

# Procedural Politics and Federal Rule 26: Opting-out of “Mandatory” Disclosure

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## I. INTRODUCTION

The legal profession has long labored with a sullied public image. Whatever its genesis, public distaste often has been tempered by perceptions of the necessity and worth of law, lawyers and a stable legal system.<sup>1</sup> Those tempering perceptions, however, appear to have faded. Harsh criticisms, and sometimes derision, emanate from legislators, attorneys, clients, community groups, and study committees.<sup>2</sup> The breadth and intensity of the criticism is perhaps unparalleled in modern legal history.<sup>3</sup> Congress,<sup>4</sup> the federal executive branches, state

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<sup>1</sup> Stephen Landsman, *Adversarial Process* (1985) (describing traditional views of the adversarial legal system and recent criticisms).

<sup>2</sup> See Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559 (1992), [Hereinafter Quayle, *Civil Justice*].

<sup>3</sup> See *Vox Populi, The Public Perception of Lawyers: ABA Poll*, ABA B. J. 60, (Sept. 1993) (revealing that lawyers had received a 40% approval rating and that 56% of the respondents had volunteered an unfavorable impression of lawyers). See generally Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 498, 516 (1912) (as an early critic of the modern legal system, criticizing employment of “the whole energy of our judicial system. . . in working out a consistent, logical, minutely precise body of [precedent]” without reference to larger social impacts).

<sup>4</sup> Jeffrey Stempel, *New Paradigm, Normal Science, Or Crumbling Construct? Trends In Adjudicatory Procedure*, 59 BROOK. L. REV. 659, 683 (1993) (discussing trends affecting our understanding of adjudicatory procedure).

Congress has not been a completely silent partner of the judiciary in the

legislatures, bar associations and community law groups have responded by offering a plethora of litigation reforms.<sup>5</sup> Federal and state judiciaries also have responded by offering their own far-reaching packages of reform. How are we to understand these overlapping, seemingly uncoordinated, initiatives? Are they generated by groups with appropriate authority and expertise? Will they fundamentally restructure the way lawyers lawyer and judges judge? The way lawyers and clients relate? The way disputes are resolved, and the kind of justice delivered?<sup>6</sup>

The recent adoption of the mandatory disclosure amendments to Federal Rule of Civil Procedure 26 provides an apt focal point for discussion of these questions. These amendments, effective December 1, 1993, eliminate formal deposition-interrogatory-document discovery at the front end of the pretrial process. They mandate a party's *disclosure* of relevant information.<sup>7</sup> No discovery requests are required or allowed before disclosure. These amendments may well fundamentally change the structure and tenor of civil litigation discovery procedure.<sup>8</sup> For

formulation of litigation policy. In fact, in the area of substantive law Congress has been quite active, by reversing or modifying Court decisions-particularly regarding civil rights statutes-thought to be insufficiently sensitive to statutory rights. Congress similarly enacted comprehensive copyright legislation in response to perceived problems of copyright infringement unremedied through litigation. But in the area of procedural law, Congress has ordinarily been less active, usually deferring to the judicially led rulemaking process or responding to judicially initiated calls for statutory reform.

Even before the current ferment, however, there were notable exceptions to my posited world of judicially centered mechanism of court reform.

*Id.*

<sup>5</sup> "Adjudicatory procedure is the means by which particular litigation is administered. Litigation reform is the means by which aspects of the litigation process, including adjudicatory procedure, are altered, marginalized, reduced in importance, bypassed, eliminated or changed." Stempel, *supra* note 4, at 693-94.

<sup>6</sup> Professor Jeffrey Stempel believes that the current changes in adjudicatory procedure evidenced by the civil rules amendments will affect litigants disproportionately. "I conclude that, on balance, the new order (or disorder) in litigation reform, like the new order in adjudicatory procedure, weighs more in favor of the socioeconomically advantaged than did its predecessor." Stempel, *supra* note 4, at 695.

<sup>7</sup> See *infra* Part III. See also Ralph K. Winters, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992) (supporting the mandatory disclosure provision to amended Rule 26(a)(1)); William H. Schwarzer, *Query: Slaying the Monsters of Cost and Delay: Would Mandatory Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178 (1991) (favoring disclosure over discovery); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991) (hereinafter "Hope Over Experience") (supporting mandatory disclosure).

<sup>8</sup> See *infra* Part III.

some courts, that is. Fifty-two federal district courts have in some fashion opted-out of the most significant amendments to Rule 26.<sup>9</sup> Why have more than half the district courts opted-out? Why the disuniformity nationwide?

The Rule 26 mandatory disclosure amendments have been embroiled in controversy<sup>10</sup> since their inception.<sup>11</sup> The Federal Judicial Center<sup>12</sup> forcefully urged adoption of the amendments both before the Supreme Court (the Court promulgated the amendments with three justices sharply dissenting)<sup>13</sup> and before Congress (the House voted to veto the

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<sup>9</sup> See *infra* note 25.

<sup>10</sup> *Symposium Reinventing Civil Litigation: Evaluating Proposals For Change*, 59 BROOK. L. REV. 655 (1993). ("The many judges, academics and practitioners who support the recent amendments long have criticized the civil litigation system as a failure in need of drastic reform, branding it costly, slow and ineffective. But others see the amendments as yet another instance in a growing trend to reduce access to the federal courts, particularly for the disenfranchised, who arguably face the greatest need for access.")

<sup>11</sup> See *infra* Part IV.

An objective description of the disclosure amendments might well be "incremental" or "a first step" or "barely non-trivial." They require the disclosure of nothing that is not mandatory under the present rules.

Winters, *supra* note 7, at 271. The conceptual underpinnings of the amendments emerged in two articles. One was authored by magistrate judge Wayne Brazil, a member of the Federal Rules Advisory Committee, and the other by retired judge William Schwarzer, now the director of the Federal Judicial Center. See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1348 (1978); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721-23 (1989) [hereinafter Schwarzer Rules].

<sup>12</sup> See 28 U.S.C. § 620 (1990) (creating and defining the duties of the Federal Judicial Center). The Center is currently funded by an appropriation of \$17,795,000 and employs a permanent staff of 134 employees. Federal Judicial Center, *About the Federal Judicial Center 1* (May 1992).

<sup>13</sup> Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 507 (1993) (Scalia, J., dissenting, joined by Thomas and Souter, JJ).

In particular [the justices] disliked the additional layer of discovery practice provided by required "disclosure" under new Rule 26. They also saw the disclosure mechanism as undermining the traditional adversary method of civil litigation to the extent that it required counsel to do work on behalf of their opponents. Additionally, the dissenters saw the discovery changes as "premature" in light of the Civil Justice Reform Act of 1990 . . . , which requires that each federal district court craft a Delay and Expense Reduction Plan, thus endorsing a period of experimentation with discovery that could be thwarted by nationwide changes in the Rules.

Stempel, *Trends*, *supra* note 4, at 680 (discussing trends affecting our understanding of adjudicatory procedure).

amendments, the Senate did not<sup>14</sup>).<sup>15</sup> The rest of the legal community joined in almost universal opposition.<sup>16</sup> Of the 264 written submissions to the Judicial Center on the proposed rule amendments, 251 opposed the amendments.<sup>17</sup> Despite strong and strident opposition, repeated statements about the proposed amendment's impending demise<sup>18</sup> proved to be, in Mark Twain's words about his own reported death, "greatly exaggerated."

In its recent status report the Federal Judicial Center, perhaps unintentionally, aptly captured the shifting, contingent nature of the mandatory disclosure amendments.

Rule 26(a)(1). . . has been rejected more often than the other disclosure subsections of the rule. . . .52 courts have exempted cases. . . . of these, however, sixteen require disclosure through local rules or under the C.J.R.A. plan, and thirteen specifically give individual judges authority to require initial disclosure. Cases in thirteen of those courts would also be exempt from expert and pretrial disclosure.

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<sup>14</sup> Randall Samborn, *Rules For Discovery Uncertain*, NATIONAL LAW JOURNAL, Dec. 20, 1993, at 1 (reporting the House veto of the mandatory disclosure amendment via H.R. 2814 and the Senate's failure to pass a veto resolution). *See also* Randall Samborn, *A Bill To Stop Change Dies*, NATIONAL LAW JOURNAL, Dec. 6, 1993, at 3 (reporting on the demise in the Senate of a House-approved measure that would have eliminated the mandatory disclosure provision from amended Rule 26 and placing the blame for this on 11th-hour pressure from plaintiff's and civil rights lawyers who additionally sought to remove the limits on depositions and interrogatories).

<sup>15</sup> Stempel, *Trends*, *supra* note 4, at 681 (discussing the mechanics of Congressional action on the rule's amendments).

<sup>16</sup> Reinette Cooper Dreyfuss, Speech at the 1994 annual meeting of the American Association of Law School Civil Procedure and Litigation Sections Seminar on Amended Rule 26. Most judges, the bar, academia, community watchdog groups, the defense bar, and the civil rights bar were opposed to the changes. There is always some opposition to rules changes. However, the sheer volume of opposition to the changes to Rule 26 was unprecedented. Randall Samborn, *New Discovery Rules Take Effect*, NATIONAL LAW JOURNAL, Dec. 6, 1993, at 3. *But see* Winters, *supra* note 11, at 275 ("I did not, and do not, regard the Bar as universally opposed to the proposals. [I]mportant segments of the organized Bar have little incentive to lessen the cost of litigation by reducing the need for unnecessary legal services. Those who seek to reform discovery are, therefore, unlikely to ever find their proposals commanding enthusiastic support among the organized Bar.').

<sup>17</sup> Alfred W. Cortese and Kathleen L. Blaner, *A Change In the Rules Draws Fire*, NATIONAL LAW JOURNAL, Oct. 18 1993, at 25.

<sup>18</sup> Winters, *supra* note 11, at 274 ("I am convinced that discovery reform is doomed to much organized resistance and little organized support').

On the other hand—and, again, if current decisions regarding the federal rule amendments hold and if local disclosure requirements continue in effect—in two-thirds of the courts parties may face initial disclosure requirements: 32 courts where the federal rules are fully in effect and 34 courts where the local rules or C.J.R.A. plan require it or the individual judge may order it.<sup>19</sup>

How have the Federal Rules, the centerpiece of modern federal courts, reached this apparent state of “primordial ooze?”<sup>20</sup> Why has the multi-faceted push to reform a troubled civil justice system left the federal courts and practitioners, at least temporarily, in this suspended state of ambiguity and uncertainty?<sup>21</sup> More questions have been raised than

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<sup>19</sup> Federal Judicial Center, *Implementation of Disclosure in Federal District Courts with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (March 1, 1994).

<sup>20</sup> United States District Court Judge Norma Shapiro, Speech at the annual meeting of the American Association of Law Schools Civil Procedure and Litigation Section's Seminar on Amended Rule 26. Notes and audio on file with authors. See Randall Samborn, *Rules For Discovery Uncertain*, *supra* note 14, at 1.

<sup>21</sup> Civil justice reform has taken many forms. Congress created the Federal Courts Study Committee (FCSC), which issued the *Report of the Federal Courts Study Committee* (1990). The FCSC was created pursuant to the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642., Title I: Federal Courts Study Act, 102 Stat. 4644. The FCSC report analyzed the problems of the federal courts over a fifteen-month period and proposed detailed recommendations to Congress. *Id.* at 3. The FCSC report findings were an instrumental building block in the Congressional formulation of the Civil Justice Reform Act (CJRA). The report found that the annual number of civil and criminal cases filed in the federal district courts since 1958 have trebled while the annual number of appeals filed in the courts of appeals have increased more than tenfold. *Id.* at 5. The FCSC report proposed changes to the civil justice system that, if adopted, were projected to reduce filings in appellate courts by 16 percent and in district courts by about 37 percent. *Id.* at 27.

Civil justice reform also emerged on another front. In 1989, Senate Judiciary Chair Joseph Biden requested that the Brookings Institution and the Foundation for Change assemble a diverse task force to study the civil justice system. The task force's report, *Justice For All: Reducing Costs and Delays in Civil Litigation*, provided another foundational pillar for the CJRA. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. II 1990)). The Civil Justice Reform Act is Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified in various sections of 28 U.S.C.). See also S. Rep. No. 416, 101st Cong., 2d Sess. 13 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6853; H.R. REP. NO. 733, 101st Cong., 2d Sess. 11 (1990). The CJRA requires the ninety-four federal district courts to assess their dockets in order to promulgate procedures for decreasing the expense and delay involved in civil lawsuits. Mandatory disclosure is one of the primary suggested reforms of the CJRA. Grass-roots advisory committees

answered by mandatory disclosure reforms and each district court's prerogative to opt-out. May the federal district courts opt-out of some but not all of the changes in the discovery rules? Was it contemplated that by opting out of mandatory disclosure without opting out of deposition-discovery limits, district courts might restrict overall discovery and shift litigation power? How do opt-out orders and the Rule amendments interface with the litigation reforms mandated by Con-

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were created to advise every district court on appropriate procedural reform. *See also* Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J. LAW. PUB. POL. 1 (1992), *but see* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993) (hereinafter "Unconstitutional Rulemaking") (criticizing the Civil Justice Reform Act).

The proposed Access to Justice Act is an extension of former Vice President Quayle's legal reform effort. The act addresses several areas of federal litigation, most notably mandatory disclosure and the adoption of the "English rule" on attorneys' fees (loser pays).

The Bush administration, through a 1991 Executive Order #12778, implemented a form of civil justice reform within the Executive Branch. The order seeks "reforms in the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases." *See* Memo of preliminary guidance on Implementation of the litigation reforms of Executive Order no. 12778, 57 Fed. Reg. 3640, 3640-41 (1992).

A populist litigation reform movement has also surfaced. *See* Margalynne Armstrong, Book Review, *Legal Breakdown: 40 Ways to Fix Our Legal System*, 32 SANTA CLARA L. REV. 297 (1992). The populist legal movement centers on self-help as a means of employing "non-attorneys to represent themselves in simple legal matters." *Id.* at 301. Populist legal movements have two general goals: "(1) simplifying and improving access to justice and (2) decreasing the number of attorneys and eliminating barriers to legal access imposed to protect the financial interests of attorneys." *Id.* at 301-2.

Within this setting of the Congressional, Executive, and Populist reform movements, the mandatory disclosure amendments emerged. In 1992 the Advisory Committee and Federal Judicial Conference proposed, and in 1993 the Supreme Court promulgated and Congress declined to veto, sweeping amendments to Federal Rules 4 (service), 11 (sanctions), 16 (pretrial conference), 30 (depositions), 33 (interrogatories), and 37 (discovery sanctions). Discovery reform formed the heart of the amendments and Rule 26's mandatory disclosure formed the heart of the reform. Fed. R. Civ. P. 11, 16, and 26, 1993 Amendments. Changes to Rule 11 include removing the sanctions for discovery abuse and placing them within Rule 37. Also, Rule 11 now provides a "safe harbor" for litigants during which sanctions will not be levied if proper action is taken.

Rule 16, the pretrial scheduling conference rule, is now linked to the discovery process. The rule requires that the judge issue a scheduling order and in some instances hold a conference with representatives of all parties. The changes to the rule allow the judge expanded powers to control the litigation through the pretrial conference.

gress' Civil Justice Reform Act—pursuant to which every district court is to reduce delay and cost by adopting a procedural reform plan and rules tailored to its needs and priorities?<sup>22</sup> To what extent are the effectiveness of all of these changes contingent upon judges and magistrate judge's commitment to active discovery management? As one commentator observed, "the [procedural reform] process has been tortured and the fight is far from over."<sup>23</sup>

The recent amendments to Rule 26, mandating disclosure of relevant information without the need for traditional party-initiated discovery, are set within a multitude of efforts to remedy the oft-described ills of the civil justice system.<sup>24</sup> As context for our inquiry into what many perceive as fundamental changes in the discovery process and, in turn, lawyer-client relationships, Part II briefly describes the Temporary "Opt Out" Order of the Hawai'i federal district court. Part III addresses the mandatory disclosure amendments, their underlying bases and accompanying criticisms. Part IV describes how that particular reform emerged and some of the political considerations at play. Part V offers a glimpse of the future.

## II. THE HAWAI'I FEDERAL DISTRICT COURT'S TEMPORARY "OPT-OUT" ORDER

By Temporary Order dated November 30, 1993,<sup>25</sup> the Hawai'i federal district court stepped into an uncertain discovery future by

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<sup>22</sup> A related state court question is, should the Hawai'i Supreme Court adopt the federal mandatory disclosure amendments as part of the state rules of procedure? 28 U.S.C. §§ 471-82 (1988 & Supp. II 1990).

<sup>23</sup> John K. Chapin, *Major Changes In The Federal Rules Become Effective, Federal Litigator*, vol. IX, no. 1 (Feb. 1994), at 4. See also, Randall Samborn, *Bill to Stop Change Dies*, *supra* note 14, at 3 (discussing the prospects for Congressional repeal of amended Rule 26).

<sup>24</sup> See *supra* note 21. See also Stempel, *supra* note 4, at 659 (discussing change within the adjudicatory system).

<sup>25</sup> *Temporary Order Regarding Discovery Procedures*, Nov. 30, 1993 In The United States District Court For the District of Hawai'i.

### PREAMBLE

On April 22, 1993 the Supreme Court of the United States referred to the Congress of the United States various proposed amendments to a number of the Federal Rules of Civil Procedure. Until the time Congress adjourned on November 24, 1993, it was uncertain as to whether Congressional approval would be given to all, some, or none of the proposed amendments prior to the

opting-out of some, but not all,<sup>26</sup> of the recently promulgated discovery

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effective implementation date of December 1, 1993. Although the United States House of Representatives passed a bill making some modifications, the United States Senate adjourned without taking any action. Accordingly, the proposed amendments will take effect as of December 1, 1993.

Sections (a), (b), (d), and (f) of 26 Fed. R. Civ. P. provide that a district court may by order or by local rule modify or "opt out" of certain provisions of Rule 26. It is the opinion of this Court, and supported by recommendations from the Advisory Group appointed pursuant to the Civil Justice Reform Act, that certain of the proposed modifications contained in Rule 26 are neither desirable nor consistent with the manner of practice in this District. In view of the uncertainty as to what action, if any, Congress would take as to Rule 26, and the lack of time for this Court to duly consider the final form of Rule 26 prior to its implementation date of December 1, 1993, it is the decision of this Court, to the extent of its authority, to maintain the status quo under the provisions of Rule 26 as they are of this date as supplemented by this District's Local Rules, and to determine within a reasonable period after December 1, 1993 which provisions, if any, together with such modifications as may be deemed appropriate, should be adopted by this District by way of amendments to this District's Civil Justice Reform Act Plan and Local Rules.

#### TEMPORARY ORDER

Therefore, the Court hereby promulgates the following Temporary Order. IT IS HEREBY ORDERED that this District will "opt out" of the proposed amendments to Rule 26, to the extent authorized under Fed. R. Civ. P. 26 (a), (b), (d), and (f), to the effect that the provisions of Rule 26 as they are of this date as supplemented by this District's Local Rules and this District's Civil Justice Reform Act Plan shall remain in full force and effect. All other Federal Rules of Civil Procedure that make reference to Rule 26 shall be construed as referring to the appropriate section of Rule 26 as it is of this date.

Dated: Honolulu, Hawai'i, this 30th day of November, 1993.

*Order Establishing Guidelines For The Application Of The Amendments To The Federal Rules Of Civil Procedure To Existing Cases*, Jan. 10, 1994 In The United States District Court For The District of Hawai'i.

Effective December 1, 1993, the Federal Rules of Civil Procedure have been amended substantially. On November 30, 1993, this Court filed a TEMPORARY ORDER REGARDING DISCOVERY PROCEDURES which temporarily "opt-out" of the application in the District of Hawai'i of the new amendments to Fed. R. Civ. P. 26(a), (b), (d), and (f). However, this Order did not negate the effectiveness of the substantial changes to Rules 1, 4, 5, 11, 12, 15, 16, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, and 76 of the Federal Rules of Civil Procedure, did not negate the adoption of a new Rule 4.1 of the Federal Rules of Civil Procedure, and did not negate the effectiveness of the substantial changes to Rule 26(c)(e) and (g) of the Federal Rules of Civil Procedure.

The Order enacting these changes also provides that these amendments shall govern, "insofar as just and practicable", all proceedings in the civil cases



amendments.<sup>27</sup> The Temporary Order's opt out on the mandatory disclosure and its "opt-in" on other discovery changes, in cumulative effect, sharply limit discovery for some, and perhaps many, cases. The Order leaves in place the amendments to Rules 30 and 33 that limit depositions to 10 per *side* and interrogatories to 25 per party including subparts. Those limitations on formal discovery at the back end were to be the *quid pro quo* for the Rule 26 informal disclosure of information at the front end. Opting out of the Rule 26 front end disclosure while accepting the Rules 30 and 33 deposition-interrogatory limits may well shift the balance of litigation power in discovery. On the one hand, presumptive limits on formal discovery may discourage wasteful deposition and interrogatory practices. On the other hand, plaintiffs may be prejudiced in multi-party or complex cases where the defendants possess most of the relevant evidence.<sup>28</sup> For certain types of cases, the Temporary Order thus may involve regular motions to or conferences

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pending on December 1, 1993 and thereafter. This Court is aware it must provide some guidance to litigants and practitioners concerning how this Court will apply these amendments to cases filed prior to December 1, 1993.

IT IS THEREFORE ORDERED that (1) all amendments to the Federal Rules of Civil Procedure except the discovery amendments (as designated hereinbelow) shall apply immediately to all civil actions, (2) the amendments to Rules 26(c), (e), and (g), 28, 29, 30, 31, 32, 33, 34, 36, 37, 38 of the Federal Rules of Civil Procedure ("the discovery amendments") shall apply completely to all pending civil actions in which an initial scheduling conference is held on or after December 1, 1993 before a Magistrate Judge pursuant to Fed. R. Civ. P. 16, and (3) the discovery amendments shall be applied to other civil actions already pending on December 1, 1993 only upon order of the Court and only to the extent ordered by the Court.

Dated: Honolulu, Hawai'i, this 10th day of January, 1994.

<sup>26</sup> The Temporary Order does *not* opt-out of the 1993 amendments to sections c, e and g of Rule 26, nor does it opt-out of the Rules 30 and 33 limits to depositions and interrogatories.

<sup>27</sup> Authority for the district courts to opt-out lies in FED. R. CIV. P. 26 (a)(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 . . . ." According to the Advisory Committee, authorization of local variations in mandatory disclosure "is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990 [see *infra* note ], which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation." Committee Notes, *supra* note . The Committee also observed that disclosure "will not be appropriate for all cases [citing social security reviews and government collections as examples], and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant." *Id.*

<sup>28</sup> See *infra* Section III.

with magistrate judges requesting waivers of the deposition-interrogatory limits according to as yet undefined criteria.<sup>29</sup>

The Local Rules Committee of the Hawai'i federal district court is undertaking a thorough evaluation of the court's Temporary Order and its impact on civil discovery.<sup>30</sup> Four alternative paths are manifest at this time: (1) finalize the Temporary Order in its current form, eliminating mandatory disclosure without altering deposition-interrogatory limits and thereby limiting overall discovery; (2) rescind the Temporary Order, thereby "opting-in" to the Rule 26 mandatory disclosure amendments with all their attendant problems (discussed in Section III); (3) issue a new order (or promulgate a local rule) rejecting the blanket applicability of the Rule 26 mandatory disclosure requirements while authorizing judges or magistrate judges to order disclosure without discovery requests on a case specific basis;<sup>31</sup> or (4) alter the Temporary Order to reject in entirety the 1993 discovery changes to Rules 26, 30, 31 and 33, thereby reverting to the pre-amendments' discovery scheme which provided for judicial control over discovery through prior Rules 16, 26(b)(1), 26(c), 26(f) and 26(g). These alternative paths will be addressed in Part V in light of the discussions in Parts II, III and IV.

### III. RULE 26 AMENDMENTS: FROM DISCOVERY TO DISCLOSURE

This Part describes salient changes to Rule 26 and varying critiques of those changes.

#### *A. Mandatory Disclosure*

Mandatory disclosure is the most striking change to Federal Rule 26.<sup>32</sup> Rule 26 now requires the parties to disclose certain "core"

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<sup>29</sup> FED. R. CIV. P. 30 limits depositions taken without leave of court to 10 per side, and FED. R. CIV. P. 33 imposes a limit of 25 interrogatories per side including subparts.

<sup>30</sup> Co-author Yamamoto is a member of the Hawai'i federal district court Local Rules Committee. He was appointed after this article was substantially completed.

<sup>31</sup> As this article goes to the press, the Local Rules Committee of the Hawai'i Federal District Court is recommending to the court that the Temporary Order be rescinded and that the court's Local Rules be amended to authorize judges or magistrate judges to order disclosure on a case specific basis.

<sup>32</sup> FED. R. CIV. P. 26(a)(1) provides:

information without formal discovery requests. The Federal Rules Advisory Committee conceived of the mandatory disclosure provisions as the functional equivalent of court ordered interrogatories and document production requests.<sup>33</sup> The primary purpose of disclosure is efficiency—to “accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information.”<sup>34</sup> Its purpose is also to “eliminate certain discovery, [and] help focus the discovery that it needed.”<sup>35</sup> According to the Advisory Committee, 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. . . [of] the rule.”<sup>36</sup> Section B of

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**(a) Required Disclosures; Methods to Discover Additional Matter.**

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

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

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

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

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

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

See FED. R. CIV. P. 26 Advisory Committee Notes in commentary suggesting disclosure amendments.

<sup>33</sup> Advisory Committee Notes.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Part III addresses whether the Rule is likely to satisfy its stated purposes. The remainder of this section generally describes the disclosures mandated by the amended rules.

### 1. Initial Disclosures

#### *Witnesses*

Section 26(a)(1)(A) of the amended rule requires a party to identify the name, address and telephone number of those individuals "likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings."<sup>37</sup> The party is also required to identify the type of information these individuals are likely to possess. The party is required to identify witnesses whether or not their testimony will be supportive of the disclosing party's position.<sup>38</sup>

#### *Documents*

Section 26(a)(1)(B) requires disclosure of, "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."<sup>39</sup> The disclosure must produce relevant documents or be of sufficient specificity to "enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the

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<sup>37</sup> FED. R. CIV. P. 26(a)(1)(A).

<sup>38</sup> *Id.* All parties who make disclosures and later learn that the disclosure is erroneous or incomplete are required to supplement their initial disclosure with a corrective disclosure. Advisory Committee Notes. However, if the target party of the disclosure has been made aware of the error or incompleteness of a party's disclosure, and has received the corrective or additional information through other methods, the disclosing party is not required to supplement. Experts are required to supplement both their report and any testimony given in a deposition that is either erroneous or incomplete. *Id.* This duty to supplement must be carried out before the party's required pretrial disclosures are made.

<sup>39</sup> FED. R. CIV. P. 26(a)(1)(B). Disclosure includes "all potentially relevant items then known to the party whether or not supportive of its contentions in the case." Advisory Committee Notes.

requests.”<sup>40</sup> Section 26(a)(1)(B) encourages the actual production of documents, or at the very least, an accurate cataloguing and accounting of the documents.<sup>41</sup> By cataloguing documents the party does not waive objections based on privilege or work product immunity.<sup>42</sup> The party also preserves the right to object to the later production of listed documents on the grounds that the expense and burden of production is outweighed by the documents’ minimal relevance.<sup>43</sup>

A party’s obligations to disclose witness identities and document information are linked to the specificity and clarity of the factual allegations in the pleadings.<sup>44</sup> Disclosure is limited to information relevant to “disputed facts alleged with particularity in the pleadings.”<sup>45</sup> Section 26(a)(1) envisions two aids to the determination of the appropriate scope of disclosure: first, heightened fact pleading by the parties, and second, the parties’ refinement of issues at the Rule 26(f) discovery plan meeting prior to disclosure.<sup>46</sup> If an opposing party serves a broad pleading filled with conclusory allegations, and issues and disputed facts are not specifically identified at the discovery plan meeting, the responding party need not ascertain all “relevant” possibilities, do exhaustive research and respond in detail.<sup>47</sup>

Once relevancy is defined, the Rules contemplate a cooperative attorney and party inquiry into the party’s files. The Advisory Committee lists factors to aid counsel in delimiting the scope of that inquiry, including the complexity of the issues, the location, nature and number and availability of witnesses and documents and the time remaining

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> FED. R. CIV. P. 26(b)(5). The disclosing party must, however, list all protected documents “otherwise discoverable.”

<sup>43</sup> *Id.*

<sup>44</sup> FED. R. CIV. P. 26(a)(1)(A). “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.” Advisory Committee Notes.

<sup>45</sup> FED. R. CIV. P. 26(a)(1)(A).

<sup>46</sup> Advisory Committee Notes.

<sup>47</sup> See Advisory Committee Notes. The defendant is required to disclose only that material gathered through the preparation of its answer that is relevant to matters “alleged with particularity” in the complaint. Virginia Hench, *Can Mandatory Disclosure Curb Discovery Abuse? The 1993 Amendments to the Federal Discovery Rules and the Just, Speedy and Inexpensive Determination of Every Action*, 67 TEMP. L.REV. 401, 420 (1994). “The defendant is 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.” *Id.*

for compliance.<sup>48</sup> Another factor is the "extent of past working relationships between the attorney and the client particularity in handling related or similar litigation."<sup>49</sup> Attorneys with long-standing client litigation relationships bear a more extensive duty of inquiry. The controlling principle overall is that a party should disclose information "then reasonably available to it."<sup>50</sup>

### *Damages and Insurance*

Section 26(a)(1)(C) of the amended Rule requires a claimant to compute all categories of damages and provide supporting documents.<sup>51</sup> Section 26(a)(2) requires defendants to provide "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."<sup>52</sup> A defendant thus must now reveal not only the contents of its liability insurance policy, as required under former Rule 26(b)(2),<sup>53</sup> it must also provide the insurance agreement itself.<sup>54</sup>

### *Expert Testimony*

Section 26(a)(2) significantly alters the discovery treatment of experts.<sup>55</sup> The section envisions the elimination of courtroom surprises. Premised on the notion that an informed party, with a realistic assessment of the likelihood or potential failure of its claims at trial, will be more likely to settle, the rule mandates early and firm disclosure of an expert's intended testimony.<sup>56</sup>

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<sup>48</sup> Advisory Committee Notes.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> "Computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered." FED. R. CIV. P. 26(a)(1)(C).

<sup>52</sup> FED. R. CIV. P. 26(a)(1)(D).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* This disclosure does not make the insurance information admissible into evidence at trial.

<sup>55</sup> FED. R. CIV. P. 26(a)(2).

<sup>56</sup> Advisory Committee Notes. "Experts" are defined with reference to Rule 702 of the Federal Rules of Evidence. Advisory Committee Notes.

The section's most significant provision requires the trial expert to prepare a formal report prior her now mandated deposition.<sup>57</sup> The expert's report must detail, (1) opinions, (2) bases for the opinions, (3) all material "*considered*"<sup>58</sup> by the expert. This report preparation requirement is significant because it will likely change customary expert behavior. Attorneys rarely ask an expert to prepare an early report. Such a report tends to lock the expert into opinions and subject her to limiting cross-examination. The requirement is also significant because, as the Advisory Committee Notes indicate, disclosure of all material "*considered*" means the expert must disclose attorney work product given to the experts, including material provided as general background.

Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.<sup>59</sup>

This represents a sharp departure from the prevailing standard which requires an expert to disclose only documents that *impacted* upon her testimony or that she *relied* upon in forming her opinion.<sup>60</sup> The party with the burden of proof on an issue must make the initial disclosure of its expert's report and testimony before other parties are so obligated.<sup>61</sup>

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<sup>57</sup> FED. R. CIV. P. 26(a)(2)(B).

<sup>58</sup> *Id.* This includes any data, treatises or case assessments the witness considered in forming her opinions. The qualifications of the witness must also be listed, including a list of all publications authored by the witness within 10 years of the date of the intended testimony. The witness must also disclose other cases, in the past four years, in which her testimony was used. Finally, the witness must also disclose the compensation she is receiving for her testimony. *Id.*

<sup>59</sup> Advisory Committee Notes.

<sup>60</sup> *See* Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977).

<sup>61</sup> FED. R. CIV. P. 26 (a)(2)(B) and Advisory Committee Notes. In addition to the initial disclosures a party must disclose information in preparation for trial. FED. R. CIV. P. 26(a)(3). This disclosure includes the identity of each trial witness. *Id.* A party must indicate which witness' testimony is to be presented by deposition transcript. *Id.* If the deposition was not stenographically recorded, then the party must provide a transcript of the portions to be used. The party must also categorize its exhibits as to those it intends to offer into evidence and those it plans to use when necessary. *Id.* In the absence of contrary court order, these disclosures are to be made at least 30 days before the trial. *Id.* Unless the court orders otherwise, a party must object to the

## 2. Disclosure Mechanics

### *Meeting of Parties*

Amended Rule 26(f) requires the parties to meet and discuss the issues in the case with an eye toward early settlement and toward framing discovery.<sup>62</sup> At this meeting the parties also are directed either to make the disclosures mandated by the Rule or to arrange for those disclosures.<sup>63</sup> All parties entering an appearance are required to attend the meeting in person or through a representative.<sup>64</sup> The parties must work in good faith towards a mutually-agreed upon disclosure and discovery plan.<sup>65</sup> A written report outlining the plan must be submitted to the court within ten days following the meeting.<sup>66</sup> The Advisory Committee Notes contemplate that the "report will assist the court in seeing that the timing and scope of disclosures. . . and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case."<sup>67</sup>

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admissibility of the other party's disclosed list of exhibits, and object to the use under Rule 32(a) of a deposition designated under Rule 26(a)(3)(B), within 14 days after receiving the required pretrial disclosures. *Id.* If the party fails to do so, the court will deem those objections waived in the absence of a good cause showing. *Id.*

<sup>62</sup> *Id.* FED. R. CIV. P. 26(f). The discovery meeting triggers the deadline for the mandatory disclosure. Disclosure must be made within 14 days of the meeting. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> FED. R. CIV. P. 26(f)(1),(2),(3) and (4). This plan is to include any agreed upon deviations to the scheme of disclosure mandated by the Rule and the time at which the disclosures are due to the parties. *Id.* The plan is also to designate those issues which require discovery and the timetable for discovery. *Id.* Any changes to the discovery limitations imposed by the Rule and any additional restrictions the parties stipulate to impose upon their discovery abilities. *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Advisory Committee Notes. Former sub-section (f) of Rule 26 created a device for optional, party-initiated discovery conferences involving attorneys and the judge. The device was sparingly used. *Id.* The amendment to section (f) makes the conference, now called a meeting, mandatory among the parties. The judge does not participate in that meeting. The meeting must occur before disclosure and before the Rule 16 pretrial scheduling conference/order.

The Advisory Committee Notes state that changes in sub-section (f) do "not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements . . . and the presumptive limits on discovery." *Id.* The Committee Notes contemplate that this early judicial supervision authority and responsibility is "more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process." *Id.*



### *The Certification Requirement*

Amended Rule 26(g)<sup>68</sup> requires that every disclosure be signed by an attorney, "reminding the parties and counsel of the solemnity of the obligations imposed."<sup>69</sup> The signing attorney certifies that disclosure is complete and correct at the time it is made.<sup>70</sup> Counsel and parties are thereafter required to supplement initial disclosures.<sup>71</sup> All discovery requests, responses or objections also must be signed.<sup>72</sup> For all papers signed and filed during discovery, the signatory certifies compliance with essentially a Rule 11 reasonableness standard.<sup>73</sup> For Rule 26(g) violations, the court is authorized to impose an "appropriate sanction" upon the signing party or attorney.<sup>74</sup> The sanction may include attorneys fees.<sup>75</sup>

### *3. Limits On Disclosure*

Privileged material need not be disclosed.<sup>76</sup> A party claiming a privilege or work product immunity, however, must explicitly describe the information withheld.<sup>77</sup> The party is required to indicate the basis of the claimed protection and describe the information withheld in

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<sup>68</sup> FED. R. CIV. P. 26(g). The standards set forth in Rule 26(g) remain essentially the same as in the version of the rule prior to the 1993 amendments.

<sup>69</sup> Advisory Committee Notes.

<sup>70</sup> FED. R. CIV. P. 26(g)(1).

<sup>71</sup> FED. R. CIV. P. 26(e).

<sup>72</sup> FED. R. CIV. P. 26(g)(1).

<sup>73</sup> FED. R. CIV. P. 26(g)(2). The party is certifying that after reasonable inquiry, to the best of the signer's knowledge, information, and belief, the response, request, or objection is:

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

*Id.*

<sup>74</sup> FED. R. CIV. P. 26(g)(3).

<sup>75</sup> *Id.*

<sup>76</sup> FED. R. CIV. P. 26(b)(5).

<sup>77</sup> *Id.*

detail.<sup>78</sup> The description must be complete enough for the other parties to gauge the validity of the claimed privilege or immunity.<sup>79</sup>

*B. Criticisms Concerning Gamesmanship, Satellite Litigation, Cost and Missing the Mark*

This section summarizes principal criticisms of the mandatory disclosure amendments to Rule 26. These criticisms focus on, gamesmanship, satellite litigation, costs, and missing the mark.

*Gamesmanship, Satellite Litigation and Cost*

Some commentators believe that the Rule 26 mandatory disclosure scheme is based on a wish and a prayer.<sup>80</sup> Mandatory disclosure embodies no incentives and few disincentives for altering the ethical and economic-driven behavior of attorneys in an adversarial system.<sup>81</sup> Yet the scheme is premised on just such a behavioral metamorphosis. According to these commentators, mandatory disclosure, instead of defusing tensions and equalizing the playing field, will likely fuel adversary passions and gamesmanship. Experience has demonstrated that some attorneys in an adversarial system cannot be left to police themselves.<sup>82</sup> In the absence of vigorous case management by judges, blanket mandatory disclosure requirements will likely fail to reform modern adversarial litigation and may well exacerbate its faults. Satellite

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<sup>78</sup> *Id.* See Advisory Committee Notes.

<sup>79</sup> *Id.* In addition, parties moving for protective orders must now certify to the court that they have first made a good faith effort to resolve the discovery dispute with opposing parties. FED. R. CIV. P. 26(c). The Hawai'i federal district court's Temporary Order, *supra* note 25, does *not* opt-out of this requirement.

<sup>80</sup> Hench, *supra* note 47, at 429. ("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 decree of professional conduct.")

<sup>81</sup> *Id.*

<sup>82</sup> This is not to state broadly that all or even most attorneys are unscrupulous; rather it is a statement of general perceptions of segments of the public and scholars. Meade, *Discovery Abuse And a Proposed Reform*, *supra* note 99; Schwarzer, *supra* note 7; Lawrence M. Frankel, *Disclosure in the Federal Courts: A Cure for Discovery Ills?* 25 ARIZ. S. L.J., 249; Paul Lowell Haines, Comment, *Restraining the Overly Zealous Advocate: Time For Judicial Intervention*, 65 IND. L.J. 445 (1990) (detailing many of the abusive behaviors of overly zealous attorneys and concluding that attorneys need greater judicial supervision).

litigation will likely be an immediate consequence in some cases.<sup>83</sup> The zealous advocate is likely to exhaust all strategic avenues available to her client. The Rule's operative standard—requiring disclosure of material relevant to facts pleaded with particularity—encourages time-consuming and costly motions for clarification<sup>84</sup> for parties seeking to forestall meaningful disclosure.<sup>85</sup> According to Professor Virginia Hench, “[t]he 1993 discovery amendments will provide an obstinate litigant with fresh new sources of dilatory tactics. . . [leading to] endless rounds of ‘satellite proceedings’.”<sup>86</sup> From this perspective satellite litigation alone is likely to undermine any benefits achieved through across-the-board application of the mandatory disclosure rules.

Commentators thus predict an increase in pretrial costs. Even for the non-obstinate litigant, costs may well increase. Many conclude that the only way an attorney and party can safely avoid sanctions under the mandatory disclosure scheme is wasteful over-disclosure.<sup>87</sup> Over-disclosure would increase compliance costs as well as protective motions practice.<sup>88</sup>

In addition, for some, the Rule 26 amendments attempt to shape reform with a sledge-hammer rather than a scalpel. Mandatory disclosure blankets all cases. It may work well in some cases. It is unlikely, however, to work well in all cases. Rule 26 mandates disclosure without regard to the needs of the particular case, the relationship of the attorneys involved or the nature of the issues presented. For many cases, even where attorneys and litigants act in good faith, disclosure requirements will likely add another layer of disputation/negotiations/motions to the discovery process, thereby driving up costs. Mandatory disclosure may work well where parties and attorneys are cooperative and documents or other information are readily identifiable.<sup>89</sup> Otherwise, according to critics, mandatory disclosure promises to increase costs and time for attorneys and their clients.

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<sup>83</sup> See, e.g., Jeffery J. Mayer, *Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of Civil Procedure*, 12 REV. LITIG. 77, (1992). See also Hench, *supra* note 47, at 420.

<sup>84</sup> Schwarzer, *supra* note 7, at 178.

<sup>85</sup> Hench, *supra* note 47, at 420.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 433-34.

<sup>88</sup> Griffin Bell, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992).

<sup>89</sup> See *supra* note 181.

*Missing The Mark*

Another principal criticism of the Rule 26 mandatory disclosure amendments is that "automatic disclosure will not correct the dysfunction [within the civil justice discovery system], nor will it somehow transform the system into a model of cooperation."<sup>90</sup> Mandatory disclosure misses the mark.<sup>91</sup> Replacing "discovery with what amounts to an honor system of information exchange, is unlikely to reduce significantly the more prevalent forms of abuse."<sup>92</sup> From this perspective, Rule 26 now attempts to engraft cooperation onto an adversary system of civil justice without altering the fundamental oppositional structure of the system.<sup>93</sup>

First, the amendments to the Rule adopt an extremely broad relevance standard for triggering mandatory disclosure. "[T]he result of this vagueness will inevitably be confusion, disagreement, cost, and delay."<sup>94</sup> As discussed, this in turn will likely heighten attorney gamesmanship rather than minimize it. There is a sharp fear expressed that the overbreadth of the relevancy standard will lead to dramatic problems especially in complex tort and securities cases.<sup>95</sup>

Second, from this perspective, the amendments' hope for a "change [in] the culture of adversariness"<sup>96</sup> is based on a wishful view of reality

<sup>90</sup> Bell, *Automatic Disclosure in Discovery*, *supra* note 88, at 1. Bell's article, cited by Justice Scalia in his dissent to the Rule 26 amendments, discusses the resounding opposition to the amendments, and concludes that "while there might be problems with the existing system, the Committee's proposal was likely to exacerbate rather than solve them." Bell, *supra* note 88, at 1.

<sup>91</sup> Hench, *supra* note 47, at 432 ("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").

<sup>92</sup> *Id.*

<sup>93</sup> Bell, *supra* note 12. *But see* Michael E. Wolfson, *Addressing The Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 64 (1988) (mandatory disclosure is 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").

<sup>94</sup> Bell, *Automatic Disclosure*.

<sup>95</sup> *Id.* Complex cases such as the toxic torts, product liability, patent and securities class actions present the specter of a virtually unlimited documents disclosure. *Id.*

<sup>96</sup> Bell, *supra* note 88, at 13; Minutes of the Advisory Committee on Civil Rules 2 (Dec. 1, 1990) (quoting Committee members James Powers, Mariana R. Pfaelzer and Wayne D. Brazil).

and a tinge of irony. Magistrate Judge Wayne Brazil and former Federal Judge William Schwarzer, key architects of the Rule 26 changes, in past articles decried the economic and professional forces encouraging lawyer overzealousness in discovery.<sup>97</sup> Judge Brazil asserted that reforms would be ineffectual without a fundamental transformation in the current business realities of client representation.<sup>98</sup> The mandatory disclosure amendments, however, leave unaddressed the essential economic and professional forces driving much lawyering behavior in litigation.<sup>99</sup> Indeed, the amendments appear to allow or even foster sharp practices. "One who does not want to give information is also doing the interpretation of what has to be given."<sup>100</sup>

Amended Rule 26 thus seeks to replace the culture of adversary discovery with a cooperative informal scheme of disclosure, employing "appropriate sanctions" to ensure cooperativeness.<sup>101</sup> In light of most judges desire to avoid refereeing discovery disputes,<sup>102</sup> this scheme appears to rely on a flimsy stick. Without strong incentives or disincentives, "the misuse and overuse [of discovery devices would] continue to represent a viable and, at times, even appropriate expression of a lawyer's role as a zealous advocate."<sup>103</sup>

In addition to a flimsy stick and the absence of carrots, the Rule's hope for cooperativeness is seemingly undermined by the limiting

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<sup>97</sup> Brazil, *supra* note 11, and Schwarzer, *supra* note 7.

<sup>98</sup> Brazil, *supra* note 11.

<sup>99</sup> See Meade W. Mitchell, *Discovery Abuse and a Proposed Reform: Mandatory Disclosure*, 62 *Miss. L. J.* 743, 746-7 (1993) (listing the forms of discovery abuse and many of the motivations for such abusive attorney behavior). See also Schwarzer, *supra* note 7, (strongly advocating the replacement of discovery with mandatory disclosure to remedy discovery abuse). Judge Schwarzer defines discovery abuse as the use of discovery "as a weapon to burden, discourage or exhaust the opponent, rather than to obtain needed information." *Id.*

<sup>100</sup> Stephen Subrin, Panel Presentation on Amended Rule 26, Annual meeting of the American Association of Law Schools Civil Procedure and Litigation Sections (January 1994) (tapes on file with authors). Professor Subrin also points out that procedural reformers have blind spots. They have a tendency not to listen to criticisms of others regarding the rough edges of their reforms. These blindspots are due in part to the zeal and steadfastness present in all procedural reformers. The reformers also tend to become adversaries with those who disagree with the reforms. *Id.*

<sup>101</sup> Advisory Committee Notes.

<sup>102</sup> See Wayne D. Brazil, *Views from the Frontlines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 *AM. B. FOUND. RES. J.* 219, 246 (explaining the view of many attorneys that judges dislike ruling on discovery disputes).

<sup>103</sup> Wolfson, *supra* note 93. The sanctioning scheme, however, is vaguely defined and appears to provide little concrete encouragement of cooperativeness.

structure of the amendments. What is the likely effectiveness, commentators ask, of an attempt to supplant one early portion of the adversary process with a cooperative ethic when the rest of the litigation process is untouched? Can a "lawsuit be squeezed of its adversariness during [one phase of] pretrial preparation and then be allowed to run at full adversarial throttle during [other phases and at] trial?"<sup>104</sup>

C. *Criticisms Concerning a Revival of Fact Pleading and Diminished Court Access*

The Advisory Committee modified the operative language of Rule 26(a) several times, settling on "material relevant to disputed facts alleged with particularity." What "particularity" means is still unclear. The Advisory Committee's suggestion of a sliding scale definition has failed to clarify the concept.<sup>105</sup>

In addition to problems of vagueness, the particularity requirement is perceived by many as a back door attempt to revive fact pleading. The Federal Rules and the United States Supreme Court have explicitly rejected fact pleading in favor of notice pleading.<sup>106</sup> The 1993 amendments to Rule 11 also specifically endorse generalized notice pleading, allowing parties to plead on information and belief even without particularized factual support provided that discovery is likely to reveal supporting evidence.<sup>107</sup> Some commentators are concerned about potentially deleterious effects of an indirect revival of fact pleading. Heightened fact pleading thresholds tend to discourage court access for individual plaintiffs suing institutional defendants and for resource-poor claimants.<sup>108</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> See Hench, *supra* note 47, at 429 (discussing the continuing problems surrounding the particularity standard).

<sup>106</sup> See FED. R. CIV. P. 8(a) (notice pleading); FED. R. CIV. P. 9(b) (requiring pleading with particularity for claims of fraud or mistake). See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S.Ct. 1160, 1163 (1993) (rejecting fact pleading in section 1983 civil rights complaints against municipalities and reaffirming the liberal notice pleading).

<sup>107</sup> FED. R. CIV. P. 11.

<sup>108</sup> See Eric K. Yamamoto, *Efficiency's Threat To The Value of Accessible Courts For Minorities*, 25 HARV. C.R.-C.L. L.REV. 341 (Summer 1990). See *infra* Section III C for a discussion on procedural reform impacts upon court access.

Mandatory disclosure may likely impact negatively upon those most in need of ready access to courts.<sup>109</sup> 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.”<sup>110</sup> Professor Hench expresses concern about the, “effect of the rule makers’ efforts [in denying] 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 or discriminatory practices in civil rights cases.”<sup>111</sup> Although both plaintiffs<sup>112</sup> and defendants<sup>113</sup> lobbying groups opposed the amendments, individual plaintiffs may stand to lose the most. This is because plaintiffs often start from a disadvantaged informational position and a sharp reduction in infor-

<sup>109</sup> Hench, *supra* note 47, at 421-22.

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 public interest and minority interests will be treated equally with the interests of more mainstream and powerful litigants. Judge Schwarzer dismisses 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.”

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.

See Yamamoto, *supra* note 108 (describing the efficiency trend in procedural reform and its effects of diminishing court access for minorities).

<sup>110</sup> See also Yamamoto, *supra* note 108, at 397 (discussing developments in procedural theory that challenge the notion of the inherent neutrality of procedure). Cf. Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993) (arguing that we should continue to endorse the pursuit of a neutralist rulemaking process).

<sup>111</sup> Hench, *supra* note 47, at 10 (“The amended discovery rules will have the effect, whether intended or not, of advancing a conservative agenda by sharply limiting the ability of non-institutional litigants to protect their rights in court”).

<sup>112</sup> The American Trial Lawyers Association (an organization representing the plaintiff’s personal injury bar) objected to the Rule 26 amendments stating, “[T]he proposed ‘voluntary disclosure’ will not reduce the cost of litigation . . . , it is difficult to see how this proposal will reduce the cost of litigation.” Bell, *supra* note 88, n. 111.

<sup>113</sup> “On the other side of the aisle, the American Corporate Counsel Association also criticized the rule as ‘unworkable’ for corporate defendants.” Bell, *supra* note 88, n. 111 (listing 61 corporations submitting individual comments in opposition to amending Rule 26(a)(1)). Winters, *supra* note 7, at 267, n. 6.

mational access at the outset cannot be easily compensated for later.

Mandatory disclosure functions under the assumption of equality of litigation power among the parties.<sup>114</sup> Numerous inequalities exist, however, among parties to litigation. An information poor plaintiff under the new discovery scheme depends upon the defendant to provide harmful information through good faith disclosure.<sup>115</sup> From this perspective, the plaintiff's fortunes thus may well turn on the self-interested defendant's willingness to disclose. If the defendant makes a calculated decision to risk sanctions and withhold information on the belief that the plaintiff will therefore be deprived of grounds to compel or seek further discovery, the plaintiff is caught in a game of "hide the ball." As the defendant will be reluctant to release damaging information voluntarily without first being specifically asked for it, the scheme creates an incentive for the defendant to withhold information and little disincentive for such behavior.<sup>116</sup> Without the information and with deposition-interrogatory limits to formal discovery, the plaintiff is precluded from building its case and is much more susceptible to a defendant's summary judgment motion. Under the new rules "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 completely successful."<sup>117</sup> According to Judge Schwarzer,

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<sup>114</sup> Hench, *supra* note 47, at 421-24.

<sup>115</sup> *Id.* at 423-24. "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 additional, valid claims that would have been revealed by legitimate discovery." *Id.*

<sup>116</sup> Hench, *supra* note 47, at 425-26. Assertions to the contrary, "seem 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. 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 of with little concern that their misconduct will 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." *Id.*

<sup>117</sup> Hench, *supra* note 47, at 424; *see also* Subrin, *supra* note 100.



now the director of the Federal Judicial Center, a party should be allowed additional discovery following disclosure only upon a showing of "particularized need."<sup>118</sup> In this light, it cannot be realistically presumed that henceforth all tort defendants, for example, will ethically comply with disclosure requirements where damaging information otherwise would remain hidden. As one attorney expressed it, "we don't get what's there [now] through discovery. . . . The idea that [defendants] are just going to tell us everything we need to know to win our lawsuits just doesn't seem very practical."<sup>119</sup> The mandatory disclosure amendments appear to disadvantage the information poor plaintiff.

Defendants also have expressed several important, albeit different, doubts about mandatory disclosure.<sup>120</sup> For those defendants, any diminishing of court access for certain plaintiffs groups is offset by likely adverse impacts on defendants and their attorneys. "Repeat player" defendants, like plaintiffs, criticize as mistaken the notion that parties bring "knowledge of relatively equal usefulness at the outset of the litigation which they can share with their opponents to reduce costs."<sup>121</sup> Their concern, however, differs from plaintiffs' concern about lack of information access. Their concern is that defendants will be doing most of the heavy disclosing.<sup>122</sup> In addition, some are concerned that the vagueness of the disclosure standard leaves ethical defense counsel in a quandary. On the one hand, it appears that over-disclosure is required to avoid possible rule violations and sanctions.<sup>123</sup> On the other hand, over-disclosure nullifies the scheme's intended benefits—cheaper quicker and less burdensome discovery for clients.<sup>124</sup> For conscientious defense counsel, good faith compliance with Rule requirements seems inevitably to undermine the Rule's purpose.

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<sup>118</sup> Schwarzer, *supra* note 7.

<sup>119</sup> American Trial Lawyers of America President Roxanne Barton Conlin, a Des Moines, Iowa, sole practitioner. Randall Samborn, *Derailing the Rules*, NATIONAL LAW JOURNAL, May 24, 1993, at 1. "Mandatory disclosure without unlimited discovery won't work. We don't think people will fully disclose information that will hurt them voluntarily unless they know it will be discovered eventually." Arthur H. Bryant, executive director of Trial Lawyers for Public Justice (a national public-interest law firm) in opposition to Rule 26, 30, 31, 33 amendments. *Id.*

<sup>120</sup> See Gerald G. MacDonald *Heisiod, Agesilaus and Rule 26: A Proposal for a More Effective Initial Disclosure Procedure*, 28 WAKE FOREST L. REV. 819 (1993) (criticizing the amendments and proposing an alternative model).

<sup>121</sup> Hench, *supra* note 47, at 12.

<sup>122</sup> Winters, *supra* note 7, at 267.

<sup>123</sup> *Id.* See also Winters, *supra* note 7, at 267.

<sup>124</sup> Hench, *supra* note 47, at 432-33.

Perhaps even more significant, defense counsel are concerned about diminished access to their clients. They worry about the impact of mandatory disclosure on attorney-client relationships.

*D. Criticisms Concerning Impacts On Attorney-Client Relationships*

Commentators have said relatively little about the likely impact of the mandatory disclosure amendments upon key litigation relationships. One such relationship is the attorney's relationship with her client.

Mandatory disclosure may threaten to undermine the attorney-client relationship by driving a sharp wedge between an attorney's loyalty to her client and loyalty to the court. Attorneys are ethically bound to represent zealously their clients.<sup>125</sup> They are also ethically bound as officers of the court to serve the interests of fairness and justice. A balancing is required. The Rule 26 mandatory disclosure amendments, however, may place attorneys in situations where they are unable to fulfill either obligation.<sup>126</sup> The defense attorney, in particular, at critical junctures appears to be required to advocate against her client's interest.<sup>127</sup>

The scenario unfolds in this way. The attorney is obligated by amended Rule 26(a) to demand that her client disclose extremely sensitive and damaging information to an opponent, even though the opponent knows nothing about the information and did not specifically request it, and even though the information may subject the client to compensatory and punitive damages. The client understandably will strongly resist that demand. The information is highly damaging to the client's position and may not otherwise be discovered. Or it may be information that would only be discovered after expensive and time-consuming discovery by the opponent—the mere prospect of which might impel a favorable settlement without production of the information. It is unrealistic to assume that the client will be amenable to its attorney's disclosure justification cast in terms of judicial efficiency

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<sup>125</sup> Canon 7 of the Model Code of Professional Responsibility mandates that "a lawyer should represent a client zealously within the bounds of the law." Model Code of Professional Responsibility Canon 7 (1980).

<sup>126</sup> Hench, *supra* note 47, ("The 1993 amendments will put ethical defense attorneys into an intolerable dilemma by forcing them to use their professional skills to help the opposition").

<sup>127</sup> Winters, *supra* note 7, at 267.

and overall systemic fairness.<sup>128</sup> From the client's perspective, the client is paying the attorney to further the client's interests, not to aid its opponent.<sup>129</sup> A client may thus be tempted to say, "Do what we say or we'll get another attorney." What are the attorney's ethical and practical options at that juncture? For these reasons, many opposed to the Rule 26 amendments believe that mandatory disclosure conflicts with the realistic culture of the practicing bar concerning (1) the zealous representation of clients, and (2) the economic reality of client demands on attorney behavior.<sup>130</sup> One defense counsel expressed his worry in the following fashion:

I still have a problem that perhaps is just my problem endemic to defense lawyers. But I have a problem that I am supposed to give up what I am supposed to disclose to my adversary, and that just really seems to be contrary to everything that I have done in my practice. . . . So don't believe that you, you know, a free for all disclosing—everybody disclosing at the same time. I think that the plaintiff, by God, has the burden of proof.<sup>131</sup>

Further, even if the attorney demands full disclosure and the client complies, the attorney may no longer enjoy the close confidences of the client in the future. The client may find it necessary to screen what the attorney knows to prevent future "gratuitous" disclosures. This in turn will hamper the quality of legal service by the malinformed attorney and a heightened possibility of later imposed sanctions upon the client. When the client must worry about how much to tell its attorney or about whether its attorney might in actuality sink the ship, distrust inevitably is cleaved into the attorney-client relationship.

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<sup>128</sup> "My client should perceive me as his or her trusted and vigorous advocate and not some doubtful agent of an officious bureaucracy dedicated to imposing its altruistic ideal of harmony at the expense of my client's interests." Samuel B. Witt, Statement at the Public Hearing of the Advisory Committee 75-76 (Feb. 19, 1992) as cited in Bell, *supra* note 12, at 175.

<sup>129</sup> Bell, *supra* note 88, at n. 176 ("Such a mandatory disclosure system threatens to interfere in the relationship between attorney and client by requiring an attorney to make disclosures based upon her assessment of the bases of her opponent's case").

<sup>130</sup> The economic and professional factors that magistrate Brazil identified as driving attorney behavior are still present and conflict with assumptions of cooperation that the rule now embraces. Brazil, *supra* note 11.

<sup>131</sup> Statement of James Bianchi; Record of Public Hearing of the Advisory Committee at 48-49 (Nov. 21, 1991) (cited in Bell, *supra* note 12, n. 177).

## IV. POLITICS OF PROCEDURAL REFORM: THE RULE 26 PHOENIX

Mandatory disclosure truly is the phoenix of federal rules reform. In light of the criticisms described in Part III, many viewed the rule as all but dead during several stages of the rulemaking process. Mandatory disclosure, however, is the reform that would not "go quietly into the good night."<sup>132</sup> Given the almost universal opposition to the Rule 26 amendments, how did the amendments emerge from the Federal Judicial Conference and Supreme Court, and how did Congressional veto efforts fail to derail them?<sup>133</sup>

A broad societal view is needed. The mandatory disclosure amendments to Rule 26 emerged in the larger context of litigation reform movements set in motion by the remarks of former Chief Justice Warren Burger and Harvard president Derrick Bok. Each "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."<sup>134</sup> The passions of the populace were stirred more recently by the Quayle Commission on Competitiveness. Former Vice President Quayle spoke publicly of a litigation explosion and the overwhelming costs of civil litigation.<sup>135</sup> These passions, along with Brookings Institute and Federal Judicial Center studies,<sup>136</sup> fueled a juggernaut of litigation

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<sup>132</sup> Randall Samborn, *New Discovery Rules Take Effect*, *supra* note 16. In Feb. 1992 the Advisory Committee, faced with strong opposition to the proposed mandatory disclosure changes, withdrew the proposal. Instead of shelving the idea, the Advisory Committee at Judge Ralph K. Winters' urging authored a modified version of the rule, catching significant portion of the legal community unaware. *Id.*

<sup>133</sup> *Id.* Professor Stempel states that: "[d]espite its ease of passage in the House, the bill was not voted upon in the Senate due to the objections of Senator Howard Metzenbaum, who refused to let the bill be considered by unanimous consent prior to the holiday recess. Consequently, the new civil rules took effect December 1, 1993, as promulgated by the Supreme Court." Stempel, *supra* note 24, at 681.

<sup>134</sup> Theodore Tetzlaff, *Federal Courts, Their Rules and Their Roles*, 18 *LITIG.* 1, 68 (Spring 1991); Eric K. Yamamoto, *Case Management and the Hawai'i Courts: The Evolving Role of the Managerial Judge*, 9 *U. HAW. L. REV.* 395, 397 (1987) (discussing former Chief Justice Burger's perception of a litigation explosion). *See supra* note 21. Marcus, *supra* note 110, at 762 (describing the ostensible litigation boom image and "the related notion that lawyers are the cause of many, if not most, of America's woes").

<sup>135</sup> *See* Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 *JUDICATURE* 244 (1992) (describing the litigation reform movement and illustrating the frailty of the statistical underpinnings relied on by many reformers); Stempel, *supra* note 24, at 687-88.

<sup>136</sup> *See supra* note 21.

reform. The question often seemed to be not whether reform would occur but by whom and in what form?<sup>137</sup> Proponents of mandatory disclosure reform occupied the rhetorical high ground, employing terms of "professionalism," "cost and delay reduction," and "active case management."<sup>138</sup> They also cast opponents onto the rhetorical low ground in describing the present state of discovery in employing terms of "over litigation," "wastefulness," and "abuse."<sup>139</sup>

The Rule 26 amendment process can be viewed from several perspectives. From one vantage point, litigation issues have become increasingly and potentially destructively politicized.<sup>140</sup> People and institutions affected by the litigation process translate their personalized political agendas into global policies for reform that further their particular interests. The "reality appears to be that many in the legal community fear that *any* change comes with a malign hidden agenda"<sup>141</sup> because "people are approaching proposed reforms primarily in terms

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<sup>137</sup> As Professor Marcus observes, "the crisis . . . , relates to control over innovation and, more specifically, the rules for handling litigation. There is an intrinsic and unresolved tension about where the power to make procedural rules should rest." Marcus, *supra* note 110, at 764.

<sup>138</sup> *Id.*

<sup>139</sup> Schwarzer, *supra* note 7.

<sup>140</sup> Stempel, *supra* note 24, at 662. There has been an increase in "ad hoc activity [from] various interest groups, including the bench and the organized bar, primarily pursued through the official organizations such as the Judicial Conference, the Federal Judicial Center, the American Bar Association, and the American Law Institute. Traditionally, of course, judges and lawyers have lobbied Congress and state legislatures for litigation change, as demonstrated by the saga of the Rules Enabling Act. But, the legal profession's more recent 'political' activity regarding litigation reform differs from the traditional model." *Id.* See also Mullenix, *Unconstitutional Rulemaking*, *supra* note 21.

[T]he profession has become more chronically active and more "political" in its activity. The more developed general and special interest bar groups provide their members with tools that encourage and enhance their political activity: publications, newsletters, lobbyists, researchers, hot lines, form letters, fundraisers, PACS and other trappings of the institutionalized political participant.

Across the spectrum of interests ranging from the American Tort Reform Association (a manufacturers group seeking more favorable product liability laws) to the Leadership Conference on Civil Rights (a liberal group seeking to protect or expand civil rights laws), America's political actors have increasingly become involved in matters of litigation procedure.

Stempel, *supra* note 24, at 668-9.

<sup>141</sup> Marcus, *supra* note 110, at 811.

of whether they will be winners or losers."<sup>142</sup> The judiciary too has become more politicized. The "modern, more institutionalized judiciary displays both greater capacity to generate litigation proposals and increased ability to react to the initiatives of others."<sup>143</sup> Business, concerned about economic impacts, also has increasingly participated in the politics of litigation reform.<sup>144</sup>

The reform process itself has opened to the public<sup>145</sup> and "the individuals and organizations providing input into the law reform process have become more diverse."<sup>146</sup> Increased participation in the reform process reflects an understanding by many that systemic change implicates political agendas.<sup>147</sup> As Professor Stephen Burbank observes,

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<sup>142</sup> *Id.* at 810. See Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, (1991) ("if the interests of the National Association of Process Servers can alter or supplant the rules process, what self-interested mischief could more powerful and wealthier political players accomplish?").

<sup>143</sup> Stempel, *supra* note 24, at 662 ("A relatively small number of 'insider' judges . . . , seem to exert great influence, through their appointment to important positions in the judicial establishment, but also because of prestigious reputations or sustained activity in litigation reform").

<sup>144</sup> Economic forces have served to drive the pace and shape of litigation policy over the years. "More than in the sciences . . . , the paradigm shift in procedure was affected in large part by the sociology and politics of the American judicial system. Despite its origin in elite efforts to pacify the masses, the open procedural paradigm became hugely unpopular with the business community, which saw itself victimized by bogus or marginal claims that consumed legal resources and actually could succeed at the hands of lay jurors, who elites thought inflated the value of legitimate claims." Stempel, *supra* note 24, at 718.

<sup>145</sup> *Id.* at 666 ("Rules Advisory Committee hearings are open to the public unless the Committee specifically enters an executive session. Upon request, the Judicial Conference routinely provides the names, addresses and phone numbers of Committee members, who can be contacted directly by persons wishing to make a case for or against change.") *But see* Stephen B. Burbank, *Ignorance And Procedural Law Reform: A Call For A Moratorium*, 59 BROOK. L. REV. 841, 853 (1993)(disagreeing with Professor Stempel's depiction of the legal community's participation in decision making about the Federal Rules).

<sup>146</sup> *Id.* at 667.

<sup>147</sup> "In recent years the political pendulum has swung in the other direction, towards the 'haves' and away from the 'have-nots.' We have witnessed a backlash against many equalizing developments in the substantive law. The public may discover too late that many of its cherished legal rights have become devalued for lack of any means to redeem them." Senior Judge Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 828 (1993) (discussing an alternative view of litigation reform).

reformers must be "candid in identifying policy choices and clear about the allocation of power to make them."<sup>148</sup>

From another vantage point, the judicial rulemaking process is perceived to have survived interest-group politics. From this vantage point, the adoption of the mandatory disclosure amendments became integrally linked to political worries about *judicial autonomy over procedural rulemaking*.<sup>149</sup> The Federal Rules Advisory Committee and Judicial Conference faced a threat of usurpation of their rulemaking authority by Congress and grass-roots rule makers under the Congressional Justice Reform Act<sup>150</sup> and by other partisan political lobbying groups.<sup>151</sup> Federal District Judge William Bertlesman encapsulated the concern, stating that "the incentive to get [the mandatory disclosure rule amendment] started. . . [was] the passage of the Biden Bill, when it looked as though the Judiciary was going to lose control of itself."<sup>152</sup> Professor Linda Mullenix perceived recent Congressional action as a debilitating incursion on the judiciary's inherent power to promulgate procedural rules.<sup>153</sup> Members of the Advisory Committee and Federal Judicial

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<sup>148</sup> Burbank, *supra* note 145, at 850 (calling for a cessation of Congressional action in the arena of litigation reform). *But see* Marcus, *supra* note 110, at 820 ("[t]here is a good deal of fear and loathing out there on the reform trail. The political critique contributes to this attitude, of course, by suggesting that there is a malign agenda, hidden or overt, lurking behind the scenes, which taints even the most benevolent-appearing reforms").

<sup>149</sup> Professor Jeffrey Stempel observes that judicial autonomy in rulemaking has withered. "A second, more coherent effort to classify recent events as a reform revolution would argue that Congress has now supplanted the judiciary and that the Rules Enabling Act's model (perhaps the Act itself) faces numbered days. The reaction of Congress to newly promulgated Rules changes concerning the controversial Rule 11, discovery and disclosure amendments indicate that this type of paradigm is possible but not yet able to displace the old model. Congress was heavily involved in almost revising or stopping the proposed amendments, suggesting that the old paradigm is wounded and on the run, and that a possible long-term shift to Congress may be in progress." Stempel, *supra* note 24, at 735. *See also*, Marcus, *supra* note 110.

<sup>150</sup> Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J. PUB. POL. 1 (1992) (describing and justifying CJRA). *See* Linda S. Mullenix, *Unconstitutional Rulemaking*, *supra* note 21 (CJRA not only drastically and unwisely alters the traditional rulemaking, but violates separation of powers norms as well).

<sup>151</sup> Mullenix, *Unconstitutional Rulemaking*, *supra* note 21 (describing the pressures faced by the Advisory Committee).

<sup>152</sup> Marcus, *supra* note 110, at 808-9, n. 199.

<sup>153</sup> Linda S. Mullenix, *Should Congress Decide Civil Rules? No: Not a Subject To Wheel'n Deal*, NATIONAL LAW JOURNAL, November 22, 1993, at 15-16. *But see* Alfred W. Cortese

Conference evinced deep concern about the agent of procedural change.<sup>154</sup> Who had the authority, expertise and methodology for responding responsibly to the chaotic demands for change voiced by all three branches of government and the public?<sup>155</sup> If the judiciary backed down on Rule 26—its most significant proposed litigation reform, a reform Congress and the Quayle Commission both recommended—the judiciary might well be viewed as abandoning serious litigation reform while ignoring public outcry. If the judicial branch did not appear to be responsive and in control, others would step in. At stake, from this perspective, were not only discovery reform but also judicial legitimacy in rulemaking.<sup>156</sup>

Mandatory disclosure opponents prevailed in the House with the passage of the "veto bill" House Resolution 2814.<sup>157</sup> Their collective opposition, however, fractured during heavy lobbying in the Senate.<sup>158</sup> Court reporters succeeded in getting one section of Rule 26 changed to omit the cost-cutting video deposition provision.<sup>159</sup> According to one report, this launched a partisan free for all with various interest groups attempting to surgically excise offending portions of any amended rule.<sup>160</sup> With multiple competing mini-veto proposals, the playing field

Jr. and Kathleen L. Blaner, *Should Congress Decide Civil Rules?*, NATIONAL LAW JOURNAL, Nov. 22, 1993, at 15. Cortese and Blaner argue that the "disclosure experience" demonstrates the benefits of public and Congressional input into the rule-making process.

<sup>154</sup> See Mullenix, *Hope over Experience*, *supra* note 7.

<sup>155</sup> The Advisory Committee's procedures also came under fire. Professor Laurens Walker proposed an Executive Order that the Advisory Committee must:

- (1) make rules based on adequate information;
- (2) refrain from rulemaking unless the "potential benefits to society outweigh the potential costs;"
- (3) "pursue objectives chosen to maximize the net benefits to society;"
- (4) "choose the alternative involving the least cost to society;" and
- (5) attempt to maximize net social benefit in its rules policy.

Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WAS. L. REV. 455, 466-68 (1993).

<sup>156</sup> See Mullenix, *Hope over Experience*, *supra* note 7.

<sup>157</sup> *No Mandatory Disclosure*, NATIONAL LAW JOURNAL, Oct. 18, 1993, at 6 (House Judiciary Committee approves bill, H.R. 2814 deleting the controversial mandatory disclosure provision from the pending amendments to the Federal Rules of Civil Procedure). See *Civil Rules Get Nod*, NATIONAL LAW JOURNAL, Nov. 15, 1993, at 6 (reporting the House of Representative's approval of H.R. 2814 deleting proposed Rule 26(a)(1)).

<sup>158</sup> Samborn, *Bill to Stop Change Dies*, *supra* note 14.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*



muddled. No unified, coherent voice emerged to oppose the Rule 26 changes.<sup>161</sup> The opposition's uncertainty and inconsistency reportedly emboldened steadfast proponents of the amendments, principally the Federal Judicial Conference, and provided space for the Senate's inaction on the veto bill.<sup>162</sup>

In the aftermath of the Congressional non-veto of the Rule 26 amendments, the American Bar Association distributed a now infamous memo.<sup>163</sup> The memo essentially asserted that while a skirmish was lost in Congress the battle itself still raged. The veto war could be won on the federal district court level, the memo said, by lobbying each district court to employ the opt-out provisions of amended Rule 26. As discussed earlier, many district courts responded by opting out of all or some of the Rule 26 mandatory disclosure changes.<sup>164</sup>

District by district opting-out, however, created procedural disuniformity nationally.<sup>165</sup> It also apparently created litigation power imbalances in district courts that opted out of some but not all of the discovery changes.<sup>166</sup> In addition, the process of opting-out (or opting-in) by local district court rules, raised new potentially serious political-legal issues. Bill Lann Lee, attorney for the National Association for the Advancement of Colored People Legal Defense Fund, recently observed that the defense bar tends to control local rule changes.<sup>167</sup> In most district courts, he indicated, defense attorneys are the ones with the time to lobby or to sit on local rules committees.<sup>168</sup> Lee's blanket observations are certainly debatable. Implicit in his statement, however, is an important concern about whether current local rulemaking has

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<sup>161</sup> *Id.* Some groups worried that the Senate would not go far enough; i.e., cutting mandatory disclosure but keeping the limits on depositions and interrogatories. Civil Rights groups worried the Senate might perhaps go too far and also veto the amended Rule 11 which they found as a desirable change. *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Panel Discussion on Amended Rule 26, Annual Meeting of the American Association of Law Schools Civil Procedure and Litigation Sections (January 1994) (discussing ABA memorandum) (tape on file with authors).

<sup>164</sup> Temporary Order, *supra* note 25. The Hawai'i federal district court has chosen this route through a local order filed November 30 1993, opting out of the new rule 26 sections (a), (b), (d), and (f). It should be noted that this "opting out" is only temporary.

<sup>165</sup> *See supra* note 19.

<sup>166</sup> *Id.*

<sup>167</sup> Bill Lann Lee, Panel Discussion on Amended Rule 26, Annual Meeting of American Association of Law Schools Civil Procedure on Sections (January 1994).

<sup>168</sup> *Id.*

provided any particular litigation interest group an opportunity to shift favorably the balance of power in discovery.

Partial opt-out orders, such as the Hawaii's Federal district court's Temporary Order, eliminate mandatory disclosure but leave in place new limits on depositions and interrogatories. The combined effect is presumptively to limit formal discovery (depositions and interrogatories) while not requiring the informal disclosure of core information.<sup>169</sup> This represents an overall narrowing of discovery. Where one party controls most of the relevant information—more often a defendant than a plaintiff—this narrowing of discovery will likely work to that party's benefit and to the other party's detriment. Might such a district court order, or local rule, narrowing discovery, generally be characterized as pro-defendant? On the other hand, blanket mandatory disclosure might drive a wedge between ethical defense counsel and their institutional clients, practically benefitting plaintiffs. Might such an order, or rule, be characterized as pro-plaintiff?

Whatever course district courts pursue via local rules, opportunities for political leveraging are apparent. Balancing concerns about discovery and litigation power among varying kinds of plaintiffs and defendants, individual and institutional litigants, private claimants and government, represented and pro se parties, is essential. It is also a challenging task. Neither the perception of any section of the bar exerting excessive influence over procedural rule formulation nor the perception of judicial efficiency overriding fairness to litigants would bode well for the legitimacy of the civil justice system.

## V. CONCLUDING THOUGHTS: A GLIMPSE OF THE FUTURE

Paths to the future emerge from the present. As discussed, confusion and national dis-uniformity mark the present state of Federal Rule 26 and mandatory disclosure.<sup>170</sup> The mandatory disclosure amendments can be fairly viewed as the federal judiciary's primary response to loud calls for systemic litigation change.<sup>171</sup> Those calls have emanated from

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<sup>169</sup> Samborn, *Bill to Stop Change Dies*, *supra* note 14 ("The House took out one part of the balance and left the other part in[.] [This] restricted the traditional means that plaintiffs have of getting discovery and eliminated entirely a new means that was recommended. That made the House bill very unfair to plaintiffs. If we have to have limits, we would rather have limits with mandatory disclosure to offset the effect of the limits").

<sup>170</sup> See *supra* Part II.

<sup>171</sup> See *supra* note 24 and accompanying text.

widely varying sources, sources that can be collectively characterized as multi-faceted, procedural reform movements. Congress is implementing its own litigation reform agenda through the Civil Justice Reform Act.<sup>172</sup> Private businesses, through the Quayle Commission on Competitiveness, have advanced a package of federal litigation reforms to take law "off of the backs" of business.<sup>173</sup> Populists and neighborhood justice centers advocate bypassing court systems altogether and focus on community-centered mediation and arbitration. State courts such as Hawaii's continue to innovate, among other things, establishing far-reaching alternative dispute resolution programs.<sup>174</sup>

The politics of procedural reform thus provides context for viewing the mandatory disclosure amendments. "Who should control procedural reform" became a significant underlying question for many. Despite almost universal opposition by all segments of the national bar,<sup>175</sup> a persistent Advisory Committee and Federal Judicial Conference successfully steered the Rule 26 amendments through the political shoals, including the Supreme Court<sup>176</sup> and Congress. The amendments became effective on December 1, 1993.

Rule 26's opt-out safety valve, however, opened the door for local lobbying<sup>177</sup> and enabled 52 of the 94 federal district courts to exempt themselves, in varying permutations, with varying degrees of permanence, from mandatory disclosure requirements. This present state of

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<sup>172</sup> See *supra* note 21 and accompanying text.

<sup>173</sup> See *supra* note 135 and accompanying text.

<sup>174</sup> HAW. CIR. CT. R. C. A. A. P. (Hawai'i Circuit Court Rules, Mandatory Court Annexed Arbitration Program).

<sup>175</sup> See *supra* Part IIIB and C.

<sup>176</sup> A Supreme Court majority appeared minimally to scrutinize the proffered rule amendments. Even Chief Justice Rehnquist's normally blase transmittal letter is pregnant with material for discussion. In adopting the amendments, he wrote: 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.

The transmittal letter suggests a highly deferential standard of review for proposed amendments received from the Judicial Conference.

In light of the language of the Chief Justice's . . . letter, the most likely conclusion is that the Court majority applied a "quick check for corruption" standard of review that focused only on fairness of process rather than a "rational relationship" standard of review directed toward the actual merits of the proposed rules changes. Stempel, *supra* note 24, at 677-79.

<sup>177</sup> See *supra* note 163 (concerning the American Bar Association memorandum urging collective political lobbying of individual federal district courts).

rule ambiguity and dis-uniformity, and the tumultuous procedural reform process leading to it, are what federal district judge Norma Shapiro recently characterized as the "primordial ooze."<sup>178</sup>

What paths lead from this state of ooze? As mentioned in Part II, for federal district courts such as Hawaii's which have temporarily opted out of some of mandatory disclosure package of amendments, at least four paths emerge: (1) finalize the Temporary Order in its current form, eliminating mandatory disclosure without altering deposition-interrogatory limits and thereby limiting overall discovery; (2) rescind the Temporary Order, thereby "opting-in" to the Rule 26 mandatory disclosure amendments with all their attendant problems (discussed in Section III); (3) issue a new order (or promulgate a local rule) rejecting the blanket applicability of the Rule 26 mandatory disclosure requirements while authorizing judges or magistrate judges to order disclosure without discovery requests on a case specific basis; or (4) alter the Temporary Order to reject the Rules 26, 30, 31 and 33 discovery changes in entirety, thereby reverting to the pre-amendments' discovery scheme which provided for judicial control over discovery through Rules 16, 26(b)(1), 26(c), 26(f) and 26(g).

How should rule reformers assess these alternative paths? Given the absence of encompassing empirical studies, most commentary concerning the likely impact of mandatory disclosure has a best "guesstimate" or reasoned speculation flavor to it. No one can predict the Rule 26 future with reasonable certainty, and speculation about possible impacts varies widely. Much of the evaluative difficulty lies in an unstated assumption embodied in the amended rule itself and much of the diffuse commentary about the rule. That assumption is that mandatory disclosure requirements must be applied in all civil cases. That assumption leads to the evaluative question around which much of the current Rule 26 debate has focused: can the mandatory disclosure amendments be fairly applied to *all cases* to reduce cost and delay? Proponents tend to make broad-based statements about mandatory disclosure's over-all systemic benefits and cite "ordinary" case examples or hypotheticals for support.<sup>179</sup> Opponents tend to highlight specific types of cases in which mandatory disclosure is likely to create an imbalance of litigation power among parties, generate wasteful strategic maneuvering and strain attorney-client relationships.<sup>180</sup>

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<sup>178</sup> See *supra* note 20.

<sup>179</sup> See *supra* Part IIIA.

<sup>180</sup> See *supra* Part IIIB and C.

As one means for breaking the evaluative log-jam, we challenge the assumption of the necessary blanket applicability of mandatory disclosure. We believe that the disclosure amendments can be evaluated by individual federal district courts by asking two questions that assume the potential appropriateness of mandatory disclosure in some types of cases but not others. The first question is, "In what types of cases is mandatory disclosure likely to lead fairly to the reduction of cost and delay?" The corollary question is, "How can rules be fashioned to facilitate mandatory disclosure in those types of cases while allowing for more appropriate methods of discovery in other types of cases?"

Asking those two questions provides a preliminary method for assessing the four paths described above. If the first question is answerable in the negative—there are no categories of cases in which mandatory disclosure is workable—then the only paths warranting further inquiry are path one (finalizing the Temporary "Opt-out" Order) or path 4 (reverting to pre-1993 discovery).

If, however, as we believe, the first question is answerable in the affirmative—mandatory disclosure can work effectively and fairly in some types of cases—then there would be no need to preclude mandatory disclosure for *all cases*. Finalization of the Hawaii district court's Temporary "Opt-out" Order would appear unwise. In addition, finalizing the Temporary order might cement into place a structural imbalance of litigation power in light of its limitation on formal discovery without informal disclosure. Thus path one, described above, appears uninviting.

Path two would be similarly problematic. In light of the voluminous and vociferous criticism, discussed in Part III, opting-in for blanket mandatory disclosure would appear unwise absent unequivocal empirical information about its across-the-board efficacy.

In light of an affirmative response to the first question, path three holds promise. Authorizing magistrate judges selectively to order disclosure on a case specific basis, according to pre-defined criteria, warrants further inquiry. It responds to the second, corollary question—how can rules be fashioned to mandate disclosure in appropriate cases? It embodies an implicit point of convergence among supporters and opponents of blanket mandatory disclosure—that mandatory disclosure may reduce cost and delay in certain kinds of case situations. If this is so, and this proposition still needs further verification, then federal court local rules committees might sensibly do one of two things: (1) identify specific categories of cases for which disclosure is to be mandatory (the magistrate judge's task would be to decide whether the

particular case within a pre-described category); or (2) authorize magistrate judges to exercise discretion ordering disclosure in a particular case following the Rule 26(f) meeting of the parties and a Rule 16 pretrial conference (the magistrate judge's task would be to evaluate case specific circumstances according to accepted criteria and determine whether disclosure is appropriate in that particular case).

We believe that the federal district courts, through their local rules committees, lack the empirical data and clairvoyance needed to identify and define in advance workable mandatory disclosure case categories. This is because key factors for determining workableness, or appropriateness, are interactive. They depend on case specific circumstances. They are not readily susceptible to pre-defined collective categorization. Those factors, identified by mandatory disclosure supporters and critics, include the cooperativeness of both counsel, the locus of needed information, the balance of litigation resources and power among parties and attorneys, the litigation histories of the parties, the complexity of issues and the difficulty of determining "relevancy" in light of the legal theories asserted.

For this reason, and assuming the first question posed above is answerable affirmatively, we believe that a federal district court could sensibly adopt a local rule authorizing magistrate judges to assess in each case the factors described above and order mandatory disclosure where it is appropriate.<sup>181</sup> This is path three. The factors (or criteria) would need careful refinement. Magistrate judges would need to be amenable to greater case management early on. Selective mandatory disclosure in this fashion might provide a way to reduce cost and delay fairly in some cases without generating untoward consequences. Thirteen federal district courts have now taken this approach.<sup>182</sup>

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<sup>181</sup> See Federal Judicial Center Report, *supra* note 19 (describing 13 district courts which give judges discretionary power to mandate disclosure). In one case, United States District Judge George M. Marovich authorized the parties in a case removed to his court prior to the adoption of the mandatory disclosure amendments to retroactively adhere to the amendments. Samborn, *Rules For Discovery Uncertain*, *supra* note 14. Judge Marovich noted that "[t]he issues in this lawsuit are few and well-defined. Similarly discovery should be limited and well focused. As a result, this is a case tailor-made for application of the amended federal discovery and scheduling rules." *Id.*

<sup>182</sup> As this article goes to press, the Hawaii Federal district court Local Rules Committee is recommending to the court the adoption of a Local Rule that embraces what we have called "path three"—rejecting blanket mandatory disclosure, as set forth in Federal Rule 26, and authorizing judges, or magistrate judges, to order disclosure on a case specific basis.

What about cases for which mandatory disclosure is deemed inappropriate? Local rules could specify that if a judge declines to order mandatory disclosure the pre-1993 discovery regime applies, as slightly modified by those 1993 amendments not embracing disclosure. But would this not encourage, or at least allow, the very discovery abuses mandatory disclosure attempted to address? This is a distinct possibility. We believe, however, that this need not be so. It appears that pre-1993 discovery management tools were under utilized by most judges. Pre-1993 Rule 26(b)(1)—Rule 26(b)(2) under the 1993 amendments—memorialized the concept of proportionality in discovery and authorized judges to shape and limit discovery at the outset to assure its appropriateness to the needs of the case, the amount in controversy, the resources of the parties and the public's interest. The pre-1993 Rule 26(f) discovery conference—a “meeting of parties” under the 1993 amendments—and Rule 26(g) discovery sanctions provided vehicles and muscle for shaping and limiting discovery to avoid problems. The Rule 16 pretrial conference also conferred upon judges significant discovery management powers. What appeared to have been lacking was a collective commitment among judges and attorneys to employ these rules to facilitate active case management of discovery early on in difficult cases. The combined powers and vehicles established by these rules provide a largely under utilized and potentially viable approach to discovery control in non-mandatory disclosure cases. The key, of course, is commitment by judges, magistrate judges and attorneys to early and active discovery management.

Thus, in our preliminary estimation, path three, as it draws upon part of path four—authorizing judges to order implementation of mandatory disclosure rules in cases where they are appropriate and otherwise relying on pre-1993 discovery management tools—emerges as the appropriate focal point of inquiry. It provides a glimpse of a potentially meaningful discovery, and perhaps even disclosure, future.

