e.g.*, THE OXFORD UNIVERSAL DICTIONARY 1591 (3d ed. 1933 revised, with addenda 1955).

178. Schwarzer, *Monsters*, *supra* note 70, at 182.

179. Brazil, *Civil Discovery*, *supra* note 37, at 854.

If courts adopt Judge Schwarzer's suggestion to limit depositions to a particular length of time, objections and claims of privilege can easily run out the clock.[180] In that event, more time, not less, will be consumed in hearings to determine when the arbitrary time limit can be exceeded.[181] In any event, depositions in high-stakes litigation will certainly continue to be marred by interruptions, obstruction, thinly-veiled coaching,[182] and instructions not to answer,[183] and hearings will undoubtedly be required to determine which of multiple parties on any given side will be allowed what number of the ten available depositions.

Indeed, in a given case the number of parties may exceed ten per side,

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180. Earlier drafts of the 1993 rule amendments had provided for Judge Schwarzer's proposed six-hour time limit. Commenting on this proposal, The Federal Bar Council Committee on Second Circuit Courts (which recommended a two-day limit on depositions), acknowledged that

> such a stark time limit may result in a perception that obstructionism by the defending attorney will be rewarded; *i.e.*, if the deposition must end after two days, defending attorneys may feel it is in their clients' interest to ensure that few questions are answered during that period. However, several of the suggested rules which follow—such as those limiting objections and reducing the availability of conferences between attorney and client—will reduce the possibility of obstructionism . . . .
>
> *We do not believe there is a method of similarly limiting the number of depositions in all cases, although we encourage the use of that device tailored to the needs of the particular case, through a discovery conference called pursuant to Fed. R. Civ. P. 26(f).*

Federal Bar Council Committee on Second Circuit Courts, *A Report on the Conduct of Depositions*, *reprinted in* 131 F.R.D. 613, 616 (1990) (emphasis added).

181. Apart from being time-consuming, it may be very difficult even for a very active court to determine without "satellite" hearings whether proposed discovery is cumulative or otherwise obtainable. As Judge Patrick Higginbotham observed:

> It's very difficult for the judge to ask, "Well, you're spending too much time with John Jones, Sales Vice-President of the Company. Why are you spending so much time with a salesman?" He can't know why you're spending so much time with him; he can't know that much about your case.

Patrick E. Higginbotham, *Discovery Management Considerations in Antitrust Cases*, 51 ANTITRUST L.J. 231, 236 (1982). Judge Higginbotham's solution is to set a limit on the number of depositions and leave it to the lawyers to decide how to allocate their limited opportunities. *Id.*; *see also* Marcus, *supra* note 67, at 368.

182. The Federal Bar Council Committee on Second Circuit Courts noted:

> Virtually every active litigator has encountered the situation where, while purporting to voice an objection to a question, the defending attorney is actually engaged in coaching the witness, attempting in the course of articulating the objection to direct the witness's attention to what the "right" or "correct" answer should be. Frequently, depositions degenerate into more "testimony" from the attorney than from the witness.
>
> Such suggestive objections, also known as "speaking objections," should be prohibited . . . . Responses should generally be limited to the statement "objection as to form" . . . .
>
> Continued speaking objections should be grounds for sanctions by the court.

Federal Bar Committee on Second Circuit Courts, *supra* note 180, at 617.

183. *See, e.g.*, Falk v. United States, 53 F.R.D. 113, 115 (D. Conn. 1971) (criticizing "meticulous objections and evasive answers from experienced counsel"). *But cf.* Martin I. Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 FORDHAM L. REV. 907, 909 (1980) (it is sometimes questioner's provocative conduct or grossly improper questions that elicit these responses).

exhausting the opponent's quota of depositions before any non-parties, including experts, are deposed, and in some cases, before all defendants have even been served. This points out another problem with the 1993 amendments, which is that redundant depositions (sometimes resulting from poor planning and failure to read earlier depositions)[184] are most common in large, high-stakes cases.[185] These are the very cases that are likely to be exempted, by category, under local rules promulgated pursuant to the Civil Justice Reform Act.[186] The 1993 amendments are likewise silent as to such tactics as scheduling depositions at inconvenient places and times to harass the opponent.[187] Thus, the 1993 amendments fail to address abuses that occur in ordinary cases, and concentrate on abuses more likely to occur in cases that will be exempt from the application of the amended rules.

5. Class Action Abuse

As applied to class actions, the mandatory disclosure rule raises some particularly thorny questions. Some discovery regarding the propriety of the class action is essential to certification of a class under Rules 23(a) and (b), but mandatory disclosure will likely place class members in a significant quandary as to disclosure on the merits after certification. It appears that the 1993 amendments will effectively shift the burden to class members affirmatively to protest why they should not disclose all kinds of personal information (rather than waiting to object if the defendant makes objectionable or harassing discovery requests of individual class members).

Of course, class action discovery abuse occurs among plaintiffs, too, including would-be plaintiffs hoping to "discover a claim" upon which to base a class action. Boilerplate allegations can serve as a launching pad for burdensome discovery calculated to fish for a claim or coerce a settlement, whether or not a valid claim is discovered.

Class action litigation is subject to all of the forms of abuse that afflict

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184. *See, e.g.*, Nicholas Katzenbach, *Modern Discovery: Remarks from the Defense Bar*, 57 ST. JOHN'S L. REV. 732, 733 (1983) (citing 45-day deposition of IBM's CEO, 11 years into litigation, at which deponent was asked, *inter alia*, "Where is the corporate office of IBM?").

185. Schroeder & Frank, *supra* note 3, at 478.

186. *See* Brieant, *supra* note 14, at 462 n.2.

187. In a story that illustrates such tactics, one commentator noted:

> One well-respected legal services attorney reported scheduling a client's deposition to be taken at the attorney's storefront offices. The offices were located in an area with a very high crime rate, and the attorney scheduled the deposition shortly before sundown in hopes of persuading his wealthier, suburban opponent to cancel the deposition, or at least to make it a short session so they would be finished before dark. Conversely, the same attorney complained of an opponent in a wife-beating case who insisted on discovering the new address and telephone number of the attorney's battered client, in hopes that the client would drop the assault charges rather than reveal her new whereabouts. Conversation with a legal services attorney, Fall, 1983.

Weissbrod, *supra* note 32, at 186 n.27; *cf. Obiter Dicta*, 78 A.B.A. J. 42, 43 (May 1992) (two Michigan lawyers directed to inspect records produced by their opponents, as kept in the ordinary course of business, in an abandoned semi-trailer in northern Mississippi, infested with bees, spiders, rats' nests, and a poisonous snake).

other types of litigation, but class actions are subject to some rather specialized abuses that also deserve mention in the context of the 1993 amendments, particularly in the area of discovery on the merits, aimed at class members.[188] Under the previous rules, at least one district court tried unsuccessfully to deny this type of class discovery on the theory that absent class members were not "parties" to the lawsuit.[189] This position is unlikely to prevail,[190] however, and the existence of contrary authority could subject the party asserting this position to sanctions. Mandatory disclosure exacerbates this quandary because the class members, as plaintiffs, cannot wait for a request, but must disclose voluntarily early in the litigation, before defendants have made any disclosures. Again, this burden falls disproportionately on those who have the least power in our society, and further restricts their access to the courts and their ability to redress legitimate grievances.

It seems inevitable that the intricacies of mandatory disclosure in class actions will create more, rather than less, "satellite" litigation on discovery. Must all class members file motions for clarification to learn whether they must make disclosure or face the threat of dismissal or other sanctions?[191]

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188. *See* Peter Gruenberger, *Discovery from Class Members: A Fertile Field for Abuse*, LITIG., Fall 1977, at 35 (detailing instances of abuse of discovery process in class action claims).

189. *See, e.g.*, Fischer v. Wolfinbarger, 55 F.R.D. 129, 132 (W.D. Ky. 1971) (interrogatories of absent class members not permitted); Jean F. Rydstrom, Annotation, *Who is a "Party" Within Provision of Rule 60(b) of Federal Rules of Civil Procedure Permitting Court to Relieve "Party or His Legal Representative" from Final Judgment or Order for Specified Reasons*, 35 A.L.R. FED. 973, § 2 (1977) (courts have generally denied relief to unnamed parties on grounds that they lack standing).

190. *See* Commonwealth v. Local Union 542, International Union of Operating Eng'rs, 507 F. Supp. 1146, 1160 (E.D. Pa. 1980) (argument that absent class members are not parties because FED. R. CIV. P. 23 does not designate them as such is "specious at best"), *rev'd on other grounds*, 458 U.S. 375 (1982); Richard H. Underwood, *Legal Ethics and Class Actions: Problems, Tactics, and Judicial Responses*, 71 KY. L.J. 787, 826 (1983) (most courts will not restrict discovery on grounds that absent class members are not parties); United States v. Trucking Employers, 72 F.R.D. 98, 104 (D.D.C. 1976). The *Trucking Employers* court said:

> The evolving view . . . seems to be that the court has the power . . . to permit reasonable discovery by way of interrogatories of absent class members when the circumstances of the case justify such action . . . [The] party seeking the discovery must demonstrate its need for the discovery for purposes of trial of the issues common to the class, that the discovery not be undertaken for purposes or effect of harassment of absent class members or of altering the membership of the opposing class, and that the interrogatories be restricted to information directly relevant to the issues to be tried . . . with respect to the class action aspects of the case . . . Discovery is not to be allowed as a matter of course . . . but only when the Court is satisfied that the required showing has been made.

Id.; *see also* Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977) (interrogatories of unnamed class members permissible if tendered in good faith and not unduly burdensome), *cert. denied*, 438 U.S. 916 (1978). The 1993 amendments shift the burden to the class action plaintiffs to make such disclosure voluntarily, without a request from the defendants, before plaintiffs may seek any disclosure or discovery from defendants.

191. *See, e.g.*, Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1006 (7th Cir. 1971) (class members who failed to comply with discovery faced dismissal from the case with prejudice), *cert. denied*, 405 U.S. 921 (1972).

When faced with a choice between expensive and possibly burdensome disclosure and motions for clarification, and risking sanctions for non-compliance, members may elect to "opt out" of the class, destroying any chance of the case being tried on the merits.[192] By placing such burdens on class-action plaintiffs, the 1993 amendments destroy the effectiveness of the class action as an instrument for the redress of systematic wrongs to the disadvantaged in our society, particularly in such areas as civil rights and employment.

V. THE MYTH OF NEUTRAL RULES

One reason for the severe flaws in the 1993 amendments is that they rest on the myth that procedural rules are neutral, *i.e.*, that they transcend the substantive law of any given case, affecting all litigants equally. This fiction is maintained despite the demonstrably different impact these rules will have on certain foreseeable categories of litigants. Supporters of the "efficiency" movement often contend that rules are neutral in themselves,[193] and that it is, in effect, just the luck of the draw if they happen to affect a particular litigant adversely. While this may be true for some kinds of cases, it would be more accurate to say that procedure has been political all along.[194] Careful analysis reveals that the myth of trans-substantive procedure is far from true in the kinds of cases that typically involve relatively powerless litigants on one side and "repeat players" on the other. Efficiency for efficiency's sake may strike at these powerless litigants to a degree that is both disproportionate and unfair.

One definition of a "just, speedy, and inexpensive determination," within the meaning of Fed. R. Civ. P. 1, is that the dispute is resolved "A) on the merits, and B) as determined by governing substantive law."[195] As Judge Keeton noted:

> [T]he facts that are relevant to the just determination of the merits are defined by "laws," or by what we more commonly call "rules of

192. *See* Underwood, *supra* note 190, at 825; *see also* Gruenberger, *supra* note 188, at 35 (discovery tactics in class action suit designed to promote defection from class); Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 724 (W.D. Ky.) (plaintiffs who opted out after defendants contacted them and threatened them with discovery ordered restored to class), *appeal dismissed without opinion*, 659 F.2d 1081 (6th Cir. 1981); United States v. Trucking Employers, Inc., 72 F.R.D. 98, 104 (D.D.C. 1976) (absent class members need not be brought personally before court); Jean F. Rydstrom, Annotation, *Absent Class Members in Class Action Under Rule 23 of Federal Rules of Civil Procedure as Subject to Discovery*, 13 A.L.R. FED. 255, §§ 2 & 3, & supp. § 3 (1976).

193. What is "neutral," is also not easy to define. "[W]hat is understood as objective or neutral is often the embodiment of a white middle-class world view." Kimberle Williams Crenshaw, *Toward a Race Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 3 (1989) (cited with approval in Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1769 n.27 (1990)).

194. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2050 (1989).

195. Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 853 n.* (1989) Keeton is a United States District Judge for the District of Massachusetts.

> substantive law." Rules of procedure are meant to facilitate hearing and deciding 1) any disputes over the applicable rules of substantive law and 2) any disputes of fact that are relevant to disposition of the case under those rules of substantive law.
>
> . . . .
>
> If, on the other hand, we fashion rules that are too rigid, they will tend to produce decisionmaking that is to some extent arbitrary. Decisionmaking under such rules will often ignore circumstances that fair-minded persons untrained in legal niceties would consider relevant. That is an inevitable consequence of unduly rigid rules.[196]

In other words, in our adversary system, substantive law can only be applied within the confines of procedural rules. For that reason, procedural rules like the 1993 rules amendments cannot fairly be considered neutral if they weigh so heavily in favor of the "institutional players" that they ignore circumstances that fair-minded persons would consider relevant, and become, for all practical purposes, outcome-determinative. When that happens, the playing field is no longer level: it is tilted in favor of the institutional party whose position the rules protect.

Judge Robert Carter directly challenged the purportedly "neutral" agenda of "efficiency" that fueled such rule revisions as the 1993 amendments, arguing that many contemporary "reforms" are intentionally designed to "*exclude*[ ] certain kinds of substantive claims."[197] Judge Carter argued that the revisions of the rules reveal a "political agenda hostile to the *substantive* rights of certain classes of federal litigants,"[198] and he proposed that any revision of the federal rules should have as its goal the provision of ready access to courts and the opportunity for the heretofore silent to make new claims of legal rights.[199] Notably, the 1993 amendments fail to provide such

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196. *Id.* at 854 (footnote omitted).

197. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2182 (1989).

198. *Id.* at 2181.

199. *Id.* at 2182. Interestingly, in his dissent to the transmission of the rules, Justice Scalia pointed out that opposition to the mandatory disclosure proposals cut across the lines between those who represent injured consumers and those who represent the interests of manufacturers in product liability cases. 61 U.S.L.W. at 4393-94 (Apr. 22, 1993); *see* Jeffrey J. Mayer, *Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Fed. R. Civ. P.*, REV. LITIG., Fall 1992, at 77, 78 ("The reaction of the organized bar to the prospect of disclosure . . . can best be described as sheer horror."). Professor Mayer noted:

> The legal community responded to the August 1991 disclosure proposal with the most commentary in the history of the Federal Rules of Civil Procedure, with almost all of the commentary harshly critical. *See* Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J., May 4, 1992, at 1 (noting the numerous negative responses to the mandatory disclosure proposal); see also Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155 (1992) (asserting that additional rule changes mandating disclosure will not solve discovery crisis) . . . .
>
> The General Counsel of Michelin Tire Corp. wrote: "The imposition of these 'automatic disclosures' is needlessly burdensome and inefficient, and it unfairly shifts the delicate balance of the notice pleading system against the defendant." Letter from

access.

Commenting on Judge Carter's views at a symposium on the fiftieth anniversary of the Federal Rules of Civil Procedure, Professor Judith Resnik remarked:

> [A] remarkable aspect of this conference has been the repeated reference to the "political" aspects of the Federal Rules of Civil Procedure. From a variety of perspectives, many of the speakers have made comments about the political implications of various Rules. Others, seeming to accept the political content of the Rules, have warned that "we" (that is, all litigants) are safer when the facade, if

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James C. Morton, General Counsel, Michelin Tire Corp., to Committee on Rules of Practice and Procedure 2 (Feb. 13, 1992) (unpublished letter available at the University of Michigan Law School).

The protestors were not only corporate lawyers. Plaintiffs' lawyers and public interest lawyers also weighed in with serious complaints. See Letter from D. Michael Dale, Oregon Legal Services, to Committee on Rules of Practice and Procedure (Jan. 29, 1992) (unpublished letter available at University of Michigan Law School) (stating that the mandatory disclosure requirement of proposed Rule 26 will work to the detriment of migrant farmworkers because they are "particularly vulnerable to intimidation or retaliation").

Lawrence Jensen had some of the harshest words for disclosure, writing that the proposed changes offered by "Reaganauts" will "keep all but the richest plaintiffs out of court." Letter from Lawrence R. Jensen, Hallgrimson, McNichols, McCann & Inderbitzen, to Committee on Rules of Practice and Procedure 2 (Feb. 13, 1992) (unpublished letter available at University of Michigan Law School).

Id. at 81-82 n.8; *cf.* Richard L. Edwards, *What's Happening in the Law: Surveying the New Developments: Advocacy, Practice and Procedure*, 60 DEF. COUNS. J. 371 (1993):

> By far the biggest news during 1992-93 in the arena of practice and procedure was the inexorable movement of the revolutionary changes in the Federal Rules of Civil procedure toward an effective date of December 1, 1993 . . . .
>
> The proposed changes in Rule 26 to impose prediscovery disclosure on litigants has met with considerable opposition . . . . The main focus has been on the requirement of disclosure of "discoverable information relevant to disputed facts alleged with particularity in the pleadings," . . . [in] Rule 26(a)(1). The argument against the disclosure proposal has been twofold.
>
> First, *more than 95 percent of the 208 judges, bar organizations, scholars, corporations and individual members of the bar who commented on the August 1991 initial version of the proposed disclosure amendment were against it. . . .*
>
> *Responding to those comments, the advisory committee voted in early 1992 to reject disclosure, but then reinstated a substantially revised version of it at its April 1992 meeting. See* "Advisory Committee Flip-flops, Opts Again for Disclosure," 59 Defense Counsel Journal 315 (1992). This new proposal, which changed the language of the disclosure requirement to "alleged with particularity in the pleadings," was approved and forwarded to the standing committee without publication or public comment. . . .
>
> [In addition to other flaws], . . . the disclosure proposal undermines the attorney-client relationship by creating a disclosure obligation running from the attorney to the opponent. In addition, the disclosure provision would be inconsistent with the policies underlying the work product doctrine. This arises from the fact that the duty of disclosure would inevitably require a party to reveal to an opponent a line of factual inquiry or legal reasoning that the opponent might never have considered or litigated on its own.

Id. at 371-72 (citations omitted).

> not the reality, is maintained that "neutral" Rules are applied to "anonymous" (that is, not identifiable in advance) plaintiffs and defendants. *I believe we cannot and should not ignore the political content and consequences of procedural rules.* Over the last decade, a variety of powerful "repeat" players have sought, sometimes openly, to influence "court reform" efforts. . . . However appealing might be the notion that writing the Rules of Civil Procedure . . . is a "neutral" task with diverse consequences on anonymous and interchangeable civil plaintiffs and defendants, that description is no longer available . . . .
>
> Finally, . . . we must wonder about whether litigation of individuals' cases will be available fifty years hence.[200]

The scenario Professor Resnick describes is frightening, and should serve as a wake-up call to repeal the 1993 amendments. Certainly, it may be difficult to divine the intent of the drafters of the rules (or any other group of people), but it is not necessary to divine the drafters' intent to make claims "directly for 'substantive justice in the federal courts.'"[201] One need not believe that the original drafters of the Federal Rules thought that substantive justice was central in order to believe that "the Federal Rules should neither be written nor construed in a manner that systematically limits opportunities in court for blacks, other minorities, women, the poor, and others who are oppressed . . . . [T]he legitimacy of our concerns for such groups does not hinge upon our predecessors' visions."[202] Rather, the legitimacy of our concerns should rest on fundamental principles of fairness, and of equal justice under the law.

Professor Paul Carrington, Reporter of the Advisory Committee on the Civil Rules,[203] acknowledged that the rulemaking process is a political one, adding that if the premise of judicial rulemaking is that it is apolitical or neutral, "then it would be subject to the popular contemporary criticism that nothing can be neutral, that all is politics."[204] He argued that this politicization results from

> [t]he aspiration and the role shared by [the courts and law schools] . . . to balance the influences of factional interests . . . [and] to celebrate the values and traditions that we hold in common. The paramount role of courts in our tradition is to earn and keep the trust of the whole public, perhaps especially of those most likely to be hostile or alienated from the democratic polity. Essential to the performance of that role is the practice by the courts of classical civic virtue, of being and seeming to be impartial, disinterested, in-

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200. Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2219-20 (1989) (emphasis added); *see* Carter, *supra* note 197, at 2183 (discussing adverse impact rules changes have had on civil rights claimants).

201. Resnick, *Domain*, *supra* note 200, at 2222.

202. *Id.*

203. *See* Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 752 & n.138 (1989) (discussing Dean Carrington's suggested set of amendments).

204. *See* Carrington, *supra* note 100, at 162.

> dependent of faction, or at least partaking of those traits within the limits of human capacity . . . .[205]

Conceding that "[i]t is of course nonsense to say that procedure is not political, just as it is nonsense to say that our courts are not political institutions,"[206] Professor Carrington asserted that

> the politics embodied in sound procedure is a celebration of some of those political ideas that all of us hold in common. Procedure is part of the structure that all of us hope that our political institutions will generally abide. It is, like the forms of judicial independence, a means by which we reduce the factional political commitments of judges in order to gain the trust and acceptance of those who are disfavored by the controlling law . . . .[207]

He added, however, that

> there is . . . no natural and effective lobby for sound judicial administration, no political force that regularly favors impartiality or disinterest, . . . [so that] legislative solutions to the problems of courts are prone to favor those factional interests that are best organized, thus reflecting the procedural preference of those whom Marc Galanter has aptly described as "repeat players." This adds to the advantage already held by such litigants.[208]

Paradoxically, Professor Mullenix blames the "politicization" of the rulemaking process on the Rules Enabling Act's requirement of openness, in the form of public comment and debate, and blames the powerless, rather than the powerful "repeat players," for politicizing the rulemaking process.[209] Professor Carrington seemed to concur, noting that

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205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 162-63. Such "repeat players" necessarily include the judges, and Professor Carrington points out that "it is likely that rules made by courts tend to be centered on the interests of the judges, interests that are not necessarily identical with the public interest." *Id.* Senator Joseph Biden (D-Del.) and the Bush-Quayle administration were behind some of the proposals. *Id.* at 164. *See* Dan Quayle, Vice-President, *Proposed Civil Justice Reform Legislation*, 60 U. CIN. L. REV. 979, 981 (1992) (proposing mandatory disclosure, "free round" of discovery, and requiring requesting party to pay for subsequent discovery).

In 1990, Senator Biden, who chairs the Senate Judiciary Committee, introduced S. 2027, the Civil Justice Reform Act of 1990, based on a study by the Brookings Institution and the Foundation for Change, mandating certain features of so-called "delay reduction" plans to be required of every federal district court. Joseph P. Esposito, *Mandatory Aspect of Biden Bill Opposed, But Section Supports Concept of Case Management*, LITIG. NEWS, Oct. 1990, No. 1, at 1. The ABA Board of Governors voted to oppose the bill, and Sen. Biden later introduced S. 2648, The Judicial Improvements Act of 1990, Title I of which contained the revised Civil Justice Reform Act. *Id.* The Council and Committee Chairs of the ABA Litigation Section endorsed the general concept of case management, but opposed the mandatory nature of the proposed law. *Id.*

In 1990, the Federal Courts Study Committee was also preoccupied with the cost of civil litigation, and in 1991 the Executive Branch under former President George H.W. Bush took the initiative to urge greater economy in civil litigation as part of its efforts to ensure competitiveness. *Id.*

209. Mullenix, *supra* note 2, at 830.

> one [likely] reason for the absence of factional politics in 1938 was that the rules were drafted in secret over 18 months and promulgated after only a brief period of public comment . . . . There was not sufficient notice and time for interest groups then active to identify ways in which they might be adversely affected by the new rules and then organize to make their views known to Congress. Factional politics was defeated by an undemocratic fait accompli conducted in the name of the Supreme Court.[210]

However, "[i]t has not been civil rights litigants who have sought open politicization of the rulemaking process. Rather, powerful repeat players have begun to speak of 'court reform'—*to change the rules of procedure so as to achieve specific substantive effects*."[211] This has resulted in "decreasing interest in paying attention to individual problems, to the adjudication of small disputes and individual cases . . . . [T]here is an unwillingness to accord such societal resources to respond to individual problems."[212]

In support of her thesis, Professor Resnik drew a persuasive analogy between the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure. As to the former, she noted:

> [W]e know up front that there are some rules that will be used exclusively by the prosecution . . . and some designed exclusively for criminal defendants, who, as a class, are poor and typically represented by counsel paid for by the government. We know a power

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210. Carrington, *supra* note 100, at 165. Professor Carrington explained:

> There is a large benign consequence of this activity, one that is not fully acknowledged in Professor Mullenix's article. Many communications received from special interest groups are helpful to rulemakers, as they may be in any lawmaking context. This is especially so to the extent that comments are rooted in shared public concerns rather than particular interests . . . .
>
> At the same time, it is useful to hear even from selfish interests. I recall that the most effective advocate of highway safety for many decades was said to be the lobby of the railroad industry. Selfish interests can and do make good suggestions.
>
> Still, genuinely selfish interests are likely to get short shrift in rulemaking discussions. While Professor Mullenix expresses concern that the rulemakers may yield too freely to coercive lobbying, I do not share that concern.

Id.

211. Resnik, *Domain*, *supra* note 200, at 2226 (emphasis added). Professor Resnick continued:

> Some of this repeat playing is overt; advertisements in newspapers promote control over juries and blame litigation for many of the ills of society. Some of the repeat playing is more subtle; insurance companies and corporations have funded surveys and conferences at 'neutral' settings such as law schools and think tanks—all with the aim of exposing the civil justice system's ills and of 'reforming' the Rules.
>
> In short, the politicization of rulemaking has already happened—caused not by the vulnerable of the society but by the powerful. Yet, as Judge Carter, Professor Burbank, Professor Carty-Bennia, Professor Minow, and Judge Weinstein have demonstrated, it is the vulnerable who are being hurt by revision of "neutral," "anonymous" rules, and we must all take responsibility for exploring the impact of civil rule making on the diverse participants in the civil justice system.

Id. at 2226-27.

212. *Id.* at 2227.

> imbalance exists, and we write rules to take into account our understanding of the resources of the two sides of a criminal case.[213]

Just as we accept, to some degree "the idea that the Federal Criminal Rules embody substantive visions about the power disequilibrium between prosecution and defense and between defendant and judge, . . . and try to take the identity of the parties into account, up front"[214] we should do the same for the civil rules. Professor Resnick continued:

> On the civil side, two theories—of neutrality and of anonymity—govern. By "neutrality," I mean that in theory, on the civil side, the Rules have virtually no political content . . . .
>
> A second feature of the civil side is an assumption of "anonymity" . . . . [O]ne never knows in advance in a civil case whether one will be a plaintiff or defendant . . . . Further, with trans-substantive pleadings, one never knows the kind of case that may be involved. With these theories of anonymity and neutrality, one can make claims that—whatever the rules—we all suffer them equally, and thus that the Federal Rules of Civil Procedure have no political content.[215]

However, as Professor Resnik pointed out, in practice, civil rights plaintiffs will be women or minorities, while the defendants must necessarily be those "acting under color of state law."[216] Similarly, while "in some kinds of cases, corporations may be either plaintiffs or defendants, corporations are the defendant employers in Title VII cases. In tort litigation, corporations are more frequently the defendants than the plaintiffs."[217] (Even in tort cases that are nominally between individuals, the defendants are likely to be defended by their insurers, who are also repeat players in the system.) Thus, neither the theory of neutrality nor the theory of anonymity is true in practice. As Professor Resnik noted:

> [T]he civil side resembles the criminal rules in this respect: in a substantial category of cases we can know up front the identity of those who will be the "plaintiffs" and the "defendants." Thus, we can ask as Judge Carter does so well: will this rule help or hurt plaintiffs in general and civil rights plaintiffs in particular? In short, we do not all suffer the civil rules equally . . . .[218]

It is appropriate, therefore, to consider the political aspects of civil rules drafting, so that we may understand

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213. *Id.* at 2222-23, 2224 ("The political content of the Criminal Rules is reflected in the Criminal Rules drafting process. It is widely recognized that the United States Department of Justice is the critical 'repeat player' . . . I have often been told that, if 'Justice' is unhappy about a rule change, the change doesn't go forward.").

214. *Id.* at 2224.

215. *Id.* at 2224-25 (discussing the likelihood that rule drafters have always had visions that many would describe as "political").

216. *Id.* at 2225.

217. *Id. But cf. id.* at 2225 n.17 (citing Justice Jackson's concurrence in Hickman v. Taylor, 329 U.S. 495, 515 (1947)) (Jackson, J., concurring) ("Discovery is a two-edged sword, and we cannot decide this problem on any doctrine of extending help to one class of litigants.").

218. *Id.*

> the political agendas of the Rules . . . and see the values embodied in procedural systems that stress either 'getting to the merits' or case disposition, the value of systems that give trial judges ever-growing discretion, the values that contract opportunities for appellate review, the values that prize settlement over adjudication. I hope that we will turn our attention to the roles of the Department of Justice and other interest groups . . . in the creation, critique, and implementation of the Federal Rules.[219]

There is nothing intrinsically antagonistic between "getting to the merits" as opposed to "case disposal," but unfortunately, as defined by the repeat players in the civil side, "reform" has almost become code for procedures that, like the 1993 amended discovery rules, serve to deny many litigants equal access to the courts and remove the courts as a force for protecting society's relatively powerless members. The 1993 amendments are thus closely linked to other "reform" measures, which are outside the scope of this article, but deserve serious study, including mandatory court-annexed Alternate Dispute Resolution, and the so-called "tracking" system, which addresses courts' case-flow problems with rigid categorizations leading to a "systematic, differential treatment" of different types of civil cases.[220] As Professor Yamamoto noted:

> The reforms assume and facilitate a procedural system hospitable to litigants with disputes involving well-settled legal principles. Efficiency reforms make expendable those raising difficult and often tenuous claims that demand the reordering of established political, economic and societal arrangement, that is, those at the system's and society's margins. Had efficiency reforms been firmly in place in 1983, they would have deterred the *Korematsu* legal team from timely initiating and forcefully litigating the *coram nobis* proceeding.[221]

It is essential that the values of individual human rights not be swept aside in an all-consuming quest for efficiency at any price. As Judge Stephen Reinhardt wrote to Senator Joseph Biden and Representative Jack Brooks,

> The federal courts must continue to handle the kinds of cases that affect individual rights and involve the problems of the poor, the oppressed, the disabled and the victims of discrimination. Those who believe that these problems are beneath them do not understand the true purpose of our Constitution and our federal court system.[222]

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219. *Id.* at 2226.

220. Edward F. Mannino, Philadelphia, Chair of the Special Review Committee on the Federal Civil Rules, *quoted in* Howard Spierer, *Aggressive Case Management Highlights District Court Plans: Differential Treatment Relies on Tri-Level Case Tracking System*, LITIG. NEWS, Oct. 1992, No. 1, at 7. Civil Rights, asbestos suits, and "other federal statutory claims" [read - employment discrimination, ERISA, and the like], are lumped in with such "standard" cases as "simple torts," requiring minimal time, although more than social security appeals and enforcement of judgments. *Id.*

221. Yamamoto, *Efficiency's Threat*, *supra* note 17, at 21.

222. Letter from Judge Stephen Reinhardt (United States Court of Appeals for the Ninth

V. THE "ROCKET DOCKET"'S[223] CASE-MANAGEMENT APPROACH: PROMOTING EFFICIENCY AND CURBING DISCOVERY ABUSE WITHOUT PREJUDICE TO PARTIES WITH UNEQUAL RESOURCES

What are we then to learn from our experience with generations of rules amendments, and what strategies are available to counter potentially harmful trends? How, in short, can we achieve greater efficiency without sacrificing fairness?

"[T]he Federal Rules of Civil Procedure historically linked efficiency with access . . . . The drafters of the rules intended to simplify the traditional procedural model, making the system more accessible by making it more efficient."[224] In contrast to the 1993 amendments, the original Federal Rules

> along with the first forty years of amendments, revolutionized common law and code pleading regimes in basic philosophy as well as in technical form . . . . More people with legal grievances could gain entry into the system . . . . Liberal discovery prevented surprises. These reforms responded to the technical rigidity of prior systems, which had fostered procedural manipulation and emphasized decisions on the merits . . . . The drafters created a less technical system designed to test claims according to information discovered during the litigation, thereby opening the system to many previously

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Circuit) to Sen. Joseph Biden, (D-Del.), and Rep. Jack Brooks, (D-Tex.), *reprinted in* Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52, 52 (1993).

223. *See* Ray McAllister, *State's "Rocket Docket" is Fastest*, THE RICHMOND TIMES-DISPATCH, Dec. 27, 1987, at E-1.

> I heard [the term "Rocket Docket"] for the first time, maybe three or four years ago from a young lawyer with Hunton & Williams in Washington. . . .
>
> I was at a dinner party . . . and he referred to [the E.D. Va.] as a rocket docket. The name spread from there.
>
> The rocket docket is an apt name for the caseload of the Eastern District of Virginia, which has 12 judges in Alexandria, Richmond and Norfolk on active or semi-retired status.
>
> The district is, officially, the nation's speediest in handling cases: No. 1 of 93.
>
> The ranking is based on civil cases because most criminal cases, for which time limits are set by law, are tried equally as fast across the country. But there is a huge difference in civil cases.
>
> According to the annual report of the director of the Administrative Office of the U.S. Courts, there were 9,690 civil trials conducted by the nation's 742 federal district judges in the year ending June 30.
>
> From filing of lawsuit to final decision, the median time for the nation's civil trials was 14 months. In many districts, it was over two years, topped by the District of New Hampshire, whose median time is a whopping 34 months.
>
> But for the rocket docket's 282 cases, the median time is only 5 months, the fastest in the nation. In fact, 90 percent of the civil cases in the Eastern District of Virginia are tried within eight months, again the nation's best figure.
>
> No one else is even close.

Id.; *see also* Barrett, *infra* note 227.

224. Yamamoto, *Efficiency's Threat*, *supra* note 17, at 356 & nn.77-79.

excluded.[225]

It is, of course, axiomatic that justice delayed can be justice denied.[226] Delaying tactics can keep powerless litigants out of court as effectively as over-zealous "fast track" measures. The challenge, then is to look at case management from the perspective of eliminating many of the procedural roadblocks to a fair and equitable, as well as expeditious, resolution of cases without denying access to legitimate claimants. One way to accomplish this is to repeal the 1993 amendments, and to adopt as a model the orderly but fair procedures of the Eastern District of Virginia that have earned that court the nickname, "The Rocket Docket."[227]

A. The Need to Restructure Pretrial Case Management

Legal procedure, after all, is a means, not an end.[228] It makes sense, then, to target reforms that will, in fact, be effective. While reforming the practice of law is beyond the power of the Federal Rules of Civil Procedure, reforming pretrial management is not. For this reason, the 1993 amend-

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225. *Id.* at 357-58 & nn.77-80.

226. Yamamoto, *Case Management*, *supra* note 100, at 399 & 399 n.8 (citing Walter E. Hoffman, *Forward*, FEDERAL JUDICIAL CENTER, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS vii (1977) ("Justice delayed may be justice denied or justice mitigated in quality.").

227. *See* Paul M. Barrett, *"Rocket Docket:" Federal Courts In Virginia Dispense Speedy Justice*, WALL ST. J., Dec. 3, 1987, at 33:

> [I]n the federal courts of eastern Virginia, the judges hate foot-dragging and frivolous paper wars. Their courtrooms have come to be known widely as the "rocket docket." They produce speedy justice with a combination of unforgiving rules and fierce pride in efficiency. Around here, says one attorney, the judicial philosophy is "put up or shut up."

Id.

228. Roscoe Pound, *The Canons of Procedural Reform*, 12 A.B.A. J. 541, 543 (1926) ("That procedure is best which most completely realizes the substantive law in the actual administration of justice.").

Judge Walter E. Hoffman, after whom the United States District Courthouse in Norfolk is named, remembered that the Eastern District of Virginia was once as backlogged as any other federal court. Judge Hoffman became a judge in 1954 when, as he recalled:

> "[T]here was a backlog just in Norfolk alone of about 1,300 cases." Hoffman became interested in the problem, then more so as he attended seminars. "In 1962, I decided I was going to do something down there in Norfolk and Newport News, and set up a system for cutting off pretrial conferences, and setting pretrial dates and trials."
>
> The system involves setting trial dates, pretrial investigation cutoff dates, hearing dates, and the like. Hoffman says he doesn't think the formal system has been adopted by judges in Richmond and Alexandria. But a similar approach is used.
>
> . . . .
>
> As Hoffman notes, judges elsewhere often grant one side's request for a continuance, or postponement, then they grant the other side's. "So you have two continuances automatically before you get to trial," he says.

McAllister, *supra* note 223, at E1 (quoting Senior United States District Judge Walter E. Hoffman). Judge Hoffman was succeeded as Chief Judge of the Norfolk Division by Judge J. Calvitt Clarke, Jr., who took senior status in August of 1991, and then by Judge Robert G. Doumar, both of whom have maintained the "Rocket Docket"'s standards for efficiency and fairness.

ments' focus on changing attorney behavior and their reliance on wishful thinking is inherently unworkable. A "Rocket Docket" style of reform is workable, as the Eastern District of Virginia has shown for more than three decades.[229] Few would dispute that effective case management is desirable,

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229. *See* David O. Loomis, *Why Norfolk's "Rocket Docket" is the Fastest, Fairest, Federal Court in the Country*, THE VIRGINIAN-PILOT & LEDGER STAR, Apr. 3, 1988, at B-1 (Interview with Senior United States District Judge Walter E. Hoffman).

> Q. What is it about the way this court handles its civil caseload that warrants the name "the rocket docket"?
>
> A. When I took over in 1954 there were about 1,300 cases that were pending. Fortunately, I had the opportunity to work on various committees headed by Judge Alfred P. Murrah, who was the chief judge of the 10th Circuit. . . . He was my predecessor as director of the Federal Judicial Center in Washington.
>
> Judge Murrah was a man devoted to the proper administration of justice and trying to expedite cases through trial. In 1962 I adopted some of the suggestions that I had learned from Judge Murrah. And I put them into effect [in Norfolk's United States District Court] on August 1, 1962. I really didn't get any genuine relief on the docket until 1967 when two additional judges joined me here. We rapidly brought that docket right up to date. Whether it was the system or whether it was the added manpower, we very soon hit the top and have pretty well led the nation in most instances since then.
>
> Q. What are the rules that the judges here borrowed to keep cases moving?
>
> A. Probably the most important factor is setting a case for trial on a definite date and ensuring that that case will be tried on that date . . . .
>
> Q. Well. the records not only show that this federal bench is the speediest, they also show that it has the lowest reversal rate of any other in the country . . . .
>
> According to the latest annual report of the Administrative Office of the U.S. Courts, the 4th Circuit is by far the lowest in the nation in the reversal rate. So why aren't the administrative principles applied in this court, that make it work so quickly and so correctly, applied in other circuits?
>
> A. On Aug. 1, 1983, there became effective a Rule 16 under the Federal Rules of Civil Procedure. The rule called for pretrial conferences and scheduling management. The rule refers here to the Eastern District of Virginia, as a matter of fact. They came down here and got every form that we had and then compiled Rule 16, which was a shock to many courts when it came out, but we didn't have to change anything.
>
> The difficulty with this rule is that they did not place the language in mandatory form. And we now have many, many district courts that don't have a scheduling conference, and they don't have a final pretrial conference. The net result is that Rule 16 is not going to solve any problem until and unless they either mandate this scheduling conference and mandate the final pretrial conference so they make the judges and their staffs get these cases lined up on proper fashion . . . .
>
> We schedule the trial date right at the time that the lawyers first meet . . . . And everybody knows they've got a firm trial date because we don't miss the date here in Norfolk . . . .
>
> But we are about to get involved in a more serious situation. My prediction is that new sentencing guidelines which are now in effect for anybody who commits a [federal] crime on or after Nov. 11, 1987, mean that practically all of our criminal cases are not going to have to be tried . . . .
>
> Q. Does that mean that this docket is going to be swamped again?
>
> A. We'll probably make out better than most of them . . . . All of the courts are going to be in bad shape. I give it four years, then Congress is going to have to move [to amend the civil pretrial rules].

Id.

at least in theory, but many argue that it is not possible in practice,[230] because it "obviously" requires a larger court staff,[231] or more time on the part of overworked judges,[232] or because judges find it difficult to learn enough about each case to control discovery effectively.[233] The use of magistrate judges in pretrial matters is also perceived to offer lawyers tempting opportunities to engage in time-consuming and expensive discovery disputes, frustrating case management.[234] As Judge Milton Pollack perceptively remarked:

> Most judges do not like to become overly involved with discovery matters. The Courts are reluctant to become involved with the factual development of a case. The Courts have by and large either abdicated or lost control of the pre-trial discovery phases of complex cases. Consequently, cases take shape without judicial management. Judges stand aloof and prefer the solitude and loftiness of dealing with "legal" matters, ignoring the cardinal circumstance that the facts invariably shape the legal result—whether through settlement or trial.[235]

The 1993 amendments will require judges to become involved with the factual development of the cases,[236] taking litigation decisions out of the hands of the parties and their counsel. As at least one commentator has noted, the 1993 amendments provide that courts "will now be asked to assume responsibility for determining what discovery, beyond a bare minimum, will be necessary. It is at best unclear that the court will be able to acquire the necessary level of knowledge about each case to make this type of decision."[237]

Other piecemeal proposals to streamline the present hodge-podge approach to case management have included the use of special masters,[238] and

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230. *See, e.g.*, Schwarzer, *Monsters*, *supra* note 70, at 180 (arguing that moving from individual calendars to master calendar constitutes diminution of individual responsibility, which is heavy price to pay). Judge Schwarzer asserted, without explanation, that, "given the present heavy and growing criminal and civil caseload in the federal courts, few judges are able to set early *credible* trial dates." *Id.*; *cf.* Frank Green, *Court District in State Viewed as Model*, RICHMOND TIMES DISPATCH, Dec. 2, 1991, at A1 (noting that Eastern District of Virginia, with one of nation's busiest calendars, typically disposes of cases within four months).

231. Edmund Wright, *Controlling Discovery Abuse: A Microcosm of Procedural Reform*, 66 LA REVUE DU BARREAU CANADIEN 551, 567 (1987).

232. Kieve, *supra* note 13, at 80 (asserting that judges find suggestion of more active role, "well, funny").

233. Schwarzer, *Monsters*, *supra* note 70, at 180.

234. The Norfolk Division of the Eastern District of Virginia does not normally assign pretrial matters to magistrate judges, who have their own dockets (also managed by the central docket clerk). However, parties may elect to have their case heard by a magistrate judge instead of a district judge if they wish.

235. Milton Pollack, *Discovery—Its Abuse And Correction*, 80 F.R.D. 219, 223 (1978).

236. Brieant, *supra* note 14, at 466.

237. *Id.*

238. *See* David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055, 1057 (1979) (discussing implementation of rules by special masters); Irving R. Kaufman, *Use of Special Pre-Trial Masters in the "Big" Case*, 23 F.R.D. 572, 578 (1959) (using

the assignment of each case to a magistrate judge for all pretrial matters, and then to a particular district judge for trial.[239] But while the time for such tinkering changes is long past, the procrustean 1993 amendments are ill-conceived, at best, and will have to be repealed before serious progress can be made.

As the "Rocket Docket"'s success illustrates, there is a readily available solution: to implement a systemic streamlining of the pretrial process that does not favor one class of litigants over another, and does not require the judge to assume the role of litigation strategist for either side.

B. What Measures Should Be Adopted for Effective, Fair Case Management?

The Eastern District of Virginia has been praised as "so efficient that it could be used as a model for the rest of the country."[240] As the Norfolk

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special masters would reduce burden on judges, lead to better preparation at trial, and increase likelihood of early settlement); *see also, e.g.*, Eggleston v. Chicago Journeyman Plumbers' Local Union No. 130, 657 F.2d 890, 904 (7th Cir. 1981) (recommending use of special master rather than magistrate to expedite discovery), *cert. denied*, 455 U.S. 1017 (1982); United States Oil Co., Inc. v. Koch Refining Co., 518 F. Supp. 957, 963 (E.D. Wis. 1981) (special master appointed to make recommendations for disposition of discovery motions); Park-Tower Dev. Group, Inc. v. Goldfield, 87 F.R.D. 96, 99 (S.D.N.Y. 1980) (ordering that special master's rulings be final and subject to court review until filing of master's final report).

Authority for such recommendations is derived from the Federal Magistrate's Act of 1988, 28 U.S.C. § 636(b)(2) (amended 1979), allowing a judge to appoint a magistrate as special master without regard to FED. R. CIV. P. 53(b), which provides that "reference to a master shall be the exception and not the rule." *See* Oliver v. Allison, 488 F. Supp. 885, 888 (D.D.C. 1980) (findings of magistrate designated as special master should be accepted "unless clearly erroneous" per rule 53(e)(2)). *But see* Pope v. Harris, 508 F. Supp. 773, 777 (S.D. Ohio 1981) (finding that "clearly erroneous" standard not required due to magistrate's limited advisory function). *See generally* James R. Withrow & Richard P. Larm, *The Big Antitrust Case: 25 Years of Sisyphean Labor*, 62 CORNELL L. REV. 1, 49 (1976) (use of special masters during pretrial period speeds discovery process in large antitrust cases).

239. It is sometimes assumed that such a system provides for more effective case management. *See, e.g.*, David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1983 (1989) (citing this practice as an example of efficient case management).

However, in the Norfolk Division of the Eastern District of Virginia, the judges do not keep separate calendars. Two full-time docket clerks manage the court's calendar as a whole, and firm trial dates are set according to the court's overall availability of courtrooms and judges, not according to any one judge's schedule. Preliminary motions may be ruled on by any judge available if the judge assigned to the case is unavailable, and the judges eat lunch together daily, which affords an opportunity to talk about pending matters as needed.

Litigants do not necessarily know which judge will try the case, as assignments may be changed at the last minute; if one judge becomes unavailable to try a case, another judge will try it, instead of the case being rescheduled for the first open date on the original judge's calendar. Through this system, the court's resources are kept in full use, allowing more cases to be tried, and preventing one judge's calendar from delaying the operation of the court as a whole. Conversation with Mrs. Michael Gunn, Docket Clerk (Fall 1987).

240. Green, *supra* note 230, at A1. Green cited a paper by University of Kansas Professor A. Kimberly Dayton, which noted:

The Eastern District of Virginia, with one of the nation's heaviest civil and criminal

experience proves, a well-run docket means that each case takes less, rather than more time for admittedly overburdened judicial officers to handle.[241] According to Professor A. Kimberly Dayton, the Eastern District of Virginia handled nearly twice the national average of civil and criminal cases, disposing of the equivalent of 647 civil cases per judge, with an average of fifty-nine civil and criminal cases going to trial during the most recent available statistical year, 1990.[242] The Norfolk division's success in maintaining a backlog-free civil docket, despite heavier than average criminal and asbestos dockets, refutes the argument that streamlining pretrial procedure is not feasible in district courts with heavy criminal and civil caseloads, even with a master calendar system.[243]

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caseloads, does not have a problem with undue expense or delay with respect to its civil or criminal caseload. Given this, it is difficult to understand why the dockets of so many federal courts are hopelessly backlogged.

Id.

241. Barrett, *supra* note 227, at 33. This approach to pretrial management, although not perfect, is manifestly more fair and reasonable than the procrustean pretrial process contemplated by the 1993 amendments. The purpose of pretrial management should be to facilitate the movement of cases through the docket, not to be a substitute for trial. *See* Identiseal Corp. v. Positive Identifications Sys., Inc., 560 F.2d 298, 302 (7th Cir. 1977) (parties, rather than court, should determine litigation strategy); Padovani v. Bruchhausen, 293 F.2d 546, 548-49 (2d Cir. 1961) (federal rules were intended to eliminate the evils of special pleading, which should not be brought back under guise of pre-trial).

242. Green, *supra* note 230, at A3. The national average, given the same statistical weighting, was 448 civil cases and 36 trials completed per judge. *Id.*

243. Judge Schwarzer apparently dismissed the Norfolk model out of hand:

> [G]iven the present heavy and growing criminal and civil caseload in the federal courts, few judges are able to set early *credible* trial dates. Some courts attempt to do it by essentially moving from individual assignment to master calendars, with any available judge trying the case. Many judges, as well as litigators, would view this diminution of individual responsibility for cases as a heavy price to pay.

Schwarzer, *Monsters*, *supra* note 70, at 180.

Judge Schwarzer did not explain why Norfolk's district judges have been setting early credible trial dates since the early 1960s, despite having a criminal caseload approximately 50% higher per judge than any other court in the United States. *See* Green, *supra* note 230, at A1. Green noted that in the statistical year 1990, a total of 5,263 felony and civil cases was filed in the Norfolk district court, amounting to 513 civil cases per judge, with an average time to trial in the civil cases of four months. The national average, given the same statistical weighting, was 448 civil cases and 36 trials completed per judge. *Id.* at A3.

Responding to comments such as those of Judge Schwarzer, Justice Louis Ceci of the Wisconsin Supreme Court commented that "[p]art of the problem with discovery has to do with the fact that too many judges are the victims of tight shoes and twisted shorts." Eric Herman, *Putting The Rocket In The Docket*, 76 A.B.A. J. 32, 32 (1990) (quoting Justice Louis Ceci):

> The judge also stressed the importance of setting a firm date for trial, saying, "It's amazing how much lawyers can get done if they know it's crash and burn next month."
>
> Many panelists praised U.S. District Judge Robert Merhige Jr., known for quick case disposal and an uncrowded "rocket docket." Merhige, of Richmond, Va., recommended that each judge control his or her docket. When judges set firm trial dates, attorneys do not have time for discovery abuses if they hope to win cases, he said.

At the 1989 ABA Annual Meeting, however, Judge Schwarzer dismissed the suggestions of United States District Judge Robert Merhige Jr., Chief Judge of the Eastern District of Virginia's

An essential component of the "Rocket Docket" approach is the system of two mandatory pretrial conferences in every civil case.

1. Pretrial Conferences and Scheduling Based on a Master Calendar System

It has been said that the hallmark of the managerial judge is early intervention in and control over the civil litigation process.[244] However, this need not always mean the judge's personal involvement in the minutiae of individual cases, if, as in the Eastern District of Virginia, the early intervention comes in the form of setting up and enforcing an effective pretrial procedure.[245]

In the Eastern District of Virginia, the pretrial process begins with an initial pretrial conference (usually handled by a law clerk or docket clerk), held within weeks of the first responsive pleading or motion. All counsel must be present, and must provide the court with dates when they will be available. All must agree to a firm trial date no more than six months away from the date of the initial pretrial conference (unless special permission is obtained from a judge).[246] Once set, the trial date is immutable, so the case

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Richmond Division, as "unworkable," insisting, despite the 30-plus years of success in the Eastern District of Virginia, that their system is "simply not feasible." *Id.*

The Eastern District of Virginia, notwitstanding Judge Schwarzer's disbelief, has managed to keep to its system of firm trial dates for more than thirty years. Green, *supra* note 230, at A1, A3, despite the fact that it encompasses the port city of Norfolk, the Washington, D.C. suburbs, and the I-95 drug corridor cities of Richmond and Petersburg, and therefore has an abundance of drug cases, as well as shipyard-related asbestos cases.

244. Yamamoto, *Case Management*, *supra* note 100, at 403-04.

245. *Id.* at 405. Professor Yamamoto pointed out:

> The managerial judge also controls the pretrial process by controlling discovery. [The judge] does so by setting discovery schedules pursuant to rules 16, 26(b)(1) and 26(f), by preventing the filing of "unreasonable" discovery requests and responses . . . and perhaps most important, by "limiting" discovery *at the outset* even before there has been abuse or overuse.

Id.

246. Out of town counsel must have local counsel, whether or not the out of town counsel is admitted to the bar of the Eastern District of Virginia. The local counsel may represent the out of town counsel at the initial pretrial conference, though not at the final pretrial conference. However, the out of town counsel who is absent from the initial pretrial conference must provide local counsel with the out of town counsel's available dates, and is held to those dates. If out of town counsel becomes unavailable for trial at the last minute, local counsel is expected to try the case.

See E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 313 (1986) (perhaps the most important single element of effective managerial judging is setting a firm trial date). Professor Elliott suggested that limiting the amount of time available before trial creates incentives for attorneys to establish priorities and to narrow areas of inquiry and advocacy to those they believe to be truly relevant and material, thus reducing the amount of resources invested in litigation. *Id.* at 313-14 (footnote omitted); *see also* Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 258 n.13 (1985) (firm trial dates encourage parties to establish priorities).

appears on the docket (and the attorneys' calendars) only once. Everyone concerned knows that the case will be settled or tried by that date.

Working backward from the trial date, dates for other pretrial matters such as the final pretrial conference, discovery cutoffs, attorneys' conference, and other matters are set, and made binding in an initial pretrial order prepared by the docket clerk for the judge's signature.[247] This procedure is an essential part of the "Rocket Docket"'s case management system. Unlike the 1993 amendments, however, this system puts the calendar under the court's control, but without requiring the judge to learn the details of each case during the pretrial stage,[248] and without taking the litigation out of the hands of the parties or their attorneys.

The 1993 amendments distort the concept of a pretrial conference by improperly substituting the pretrial conference for a trial on the merits on at least some matters.[249] This is certain to work to the disadvantage of minorities, the disabled, and other plaintiffs in unequal positions relative to their opponents. Additionally, although not specifically required, Judge Schwarzer's proposed "motion for clarification" will likely become standard defense practice. According to Judge Schwarzer, such a motion (and its attendant hearing)

> would serve the purposes of a Rule 16 conference. It would bring the judge into the issue defining and narrowing process at an early stage, but only when needed . . . . When a judge does become involved, it will be in a meaningful way rather than in what is now

247. At the initial pre-trial conference, the trial date and time and location are set (no more than six months from the date of the initial pre-trial conference). The final pretrial conference is set three weeks before the trial. The attorneys' conference, at which all exhibits must be exchanged, is two weeks before the final pre-trial conference, and the *de bene esse* deposition cutoff date is one week before the attorneys' conference. The defendant(s)'s discovery cutoff is two weeks before the *de bene esse* cutoff, and the plaintiff(s)'s discovery cutoff is one month before the defendant(s)'s cutoff date. Third-party complaints, and any cross-claims or counterclaims can be filed up to 30 days after the initial pre-trial conference. Oral argument is rarely heard on any motion, and no party may request a hearing on any motion without first ascertaining her own and her opponent's available dates, and providing those dates to the court. Thus, when hearings are set, they are also immutable. Motions are heard in the morning, before any trials start for the day, and during recesses in trials, so no time is wasted. *See* Eastern District of Virginia worksheets and pre-trial order (on file with author). *See generally* E.D. VA. LOCAL RULES 12(E).

248. *Cf.* Second Circuit Committee on the Pretrial Phase of Civil Litigation, *Final Report* (1986), *reprinted in* 115 F.R.D. 349, 458 (1986), suggesting courtwide management procedures:

> The important point is that there must be some central supervision over crowded dockets in multi-judge courts utilizing the individual calendar system, or that, at a minimum, there be a recognized collective obligation to respond to the self-generated action of the judge whose docket, particularly whose criminal docket, is in arrears. *The advantages of the individual calendar cannot justify rigid adherence to that system at the expense of the rights of individual litigants.*

Id. (quoting United States v. DeLeo, 422 F.2d 487, 496 (1st Cir.), *cert. denied*, 397 U.S. 1037 (1970)) (emphasis added).

249. *See* Padovani v. Bruchhausen, 293 F.2d 546, 548-49 (2d. Cir. 1961) (pretrial conference should not become a substitute for trial).

> often a perfunctory Rule 16 conference. A motion for clarification of the disclosure obligation will call on the judge to address the case in the context of the documents and information previously disclosed and the issues they have raised. By advancing the definition and narrowing of issues, such motions would serve to focus cases early in the litigation and forestall wasteful activity.[250]

The possibilities of manipulating such a system into increased obstruction and delay are fertile indeed. In contrast, the Eastern District of Virginia's system, without requiring one minute of a district or magistrate judge's time, makes the existing Rule 16 initial pretrial conference meaningful by setting firm, credible dates for discovery cutoff and trial, so that litigants must focus cases early in the litigation and forestall wasteful activity. Plaintiffs typically file their discovery requests before the initial pretrial conference, and opposing counsel either raise any objections to already-served discovery requests or commit at the pretrial conference to responding on time. This commitment becomes part of the pretrial order. The defendant has thirty days to complete discovery after the close of the plaintiff's discovery, but if the defendant adds extra witnesses during that time, the plaintiff may either depose them or request that they be excluded (a request that is frequently granted).[251]

It seems clear that the 1993 amendments will generate a series of minitrials during the pretrial phase in order to define issues subject to mandatory disclosure, and this, along with the Rule 26 provision for filing all disclosures with the court, seems a bizarre way, at best, of reducing delay and promoting fairness and efficiency.

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250. Schwarzer, *Monsters*, *supra* note 70, at 181. Judge Schwarzer noted:

> Resort to motions would be minimized by requiring a prior conference of counsel. Abuse of the motion process, as well as evasion of the obligation to disclose, would be deterred moreover by the prospect of having later to come before the same judge to request discovery. A lawyer who appears to have misused or frustrated the system, or filed a false certificate, will not be in good standing before the judge whose discretion she seeks to invoke. In addition, abuse would be deterred by the threat of sanctions, shifting the resultant fees to the party making a baseless motion or opposing it without reasonable grounds, as under Rule 37(a)(4).

Id.

251. In the Eastern District of Virginia, for example, objections to discovery requests must be filed in writing within 15 days after service of the request, and the objection does not extend the time for answering any discovery not objected to. E.D. VA. LOCAL RULE 11.1(D). If discovery motions are filed, a response is due within 11 days of service, E.D. VA. LOCAL RULE 11.1(G), and after the court has ruled on the discovery motion, compliance is required within 11 days, unless otherwise ordered by the court. E.D. VA. LOCAL RULE 11.1 (H).

The "Rocket Docket," by its own internal operating rules, requires motions to be ruled on within 30 days, and requires a written explanation from each judge if any motion is not ruled upon within 60 days. Oral argument is rarely entertained on motions, and when necessary, is set for the nearest Friday, after ascertaining counsel's availability on that date. Court schedules have built-in times to accommodate emergency motions. Conversation with Mrs. Michael Gunn, Docket Clerk, E.D. Va. (Fall 1987).

2. Limiting Only Non-party Depositions

The 1993 amendments will more than likely have the undesirable effect of forcing courts to become involved in every deposition, perhaps reviewing transcripts to determine whether to allow an extension beyond time limits enacted pursuant to Rule 26(b)(2), or whether to force parties to depose fewer than all parties and experts in cases where the parties and expert witnesses exceed Rule 30(a)(2)(A)'s limit of ten depositions per side.

It is at best questionable whether arbitrary limits, absent effective pretrial management, will have any beneficial effect. If such limits are deemed desirable, however, a better solution would be to adopt a reasonable numerical limit on *non-party* depositions only, similar to that in use in the Eastern District of Virginia, and to couple this restriction with the implementation of an effective pretrial management system.

3. Promptly Applying Existing Sanctions for Delay or Non-compliance

If the docket is managed effectively, the existing sanctions, including witness exclusion, the preclusion of claims or defenses, and imposition of fees and costs when a party or counsel behaves obstructively, are adequate. Under the 1993 amendments, however, sanctions for incomplete or evasive disclosure are limited to those expenses incurred in "making the motion," *not* in "obtaining the order" compelling discovery, as under the previous rules.[252] This is an additional obstacle that the information-rich litigant will be able to use as a weapon of attrition against a less financially secure, information-poor opponent. Under the 1993 amendments, one who unsuccessfully moves for an order compelling such disclosure is liable for all the opponent's resultant costs and fees. These, of course, can greatly exceed the costs of "making the motion," and under the amended rules will be an additional weapon against a less financially secure litigant.

The party seeking disclosure under the 1993 amendments will also be precluded from seeking court intervention, on pain of sanctions, without making a good faith effort to obtain disclosure.[253] Again, this unfairly favors the information-rich defendants, who can delay disclosure and file endless

252. *See* text of amended Rule 26, *supra* note 7; *see also* Brieant, *supra* note 14, at 468 n.3.

253. Such an effort is likely to be futile, and serve as an additional drain of time and resources on those occasions when the opponent is acting in bad faith. *See, e.g.*, Bell v. Automobile Club, 80 F.R.D. 228 (E.D. Mich. 1978), *cert. denied*, 442 U.S. 918 (1979). In *Bell*, the defendant Automobile Club concealed a relocation study and other materials known as the "book of blacks," which plaintiffs had sought to discover. *Id.* at 231. The court found no excuse for defendant's failure to produce these materials, and assessed $52,089.73 against defendants to offset plaintiffs' additional discovery costs. *Id.* at 235. The court noted that if defendants had been acting in good faith, they should have disclosed the existence of the materials sought, adding "[d]iscovery is not to be treated as a game of hide and seek." *Id.* at 231; *see also* Ohio v. Crofters, Inc., 75 F.R.D. 12, 22-23 (D. Colo. 1977), *aff'd sub nom.* Ohio v. Arthur Anderson & Co., 570 F.2d 1370 (10th Cir.) (trial court imposed expenses and attorney's fees of almost $60,000 on defendant Arthur Anderson for failure to produce requested documents, including costs of defendant's appeals applying Rules 37(a) and (b)), *cert. denied*, 439 U.S. 833 (1978).

quibbling motions for clarification knowing that if they lose their opponent's motion, the sanctions involved will be limited to those costs involved in "making the motion," not in "obtaining the order," under the disparate standards of amended Rule 26. Also, if the plaintiff, lacking information that only the defendant possesses, cannot prove that defendant's disclosure is incomplete, amended Rule 37(a)(4)(B) provides that the plaintiff will pay *all* the defendant's costs and fees involved in resisting the plaintiff's motion.

Civil rights plaintiffs and other plaintiffs whose financial position is typically less secure than that of the defendant, may well be forced to abandon legitimate causes of action after being forced to go into court repeatedly to obtain disclosure (after first making futile efforts to obtain voluntary disclosure from an obstructive opponent) without a hope of having the attendant costs reimbursed.

When management fails to control abuse, sanctions are necessary, but without effective management, sanctions are demonstrably ineffective as a means of controlling discovery.[254] Judges will continue to need to use sanctions to encourage compliance with rules and court orders, and to prevent more powerful parties from imposing financial burdens on their opponents or on the judicial resources of the United States.[255] Sanctions, if used at all, should be used consistently as a predictable part of an overall system of efficient case management, and not, as under the 1993 amendments, as a means of intimidating and discouraging the less powerful, non-institutional litigants from bringing their cases, or from seeking compliance from their more powerful "repeat player" opponent.

C. Advantages of the "Rocket Docket"'s System of Pretrial Management

The importance of fairly allocating scarce judicial resources cannot be over-emphasized. Proponents of increased judicial management have argued all along that the self-policing nature of discovery permits attorneys to harass the opposition and obtain delays even though the aggrieved party may later seek a protective order. If attorneys fail to cooperate, having the trial judge control the pace of discovery from the beginning means that improprieties can be dealt with without delay.[256] As judges act upon their increasing concerns about various litigation practices, and begin to participate more actively in the pre-trial process, the much-decried "atmosphere of lawlessness"[257] in pretrial practice must diminish as litigators come to view the judge as an ally

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254. *See* Edna Selan Epstein, *An Up-Date on Rule 37 Sanctions After* National Hockey League v. Metropolitan Hockey Club, 84 F.R.D. 145, 171 (1979) (concluding that discovery sanctions cannot control abusive requests).

255. Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 706 (1983); *see also* Underwood, *supra* note 190.

256. 1983 Advisory Committee's Notes, *supra* note 2, at 220.

257. Walsh v. Schering-Plough Corp., 758 F.2d 889, 895 (3d Cir. 1985) (citing Miller, *Dinosaur*, *supra* note 6, at 21).

against the common enemy: the abusive opponent.[258] Unlike the 1993 amendments, the "Rocket Docket" plan has the advantage of being even-handed: it does not burden either plaintiffs or defendants disproportionately, and has been recommended as a national model by a congressional advisory group.[259]

This is not to say that the "Rocket Docket"'s system is without flaws. Senior United States District Judge Richard Williams of the Rocket Docket's Richmond division, for example, carries the "rocket" concept over into the courtroom, and has been criticized for "streamlin[ing] trials so much that . . . he doesn't let you try your own case."[260] Attorneys with backlogs in their own case management systems may find it difficult, at first, to organize their cases in the shorter time frames. Also, it is sometimes difficult for local attorneys to convince attorneys from out of town that the dates set in the pretrial scheduling order are serious, credible dates, and that they will be met.

However, implementation of any system that eliminates backlogs and promotes expeditious trial and settlement of pending cases will require adjustments. With cases appearing on their calendars only once, even attorneys with personal caseload backlogs will gradually find their backlogs diminishing and their workload lessened accordingly. Unlike the essentially untested provisions of the new mandatory disclosure rule, the "Rocket Docket" approach has been working effectively for many years, despite vacancies on the bench, and a heavier than average civil and criminal caseload. Any approach this effective should be given a fair trial.

CONCLUSION

The 1993 discovery rules amendments should never have been enacted. These amendments purport to move federal litigation from a purely adversarial mode to a shared power relationship between bench and bar,[261] but they are fatally flawed, and should be repealed. The practical demonstration that the Eastern District of Virginia has provided for the last three or four decades shows clearly that courts can deal effectively, fairly, and even efficiently with increasing civil and criminal caseloads, without "novel case procedures, extrajudicial dispute resolution techniques . . . or other extraordinary rules of practice . . . contemplated by Congress."[262]

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258. Miller, *Dinosaur*, *supra* note 6, at 17.

259. *See, e.g.*, *Virginia's U.S. Courts Feeling Effects of Political Stalemate*, RICHMOND TIMES-DISPATCH, December 8, 1991, at E-4 (noting the court's efficiency despite unfilled vacancies on the courts of the Eastern District of Virginia).

260. *See* McAllister, *supra* note 223, at E-7 (even those lawyers who criticize Judge Williams agree that a fast-moving docket is preferable to a slow-moving one, both in unclogging the courts and in saving litigants time and money).

261. *See* Sherwood, *supra* note 41, at 570-71 (trial judge could minimize discovery abuses and delays by supervising discovery from inception).

262. Green, *supra*, note 230, at A3 (citing interview with Professor Dayton concerning her report on operation of Eastern District of Virginia) ("She said that 'despite the court's exceptionally burdensome caseloads, case management figures for the Eastern District of Virginia

Until the 1993 amendments can be repealed, district courts should suspend the amendments' application for as long as possible pursuant to the authority of the Civil Justice Reform Act.[263] Repealing the 1993 amendments and adopting some version of the Eastern District of Virginia's "Rocket Docket" provisions will help to assure that the balance of power is not unfairly weighted toward monied, 'repeat player' litigants, and against those who would try to right institutionalized, as well as individual wrongs.[264]

Implementing the Eastern District of Virginia's pretrial system may, in the short run, create some time demands on already overworked federal judges, but the experience of the "Rocket Docket" has shown that the demands and frustrations are far less in the long run, as cases are expedited and dockets cleared.[265] We must repeal the unfair, unworkable, and unrealistic[266] 1993 amendments to the discovery rules, and begin implementing procedures that allow a claimant to get to court in a reasonable length of time, without setting up a one-sided system that denies the disadvantaged their day in court.

The alternative is grim. To paraphrase Professor Miller's 1985 warning, if the 1993 amendments remain in effect, "we might as well chisel off the legend above the Supreme Court's door, 'Equal Justice Under Law,' and replace it with a sign that says, 'Closed—No Just, Speedy, or Inexpensive Adjudication for Anyone.'"[267]

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show that the court has significantly shorter disposition rates' for both civil and criminal cases 'than the national average'.").

263. *See In Re* Amendments to Federal Rules of Civil Procedure, Temporary Order Regarding Discovery Procedures (Nov. 30, 1993) (unpublished opinion; on file with author). By temporary order filed in the United States District Court, District of Hawai'i, the United States District Judges Kay, Fong, and Ezra declined to implement the 1993 amended discovery rules.

264. As the Powell dissent to the 1980 amendments pointed out:

> [T]oo often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants . . . . Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of out legal system.

48 U.S.L.W. 4497, 4500 (May 6, 1980) (Powell, J., dissenting).

265. *See* MILLER, *supra* note 1, at 30.

266. *See* Prepared Statement of Alfred Belcuore, President, Federal Bar Association, *Statement of the Federal Bar Association to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, Feb. 7, 1992, at 4 (on file with author) ("[A]lmost uniformly, different chapters and individuals characterize the proposed amendments relating to Rule 26(a)(1) as unworkable, unrealistic, unnecessary and potentially counterproductive.").

267. MILLER, *supra* note 1, at 14-15.

APPENDIX A

New material is underlined and deleted material is lined through.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

(a) REQUIRED DISCLOSURES; ~~DISCOVERY~~ METHODS TO DISCOVER ADDITIONAL MATTER.

(1) INITIAL DISCLOSURES. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such a computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) DISCLOSURE OF EXPERT TESTIMONY.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence

under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain 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; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list 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 in deposition within the preceding four years.

(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 (2) (B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e) (1).

(3) PRETRIAL DISCLOSURES. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name, and if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days

thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) FORM OF DISCLOSURES; FILING. Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(5) METHODS TO DISCOVER ADDITIONAL MATTER. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or (a) (1) (C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) IN GENERAL. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. ~~It is not a ground for objection that t~~The information sought need not be ~~will be in~~admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) LIMITATIONS. By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. — The frequency or extent of use of the discovery methods ~~set forth in subdivision (a)~~otherwise permitted under these rules and any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) ~~the discovery is unduly burdensome or expensive~~ the burden or expense

of the proposed discovery outweighs its likely benefit taking into account the needs of the case, the amount in controversy, ~~limitations on~~ the parties' resources, and the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

~~(2) INSURANCE AGREEMENTS. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.~~

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(4) TRIAL PREPARATION: EXPERTS.

~~Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b) (1) of this rule and acquired or developed in the anticipation of litigation or for trial may be obtained only as follows:~~

(A)~~(i)~~ A party may ~~through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b) (4) (C) of this rule, concerning fees and expenses as the court may deem appropriate.~~ depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a) (2) (B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial~~,~~ only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the

court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivisions ~~(b) (4) (A) (ii) and (b) (4) (B) of this rule~~; and (ii) with respect to discovery obtained under ~~subdivision (b) (4) (A) (ii) of this rule the court may require, and with respect to discovery obtained under~~ subdivision (b) (4) (B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

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

[subsection (c) provides for the issuance of protective orders which justice may require in various factual situations "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ."]

(d) ~~SEQUENCE AND~~-TIMING AND SEQUENCE OF DISCOVERY. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

. . . .

[Under subsections (e)(1) and (2), parties have a continuing obligation to supplement and correct disclosures or discovery responses in certain circumstances set forth therein]

(f) MEETING OF PARTIES; PLANNING FOR DISCOVERY~~CONFERENCE. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes~~ Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery

plan. The plan shall indicate the parties' views and proposals concerning:

(1) ~~A statement of the issues as they then appear;~~ what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a) (1) were made or will be made;

(2) ~~A proposed plan and schedule of discovery;~~ 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) ~~Any limitations proposed to be placed on discovery;~~ 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) ~~A~~any other ~~proposed~~ orders ~~with respect to discovery~~ that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).; and

. . . .

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan. . . .

. . . .

(g) SIGNING OF DISCLOSURES, DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, ~~for discovery or~~ response, or objection ~~thereto~~ made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party ~~who is not represented by an attorney~~ shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification ~~that the signer has read the request, response, or objection, and~~ that to the best of the signer's

knowledge, information, and belief, formed after a reasonable inquiry, ~~it~~ the request, response, or objection is:

(~~1~~A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(~~2~~B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(~~3~~C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

APPENDIX B

New material is underlined and deleted material is lined through.

RULE 33. INTERROGATORIES TO PARTIES

(a) AVAILABILITY; ~~PROCEDURES FOR USE.~~ Without leave of court or written stipulation, a~~A~~ny party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, i~~I~~nterrogatories may~~, without leave of court,~~not be served ~~upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party~~ before the time specified in Rule 26(d).

(B) ANSWERS AND OBJECTIONS.

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection ~~shall be stated in lieu of an answer~~ and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories~~, except that a defendant may serve answers or objections within days after service of the summons and complaint upon that defendant. The court may allow a~~A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(~~B~~C) SCOPE; USE AT TRIAL. Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to

fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(ED) Option to produce Business Records.

* * * *

APPENDIX C

As amended December 1, 1993, Rule 30 provides as follows. New material is underlined and deleted material is lined through.

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

(a) When Depositions May be Taken; When Leave Required.

(1) ~~After commencement of the action, any~~ party may take the testimony of any person, including a party, be deposition upon oral examination without leave of court except as provided in paragraph (2). ~~Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule.~~ The attendance of witnesses may be compelled by subpoena as provided in Rule . ~~The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in MORE THAN TEN DEPOSITIONS BEING TAKEN UNDER THIS RULE OR RULE 31 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time. (b) Notice of Examination: General Requirements; ~~Special Notice; Non-Stenographic~~ Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be pro-

duced as set forth in the subpoena shall be attached to, or included in, the notice.

(2) ~~Leave of court is not required for the taking of a deposition by the plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless the person's deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.~~

~~If a party shows that when the party was served with notice under this subdivision (b)(2) the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the~~

~~deposition, the deposition may not be used against the party.~~

The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, if may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the costs of the recording; Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) ~~The court may for cause shown enlarge or shorten the time for taking the deposition.~~ With prior notice to the deponent and other parties, any party may designate another method to record the deponent's

testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(4) ~~The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at the party's own expense. Any objections under subdivision (c), any changes made by the witness, the witness' signature identifying the deposition as the witness' own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required~~

~~by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.~~ Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

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(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1)~~, and (d)~~, a deposition taken by ~~telephone~~ such means is taken in the district and at the place where the deponent is to answer questions ~~propounded to the deponent~~.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other ~~means ordered in accordance with~~ method authorized by subdivision (b)(42) of this rule. ~~If requested by one of the parties the testimony shall be transcribed.~~ All objections made at the time of the examination to the qualifications of the officer taking the deposition, ~~or~~ to the manner of taking it, ~~or~~ to the evidence presented, ~~or~~ to the conduct of any party, ~~and any other objection to~~ or to any other aspect of the proceedings~~,~~ shall be noted by the officer upon the record of the deposition~~, Evidence objected to shall be~~; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Schedule and Duration: Motion to Terminate or Limit Examination.

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

(2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(3) At any time during ~~the taking of the~~ a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) ~~Submission to~~ Review by Witness; Changes; Signing. ~~When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign, together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion~~

~~to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.~~ If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate on the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.

(1) The officer shall certify ~~on the deposition~~ that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall ~~then~~ securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending ~~or send it by registered or certified mail to the clerk thereof for filing~~ or send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefore, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

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APPENDIX D

FED. R. CIV. P. 26, Advisory Committee's Notes (1993). All material is new; underlining is for emphasis only.

> SUBDIVISION (A). Through the addition of paragraphs (1)-(4), this 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. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3) as the trial date approaches to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B). . . .
>
> PARAGRAPH (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement[sic] or to modify the nature of the information to be disclosed. . . . By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly, the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. . . .
>
> Authorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. . . . [T]he present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.
>
> . . . .
>
> Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of

the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody or control of the disclosing party. . . . As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

. . .

The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence "relevant to disputed facts alleged with particularity in the pleadings." . . . Broad, vague, and conclusory allegations sometimes tolerated in notice pleading — for example, the assertion that a product with many component parts is defective in some unspecified manner — should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1) (B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such material had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product.

Likewise a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person. . . .

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made . . . .

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonably under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, . . . and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subparagraph (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonable available to it. As its investigation continues, and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, . . . they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation . . . affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1) . . . should be adequate and appropriate in most cases.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefore.

APPENDIX E

Amended Rule 37 reads as follows. New material is underlined, while deleted material is lined through.

RULE 37. FAILURE TO MAKE DISCLOSURE OR COOPERATE IN DISCOVERY: SANCTIONS

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

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

(2) Motion.

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

. . .

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

(4) ~~Award of Expenses of Motion~~ and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity ~~for hearing,~~ to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the ordermaking the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the ~~opposition to the motion~~ opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity ~~for hearing,~~ to be heard, re-

quire the moving party or the attorney ~~advising~~ filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

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(C) ~~Expenses on~~ Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

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

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (~~1~~A) the request was held objectionable pursuant to Rule 36(a), or (~~2~~B) the admission sought was of no substantial importance, or (~~3~~C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (~~$~~ D) there was other good reason for the failure to admit.

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

. . .

**** [sic]

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the development and submission ~~framing~~ of a proposed discovery plan~~by agreement~~ as ~~is~~ required by Rule 26(f), the court may, after

opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

APPENDIX F

As amended in December, 1993, Rule 16 provides as follows. New material is underlined, and deleted material is lined through.

RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

****

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties ~~.~~ , by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file ~~and hear~~ motions; and

(3) to complete discovery.

The scheduling order may also include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(-) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(~~5~~6) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in ~~no~~ any event ~~more than 120~~within 90 days after ~~filing of the complaint~~ the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge ~~when authorized by district court rule upon a showing of good cause~~.

(c) Subjects ~~to be Discussed~~ for Consideration at Pretrial Conferences. ~~The participants a~~At any conference under this rule ~~may consider and take action~~ consideration may be given, and the court may take appropriate action, with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumula-

tive evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;

(5) the appropriateness and timing ofsummary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

(~~5~~7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(~~6~~8) the advisability of referring matters to a magistrate judge or master;

(~~7~~9) ~~the possibility of~~ settlement ~~or~~ and the use of ~~extra-judicial~~ special procedures to ~~receive~~ assist in resolving the dispute when authorized by statute or local rule;

(~~8~~10) the form and substance of the pretrial order;

(~~9~~11) the disposition of pending motions;

(~~10~~12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(~~11~~16) such other matters as may ~~aid in~~ facilitate the just, speedy, and inexpensive disposition of the action. At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may requirethat a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.