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GLADIATORS BE GONE: THE NEW DISCLOSURE RULES COMPEL A REEXAMINATION OF THE ADVERSARY PROCESS†

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INTRODUCTION

The American system of civil dispute resolution is in crisis. Although the number of lawsuits may or may not be a problem, the length and cost of resolving lawsuits undoubtedly is. Judges, lawyers

and clients agree that discovery is the root of the problem. Discovery is riddled with abuse, delay and expense. The problems of discovery have given rise to a torrent of reform proposals culminating in the recently amended Federal Rules of Civil Procedure ("FRCP").

In order to directly confront the most serious concerns about discovery, the new rules contain some of the most radical changes in discovery of the past fifty years. The new rules have not, however, been universally embraced. The new mandatory disclosure provisions of Rule 26(a) are at the center of the controversy. Few amendments to the FRCPS have been as hotly debated or as vehemently attacked. Although the new rules went into effect on December 1, 1993, the storm over automatic disclosures rages unabated.

When I first read the new rules' requirement that a party automatically disclose information previously required only upon a formal discovery request, I had some trepidation about such a radical departure from established practice. Voluntary disclosure of information that might expose the faultlines in a client's case seemed at first like high treason. Voluntary disclosures also seemed antithetical to the adversary process because, by providing a level field in discovery battles, they diminish the advantage that a cunning lawyer might have over a less gifted opponent.

As I dissected the new provisions in preparation for my pre-trial procedure class, I began to confront my discomfort with the concept of automatic disclosure in the adversary process: I am a lawyer trained in the winning-is-everything model of adversary practice. I am also conservative by nature and, even if unhappy with the status quo, I distrust change. More to the point, I was a civil litigator. A gladiator. Considering how infrequently I actually went to war . . . er . . . I mean, trial, I admit enjoying the thrill of victory-at-any-cost that discovery battles afforded me.

With this bit of self-knowledge in mind, I have read the many articles and letters by lawyers and commentators criticizing the new disclosure provisions. Although I identify with most of the expressed concerns, I realize that our initial hostility to automatic disclosure is the result of a widely held, but mistaken, perception that the adversary process means war. Upon reevaluating the role of the lawyer in the adversary process, I recognize the benefits of the new automatic disclosure requirements. Furthermore, when disparate groups including the Clinton Justice Department, big-firm lawyers, big business, manufacturers, insurers, Justices Scalia and Thomas, public interest groups, professors, many judges, most organized bars, and both plaintiff and

defense lawyers all rallied against the new disclosure requirement, it seemed the rule deserved closer scrutiny.

As I reread the disclosure provision after studying the articulation of its goals by the judges and lawyers who proposed the new amendment, I began to understand its prudence. Discovery without automatic disclosures contains an inescapable quandary: lawyers instinctively believe that their own discovery requests are proper and their opponents' requests are abusive. In other words, the same lawyers who design their own discovery requests as broadly as possible will construe their opponents' discovery as narrowly as possible. This leads to inevitable disputes. Automatic disclosures circumvent this conflict by requiring full disclosures from all parties.

My conclusion is that most objections to automatic disclosures are, like my initial visceral reactions, unfounded. Not only are automatic disclosures consistent with the ideal of the adversary process, but they also provide a unique opportunity to achieve the essential premise of the adversary model: fair resolution of a dispute. Additionally, a cursory survey of actual practice under the new rules reveals that the predictions of disclosure disasters have not materialized.

This Article examines the new rules, discusses some of the anticipated problems, and proposes a plan to use the new rules to prepare discovery that achieves earlier and more efficient exchange of information. Part I contains a brief overview of discovery practice under the old rules. Part II analyzes the most significant changes to the rules, particularly those affecting discovery. Part III contrasts the dire predictions before the rules went into effect with the experiences of some lawyers and judges after several months of practice under the new rules. Part IV contends that automatic disclosures will result in shorter, less costly discovery, and fairer dispute resolution. It also predicts that automatic disclosures will have a salutary effect on the often misunderstood adversarial process. Part IV also urges federal and state courts to adopt the new automatic disclosure provisions. Finally, Part V provides an innovative strategy for using the new rules to achieve faster, less costly discovery, consistent both with the adversarial process and attorneys' ethical obligations.

I. Discovery Practice Before the New Rules

Discovery is crucial to dispute resolution in an adversary system. Discovery is the principal fact-gathering mechanism in the formal civil litigation process. Discovery is where most pre-trial disputes are played out and where many cases are effectively won or lost.

The principle behind discovery is simple: mutual knowledge of all the relevant facts of a dispute leads to its fair resolution.[1] If the parties, the court and the trier of fact have access to all the relevant facts of a dispute, its outcome at trial will more likely be fair. Moreover, early access to all potential evidence often leads to early settlement. Early settlement avoids costly trials. The primary means to achieve full access to the facts is discovery.[2]

A. *Historical Development of the Discovery Process: From No Discovery to Discovery Wars to Automatic Disclosure*

The modern rules of discovery evolved to release the adjudicatory process from the English common law system of writs and formalistic pleadings in which hyper-technical formulas rather than merit or fairness decided cases.[3] Under the common law system, pre-trial disputes focused on the wording of the pleadings rather than on the facts of the case.[4] Because the facts of a case were only of secondary interest, common law procedure contained no discovery scheme. Although common law courts eventually allowed some crude forms of discovery like the "bill of particulars," our modern discovery practice evolved primarily from equity proceedings.[5]

In federal courts, the break with common law pleadings and the introduction of the discovery process occurred in 1938 with the adoption of the Federal Rules of Civil Procedure.[6] The authors of the FRCP designed discovery to make information gathering a self-executing

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[1] *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947).

[2] The discovery provisions of the FRCP were designed to achieve "mutual knowledge of all the relevant facts." *Hickman*, 329 U.S. at 500–01.

[3] Commentators have described "the dance of the common law pleadings" where one misstep in the rigid requirements resulted in the death of the action. *See, e.g., Modern Procedure in Historical Perspective, in* STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE 345–60 (3d ed. 1992); *see also* SIR FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (2d ed. 1968).

[4] STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 17 (1984).

[5] *See, e.g.*, EDSON R. SUNDERLAND, CASES AND MATERIALS ON TRIAL AND APPELLATE PRACTICE 1–4 (1941).

[6] *See* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004, at 28 (1987). Wright & Miller describe how the original FRCP became law in 1938 when Congress adjourned without taking action on the Supreme Court's adoption of the rules. Interestingly, the same congressional inaction allowed the new disclosure rules to become effective. *See infra* notes 16–20 and accompanying text.

Not surprisingly, the objections to the original FRCP were almost as intense as the objections to the new disclosure provisions. *See, e.g.*, John J. Parker, *Handling A Case Under the New Federal Rules*, 24 A.B.A. J. 793 (1938) (Judge Parker concludes that the opposition to the original FRCP was primarily due to "the inherent conservatism of the professional mind," and he notes that lawyers have traditionally objected to any change, no matter how reasonable).

process. In other words, under the rules, parties were expected to use discovery to prepare their case without having to resort to judicial proceedings.

Specifically, Federal Rules 26 to 37 were meant to accomplish early, open and complete discovery without court intervention. However, the initial versions of the rules failed to achieve these goals. Filtered through a skewed perception of the adversarial process, lawyers often fail or refuse to use the rules to achieve the goals of discovery. Lawyers generally use the rules of discovery to obtain early and open discovery from their opponents while simultaneously doing everything possible to prevent open discovery of their own clients' information. In other words, lawyers have used discovery as a proxy for battle.

B. *The Evolution of the Lawsuit: How Discovery Altered the Role of Lawyers From "Trial Lawyers" to "Litigators"*

An understanding of how the new rules might make litigation less costly, lawyers less abusive, and dispute resolution more fair, requires an understanding of how modern discovery has affected the institution of dispute resolution in an adversary system.

Modern discovery in federal and state courts changed the institution of the lawsuit from "trial" to "litigation" and the role of the lawyer from "trial attorney" to "litigator." A lawsuit used to mean a "trial." Trial involved the equivalent of thrilling hand-to-hand combat "with surprise and technicalities as . . . [the] chief weapons."[7] In the old days, the essence of a trial lawyer was personified by Perry Mason. In the last few minutes of trial, Perry Mason would invariably introduce the surprise witness or evidence that saved his client and left prosecutor Berger with a perplexed frown on his face. Discovery, however, changed all that.

Modern discovery dramatically reduced the element of surprise in a lawsuit. As a result, discovery transformed the lawsuit from an exciting "mano-a-mano" battle to a sluggish boxing match between overweight contenders. At its best, a modern lawsuit resembles a tedious super-heavy weight boxing match where two lumbering fighters sluggishly loiter in the ring doing much posturing and little punching. The result: time consuming and inefficient dispute resolution. At its worst, a lawsuit resembles an uneven match between a 300-pound

[7] Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?*, 42 AM. U. L. REV. 1465, 1490 (1993) (quoting ARTHUR T. VANDERBILT, CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 10 (1952)).

heavy-weight fighter and a 100-pound feather-weight boxer. The result: time consuming, inefficient and unfair dispute resolution.

C. *A Unanimous Demand for Discovery Reform*

In recent years, lawyers, judges and commentators have loudly complained that discovery does not work as intended, is fraught with abuse and undue delay, and is too expensive.[8] Defense lawyers complain that plaintiffs' lawyers use discovery to "fish" for causes of action. Plaintiffs' lawyers' protest that defense lawyers use discovery as a weapon to exhaust weaker opponents. A few commentators have denounced pre-trial discovery as an unfair enterprise, given the disparities in resources and wealth between many parties.[9] Judges deplore obstreperous lawyers who force the court to spend precious time intervening in unnecessary discovery disputes. Lawyers and judges complain that cases too often are settled not due to the claims' merit, but rather to avoid lengthy and costly discovery.[10] In short, the consensus is that discovery before the new rules was the curse of the civil justice system.

The problems with discovery, however, have as much to do with how lawyers use the discovery rules as with the rules themselves.[11] In transforming the lawsuit from trial to litigation, modern discovery also changed the role of the lawyer in the lawsuit. Because only a relatively

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[8] *See, e.g.*, Wayne C. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 219. In 1989, for example, lawyers and judges responded to a Harris poll on the status of federal civil litigation by overwhelmingly pointing to discovery abuse as the single most important cause of costs and delays. LOUIS HARRIS & ASSOC., INC., PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM (Mar. 1989); *see also* Thomas D. Rowe, Jr., *A.L.I. Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation: Background Paper*, 1989 DUKE L.J. 824. One of the most vocal critics in the last decade was then Vice-President Dan Quayle who, with a straight face and the power of the "President's Council on Competitiveness," claimed that American companies could not compete in the international market because of the "time-consuming, burdensome, and expensive pre-trial discovery process." Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 563–64 (1992).

[9] *See* Marc Galanter, *Why the Haves Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); Deborah L. Rhode, *Ethical Perspectives on Lawyering*, 37 STAN. L. REV. 589, 597 (1985).

[10] *See, e.g.*, William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978).

[11] My views, generalizations and recommendations are based not only on research and conversations with judges and practitioners but also on my experience as a clerk for a federal district judge and as a litigation associate in two large law firms in Chicago, Illinois. During my first two years of practice, I represented physicians, hospitals, manufacturers and insurers in medical malpractice and products liability cases. During the following four years I represented plaintiffs and defendants in commercial cases ranging from breach of contract to patent infringement claims. The value of the claims in these cases ranged from $5,000 to $35,000,000.

small number of civil cases actually go to trial,[12] modern discovery changed "trial lawyers" into "litigators." Frustrated because discovery recast their role from swashbuckling trial lawyers to administrators of the pre-trial litigation process, many lawyers abuse discovery in order to recapture the lost excitement of trial.

The result is discovery disputes based more on posturing than substance. With few opportunities to go to trial, many lawyers use discovery disputes to demonstrate to their opponents that they are worthy "adversaries" and to their clients that they are worth their substantial fees. Judges in turn are forced to spend an inordinate amount of court time resolving petty discovery disputes despite the fact that discovery was intended to be self-executing.

D. *The Reform Frenzy*

Persistent condemnation of modern discovery practice resulted in a torrent of proposals to reform the system. The proposals culminated in the recently amended FRCP, which contain radical changes in pre-trial discovery practice.

Such was the outcry for change in civil litigation practice that every branch of government weighed in with recommendations for discovery reform. In 1990, Congress enacted the Civil Justice Reform Act ("CJRA"). The CJRA authorized the creation of pilot programs in the federal district courts to experiment with, among other things, improvements to "facilitate deliberate adjudication of civil cases on the merits [and] monitor discovery."[13]

On October 23, 1991, President George Bush issued Executive Order 12,778, to "facilitate the just and efficient resolution of civil claims" involving the United States Government.[14] Vice-President Dan Quayle's Council on Competitiveness also issued a report in 1991, recommending specific changes to the discovery process.[15]

In August 1991, the Advisory Committee on Rules of Practice and Procedure of the Judicial Conference of the United States circulated

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[12] About 5% of civil cases, less in purely commercial disputes, actually go to trial. *See* REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1989 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 21.

[13] 28 U.S.C. §§ 471–82 (Supp. 1993). The CJRA, also known as the "Biden Bill," was signed into law by President Bush on December 1, 1990. *Id.*

[14] *See* Exec. Order No. 12,778, pmbl., 3 C.F.R. 359, 360 (1991).

[15] *See* PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (Aug. 1991). Although the Council's agenda had less to do with reforming the system and more with restricting the recovery of injured persons, it was advanced under the euphemisms of "tort reform" and "civil justice reform."

for public comment its proposed amendments to the Federal Rules of Civil Procedure.[16] In April 1992, the Advisory Committee approved the recent amendments, and in November 1992, the Judicial Conference transmitted them to the United States Supreme Court. On April 22, 1993, Chief Justice Rehnquist submitted the amendments to Congress accompanied by a tepid endorsement.[17] Justice Scalia added a blistering dissent to which Justices Thomas and Souter joined.[18] Opposition to the disclosure provisions came from every quarter, ranging from President Clinton's Justice Department to plaintiffs' and defense lawyers.[19] Despite almost unanimous opposition to the amended rules' disclosure provisions, Congress failed to adopt any changes and the rules automatically became law on December 1, 1993.[20]

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[16] *See* Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53 (1991).

The Advisory Committee, comprised of members of the bench and bar appointed by the Judicial Conference, formulates rules that eventually are transmitted by the Judicial Conference to the Supreme Court. *See* 28 U.S.C. § 2073 (1988). Section 2078 authorizes the Judicial Conference to appoint committees to draft rules of practice and procedure for federal courts. These rules are then transmitted to the United States Supreme Court, which is authorized by § 2072 to propose these rules. The Supreme Court reviews the rules and transmits them to Congress to become effective at a specified time unless Congress affirmatively acts to change them.

[17] H.R. Doc. No. 74, 103d Cong., 1st Sess. 112–15 (1993), *reprinted in* 146 F.R.D. 401–728 (1993). Chief Justice Rehnquist forwarded the proposed rules with a letter to Speaker of the House of Representatives Thomas S. Foley where he noted that "this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted." *Id.* Chief Justice Rehnquist's letter to Speaker Thomas Foley is reprinted in 146 F.R.D. 403 (1993).

[18] 61 U.S.L.W. 4392–94 (Apr. 27, 1993), *reprinted in* 146 F.R.D. 507–13 (1993). Justice Scalia's objections included predictions that the new rules would increase ancillary litigation regarding what is disclosable and would lead to disclosure of irrelevant information. Scalia also protested that the automatic disclosures are inconsistent with the adversary system. *See infra* notes 110–14 and accompanying text.

[19] *See, e.g.*, Griffin B. Bell et al., *Automatic Disclosure and Discovery—The Rush To Reform*, 27 GA. L. REV. 1 (1993). Bell's article enumerates scores of widely diverse groups who opposed the disclosure provisions. He names, among others, the American Bar Association, state and local bars, corporations such as Amoco, General Motors and Ford, the American Corporate Counsel Association, American Trial Lawyers Association, the Defense Research Institute, the Alliance of American Insurers, Ralph Nader's Public Citizen Litigation Group, the American Civil Liberties Union, the National Association for the Advancement of Colored People, Legal Defense Fund, the Product Liability Advisory Counsel, and even the American Institute of Certified Public Accountants. *Id.*

Ex-Attorney General Griffin Bell and Chilton D. Varner are partners at Atlanta's King & Spalding and have represented General Motors, among others, in product liability cases. Financial support for Bell's article came from the Product Liability Advisory Council Foundation, an entity that represents the interests of manufacturers and other businesses in product liability litigation.

See also 61 U.S.L.W. 4372 (Apr. 21, 1993).

[20] Several members of Congress introduced H.R. 2814 for the specific purpose of killing the disclosure provisions of the new rules. *Bill to Delete Discovery Rules Reported to House Committee,*

II. The New Rules of Discovery: The Amended Rules of Civil Procedure

The amended FRCP, which apply primarily to cases filed after December 1, 1993, include significant changes to Rules 4, 11, 26 and 30.[21] The most dramatic changes to the rules were in the area of discovery.

A. *Overview of the New Discovery Provisions*

The most significant feature of the new discovery provisions is found in the combination of Rules 26(a) and (f) with Rule 16. Together, these rules delineate a mechanism by which the parties exchange relevant information about the case early in the litigation and without formal discovery.[22] First, the parties' lawyers look to the pleadings to determine the scope of required disclosures. Then, the lawyers meet informally to refine disputed issues about the case and the extent of required disclosures. Finally, the parties must submit any contested

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BNA Mgt. Briefing, Aug. 6, 1993. Although everyone assumed the bill would pass, it was held up in the Senate, and Congress adjourned without amending the new rules. Randall Samborn, *New Discovery Rules Take Effect; Bill to Stop Change Dies*, Nat'l L.J., Dec. 6, 1993, at 3; *Civil Discovery Bill Bogs Down; Revised Rules Take Effect Dec. 1*, Daily Rep. for Executives (BNA), Nov. 24, 1993, at A-7 to A-8.

Interestingly, the CJRA, President Bush's executive order, Vice-President Quayle's report, and the Advisory Committee's proposed amendments to the FRCP all included some form of automatic disclosure of certain types of information. *See, e.g.*, 28 U.S.C. § 473(a)(4) (Supp. 1993); Fed. R. Civ. P. 26(a)(1); 3 C.F.R. 359, 361 (1991); President's Council on Competitiveness, Agenda for Civil Justice Reform in America, *supra* note 15, at 16.

[21] The new Rule 4 encourages defendants to waive service by extending the time to answer from 20 to 60 days and by making defendants pay the cost of service if they refuse to waive it.

The new Rule 11 should reduce what has been called the "collateral industry of Rule 11 motion practice" by, among other things, providing for discretionary, instead of mandatory, sanctions for improper pleadings. The Advisory Committee also seeks to take the profit out of Rule 11 by limiting "fee-shifting" and emphasizing non-monetary sanctions. The new rule further provides for a 21 day "safe-harbor" to allow a challenged pleading to be withdrawn before a motion for sanctions is filed. Finally, the new Rule 11 no longer applies to discovery papers but does apply to a party's continuing duty to withdraw a pleading found to be unsupported by subsequently discovered facts.

[22] Rule 26(a)(1) requires automatic disclosure of information previously produced only pursuant to formal discovery requests. These disclosures must be made at or within ten days after the mandatory 26(f) meeting that must be held no later than 14 days before the Rule 16(b) order is entered. Fed. R. Civ. P. 26(a)(1) & 26(f).

During the Rule 26(f) meeting the parties' attorneys must clarify issues related to the automatic disclosures and must prepare a disclosure and discovery plan to be submitted to the court before the Rule 16(b) order is entered. *See* Fed. R. Civ. P. 26(f). Final adjustments to the Rule 26(a)(1) disclosures may be made by the judge during the Rule 16(b) conference. Fed. R. Civ. P. 16(b)(4).

disclosure issues to the court for final determination of the scope of disclosures.

B. *Rule 26(a) Disclosures*

Rule 26 has been thoroughly revised to encompass formal discovery as well as the new automatic disclosure requirements. Reflecting the rule's new substance, Rule 26(a) has been retitled "Required Disclosures; Methods to Discover Additional Matter."[23] Rule 26(a) imposes a duty on parties to disclose certain categories of information, including routinely discoverable information, expert testimony, and pretrial witnesses and exhibits, without waiting for formal discovery requests. Rule 26(a) establishes three distinct types of pre-formal discovery disclosures: (1) Persons, Documents/Things, Damages and Insurance; (2) Expert Opinions; and (3) Miscellaneous Trial Disclosures.

Rule 26(a)(1)(A) requires a party to make informal preliminary disclosures of the types of information which were previously sought by routine formal interrogatories, such as the identity of all witnesses and persons with discoverable information.[24] The disclosure also must generally identify the information in the possession of each person.[25]

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[23] FED. R. CIV. P. 26(a).

[24] FED. R. CIV. P. 26(a) provides:

> (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:
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> (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;
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> (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;
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> (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
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> (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.

[25] FED. R. CIV. P. 26(a)(1)(A) advisory committee's note ("Indicating briefly the general

The controversy about 26(a)(1) disclosures arises out of the requirement that in addition to supportive information, the parties must automatically also disclose damaging information.[26]

Subsection (a)(1)(B) requires that parties disclose copies or descriptions of relevant documents in their custody or control,[27] with the idea that parties may not simply bury their opponents in a blizzard of unorganized and often irrelevant documents. If parties choose to disclose copies of relevant documents, they must categorize or index them in a manner that reflects the issues to which the documents are relevant.[28] If the parties choose instead to disclose a description of the relevant documents, the disclosure must likewise categorize the documents.[29] Whether disclosing documents or descriptions of documents, the categorization must be clear so that the other parties can decide which original documents they need to examine. As with information regarding witnesses, all relevant documents are to be disclosed whether or not they support the disclosing party's case.[30]

Subsection (a)(1)(C) requires a party to disclose the computation of all claimed damages and to make available for inspection or copying all supporting discoverable documentation.[31] Of course, a disclosing party does not have to disclose a calculation of damages if this can only be accomplished with information in the possession of other parties.[32] Finally, Subsection (a)(1)(D) requires that a party automatically provide copies of insurance policies or allow the other parties to inspect the policies.[33]

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topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.").

[26] The disclosing party must automatically disclose all witnesses "*whether or not their testimony will be supportive* of the position of the disclosing party." FED. R. CIV. P. 26(a)(1)(A) advisory committee's note (emphasis added). For more on the controversy see *infra* notes 110–14 and accompanying text.

[27] *See* FED. R. CIV. P. 26(a)(1)(B).

[28] Disclosures under 26(a)(1)(B)

> should describe and categorize, to the extent identified during their initial investigation, the nature and location of potentially relevant documents and records . . . sufficiently 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 request in a manner likely to avoid squabbles resulting from the wording of the requests.

FED. R. CIV. P. 26(a)(1)(B) advisory committee's note.

[29] *Id.*

[30] *Id.*

[31] FED. R. CIV. P. 26(a)(1)(C).

[32] *See* FED. R. CIV. P. 26(a)(1)(c) advisory committee's note.

[33] *See* FED. R. CIV. P. 26(a)(1)(D).

Rule 26(a)(2) requires extensive disclosure of the identity of expert witnesses without waiting for a formal discovery request.[34] The disclosure must include a detailed report, not merely a summary, prepared and signed by the expert. The report must cover the opinions and basis for the opinions, as well as the experience, writings and qualifications of the expert.[35] Additionally, the report must include the compensation that the expert has received or will receive as well as a list of cases in which the expert has testified over the previous four years.[36] Parties must disclose expert reports whether the expert is retained or specially employed to provide testimony or is an employee of the party whose duties regularly involve giving expert testimony.[37]

Although the rules still permit the deposition of an expert witness,[38] the Advisory Committee anticipates that the detailed report will eliminate or shorten the expert's deposition.[39] Rule 26(a)(2) sets out times for disclosure of expert witnesses. The rule suggests that the court normally should include these times in the Rule 16(b) scheduling order and that ordinarily a party with the burden of proof should disclose its experts first.[40]

Subsection (a)(3) requires disclosure, shortly before trial, of information regarding witnesses and evidence that may be used at trial "other than solely for impeachment."[41] This information is similar to that which is usually exchanged via pretrial order.[42] As with all disclosures, the Rule 16(b) scheduling order should control the time for disclosure of trial materials.[43] The rule also provides, however, that the trial disclosures may be made by a special pretrial order or, at the latest, at least thirty days before trial.[44]

Rule 26(a)(1) specifies that the information disclosable under (a)(1) must be turned over automatically at or within ten days of the

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[34] FED. R. CIV. P. 26(a)(2).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] FED. R. CIV. P. 26(b)(4)(A).

[39] *See* FED. R. CIV. P. 26(a)(2) advisory committee's note. Parties seeking to depose their opponents' experts may have to pay for the expert's time at the rate the experts charge the parties who hire them.

[40] For example, Rule 26(a)(2)(C) provides that disclosure of expert witness information should be made no later than 90 days before trial or at times set by the court. *See* FED. R. CIV. P. 26(a)(2)(C) & advisory committee's notes.

[41] FED. R. CIV. P. 26(a)(3).

[42] *See* FED. R. CIV. P. 26(a)(3) advisory committee's note.

[43] *Id.* For details on the Rule 16(b) scheduling order, see *infra* notes 80–86 and accompanying text.

[44] FED. R. CIV. P. 26(a)(3).

26(f) informal meeting between the parties or, if necessary, at times directed by the court.[45] The 26(f) meeting must be held at least fourteen days before the Rule 16(b) scheduling order is entered.[46] Since the Rule 16(b) order is to be entered no later than ninety days after a defendant appears or 120 days after service, the timing of disclosures can be calculated by backtracking from the date the Rule 16(b) order is to be entered. If disclosures are not completed before the Rule 16(b) conference, a schedule for their completion must be included in the 16(b) scheduling order.[47]

Lawyers should understand that the timing stated in the rules is simply a ceiling which provides time limitations, not absolutes. The rules contemplate a disclosure "process" that includes informal discussions between the attorneys before disclosures are due. Informal contacts soon after the complaint is received will result in more effective investigation as well as more focused and perhaps earlier disclosures.[48]

The express requirement that a party need only disclose information "relevant to disputed facts alleged with particularity in the pleadings" limits initial disclosures to allegations that are specific and clear and that the disclosing party does not admit.[49] This should alert the parties that broad allegations proper under notice pleading may result in less rather than more disclosures.[50] Otherwise the disclosing party

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[45] FED. R. CIV. P. 26(a)(1). Many district courts have modified the times for disclosures. For example in the United States District Court for the Western District of Missouri, 26(a)(1) disclosures should be made at the 26(f) meeting which, itself, must be held no later than 30 days before the Rule 16 conference. *See* Local Court Rules of the United States District Court for the Western District of Missouri, effective July 1, 1994, at 15.2–15.3. The fact that the FRCP as well as the local rules also call for a discovery/scheduling order to be submitted to the court within 10 days of the 26(f) meeting reflect a flexible approach to the timing of disclosures.

[46] FED. R. CIV. P. 26(f). Local rule 15 of the Western District of Missouri requires that the 26(f) meeting take place no later than 30 days before the Rule 16(b) [known as R15D] scheduling order, which itself is to be entered no later than 90 days after the appearance of a defendant or 120 days after the complaint is served on any defendant, whichever is earlier. More details on the 26(f) meeting can be found *infra* at notes 67–68 and accompanying text.

[47] For details on the Rule 16(b) scheduling order, see *infra* notes 80–86 and accompanying text.

[48] *See, e.g.*, FED. R. CIV. P. 26(a)(1) advisory committee's note.

[49] FED. R. CIV. P. 26(a)(1) & advisory committee's notes.

[50] Some lawyers and commentators have argued that the new rules have done away with notice pleading. Colleen McMahon, *Critics Turn Up Heat on Proposed Discovery Rules*, N.Y. L.J., July 19, 1993, at S1; Jaret Seiberg, *All or Nothing*, CONN. L. TRIB., May 2, 1994, at 12 (citing United States District Judge Warren Eginton); *see also* Bell et al., *supra* note 19, at 30; Gerald G. MacDonald, *Hesiod, Agesilaus and Rule 26: A Proposal for a More Effective Mandatory Initial Disclosure Procedure*, 28 WAKE FOREST L. REV. 819, 838 (1993). This is not so. To the extent that there was "notice pleading" before the new rules, the disclosure provisions do not change pleading requirements. The disclosure provision merely provides some incentive to plead with more specificity to secure better disclosures. Plaintiffs can still make vague and general allega-

would be obligated to a scope of disclosure out of proportion to any real need. Specific and clear complaints, defenses, counterclaims or cross-claims will result in more complete disclosures of witnesses, documents and expert witnesses.

Before making Rule 26(a)(1) disclosures, a party must make a "reasonable inquiry" into the facts of the case.[51] Whether an inquiry has been "reasonable" before disclosure depends on the circumstances of each case, but several factors will affect the exhaustiveness of an inquiry. These factors include (1) the complexity and number of the issues alleged with particularity in the pleadings; (2) the location, number and availability of the witnesses and documents; (3) how long the party has to conduct the inquiry; and (4) the extent of the working relationship between the disclosing party and the party's lawyer, particularly in handling similar litigation.[52]

The rules contemplate that a party will make its initial disclosures based on the specificity of the pleadings and the information reasonably available to the party within the time allowed for disclosure.[53] The rules, however, are clear that a party cannot postpone making disclosures either because it has not completed its investigation, or because the other party has not completed its disclosures.[54]

A party must make its Rule 26(a) disclosures in writing, must serve them on the other parties, and must file them with the court.[55] The disclosures must be signed by the party's lawyer or, if unrepresented, by the party.[56] The signature certifies that the disclosure is complete and correct as of the time made.[57] This certification is similar to that required by Rule 11 and it likewise subjects the signatory to sanctions if the disclosures are improper or incomplete.[58]

Rule 26(b)(5) is new and requires a party claiming privilege or work product protection to make the claim expressly and describe the nature of the information not disclosed. This allows the other side to

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tions. This may affect the extent of disclosures the defendants must make but it does not invalidate the complaint.

[51] FED. R. CIV. P. 26(g)(1).

[52] FED. R. CIV. P. 26(a)(1) advisory committee's note.

[53] FED. R. CIV. P. 26(a)(1) advisory committee's note. This includes information the disclosing party obtains during the 26(f) meeting. For details on the disclosure mechanism, see *infra* notes 55–63 and accompanying text.

[54] FED. R. CIV. P. 26(a)(1).

[55] FED. R. CIV. P. 26(a)(4).

[56] FED. R. CIV. P. 26(a)(4) & 26(g)(1).

[57] FED. R. CIV. P. 26(g)(1).

[58] For details on sanctions for improper or incomplete disclosures, see *infra* notes 64–66 and accompanying text.

evaluate the claimed protection.[59] This requirement should accomplish two goals: first, it should prevent lawyers from unilaterally withholding information without mentioning its existence; second, it should discourage arbitrary and tenuous claims of privilege or work product.

Rule 26(e)(1) imposes on parties a new duty to supplement disclosures at timely intervals as the investigation continues, and irrespective of whether the other side has disclosed.[60] This includes a new duty to supplement expert opinion should it change subsequent to the initial disclosure under Rule 26(a)(2).

The disclosure obligations of 26(a)(1) can be modified or suspended by stipulation of the parties, court order or local rule.[61] This provision, known as the "opt-out" rule, is meant to accommodate the Civil Justice Reform Act that directed districts to experiment with different procedures to "reduce the time and expense of civil litigation."[62] Under this provision, parties may stipulate to waive or modify disclosures and judges may modify or suspend the disclosure requirement on a case-by-case basis.[63]

Rules 26(b) and 37 provide for enforcement of 26(a) disclosures. Rule 26(g)(3), in conjunction with Rule 37, allows the court to order a range of sanctions including fee shifting. Rule 37 sanctions may include, but are not limited to, attorney's fees. Rule 37(c)(1) contains a self-executing sanction for failure to disclose information "without substantial justification."[64] This sanction results in exclusion at trial of the non-disclosed evidence.[65] Rule 37 also allows courts discretion to order, in addition to attorney's fees, "a wide range of other sanctions—such as declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to

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[59] FED. R. CIV. P. 26(b)(5) & advisory committee's note. The rule also applies to claims of work product and privilege in response to formal discovery requests. *Id.*

[60] FED. R. CIV. P. 26(e)(1).

[61] FED. R. CIV. P. 26(a)(1) advisory committee notes.

[62] FED. R. CIV. P. 26(a)(1) advisory committee's note. Pursuant to the CJRA, several jurisdictions have required some form of disclosure for almost two years.

[63] This provision has also allowed many district courts to opt out of the disclosure provisions altogether. To date, 35 of the 94 federal districts have adopted the new FRCP. *News & Trends*, TRIAL, July 1994, at 95. While only a dozen districts have rejected the new rules outright, many courts have opted out of them because they already have local rules designed to expedite discovery. Moreover, several districts enacted local rules to expedite discovery pursuant to the CJRA. *Id.*; *New Discovery Rules Are Here to Stay—But Many Districts Balk*, LAW. WKLY. USA, Mar. 14, 1994, at 22.

[64] FED. R. CIV. P. 37(c)(1).

[65] *Id.* For example, under 37(c)(1), any expert testimony not disclosed under (a)(3) may not be allowed as direct testimony at trial.

be informed of the fact of nondisclosure—that . . . can be imposed when found to be warranted after a hearing."[66]

Violations of the disclosure provisions, as with other discovery violations, are no longer subject to Rule 11 sanctions. The amended rules limit Rule 11 sanctions to violations involving pleadings.

C. *Rule 26(f) Pre-Discovery Meeting*

The new rules require that parties meet no later than fourteen days before the Rule 16(b) conference is scheduled or the 16(b) order is entered.[67] This meeting offers lawyers an opportunity to informally refine and clarify the disputed issues between the parties and, if necessary, stipulate to adjustments in the timing of disclosures.[68] During the meeting, the lawyers are to informally discuss the case, settlement possibilities and disclosures, as well as prepare a discovery/scheduling plan.

Within ten days of the 26(f) meeting, the parties must generate a detailed discovery/scheduling plan to be submitted to the court before the Rule 16(b) scheduling order is to be entered (the "plan" or "Proposed Joint Discovery/Scheduling Plan" or the "Proposed Plan").[69] The plan must contain the proposed timing of disclosures unless the parties stipulate to "opt-out" of the disclosure requirements.[70] Additionally, the plan should contain the proposed timing of formal discovery, joinder of parties and issues, dates for lists of trial witnesses, as well as any other orders sought to be entered under Rule 16(b). The Proposed Plan also should include times for the parties to supplement disclosures and discovery, as well as times for pretrial motions and settlement discussions.

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[66] FED. R. CIV. P. 37(c) advisory committee's note.

[67] Because the Rule 26(f) meeting is linked to the Rule 16(b) conference, which must take place 90 days after an appearance, the 26(f) meeting is likely to take place approximately 75 days after the first appearance.

Some jurisdictions have, by local rule, shortened the time within which the Rule 26(f) meeting must be held. For example, the local rules in the Western District of Missouri encourage the parties to hold the 26(f) meeting "as soon as practicable" but no later than 30 days before the 16(b) scheduling conference. Moreover, some jurisdictions allow the 26(f) meeting to be held by telephone if the lawyers are located more than a certain distance apart. In Kansas federal court, for example, that distance is 100 miles, while in the Western District of Missouri it is 75 miles. In Missouri, the 26(f) telephone meeting must be recorded by a court reporter.

[68] FED. R. CIV. P. 26(a) & (f) advisory committee's notes.

[69] FED. R. CIV. P. 26(f); *see also* FED. R. CIV. P. Form 35. Form 35 names the proposed plan as "The Report of Parties' Planning Meeting."

[70] *See* FED. R. CIV. P. 26(a) & (f).

Only one Proposed Joint Discovery/Scheduling Plan is to be submitted to the court.[71] Therefore, the plan must include not only the agreed-to items but also any competing proposals on items not agreed-to by the parties. For example, if the parties cannot agree on a schedule for disclosures, the Proposed Plan must include each party's suggested schedule. The Proposed Joint Discovery/Scheduling Plan is to be a blueprint for the Rule 16(b) scheduling order and, as such, must be submitted to the court before the Rule 16(b) conference.[72]

D. *Limits to Formal Discovery Under the New Rules*

The new rules prohibit, with some exceptions, the initiation of any formal discovery (interrogatories, depositions, document requests or admissions) before the parties have held the Rule 26(f) meeting.[73] The new rules also limit the number of interrogatories and depositions allowed without leave of court. Rule 30 limits to ten the number of depositions a party may take without leave of court.[74] Also, a party must obtain leave of the court to depose a person who has been previously deposed in the same case or to depose a person anytime prior to the 26(f) meeting.[75] Rule 33 limits to twenty-five the number of interrogatories, including subparts, that a party may serve on any other party.[76]

E. *Rule 16(b) Scheduling Conference and Order*

Under the new rules, the initial scheduling conference could become very important, a watershed in the litigation. Although Rule 16 does not mandate that a scheduling conference take place, the rule allows the judge an opportunity to meet the parties' lawyers early in the litigation, soon after the lawyers have met pursuant to Rule 26(f).[77] The Rule 16(b) conference must result in a scheduling order. Al-

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[71] *See* FED. R. CIV. P. 26(f).

[72] *Id.*

[73] FED. R. CIV. P. 26(d). Most jurisdictions place the same limit on formal discovery. For example, in the District of Kansas and the Western District of Missouri, local rules also provide that formal discovery under Rules 30, 31, 33, 34 and 36 cannot be started before the 26(f) meeting.

[74] FED. R. CIV. P. 30(a).

[75] *Id.*

[76] FED. R. CIV. P. 33(a). Rule 26(b)(2) allows local rules and courts to change the presumptive limits now set on interrogatories and depositions. Many jurisdictions have changed the limits to formal discovery. For example, in Kansas federal court, local rules allow 30 interrogatories (including subparts).

[77] Instead of mandating a conference, Rule 16(b) specifies that a scheduling and planning order "shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant." FED. R. CIV. P. 16(b).

though the rule provides that the scheduling order may be entered without a hearing, the Advisory Committee anticipated that in most cases, courts at least will confer with the parties' attorneys by phone.[78] Thus, the rule invites judges to use the Rule 16(b) conference to set the tone of and exercise control over the course of the litigation.[79] This early conference provides the opportunity for judicial guidance in the initial formulation of the issues of a case.

Under Rule 16(b), the court must enter a scheduling order after receiving the parties' Rule 26(f) Proposed Joint Discovery/Scheduling Plan or after consulting with the lawyers or unrepresented parties.[80] In no event should this order be entered any later than ninety days after a defendant has appeared or 120 days after the complaint has been served.[81]

The scheduling order should include:[82] the parties' agreed schedule of disclosures and discovery;[83] limits on discovery;[84] joinder of parties or amendments to pleadings; schedule for pre-trial motions; schedule of experts' reports; dates for settlement discussions and, if appropriate, for mediation;[85] dates for lists of trial witnesses; and dates for subsequent pre-trial conferences.

If necessary, the scheduling order can provide special procedures for handling complex litigation.[86]

III. AUTOMATIC DISCLOSURES: THE SKY IS NOT FALLING

A. *Plaintiffs' and Defendants' Bar: Objections and Predictions*

Even before the new rules went into effect on December 1, 1993, plaintiff and defense lawyers unanimously predicted that automatic disclosures would have a significant negative impact on their practices.

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[78] *See* FED. R. CIV. P. 16(b) advisory committee's note.

[79] The 16(b) conference can be presided over by a judge or magistrate. FED. R. CIV. P. 16(b).

[80] *Id.*

[81] *Id.*

[82] *See* FED. R. CIV. P. Form 35.

[83] Although the court has the discretion to change the timing agreed to by the parties, judges will likely institute changes only when the agreed-to schedule is unnecessarily long. Most of the judges I surveyed noted that in the majority of cases the scheduling order did not alter the proposed joint discovery/scheduling plan to which the lawyers had agreed.

[84] These include limits on the number of interrogatories, depositions and requests for admission, as well as limits on the time for expert depositions.

[85] Some judges and magistrates are including in the Rule 16(b) scheduling order a time limitation or a specific date for the parties to meet to discuss the potential for either settlement or mediation. Since disclosures and discovery should have been essentially completed, this is a timely opportunity to consider ways to accelerate the resolution of the dispute, maybe even without court intervention.

[86] *See* FED. R. CIV. P. 16(b)(6).

Curiously, plaintiffs' and defendants' attorneys' groups each claimed that disclosures would unfairly benefit the other. For the most part, their concerns have proven exaggerated.

Plaintiffs' lawyers predicted that the disclosure provisions would help defendants because plaintiffs could have to disclose their weaknesses before defendants.[87] This is not a significant concern. Conceivably, under the new rules, a plaintiff may have to disclose damaging information to the defendant prior to the defendant's disclosure of comparable information. The timing of the parties' disclosures, however, will have no substantive effect on their obligation to disclose. The defendant's duty to disclose is not excused simply because plaintiff has disclosed some damaging information. With some exceptions, a judge will not allow a defendant to use damaging information against a plaintiff before the defendant's disclosures shed light on all the facts of the case.[88] If the plaintiff's disclosure reveals that the lawsuit should not proceed, however, the defendant should be awarded early dismissal; in such a case, the rule has served its purpose. If, for example, early disclosures reveal that the lawsuit is time barred or that the plaintiff is suing the wrong party, the court should stay the defendant's disclosure obligations pending resolution of a motion to dismiss or for summary judgment.[89]

To the extent that plaintiffs' lawyers worry that automatic disclosures will rob them of the opportunity discovery affords to find evidentiary support for their claims, their worries are misplaced. It is true that defendants frequently possess much of the evidence needed to support a claim. Although this may reduce the specificity of the allegations in the complaint, it does not affect the plaintiff's duty to disclose. The new rules limit the extent of disclosures to that which plaintiffs possess or can obtain after reasonable inquiry.[90] If plaintiff's counsel is unable to determine the exact manner in which the defendant's conduct injured the plaintiff, notice pleading allows general allegations in the complaint.[91] Vague allegations may result in fewer disclosures from a defendant, but the new rules do not affect the level of plaintiff's disclosure.

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[87] *See, e.g.*, Bell et al., *supra* note 19, at 32 & n.120.

[88] With the possible exception of information that reveals that the lawsuit is groundless or absolutely barred, some judges are delaying motions to dismiss until all disclosures are made. Interview with Judge Magistrates Karen Humphreys and Ronald Newman, Nov. 10, 1994.

[89] At the very least, the judge should narrow the scope of disclosures to those related to the potentially dispositive issue.

[90] *See supra* notes 49–53 and accompanying text.

[91] *See, e.g.*, FED. R. CIV. P. 8(a).

To the extent, however, that plaintiffs' lawyers fear that the new rules threaten the old practice of file-now-find-support-later, their worries are valid. With all its shortcomings, the strict formalism of common-law pleading forced lawyers to prepare thoroughly before filing a complaint. By contrast, notice pleading and liberal discovery have permitted lawyers to file lawsuits with little or no support, but with the hope that discovery might provide subsequent justification. The new disclosure provisions should reduce the number of federal lawsuits filed with little or no preparation because failure to disclose supportive information reasonably available to plaintiff can result in such evidence being excluded at trial.[92] As a result, the new rules compel plaintiffs' lawyers to gather, before filing suit, all information that reasonable inquiry might reveal regarding witnesses, documents and damages.

Mirroring their counterparts, defense attorneys predicted that the new mandatory disclosure provisions would help plaintiffs and disproportionately hurt defendants. They argued that disclosure provisions provide plaintiffs' lawyers with unlimited time to prepare minimal disclosures while defense lawyers must conduct their investigation with a very short time before disclosure. Defense attorneys asserted that, as a consequence, they run the risk of producing incomplete disclosures for which they later may be sanctioned.[93] Defense attorneys also complained that because defendants usually possess the bulk of the relevant documents, the disclosure provisions force defense lawyers "to start gathering documents as soon as the case is served."[94]

This objection also mirrors plaintiffs' attorneys' complaint that the new rules require them to be prepared earlier in the process. On both sides complaining lawyers have missed the point. Earlier preparation of cases is precisely one the goals of the new disclosure provisions. If the new disclosure provisions compel lawyers to prepare their cases earlier, then the rule will accomplish the purpose of less costly and time-consuming litigation.

Much of the criticism by defendants and their attorneys boils down to objections that mandatory disclosures would change the way in which lawyers traditionally have practiced law. Although the new rules could force lawyers to practice law differently, this new way of practicing would benefit the profession.

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[92] *See supra* notes 64–65 and accompanying text.

[93] *See, e.g.*, Lisa B. Brown & Charles W.R. Brown, *Watch Out for Rule 26 Changes*, TEX. LAW., June 13, 1994, at 30.

[94] Brown & Brown, *supra* note 93, at 32.

Some lawyers fear the new rules will not permit litigators to treat discovery as a war game. Among the least persuasive objection to automatic disclosures was that offered by car manufacturers and their lawyers. They expressed concern about their disclosure obligations when confronted with complaints containing general and vague allegations: "[Given] the thousands of components in motor vehicles, . . . [the disclosure provisions] would leave the defendant wondering whether countless [materials] . . . should be included in the defendant's disclosures."[95] This concern is dubious, given the Machiavellian efforts car manufacturers and their lawyers routinely undertake to hide relevant information even when confronted by specific discovery requests.[96]

Many defense lawyers denounced the new rules' standard for disclosure—"relevant to the disputed facts alleged with particularity"—as ambiguous and likely to lead to more rather than less litigation.[97] They argued that the parties would interpret what is "relevant" differently, which would lead to extensive collateral litigation further crowding already overextended judicial dockets.[98] These lawyers do not un-

[95] Bell et al., *supra* note 19, at 42.

[96] The instances where car manufacturers and their lawyers have been found to conceal relevant information despite specific discovery requests and court orders are too numerous to name. *See, e.g.*, Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978); Delvecchio v. General Motors Corp., 625 N.E.2d 1022 (Ill. App. 1993); Nov. 16, 1993 Hr'g Tr. at 171–74, Stump v. General Motors Corp. (No. 91-C-09), Dist. Ct. of Rep. Cty., Kan. (on file with author); Feb. 8, 1993 Hr'g Tr. at 31–32, Cooper v. General Motors Corp. (No. 23459) Markette Cty., Mich. (on file with author).

The recent case of Mosely v. General Motors Corp., No. CA-90V6276 (Ga. State Ct., Fulton County Feb. 26, 1993), offered a rare glimpse into the extreme measures car manufacturers and their lawyers undertake to conceal information not only from discovery in lawsuits but also from governmental and regulatory inquiries. *See, e.g.*, Terence Moran, *GM Burns Itself*, AM. LAW., Apr. 1993, at 68. The Mosely trial demonstrated G.M.'s carefully crafted defense scheme, designed specifically to prevent plaintiffs (and regulators) from obtaining discoverable information. *Id.* The 1993 trial involved allegations that young Shannon Moseley had burned to death as a result of a defect in the fuel tank of his G.M. pick-up truck. Before trial, Moseley's lawyers fortuitously obtained documents on 22 truck crash tests involving fuel tank placement performed by G.M., which the manufacturer and its lawyers had failed to produce to any of the more than 100 plaintiffs who had sued G.M. over fuel-fed truck fires. When the jury found out about G.M's elaborate scheme to conceal discoverable information, it slapped G.M. with $101 million in punitive damages.

With G.M. and other manufacturers having spent so much effort designing plots to subvert discovery, it is no wonder they oppose the new disclosure provisions. Failure to disclose will no longer simply be a violation of discovery requests, it will be a violation of Rule 26(a). Failure to disclose will likely also be a violation of the Rule 16 order and, as such, contempt of court.

[97] Joanna Stark Abramson, *Federal Civil Procedure Amendments Opposed By State Bar Commissioners*, MICH. L. WKLY., Aug. 2, 1993, at 1; Bell et al., *supra* note 19, at 42–43; Brown & Brown, *supra* note 93, at 31; McMahon, *supra* note 50, at S1.

[98] Joanna Stark Abramson, *Federal Civil Procedure Amendments Opposed By State Bar Commissioners*, MICH. L. WKLY., Aug. 2, 1993, at 1; Bell et al., *supra* note 19, at 42–43; Brown & Brown, *supra* note 93, at 31; McMahon, *supra* note 50, at S1.

derstand that under the new rules, a party's obligation to disclose is based on more than simply the "facts pled with particularity" in the complaint.

If a defendant is concerned that the vague allegations of the complaint may make it difficult to determine the scope of disclosure, the rules require the parties to take further steps to determine what should be disclosed. If the complaint does not provide sufficient "specificity," the parties must first meet informally to "attempt to frame a mutually agreeable [disclosure and discovery] plan."[99] If further clarification or refinement is needed before disclosures can be completed, the court will hold a disclosure/discovery scheduling conference to resolve any lingering questions about what should be turned over and when.[100] Although the new rules are unlikely to hurt any defendant who, in good faith, intends to disclose information relevant to the case, the rules probably will harm those defendants who used discovery as a weapon in litigation war-games.

Many defense lawyers erroneously complained that the new rules would result in more work. The old rules mandated production of relevant but unprivileged information during the discovery period. The only difference under the new rules is that the same information must be disclosed or produced a few steps earlier in the litigation.[101] This may require lawyers to work earlier; but it should not require them to work more. Even for defense lawyers who in the past successfully overwhelmed opponents with motions until they gave up, the new rules do not mean more work. They may even save time and money because the costs of the Herculean efforts spent to delay discovery probably exceeded the costs of simply producing the information.

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[99] *See* FED. R. CIV. P. 26(f) & advisory committee's note.

The lawyers who object to using the 26(f) meeting to narrow the scope of disclosures probably believe that informal attempts to resolve discovery disputes are inconsistent with the adversarial process. These lawyers are likely to routinely respond to discovery requests either with objections or motions claiming that the requests are "overly broad, ambiguous and unduly burdensome," and that the information sought is "not relevant or reasonably calculated to lead to the discovery of admissible evidence."

In my practice, I regularly encountered lawyers who simply did not believe that the adversarial process contains room for informal resolution. They never considered simply calling me to clarify a discovery request they found objectionable. Their knee-jerk reaction to any disputed discovery request was to respond with a boiler-plate objection or file a motion for protective order. When I would call them to attempt to clarify their discovery requests, they would respond that their requests were clear and if I had a problem, they'd "see me in court."

[100] FED. R. CIV. P. 16(b).

[101] The only instance when disclosures would result in more work for defense counsel is when they must continue with the disclosure process despite clear evidence that the plaintiff's case is groundless or time barred. If that is the case, defense attorneys should seek to have disclosures stayed pending the resolution of a motion to dismiss or for summary judgment.

Some lawyers predicted that because automatic disclosures do not replace formal discovery, the new rules simply add another layer of disputes on top of those initiated by formal discovery disputes.[102] This prediction also ignores the effect of the informal disclosure process. Because formal discovery cannot begin until after the parties' lawyers have begun the disclosure process, most disputes regarding what is discoverable should be resolved during the Rule 26(f) meeting or, if needed, during the Rule 16(b) conference. Formal discovery should be limited to exchanging relevant information not informally disclosed.

Some lawyers protested that the disclosure provision would "force counsel to attempt to think like opposing counsel."[103] This is a peculiar objection given that this is precisely what lawyers are supposed to do. Effective litigation strategy requires that lawyers think like their adversaries in order to better anticipate their arguments and strategies.

Some lawyers and commentators have criticized the new rules' provision allowing suspension or modification of disclosure obligations. They argue that allowing local rules to modify or eliminate disclosure requirements will lead to a loss of uniformity among federal courts and confusion among lawyers.[104] This concern underestimates lawyers' abilities. Diligent lawyers routinely inquire about the local rules in unfamiliar jurisdictions and are not confused by differing local procedural rules. This objection also ignores the fact that the CJRA has already reduced uniformity among federal courts by mandating that district courts design their own experimental discovery rules.[105] Moreover, to the extent that a lack of uniformity exists regarding the specifics of disclosure, it is of minimal concern when weighed against the benefits of the rule.

B. *The Executive and Judiciary: Objections and Predictions*

The Clinton administration reversed the Bush administration's support for the new provisions, indicating that "a rule mandating pre-discovery disclosure is not prudent or in the best interest of the

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[102] *See, e.g.*, Bell et al., *supra* note 19, at 40–41.

[103] For example, at a hearing of the Philadelphia Bar Association's Board of Governors, board member Robert Newell stated that Rule 26(a) "forces you to guess your opponent's argument." Hank Grezlak, *Bar Opposes New Federal Discovery Rules*, LEGAL INTELLIGENCER, Aug. 2, 1993, at 1; *see also Pre-Trial Practice in the 90's and Coping with New Federal Rules of Civil Procedure and the Civil Justice Reform Act*, SECTION OF LITIGATION, ABA ANNUAL MEETING, Aug. 8, 1994.

[104] Rule 26(a)(1) allows local courts to modify or completely reject the disclosure requirements. As a result many courts have opted out of or modified the disclosure provisions of 26(a)(1). *See, e.g.*, John F. Rooney, *Discovery Rule Lacks Uniformity, is Source of Confusion*, CHI. DAILY L. BULL., Apr. 23, 1994, at 17. Rooney points out that as of April 1994, only 38 of 94 federal districts had adopted the disclosure rule.

[105] *See supra* note 13 and accompanying text.

United States."[106] The Clinton Department of Justice complained that for lawyers representing large clients like the United States Government, disclosures may take too much time because information is often scattered throughout the country.[107] This concern is premature. To the extent that disclosures will burden a large entity, its attorneys can seek, from opponents or the courts, an extension of time to disclose.

Even the Supreme Court got into the fray, with Justice Scalia refusing to endorse the new amendments.[108] Justice Scalia's main objection to the new provisions was that automatic disclosure is inconsistent with the adversarial system.[109]

C. *Disclosures Are Consistent with the Adversary System and Lawyers' Ethical Obligations*

By far the most frequently voiced objection to the disclosure provisions is that disclosure undermines the adversary system.[110] According to this argument, automatic disclosures create an unworkable conflict between a lawyer's ethical obligation to "represent a client zealously,"[111] and the new rules' obligation to disclose relevant information even if damaging to the client. Lawyers complain that the duty to disclose without discovery requests "impose[s] an ongoing, affirmative obligation on the attorney to initiate disclosure to an opponent or the court of information potentially adverse to the client's interests."[112] This, they maintain, "is fundamentally unfair to the client, and places the attorney in a particularly problematic position."[113] According to Justice Scalia's dissent to the new rules:

> The proposed new regime does not fit comfortably within the American system which relies on adversarial litigation to de-

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[106] *Administration Opposes New Disclosure Rule,* NAT'L L.J., July 26, 1993, at 5.

[107] *Id.*

[108] Justice Scalia submitted a blistering dissent to which Justices Thomas and Souter joined. *See* 61 U.S.L.W. 4392, 4393 (Apr. 27, 1993), 146 F.R.D. 507 (1993).

[109] 61 U.S.L.W. at 4393.

[110] These critics are mostly, but not exclusively, defense lawyers. *See, e.g.,* Abramson, *supra* note 97, at 1; Bell et al., *supra* note 19, at 42–43; Brown & Brown, *supra* note 93, at 31; McMahon, *supra* note 50, at S1; *see also* 61 U.S.L.W. at 4373; *Congressman Poised to Propose Striking Disclosure Clause in Civil Practice Reforms,* BNA BRIEFING, Aug. 2, 1993; *Bill To Delete Discovery Rule Reported to House Committee,* BNA BRIEFING, Aug. 6, 1993.

[111] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980). Canon 7 of the Code of Professional Responsibility admonishes that "[a] lawyer should represent a client zealously within the bounds of the law." *Id.*

[112] *Justice Department Opposes Changes in Rules of Civil Procedure,* 8 LIAB. WK., Aug. 2, 1993 (statement of Alfred W. Cortese, Jr., a lawyer representing various defense and business associations opposed to the rule); *see also supra* note 110 and accompanying text.

[113] *Justice Department Opposes Changes in Rules of Civil Procedure, supra* note 112.

> velop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their client—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule [26(a)] would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side.[114]

1. The Misunderstood Adversarial Model

The claim that automatic disclosures undermine the adversary system reflects a widespread and unfortunate misinterpretation of the adversarial model of civil dispute resolution. The adversary process is the primary model of dispute resolution in our Anglo-American legal system.[115] Although the adversary process evolved over centuries,[116] its origins include the Norman trial by battle.[117] Trial by battle was a means of settling disputes through which the litigants (or their hired fighters) engaged in physical combat until one or the other surrendered or suffered defeat.[118] Judicial officers, usually connected to the church, administered the litigants' combat, and both sides were required to swear under oath that their position (or their clients') was just.[119] Presumably in deference to the adversary process' roots in the trial by battle, many lawyers today still perceive litigation as "war," discovery as "battle," and their adversaries as "enemies" to be given no quarter.[120]

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[114] 61 U.S.L.W. at 4393.

[115] The adversary model of the Anglo-American judicial system contrasts with what is commonly called the inquisitorial or interrogative model used in civil law countries. GEOFFREY C. HAZARD, JR., *The Adversary System, in* ETHICS IN THE PRACTICE OF LAW 120–35 (1978).

[116] STEPHAN LANDSMAN, *The History of the Adversary System, in* THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 7–25 (1984).

[117] *See, e.g.*, HAZARD, *supra* note 115, at 120. *But see* LANDSMAN, *supra* note 116, at 8. The tortuous road from trial by battle to adversarial model included stops at wager of law, trial by ordeal and the star chamber. *See* LANDSMAN, *supra* note 116, at 8–18.

[118] LANDSMAN, *supra* note 116, at 8. In some types of criminal cases, trial by battle continued to the death. *Id.*

[119] *Id.*

[120] The view that the role of the lawyer in the adversary system is to win at any cost has been widely followed by practitioners and enthusiastically supported by many commentators. *See, e.g.*, GEORGE SHARSWOOD, LEGAL ETHICS (1854). More recently, professor Murray Schwartz advanced that "when acting as an advocate for a client . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved." Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978) (Schwartz calls this "The Principle of Nonaccountability"). The ethical support for this partisan view is the rationalization that "the lawyer's morality is distinct from, and not implicated in, the client's." David Luban, *The*

Once litigation is accepted as a surrogate for war, discovery strategy necessarily becomes a "win-at-any-cost" battle. Romantic though these notions may be, in civil cases they are inaccurate.[121]

The adversary model of civil litigation simply implies that the interests of disputing parties are advanced by opposing lawyers, with the judge and jury acting as neutral arbitrators.[122] This contrasts with the "inquisitorial" model in which the judge is called upon both to make a decision and to protect the interests of opposing parties.[123] The adversary process depends on the parties, rather than the judge, to ascertain the legal and factual support for the litigants' respective positions, as well as to present that proof to the court.[124]

In the civil adversary process, the role of opposing counsel is central and well defined: they are advocates.[125] As advocates, their role is to employ their innate talents and acquired lawyering skills in a two step process. In the first step, each advocate defines the issues of a dispute and seeks legal support for the client's position.[126] The advocate also searches for factual support for the client's stance, analyzing and evaluating all relevant information from all sources.[127]

Once all relevant information is made available to the decisionmaker, the adversary process proceeds with the advocates making competitive presentations to the decisionmaker. In this step the advocates use the facts and law to present the claims in the light most favorable to their respective clients.[128] If the parties' advocates are of roughly

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Adversary System Excuse, in THE GOOD LAWYER 84 (David Luban ed., 1984) (citing Schwartz' Principle of Nonaccountability).

[121] Because this Article focuses on the Federal Rules of Civil Procedure, my analysis is limited to the adversary process in civil cases. Moreover, the justifications for winning-at-any-cost in a criminal defense are not present in civil litigation. *See infra* notes 141–42 and accompanying text; *see also* Murray L. Schwartz, *The Zeal of the Civil Advocate, in* THE GOOD LAWYER 160 (David Luban ed., 1984).

[122] *See, e.g.*, HAZARD, *supra* note 115, at 120; *see also* Lon Fuller, *The Adversary System, in* TALKS ON AMERICAN LAW 30–32 (Harold Berman ed., 1961).

[123] *See, e.g.*, HAZARD, *supra* note 115, at 120; *see also* Fuller, *supra* note 122, at 30–32.

[124] In the inquisitorial model, the court, rather than the parties, determines the law and conducts its own independent inquiry into the facts of each case. HAZARD, *supra* note 115, at 120; *see also* Fuller, *supra* note 122, at 30–32.

[125] HAZARD, *supra* note 115, at 121; LANDSMAN, *supra* note 116, at 4.

[126] HAZARD, *supra* note 115, at 121.

[127] *Id.* If the advocate finds weaknesses in the client's position, the advocate's role includes confronting the client early and advising the client of the viability of alternatives. Only after mutually agreeing to continue with litigation should the advocate proceed to the next step. The understanding should be that at any time during the litigation the client has alternatives to all-out war.

[128] *Id.*

equal ability—an essential premise of the adversary model—fair dispute resolution is fulfilled.[129]

The adversary process presupposes that during the fact-finding stage of civil litigation, the lawyers for each party tender all discoverable relevant information and use their skills to make certain their opponents reciprocate.[130] The adversary process in civil litigation never has contemplated that lawyers use their skills to conceal discoverable information even as they seek complete discovery from their opponents. But lawyers who misconstrue "adversary" for "enemy" also misinterpret "advocacy" for "winning by any means." To these lawyers, proper adversarial conduct necessarily includes concealing relevant information and lying to opponents and decisionmakers, while aggressively preventing opponents from reciprocating.

Under this warped view of the civil adversary model, lawyers rationalize that they are obligated to turn over discoverable information, if ever, only when their opponent's discovery request describes it with photographic detail. Often, however, only their own client possesses the details. When any reasonable interpretation of the scope of the opponent's request would include the concealed information, failure to produce it demonstrates a sophistic interpretation of the adversary process.[131]

The adversary process demands that lawyers promote their clients' position by advancing evidence favorable to their clients and rebutting unfavorable evidence. The adversary process does not imply that to accomplish these goals, the lawyers' duties include concealing unfavorable evidence. But it is this misinterpretation of our role as advocates that permits lawyers to declare that "[a]sking your client for that smoking gun [pursuant to 26(a)] is very troubling . . . [and] could damage the attorney-client relationship."[132]

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[129] *See infra* notes 149–52 and accompanying text.

[130] *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 500–01 (1947).

[131] It is possible that these lawyers simply assume that the support for winning at any cost in criminal cases is equally applicable to civil cases. As support for the civil-litigation-as-war philosophy, lawyers often cite the zealous partisanship dogma advanced in 1821 by Lord Brougham in his defense of Queen Caroline against a criminal charge of adultery brought by her husband, King George IV. To bolster his maneuvering to hinder the prosecution, Brougham stated that protection of the client was the advocate's "first and only duty; and in performing that duty [the advocate] . . . must go on reckless of the consequences." GEOFFREY C. HAZARD, JR., *Concluding Reflections, in* ETHICS IN THE PRACTICE OF LAW 150 (1978). I reiterate that while there may be some logical rationale for construing criminal litigation as battle, there is none in civil cases. *See infra* notes 141–42 and accompanying text.

[132] Seiberg, *supra* note 50, at 12.

The rules of civil procedure provide the framework for the adversarial development and presentation of civil claims. The adversarial model requires the advocates to prepare and present their clients' positions within the boundaries of the law and the constraints of their ethical obligations. Lawyers who interpret Rule 26(a)'s requirement of automatic disclosure of all discoverable information as a betrayal of their commitment to the client and the adversary system misinterpret their role as adversaries as well as their ethical obligations.

Condemnation of the winning-is-everything approach to adversary practice is not unique. Neither is the fact that all the critics fail to distinguish between the win-at-any-cost philosophy and the adversary model. Most critics of the adversarial model attack the win-at-any-cost approach on moral or ethical grounds.[133] They denounce the adversary system as morally and ethically deficient because, among other failings, it pretends to excuse lawyers from moral responsibility and it does not seek or achieve the truth.[134] Some recent commentators have attacked the win-at-any-cost ethic on feminist grounds.[135] The feminist critique urges a reexamination of the lawyer's role, but assumes that the win-at-any-cost approach is an unavoidable "male" characteristic of the adversary process.[136] Whether the critiques are moral, ethical, or femi-

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[133] *See, e.g.*, Luban, *supra* note 120, at 83–118; Rhode, *supra* note 9; Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 36–37 (1978).

[134] *See, e.g.*, Marvin Frankel, *The Search for Truth: An Umperial View*, U. PA. L. REV. 1031 (1975); Rhode, *supra* note 9, at 596–98; Shaffer, *supra* note 133, at 699.

[135] *See, e.g.*, Naomi R. Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEGAL ETHICS 23 (1990); James C. Foster, *Antigones in the Bar: Women Lawyers as Reluctant Adversaries*, 10 LEGAL STUD. F. 287 (1986); Carrie Menkel-Meadow, *Portia in a Different Voice: Some Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

[136] Cahn, *supra* note 135; Foster, *supra* note 135; Menkel-Meadow, *supra* note 135, at 51–55. I agree with the feminist critique that the role of a lawyer should consider the client's dispute within a larger context than the immediate dispute, transcending the instant objective of winning the battle for the larger goal of the client's good. Because clients' legal problems do not arise in a vacuum, it makes sense to consider them in the context of the whole client. I am not qualified to opine on the suggestion that this lawyering approach, described by some feminist commentators as an "ethic of care," is practiced more often by women than men. Cahn, *supra* note 135, at 45; *see also* Nina W. Tarr, *Two Women Attorneys and Country Practice*, 2 COLUM. J. GENDER & L. 1 (1992).

As support for her argument that women's lawyering process is different than men's, professor Menkel-Meadow gives the results of Carol Gilligan's study of how girls and boys perceive a "moral" dilemma differently. Menkel-Meadow, *supra* note 135, at 45–47. Menkel-Meadow describes the dilemma as follows: Heinz's wife is dying of cancer and requires a drug which he can only obtain from his pharmacist who is selling the drug at a price Heinz cannot pay. Gilligan presents the problem to two eleven-year-olds, Jake and Amy. *Id.* at 46.

Instead of evaluating the conduct of Jake and Amy as children, I would like to analyze the same dilemma after Jake and Amy have become lawyers. Heinz approaches the two lawyers, Jake and Amy, for advice. Jake advises Heinz that because life is more valuable than property, he should

nist, however, they are all based on the assumption that the win-at-any-cost ethos is inseparable from the adversary process. All these critics, therefore, advocate the same solution: the abrogation of the adversarial model.[137] Because it is not intrinsic to the adversary process, discrediting the winning-is-everything pathology does not demand invalidating the adversarial model. Abrogation of the adversary model is not only unnecessary, it is dangerous.

Despite its flaws, the adversarial model is preferable to the inquisitorial model. The inquisitorial model places on judges the potentially conflicting roles of fact finder and decisionmaker.[138] This burden unavoidably allows biases and prejudicial influences to unfairly prejudice results.[139] The wisdom of the adversary process is in placing potentially conflicting tasks on the participants best suited to their discharge.[140] My criticism, therefore, is not directed as much at the adversary system as at the way many lawyers interpret it. Whether winning at any cost is

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steal the drug. *Id.* Amy, by contrast, wants to first explore a credit transaction. *Id.* Menkel-Meadow argues not only that Jake's "single-winner" approach is a male approach, but that this is the only approach under the adversary process. *Id.* at 49, 51. I am not convinced that Jake's winning-at-any-cost approach is necessarily a male trait. I am convinced, however, that it is a bad-lawyering trait. Advising a client to engage in a course of action that might land him in jail is not what a good lawyer would do, irrespective of gender. By contrast, Amy's approach is the essence of good lawyering within the adversary process. By approaching the opponent to prescribe a course of action that allows her client to obtain the drug without risking incarceration, Amy uses her advocacy skills to secure the best result for her client. This is the epitome of good adversarial lawyering.

Whether the "win-at-any-cost" approach is a genetically determined characteristic or simply a misinterpretation of the adversary system does not alter my argument that it is not a characteristic necessary to the adversarial model.

[137] *See, e.g.*, LANDSMAN, *supra* note 116, at 37; Andreas Eshete, *Does a Lawyer's Character Matter?*, *in* THE GOOD LAWYER 270–83 (David Luban ed., 1984); Gerald Postema, *Self-Image, Integrity, and Professional Responsibility*, *in* THE GOOD LAWYER 306–10 (David Luban ed., 1984); Rhode, *supra* note 9, at 639–43.

[138] *See, e.g.*, LANDSMAN, *supra* note 116, at 23.

[139] *See, e.g.*, Lon Fuller and John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (Dec. 1958); *see also* HAZARD, *supra* note 115, at 128; LANDSMAN, *supra* note 116, at 37.

The dangers of biased judges who, in the inquisitory model, also should impartially represent the parties' interests is specially acute in light of our increasingly hostile racial relations. Moreover, even within the adversary model, instances of racial, ethnic and gender bias in our judiciary are too numerous and well-documented to ignore.

[140] The decisionmaker in the adversarial process is only motivated by a desire to resolve disputes evenhandedly and expeditiously. Because the judge's motivation is primarily to make a decision, she does not have to take sides. By contrast, the role of the parties' advocates is solely to achieve the best results for their respective clients. As such, they are motivated to give their all to present the best case possible on behalf of their clients. The advocates are expected to take sides. If the advocates are of roughly equal ability, the adversary model provides a better chance for fair dispute resolution than the inquisitorial model. I believe this is true even though equivalent advocacy is rare. *See infra* notes 149–52 and accompanying text.

immoral, unethical or peculiar to males, it is not a necessary component of the adversarial model and, more importantly, it simply is not good lawyering.

I emphasize that my analysis of the adversary model is limited to civil cases. The win-at-any-cost rationale may be acceptable in criminal cases because of constitutional mandates and the criminal defense objective of protecting the individual against the overwhelming power of the state.[141] By contrast, the goal of the civil advocate is to resolve a dispute favorably to the client within a framework that is fair to both litigants.[142] Winning-at-any-cost is inconsistent with that goal.

2. Automatic Disclosures Are Consistent with Ethical Obligations

Many lawyers argue that automatic disclosures violate the ethical duty they owe the client under Canon 7 of the Model Code of Professional Responsibility. This argument not only reads the statement out of context but it also disregards the rest of the Code.

The Model Code of Professional Responsibility and the Model Rules of Professional Conduct provide the only formal regulation of lawyers' conduct toward their clients, opponents, and the courts.[143] Canon 7 of the Model Code of Professional Responsibility urges that "[a] lawyer should represent a client zealously within the bounds of the law."[144] Although Canon 7 commands that lawyers represent their clients zealously, it also admonishes that such representation cannot be unbridled. A lawyer's zealous representation must be legal and ethical.[145]

Concealing, hiding, or withholding relevant and discoverable information from an opponent or the court is unlawful. Knowingly refusing to turn over otherwise discoverable information simply because it is damaging to the client's position is expressly prohibited by the rules of civil procedure. Moreover, such concealment is nothing short of fraud which is unlawful in all jurisdictions.[146]

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[141] *See* U.S. CONST. amend. V & VI; Luban, *supra* note 120, at 91–92; Schwartz, *supra* note 121, at 155–60.

[142] *See, e.g.*, Luban, *supra* note 120, at 92.

[143] Cahn, *supra* note 135, at 29.

[144] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

[145] *Id.*

[146] The elements of a cause of action for fraud (sometimes referred to as "deceit") are generally stated as: (a) a misrepresentation of fact; (b) knowledge that the representation is false (scienter); (c) intention to induce a party to act or refrain from action in reliance of that misrepresentation; (d) actual reliance; and (e) damages resulting from such reliance. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 728 (5th ed. 1984).

In addition to being illegal, knowingly refusing to turn over damaging information which is discoverable is also unethical. No reasonable interpretation of Canon 7 can read it to imply that zealous representation requires committing or assisting a client to commit fraud. Not only is concealing or assisting to conceal relevant information not suggested by the Code, it is explicitly prohibited by the rules of professional ethics.

Model Rule 3.4 expressly warns that "[a] lawyer shall not . . . obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."[147] Additionally, Model Rule 1.2 specifically commands that:

> [a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is . . . fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[148]

Lawyers who insist that automatic disclosures are unethical or contrary to the adversary system misconstrue the lawyer's role in the adversary process as well as their ethical obligations under the rules of professional responsibility.

3. Automatic Disclosures Bring Fairness to the Adversary Process

One of the premises of the adversary process is that having the disputing parties' positions advanced by competing advocates makes the adversary model more fair, and therefore, superior to the inquisitorial model.[149] A seldom articulated presupposition to this argument is that fairness results from the decisionmaker being able to decide between competing and equivalent presentations by advocates of equivalent ability.[150] Because only rarely will the parties have advocates of even roughly equal ability, the ideal of fairness within the adversary system is seldom reached.[151]

Such misrepresentation involves not only an affirmative concealment, but also nondisclosure. *Id.* at 737–39.

[147] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) (1988).

[148] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1988).

[149] LANDSMAN, *supra* note 116, at 49–50; Fuller & Randall, *supra* note 139, at 1160.

[150] *See* LANDSMAN, *supra* note 116, at 4; Cahn, *supra* note 135, at 32; Schwartz, *supra* note 121, at 153–54.

[151] Galanter, *supra* note 9, at 97–135; Rhode, *supra* note 9, at 597.

The adversary model must continually seek to reduce that built-in imbalance. One such improvement is provided by the new automatic disclosure requirements. Prior to the new rules, the quality of the information available to the decisionmaker was often contingent on the ability of the parties' advocates. Automatic disclosure means that irrespective of the advocates' ability, the parties and the decisionmaker have access to all the relevant facts of a dispute, resulting in a more fair outcome.[152]

4. Full Disclosures Are Nothing New to Good Lawyers

Those who object to automatic disclosure have apparently never included full disclosure as part of their litigation strategy. Good lawyers, however, have long been representing clients successfully without concealing information. During my private practice, the lawyers I worked for emphasized that litigation strategy demands full disclosure from all parties. We did not condone clients whom we discovered (or suspected) were selectively withholding information. In such cases, we explained that our role as their lawyers did not include lying on their behalf or finding justification for their misconduct; that our job was to use all our talents and legal skills to assist them in reaching as advantageous an outcome as the parameters of the law permit.[153] We made sure clients understood that, in addition to zealous advocacy, our duties as lawyers included counseling them not to engage in conduct that could have adverse legal or business ramifications. In that role, we advised them that concealing relevant information was a bad strategy because the value to our opponent of information concealed and later found out is exponentially higher than its value when confronted head-on.

In my six years of practice we never lost a client because we counselled full disclosure. Clients valued our role as counsellors and

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[152] The new disclosure provisions also level the playing field for lawyers who do not practice in large law firms with unlimited resources.

[153] Although I never represented G.M., A.H. Robbins, or a tobacco company, I did represent some difficult clients. These clients often wanted to use the discovery process as a weapon. The most common problem arose when a client wanted to withhold or alter discoverable information.

Dealing with difficult clients is a delicate matter. On one hand, if you cater to their wish to obstruct discovery, you not only fail your ethical obligations but you also fail your client. Engaging in discovery abuse more often than not comes back to haunt you and your client. On the other hand, in our competitive profession, it is economically risky to challenge a client who brings substantial income to your firm.

There is, however, only one solution. As your client's counselor, it is your duty to convince the client that obstructing discovery is not only unethical but also a bad business decision which is likely to hurt in the long run.

appreciated that we did not simply act as brash gunslingers. Had the lawyers who represented G.M. in the Mosely case acted as more than hired guns, they would have better served G.M.[154] The $101 million exemplary damage award was meted out not so much to punish G.M. for knowingly putting a defective product on the market as it was to chastise the company and its lawyers for concealing all information they deemed beyond the comprehension of juries and regulators.[155] Assisting a client to conceal relevant information potentially adverse to the client is not only inconsistent with the adversary process and our ethical obligations, it is just plain bad lawyering.

Furthermore, as attorneys, integrity is our most valued asset. Once you are known to have subverted the process, your opponents will not trust you. Worse yet, once judges know you have abused the process, they will presume you will do it again. If you cannot convince the client to do the right thing, withdrawing from the case is the only alternative. Even if you convince yourself that the adversary process demands that you abuse discovery, you will pay a high price for subverting the system.

D. *Automatic Disclosures and the Client's Interests*

In legal folklore, plaintiffs' attorneys want a case promptly resolved so they can collect their fees. The contrasting myth of the defense attorneys is that they prefer to delay the case as much as possible so that they can churn fees and allow their clients more time to use the plaintiff's money.

In my practice I found little truth in this folklore. Although I defended doctors, hospitals, manufacturers, corporations and insurers in medical malpractice, products liability and commercial cases, I discovered that most plaintiffs' attorneys were slower than I in moving cases forward. I also learned that, as defendants, my clients valued predictability above mere numbers. Most of my clients wanted cases to be concluded promptly so that they accurately could assess the value of their loss and avoid years of uncertainty as the litigation lingered.

The new disclosure provisions, therefore, advance rather than hinder the client's interests. The principle behind the disclosure provision is that lawyers should seek to conclude pre-trial discovery as early

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[154] *See supra* note 96.

[155] *See supra* note 96; *see also* Moran, *supra* note 96, at 7. That G.M.'s exorbitant appellate team, which included among others, former Attorney General Griffin Bell and former Solicitor General Kenneth Star, was able to overturn the award does not change the fact that full disclosure would have saved the company millions in the long run.

and as openly as reasonably possible without jeopardizing the client's case. In my experience, this is also what most clients want from the civil litigation process.[156]

E. *Automatic Disclosures and the Managerial Judge*

The new discovery provisions of the amended FRCP may significantly reduce the time and costs associated with discovery in civil litigation. Whether the new provisions live up to their potential, however, will depend on the role both lawyers and judges take in their implementation. Lawyers must reexamine their role within the adversarial process and take advantage of the opportunity to undertake early fact-finding which the new rules provide.

Also crucial to the success of the new rules, however, is the role of the judge. Judges must be willing to become more actively involved in early management of their cases. The disclosure provisions have as their expressed goal "to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information."[157] Moreover, the Advisory Committee urges judges and lawyers that Rule 26(a)(1) "should be applied in a manner to achieve those objectives."[158] The effectiveness of the new disclosure provisions, therefore, will depend in part on whether judges are willing to enforce them.

"Managerial judges" are essential to achieving the goals of the new rules.[159] The combination of the new rules with a managerial judge can have a salutary effect on how lawyers conduct pre-trial proceedings. For example, lawyers are more likely to follow their mutually agreed-to disclosure/discovery schedule if they know that their failure to do so will prompt the judge to mandate a schedule that may not be as flexible.

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[156] *See, e.g.*, Howard Spierer, *General Counsel Speak Their Minds About Outside Litigators: "Gladiator Mentality" Doesn't Always Win Points With the People Who Pay the Bills*, LITIG. NEWS, Aug. 1994, at 2. The article contains excerpts from group discussions conducted by the ABA Section of Litigation's Task Force on Client Concerns. A recurring client complaint is that outside litigators have a "gladiator mentality" and a "desire to win at all costs" which is inconsistent with the clients' bigger picture.

[157] FED. R. CIV. P. 26(a) advisory committee's note.

[158] *Id.*

[159] *See, e.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 377 (1982). Resnik and other commentators have described a "managerial judge" as one who is willing to shape the litigation and use the court to influence results.

F. *Mandatory Disclosures Should Be Given a Fair Chance*

Rules 26(a), 26(f) and 16(b) offer an excellent opportunity to curb abusive discovery and its resulting cost to parties and the civil litigation system. Additionally, the disclosure provisions have the potential to improve the adversary process and make the system of civil dispute resolution efficient and fair. The Rule 26(f) pre-discovery meeting offers opposing attorneys an informal venue for early resolution of pre-trial issues without unnecessary collateral litigation. Because the Rule 26(f) discovery/scheduling plan must be submitted to the court shortly before the Rule 16(b) scheduling conference, the parties' attorneys are compelled to make a good faith attempt to resolve many pre-trial issues without court intervention. Furthermore, requiring a comprehensive Rule 16(b) scheduling order encourages judges to become involved in the case in the initial stages of the litigation.

The disclosure process may even have the salutary effect of causing lawyers to reexamine their distorted perception of the adversarial process. An adversary need not subvert the process to win-by-any-means. Adversaries can cooperate with each other during fact-finding and use their advocacy skills to present their case persuasively and obtain a resolution favorable to their client. Moreover, this adversarial strategy will prove to be personally rewarding because lawyers can avoid the emotionally damaging rationalizations necessary to cope with unethical conduct in the name of winning-at-any-cost. This revised adversarial philosophy will also give our profession a shot of desperately needed integrity as clients and the public notice our recognition that the client and a fair process are meaningful components of civil dispute resolution.

Lawyers, judges and legislators should allow the new disclosure process to work for several years before consideration is given to scrapping or changing it.[160] The federal jurisdictions that opted out of the new rules should adopt some form of automatic disclosures provision.[161] Lawyers must not attempt to subvert the rules simply to demonstrate their disapproval of the automatic disclosure requirement. Judges must forcefully manage the cases in their docket to ensure that

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[160] Section 105(c)(1) of the Civil Justice Reform Act of 1990 requires that by December 31, 1995, the Judicial Conference report to Congress the experience with various disclosure strategies. *See* FED. R. CIV. P. 26(a)(1) advisory committee's notes. Under § 105(c)(2)(B) of the CJRA, Congress could amend the disclosure provisions by December 1998. *Id.*

[161] Many of the jurisdictions which opted-out of 26(a)(1) were already experimenting with some forms of disclosure under the mandate of the CJRA. Many others, however, opted-out under pressure from groups who oppose automatic disclosures.

disclosures serve to advance litigation without unfairly affecting one side or the other.

G. *Practice Under the New Rules Has Not Been Fatal*

The disclosure provisions have been in effect for almost eighteen months, and although the predictions of tragedy have not subsided, they have also not materialized. At a minimum, my informal survey of the experience of judges and lawyers seems to demonstrate that the new disclosure provisions are, for the most part, achieving their goals of faster, less costly discovery despite the melodramatic concerns raised by their detractors.[162]

Some lawyers have declared that they try to avoid federal court in order to avoid the disclosure provisions; others insist that lawyers and judges in some courts are simply ignoring them.[163] The general response I have received, however, can be summed up by the comment of Magistrate Judge Wayne Brazil from the Northern District of California:[164] "We have had quite substantial compliance and no problems. Our assessment is that . . . [the disclosure provisions] have had a net positive effect and the sky has not fallen!"[165] Judge Brazil added that most judges believe the disclosure provisions in conjunction with the Rule 26(f) pre-discovery meeting and the Rule 16(b) conference have, as expected, resulted in earlier case resolution and reduced litiga-

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[162] Between June and November 1994, I conducted an informal telephone survey of lawyers and judges around the country asking them a series of questions regarding practice under the new disclosure provisions of the FRCP. The Judges were from the Northern District of California (where they have had a similar disclosure provision for about two years), the Western District Missouri and the District of Kansas. The lawyers were from San Francisco and Palo Alto, California; Kansas City, Topeka and Wichita, Kansas; and Kansas City, Missouri.

From judges I sought information regarding the number of cases handled where disclosures were used as well as an evaluation of the provisions' intended goals. From lawyers I sought information on the number of cases where disclosures were used as well as the type of case, the amount in controversy, which side the lawyers represented and an evaluation of the provisions' intended goals.

[163] *See, e.g.*, Rooney, *supra* note 104, at 17. Other lawyers interviewed by the *Chicago Daily Law Bulletin*, however, stated that the disclosure provision has worked well and that judges in Chicago are using it with lawyers who want to use it. *Id.*

[164] Judge Brazil is probably the first to suggest automatic disclosures as a way of reducing discovery costs and abuse. *See* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1348–49 (1978). He is presently a member of the federal procedure commission studying the rules.

[165] Telephone conversation with Judge Magistrate Wayne D. Brazil, on or about July 11, 1994. My notes reflect conversations with Judge Brazil on July 8, 11 and 14, 1994. Additionally, a recent survey of lawyers conducted in the Southern District of Illinois revealed that 60% of the lawyers believed the rule was working well while 25% said it was not working. *See* Rooney, *supra* note 104, at 17.

tion.[166] He noted that the new rules have also had the unexpected effect of more cooperation between lawyers.[167] Other judges have confirmed that lawyers are using the new provisions to accelerate discovery noticeably and with few disputes.[168]

IV. One State's Attempt: A Look at Kansas

Although to date no state has adopted automatic disclosure provisions similar to those under the FRCP, Alaska is considering adopting them in 1995. Kansas is typical of the states which have considered but rejected adoption of automatic disclosures.

A. *The Proposed Kansas Amendments*

The Civil Code Advisory Committee of the Kansas Judicial Council recently considered amending the state's procedure rules in light of the new FRCP. The proposed rules make some positive moves toward more efficient discovery practice. These include a mandatory case management conference between the parties and the judge early in the litigation and automatic disclosure of experts. Unfortunately, the Advisory Committee recommended not adopting either Federal Rule 26(a)(1)'s automatic disclosures or 26(f)'s mandatory pre-discovery meeting. The early case management conference could help expedite the litigation. Failure to incorporate automatic disclosures and a mandatory informal meeting between opposing counsel prior to the case management conference, however, would likely reduce the efficiency of the conference and decrease its potential for expediting litigation.

B. *Automatic Disclosures and a Pre-Discovery Meeting Would Make the Case Management Conference More Efficient*

Instead of automatic disclosures and a mandatory pre-discovery meeting, the proposed Kansas rules require courts to hold a "case management conference" with the parties' lawyers and with unrepre-

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[166] Telephone conversation with Judge Magistrate Wayne D. Brazil, on or about July 11, 1994.

[167] *Id.*

[168] Telephone conversations with Chief Judge Patrick Kelly of the District of Kansas on Aug. 24, 1994; Magistrate Judge Ronald Newman of the District of Kansas on Aug. 29, 1994; Magistrate Judge Sarah Hays of the Western District of Missouri on July 15 and Nov. 18, 1994; Judge James Ware of the Central District of California on Sept. 28, 1994; Judge Marilyn Hall-Patel of the Northern District of California on Sept. 29, 1994; Judge Ann C. Williams of the Northern District of Illinois and Magistrate Judges Franklin Noel and Jonathan Lebedoff of the District of Minnesota in November of 1994 and March of 1995.

sented parties.[169] The court, however, has discretion as to when to hold the conference.[170] Involving the judge in managing the case early in the litigation will expedite it. In addition, the proposed rule requires the court to hold at least one more pre-trial conference.[171]

As proposed, however, the case management conference is inefficient. Opposing attorneys will not meet informally before the case management conference unless they are required to do so. As a result, the judge will have to deal with many trivial issues the lawyers could have resolved on their own.

Pre-discovery automatic disclosure is one such issue. There is no automatic disclosure requirement in the proposed rules. However, subsection (b)(3) of Proposed Rule 60-216 mandates that "the court shall take appropriate action with respect to . . . [e]xchanging information on the issues of the case, including key documents and witness identification" during the case management conference.[172] This may indicate that the parties should mutually disclose "core" information during or shortly after the case management conference. But the Advisory Committee also seems to have intended that the court set a schedule for automatic disclosures during the case management conference.[173]

If this is what the Advisory Committee intended, the case management conference could end up being unreasonably—and unnecessarily—long. The case management conference must deal with issues related to disclosure, discovery, alternative dispute resolution and pretrial motions.[174] Additionally, according to the proposed rule, during the case management conference the judge should deal with topics

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[169] Proposed Rule 60–216(b) provides that

> [i]n any contested action, other than an action described in subsection (e), the court shall conduct a case management conference with counsel and any unrepresented parties. The conference shall be scheduled by the court as soon as possible and shall be conducted within 45 days of the filing of an answer. However, in the discretion of the court, the time for the conference may be extended or reduced to meet the needs of the individual case.

[170] *Id.* (the proposed rule urges that the case management conference should take place within 45 days of the filing of an answer).

[171] Proposed Rule 60–216(a).

[172] Proposed Rule 60–216(b)(3).

[173] Proposed Rules 60–216(b)(4) & (5) require that during the case management conference the judge establish a plan and schedule for discovery.

Nevertheless, Proposed Rule 60–216(b) provides that before the case management conference the parties may commence formal discovery. To depose non-parties, they must obtain agreement from the parties or seek leave of court. This may result in the parties exchanging discovery requests before they have an opportunity to exchange disclosures.

[174] Proposed Rule 60–216(b).

such as issue narrowing, stipulations and settlement.[175] Because the case management conference will most likely take place before the lawyers have had an opportunity to discuss these issues informally, the conference is likely to be long and inefficient.

The Advisory Committee should require a pre-discovery automatic disclosure process including a mandatory informal meeting between the parties' lawyers. At the very least, the Advisory Committee should require the parties' lawyers to meet informally prior to the case management conference to discuss the case, settlement possibilities, and disclosures, and to prepare a discovery/scheduling plan to be sent to the judge no later than five days before the conference.[176] Such a meeting likely would resolve many issues and result in a more efficient case management conference.

V. Discovery Strategy Under the New Rules

Rules 16, 26 and 37 of new FRCP provide an opportunity to engage in productive fact-finding during the initial stages of litigation. Expedited discovery will, in turn, result in earlier, less costly resolution of civil disputes. To expedite fact-finding under the new rules, however, lawyers must prepare a discovery plan early in the litigation.

The automatic disclosure provisions of Rule 26(a)(1) are closely linked to two events prescribed by the new rules: the Rule 26(f) pre-discovery meeting between the parties' lawyers and the Rule 16 Scheduling Order. Effective discovery under the new rules must be planned around these two events.

A. *Rule 16 Scheduling Order*

The Rule 16(b) Scheduling Order is a significant event for two reasons. First, the scheduling order reflects the extent to which the judge is managing the litigation. Second, the timing of the scheduling order determines the timing for disclosures and discovery. As previously discussed, because the Rule 16(b) order must be entered no later than ninety days after a defendant appears or 120 days after service, the timing of disclosures can be calculated by backtracking from the date the court sets the Rule 16(b) conference.[177]

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[175] *Id.*

[176] Fed. R. Civ. P. 26(f) requires that the Proposed Plan be sent to the judge no later than 4 days before the Rule 16(b) conference.

[177] Automatic disclosures must be made within 10 days of the 26(f) pre-discovery meeting, which must be held no later than 14 days before the Rule 16(b) order is entered. *See supra* notes 45–46 and accompanying text.

B. *Rule 26(f) Pre-Discovery Meeting*

The Rule 26(f) pre-discovery meeting between the parties' lawyers must be held no later than fourteen days prior to the date the Rule 16(b) Scheduling Order is to be entered. Many courts are setting scheduling conferences for the date of the Rule 16(b) scheduling order. If the lawyers cannot agree to a disclosure and discovery plan during the 26(f) meeting, the court will resolve any disputes during the Rule 16(b) conference. If the opposing lawyers agree on a disclosure and discovery plan, the court will likely enter the agreed plan as the court's Rule 16(b) scheduling order. Coupling the 26(f) meeting of the parties' lawyers with the 16(b) order should compel lawyers to resolve many trivial and some substantive disclosure/discovery issues early in the litigation and without court intervention. Consequently, the Rule 16(b) scheduling order and the Rule 26(f) meeting are likely to be watersheds in the litigation. Any discovery strategy, therefore, must revolve around them.

C. *Applying the New Rules: A Hypothetical Scenario for Full, Fair, and Timely Disclosure*

Imagine you are a lawyer representing the Widget Motor Company ("WMC"), the defendant in a products liability action filed in federal district court. On April 23, 1994, your client received a complaint and request for waiver of service under amended Rule 4(d). Plaintiff's attorney mailed these documents by first-class mail on April 22, 1994. The complaint alleges that on May 22, 1993, plaintiff was involved in an accident where her 1986 WMC pick-up "collided with a tree on a rural road." The complaint further alleges that plaintiff "received injuries to her head and back as a result of a defect in the pick-up truck manufactured by defendant WMC."

WMC's answer is due on June 17, 1994, the sixtieth day after plaintiff sent the complaint and request for waiver of service. If you filed your appearance and answer on the last possible day, June 17, 1994, the judge assigned to the case would set a Rule 16(b) scheduling conference in ninety days,[178] for September 9, 1994.

As previously discussed, the first crucial event under the new rule is the 26(f) pre-discovery meeting. In this case, the informal meeting is to take place no later than August 26, 1994. Early planning and an

[178] Many judges are setting the conference sooner. In Kansas federal district court, for example, judges set the Rule 16 scheduling conference 45 days after the answer is filed.

aggressive approach should permit you to hold the 26(f) meeting earlier than August 26 and the 16(b) scheduling conference before September 9, 1994. The following is an outline of a plan designed to have the Rule 16(b) conference scheduled for August 19 instead of September 9, 1994.

1. The Discovery Plan: Pre-Answer Contacts

Early informal discussions between the parties' attorneys regarding the lawsuit in general and disclosures in particular are not only desirable but strongly recommended by the rules.[179] One way to accomplish this is to contact opposing counsel within days of receiving the complaint and waiver of service request.[180] At this time you are unlikely to have had any time to conduct an investigation. If this is the case, and the allegations of the complaint are not very specific, you should suggest an early, informal meeting. The goal is to obtain sufficient information about the claim so that you and your client have a better idea of what is "relevant to the facts alleged with particularity," and so that you can conduct an effective investigation before the time for initial disclosures.

A more efficient investigation and avoidance of disclosure-related problems provide the motivation for defense attorneys to seek an early meeting with opposing counsel. For a defendant, earlier resolution of the scope of disclosure will result in a more focused, and therefore less costly and more efficient investigation.[181] Moreover, armed with specific information about a claim, defense counsel is less likely to risk court sanctions for underdisclosure or face ethical dilemmas because of overdisclosure. If necessary, defense counsel may seek a longer period of time for disclosures to be made.[182]

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[179] *See, e.g.*, FED. R. CIV. P. 26(a)(1) advisory committee's note.

[180] For plaintiff's lawyers, first contact can be within days of sending the complaint and waiver of service. This is particularly important if the claims made in the complaint are broadly stated. *Id.*

[181] Assuming that a defendant gives a copy of the complaint and waiver of service request to its lawyer within a week of receiving them, defense counsel will have little over four months to conduct an investigation and complete the initial disclosures. If the 26(f) meeting is not held until the last allowed date, defense counsel may have spent months gathering information which eventually turns out to be unnecessary and will have only a few days to find information he or she did not expect to have to disclose.

[182] Under the schedule required by the rules, a defendant must make its initial disclosures no later than 145 days after plaintiff sends its complaint and waiver of service request. In complex cases or when defendant's materials are not readily accessible, more time may be necessary. Instead of 10 days after the 26(f) meeting as required by rules, defense attorneys can seek to extend the time to complete the initial disclosures.

The prospect of streamlined, less costly litigation provides the motivation for plaintiff's counsel to agree to meet even before the defendant files an answer. Instead of spending months faced with defendant's delays and inefficient discovery disputes, plaintiff's attorney likely will obtain most discoverable materials within the first few months of litigation. This should considerably reduce the presently prohibitive cost of taking a complex case to trial.

2. First Contact with Opposing Counsel

Within two or three days of receiving the complaint and waiver of service, you call plaintiff's attorney and follow up the call (or calls) with a letter. Assume that in the hypothetical you received the complaint on April 23, telephoned plaintiff's attorney on the 26 and suggested a meeting on Tuesday or Wednesday, May 3 or 4, within ten days of receiving the complaint. This allows you to initiate your investigation more than forty-five days before your answer is due, and more than 120 days before the 26(f) meeting must occur. Because the goal is to keep the first contact casual, you may not want to label the first meeting with plaintiff's counsel a "26(f) meeting."

My favorite approach is to suggest a breakfast or lunch meeting. A breakfast or lunch meeting seems less "adversarial" and also provides a casual opportunity to meet opposing counsel for the first time or to further cement a previous relationship. I bill the client only about thirty minutes unless the meeting was remarkably productive and I feel it saved time.

You may indicate during the first call that it would be a good idea to meet to talk informally about the suit. Point out that the earlier you know more details of the claim, the more productive the 26(f) meeting will be and the earlier plaintiff can obtain defendant's disclosures. Follow up the initial phone call with a letter. If you have agreed to meet, the letter should confirm the details. If you could not talk to plaintiff's counsel or reach an agreement on the meeting, the letter should repeat your invitation.

This early "pre-26(f) meeting" will force plaintiff's attorney to conclude her investigation and likewise nudge you and your client to do the same. It will also start a record that reflects your client's attempts to complete pre-discovery disclosures early and in good faith.

3. Follow-Up Contact

If plaintiff's attorney does not respond to your initial contact within seven days (by May 3), follow up this first contact with another

call and letter. Again urge that an informal meeting will benefit the plaintiff because the subsequent 26(f) meeting will be more productive and result in more meaningful disclosures and a more effective Rule 16(b) scheduling conference. If plaintiff's attorney is unavailable by phone, send a letter advising counsel that another call will follow within days. As further motivation, offer to file your appearance soon after the initial meeting, thereby shortening all the litigation's deadlines. Attempt to schedule the informal breakfast or lunch meeting for the week of May 9, 1994. This is still a month before your answer is due.[183]

4. The Pre-Rule 26(f) Meeting

Let's assume that the earliest you can schedule a lunch meeting with plaintiff's attorney is May 13, 1994. This is still more than thirty days before you must file defendant's answer.

Although this is an "informal" meeting, come prepared to make it productive. You should prepare specific questions related to the pleadings to help narrow issues. For example, our hypothetical complaint is vague regarding several important facts. The complaint does not indicate the model of 1986 WMC pick-up involved in the accident or the precise defect which allegedly caused the plaintiff's injuries. Additionally, you will want to have the medical records and the names of all witnesses to the accident, including the paramedics at the scene and the treating physicians. Having such details early in the litigation will make your client's investigation more productive and plaintiff's attorney should have this information readily available. If during the lunch meeting plaintiff's attorney does not supply the information you seek, ask that she do so within a few days of the meeting. You should also ask plaintiff's counsel to describe any information plaintiff needs the defendant to disclose.

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[183] If plaintiff's attorney is still elusive, you can show good faith and pressure plaintiff's attorney by sending some of the information WMC must disclose under the rules with the confirmation letter. If the complaint is as vague as the one in the hypothetical here, these disclosures may be very limited.

If the plaintiff's attorney initiates contact early, plaintiff can subtly pressure defense attorneys by unilaterally disclosing relevant information before any contact with opposing counsel. This information should be readily accessible since plaintiff's attorney should possess most, if not all, of plaintiff's materials (like medical records).

You can eliminate any advantages your opponent may have gained from your early disclosures by asking the judge to give short deadlines for your opponent to complete disclosures. Since you provided opposing counsel with your client's information very early in the litigation, the judge will probably oblige you.

Be mindful that you don't appear too formal so plaintiff's attorney feels you are serving discovery. If you believe that giving plaintiff's lawyer a written list of items will be too formal for the lunch meeting, follow-up with a letter confirming your conversations instead.

If this preliminary meeting with your opponent goes well, suggest that the 26(f) meeting be scheduled for a date soon after you believe you can complete your initial investigation. If your client has been involved in previous suits related to the specific product and defect in question, your investigation could well be completed in less than 60 days. Schedule the Rule 26(f) meeting for July 15, 1994, which is still more than 30 days earlier than the meeting must be held under the rules. It is also six weeks before the Rule 16(b) scheduling conference would have taken place absent your aggressive plan.

5. Follow-Up Letter

In the afternoon of the pre-26(f) lunch meeting, send a letter thanking plaintiff's attorney for having lunch with you and confirming what you discussed during the lunch meeting. This letter should include a list of items you mutually agreed to provide each other as well as the dates by which you agreed to do so. If you have disclosed some items, confirm this also. In addition, you should delineate the parameters of the upcoming Rule 26(f) meeting. Use the items you plan to include in the 26(f) discovery/scheduling plan.[184] This adds to the record of your good faith and will support, if needed, any additional pressure on the other side at the Rule 16(b) scheduling conference with the judge. As a further gesture of good faith and cooperation, file your appearance on May 27, 1994: three weeks before the date required by Rule 4(b). This will trigger an earlier 26(f) meeting and 16(b) scheduling conference. Under the new rules, the court will schedule a 16(b) conference no later than 90 days after you filed the appearance. If the judge schedules the 16(b) conference for August 19, 1994, the 26(f) meeting must be held no later than August 5, 1994.

6. The Rule 26(f) Meeting

The 26(f) meeting will be held on July 15, 1994. You will have had more than 60 days since the first informal meeting to complete disclosures. If your client is reluctant to provide information, remind your client that the rules require you to complete disclosures at or within

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[184] *See supra* notes 69–72 and accompanying text.

ten days of the 26(f) meeting.[185] If you cannot complete disclosures by then, ask plaintiff's attorney to stipulate to a short extension.

Come prepared to the 26(f) meeting with a draft of the Discovery/Scheduling Plan to be prepared under the rule so that you can fill it out during the meeting. Use Form 35 of the FRCP as an outline for this report. Do not expect plaintiff's attorney to agree to a long extension for you to complete disclosures. Because you have had notice of the case for several months, the judge will probably be unsympathetic to a claim that you need more than thirty days to complete disclosures. This is particularly true if you have previously represented this defendant in similar cases.

7. Service of Formal Discovery

While plaintiff's attorney will probably disclose all relevant information without formal discovery, automatic disclosures should not dissuade you from using the information you obtained informally to prepare precise formal discovery requests under Rules 30, 31, 33, 34 and 36 for service at the 26(f) meeting on July 15, 1994.

Although the new rules contemplate that everything you could previously obtain by formal discovery requests should now be voluntarily disclosed, it is quite possible that parties will not disclose all the information "relevant to disputed facts alleged with particularity." Even if the incomplete disclosure is the result of oversight or honest disagreement over the scope of "relevant information," you should consider serving the other side with formal discovery requests to be sure that between disclosures and discovery you obtain everything you want.[186] Advise plaintiff's attorney that to the extent that the responses to the formal discovery duplicate what has already been disclosed, counsel need merely so state in the responses to your formal discovery. Under the Rules, plaintiff's responses to formal discovery will be due on August 15, 1994.

8. The "Discovery/Scheduling Plan"

Within a few days of the 26(f) meeting, send plaintiff's attorney a draft of the "Proposed Joint Discovery/Scheduling Plan" you and plaintiff's attorney prepared during the meeting. The plan should be entitled "Joint Proposed Discovery and Scheduling Plan."[187] Urge plaintiff's

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[185] *See supra* note 45 and accompanying text.

[186] For the same reasons, plaintiff's attorney should also serve formal discovery on defendant at or shortly after the Rule 26(f) meeting.

[187] Form 35 in the new rules' appendix of forms is meant to provide only a rough outline of

attorney to amend and return the draft promptly because it must be submitted to the court within ten days of the 26(f) meeting (no later than July 26, 1994). To the extent that there are disagreements regarding any items of the plan, you must identify them explicitly in the Joint Proposed Plan. Include in the proposed plan dates for initial disclosures and responses to discovery as well as the dates when the parties will supplement their production under Rule 26(e)(1).[188]

9. Rule 16(b) Scheduling Conference

If you and plaintiff's attorney agree on all the items of the Joint Proposed Discovery/Scheduling Plan, there may be no need to hold the Rule 16(b) Scheduling Conference. Unless the judge wishes to find out more about the case, the court will likely adopt the Joint Proposed Plan as the scheduling order and simply schedule a pre-trial conference after discovery has been completed.[189]

Since in our case the 26(f) meeting occurred more than a month earlier than specified under the rules, ask the court to also advance the Rule 16(b) Scheduling Conference to the week of July 25, 1994.

Assume the Rule 16(b) scheduling conference is set for July 29, 1994. During the conference the judge will assist in resolving disagreements regarding any items of the proposed discovery/scheduling plan. The scheduling conference will generate a Scheduling Order delineating the parameters of pre-trial.[190]

10. Rule 16(b) Scheduling Order

If the parties agree to all items discussed during the Rule 26(f) meeting, the court will simply adopt your Proposed Joint Discovery/Scheduling Plan as the scheduling order. If the court must resolve disputed issues, the scheduling order will be prepared at or soon after the Rule 16(a) scheduling conference.

Since the Rule 26(f) meeting occurred over a month ago, you should seek a scheduling order which mandates that disclosures and discovery be completed within a very short time. Ask that plaintiff

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the proposed discovery/scheduling order devised by the parties' lawyers. Form 35 titles the proposed discovery/scheduling order "Report of Parties' Planning Meeting." *See supra* note 69 and accompanying text.

[188] For a comprehensive list of the items to be included in the proposed discovery/scheduling plan, see *supra* notes 69–72 and accompanying text.

[189] Judges who actively manage their cases almost always hold a Rule 16(b) conference. Even if opposing lawyers have agreed to a disclosure/discovery schedule, these judges may modify it if they believe the case does not merit such an extended schedule.

[190] *See supra* notes 77–86 and accompanying text.

complete supplementation of disclosures and discovery within fifteen days, by September 2, 1994. Ask the judge to include in the scheduling order an initial settlement or mediation meeting within thirty days of the completion of all disclosures and discovery, if you have not mutually agreed to do so previously.

If disclosures and discovery are substantially completed by the Rule 16(b) conference, this may also be the perfect time to consult with the client regarding future strategy in the case. You may need to confront the client with all the factual information found to date, the potential for success at trial, cost of proceeding toward trial, as well as the cost of mediation.[191]

11. Rule 37 Phone Call and Letter

Presumably, opposing counsel will diligently comply with all disclosure and discovery requirements, but you should prepare for the worst. It will take some time for the new rules to eliminate the residue of the win-at-any-cost philosophy. If plaintiff's attorney has not complied with the Rule 16(b) scheduling order, call and demand compliance within days. Follow up with a letter describing the history of noncompliance. Threaten to move for sanctions under Rule 37(a)(2) if compliance is not forthcoming within five days.

VI. Conclusion

The recently adopted disclosure provisions of the FRCP can improve discovery, make litigation more efficient and lead to more fair dispute resolution. Automatic disclosure of "core" information about a dispute should result in earlier, less costly and more complete fact finding, leading to more fair dispute resolution. Additionally, automatic disclosures force lawyers to abandon the win-at-any-cost approach to litigation which has plagued civil dispute resolution. The new rules compel adversaries to cooperate during discovery. Having to cooperate in the fact-finding stage of a case will compel lawyers and clients to reevaluate their view of the adversarial process.

By compelling lawyers to reexamine their roles as adversaries and to prepare a litigation plan early in the case, the new disclosure provisions will significantly expedite litigation, the original goal of the federal rules of civil procedure.

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[191] This may be the ideal time to consider the potential advantages and disadvantages of mediation or other forms of alternative dispute resolution.