MANDATORY DISCLOSURE: A HISTORICAL REVIEW OF THE ADOPTION OF RULE 26 AND AN EXAMINATION OF THE EVENTS THAT HAVE TRANSPIRED SINCE ITS ADOPTION

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I. Introduction

Discovery provides parties with various tools which enable them to uncover information and documents that shed light on the issues of a case.[1] In the federal courts, the discovery process is governed and regulated by Rule 26 of the Federal Rules of Civil Procedure.[2] Discovery is an important component of civil litigation because it shapes the theory of a case, decides the strategy to be employed, molds settlement offers and leads to a resolution of the case on the merits.[3] However, the discovery system has been the target of heated criticism and controversy in recent years, stemming from severe abuses of the discovery process.[4] This abuse has caused an exorbitant increase in the costs and delays of civil litigation.[5]

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1 *See, e.g.*, FED. R. CIV. P. 30, 33, 34, & 36 (providing for depositions, interrogatories, document and inspection requests, and requests for admissions respectively).

2 *See* FED. R. CIV. P. 26.

3 *See* Jeffery J. Mayer, *Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of Civil Procedure*, 12 REV. LITIG. 77, 78-79 (1992); *see also* Taylor v. Illinois, 484 U.S. 400, 425 (1988) (Brennan, J., dissenting) (stating that "[b]y aiding effective trial preparation, discovery helps develop a full account of the relevant facts, helps detect and expose attempts to falsify evidence, and prevents factors such as surprise from influencing the outcome at the expense of the merits of the case.").

4 *See infra* notes 21-26 and accompanying text.

5 *See infra* notes 41-43 and accompanying text. For example, former Vice President Dan Quayle stated in his speech to the America Bar Association:

> Anyone who has ever sued or been sued knows that discovery too often becomes an instrument of delay and even harassment. Unnecessary document requests and depositions can disrupt or put on hold a company's entire research-and-development program, and the very idea of limits on discovery is outdated. I'm told of one judge who has said his policy is "just to have the parties exchange the filing cabinets." Worse yet, discovery can be a virtually cost-free weapon for the requesting party. That is what we want to change.

In an unique solidarity, all three branches of the American government recently recognized that the discovery process is in need of reform.[6] However, there is still a question as to which method will be most effective in refining the system. The drafters of the Federal Rules of Civil Procedure chose to create a system of mandatory disclosure.[7] They adopted an amendment to Rule 26 which mandates that parties, without waiting for a request, disclose to their adversaries certain basic information during the early stages of litigation.[8] The objective of the Rule "is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information."[9] The Rule, however, has been highly criticized for various reasons. Some claim that the standard of disclosure delineated in the rule is ambiguous and will lead to an increase in motions and the overproduction of irrelevant or marginally relevant information.[10] Others contend that it undermines attorney-client confidentiality, ignores the ethical responsibilities of attorneys to their clients and infringes upon the work-product privilege.[11] Still others are concerned that some attorneys will continue to use tactics that avoid and delay mandatory disclosure[12] and that the Rule will promote a lack of uniformity in the federal courts.[13]

This article traces the discovery scheme from its origins to the present system and explores the problem of discovery abuse. The article then assesses causes of discovery abuse and the various procedures utilized by Congress and the Advisory Committee to rem-

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DAN QUAYLE, SPEECH TO THE AMERICAN BAR ASSOCIATION, August 13, 1991, *reprinted in Quayle: Are There Too Many Lawyers in America?* N.J. L.J., Aug. 29, 1991, at 15.

6 *See* Gerald G. MacDonald, *Hesiod, Agesilaus and Rule 26: A Proposal For a More Effective Mandatory Initial Disclosure Procedure*, 28 WAKE FOREST L. REV. 819 (1993). The Legislative branch, through the adoption of the Civil Justice Reform Act of 1990, also acknowledged that the discovery process was in need of reform and adopted a plan to experiment with possible solutions. *See infra* notes 50-56 and accompanying text (discussing the Act). The Judiciary, also recognizing the problem, recently adopted amendments to the Federal Rules of Civil Procedure in an effort to reform the process. *See generally* FED. R. CIV. P. 26 (Advisory Committee Notes).

7 *See* FED. R. CIV. P. 26.

8 *See* FED. R. CIV. P. 26.

9 *See* FED. R. CIV. P. 26 1993 Amendments. Subdivision a.

10 *See infra* notes 144-57 and accompanying text.

11 *See infra* notes 158-71 and accompanying text.

12 *See infra* notes 173-75 and accompanying text.

13 *See infra* notes 176-83 and accompanying text; *see also infra* notes 50-56 and accompanying text (discussing the Civil Justice Reform Act).

edy such abuse. In addition, this article explains the adoption of the amendments to the Federal Rules of Civil Procedure, the various provisions of the new Rule and the criticisms of Rule 26's mandatory disclosure system. Finally, this article examines Rule 26 and its amendments in light of the events that have transpired in the years following its adoption.

II. The Origins of Discovery

The discovery scheme first arose in 1938 when the Federal Rules of Civil Procedure were adopted.[14] Prior to the promulgation of the Federal Rules, the pretrial exchange of material hinged upon the particular facts disclosed in the pleadings.[15] The previous practice, patterned after English common law, required the parties to submit pleadings comprised of a complete statement of their legal position and the facts they would demonstrate which were necessary to prove their position.[16] Little information was revealed outside of the pleadings.[17] Therefore, surprise permeated trials and the outcomes were often determined by the wits of attorneys rather than the merits of the case.[18]

The Federal Rules of Civil Procedure were subsequently adopted to eliminate the hardships of the prior system and to make trials "less a game of blind man's buff [sic] and more a fair contest with the basic issues and facts disclosed to the fullest practi-

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[14] *See* Griffin B. Bell, *Automatic Disclosure in Discovery - The Rush to Reform*, 27 GA. L. REV. 1, 6 (1992).

[15] *See* Mayer, *supra* note 3, at 85.

[16] *See* Meade W. Mitchell,Comment, *Discovery Abuse and A Proposed Reform: Mandatory Disclosure*, 62 MISS. L.J. 743 (1993). Originally the American courts followed the narrowly tailored discovery practice of England. *See* Robert W. Millar, *The Mechanism of Fact Discovery: A Study in Comparative Civil Procedure*, 32 ILL. L. REV. 424, 437 (1937). At common law, parties apprised each other of the essence of their claims and exchanged information by formal and stylized pleadings. *Id.* at 437-38. For actions at law it was extremely difficult to obtain bills of discovery and modern discovery devices were practically unavailable due to onerous regulations. *Id.* at 440. In some states, interrogatories were the sole method for obtaining discovery and in other states depositions were the exclusive means for gaining access to discovery. *See* Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Procedure*, 36 CLEV. ST. L. REV. 17, 25-28 (1988).

[17] *See* Bell et al., *supra* note 14, at 7; *see also* Angela R. Lang, *Mandatory Disclosure Can Improve the Discovery System*, 70 IND. L.J. 657, 661 (1995).

[18] *See* Mitchell, *supra* note 16, at 743; *see also* Bell, *supra* note 14, at 6; *see also* William W. Schwarzer, *The Federal Rules, The Advisory Process and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).

cable extent."[19] To promote a trial on the merits, the Federal Rules relating to discovery were intended to provide the parties with various discovery mechanisms ensuring litigants are apprised of necessary information prior to trial.[20] Although liberal discovery may have promoted the disclosure of information and eliminated a trial by ambush, it has created new problems.

III. Modern Discovery Practices

A. *Discovery Abuse*

Most commentators generally agree that the current discovery process is abused and overused, resulting in unnecessary costs and delays.[21] Former Chief Justice Warren E. Burger, expressed similar concern over the abuse of discovery. He observed that discovery results in "wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable."[22] Further, most judges and practitioners believe that such excessive discovery contributes to high litigation costs.[23]

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19 *See* United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958); *see also* Hickman v. Taylor, 329 U.S. 495, 501 (1947) (noting that the federal rules were adopted to ensure that parties would acquire the fullest possible understanding of the issues and facts prior to trial); *see also* Schwarzer, *supra* note 18, at 703 (explaining that under the rules "victory is intended to go to the party entitled to it . . . rather than to the side which best uses its wits.").

20 *See* Mitchell, *supra* note 16, at 743. The discovery options available to litigants under the federal rules include: depositions; interrogatories; requests for inspection; requests for documents; and requests to admit. *See supra* note 1.

21 *See* Bell, *supra* note 14; *see also* Mitchell, *supra* note 16, at 744-47; *see also* Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 264 (1992); *see also* Lawrence M. Frankel, *Disclosure in the Federal Courts: A Cure for Discovery Ills?*, 25 ARIZ. ST. L.J. 249, 254 ((1993); *see also* Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989); *see also* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2240 (1989); *see also* William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?*, 74 JUDICATURE 178 (1991); *see also* Leon S. Cohan, *Choking on Discovery: An Appeal for Reason*, 1983 DET. C.L. REV. 1099 (1983); *see also* Frank Rothman, *Excessive Discovery: A Client's View*, 28 *Trial Law. Guide* 304 (1984); *see generally* Francis R. Kirkham, *Complex Civil Litigation - Have Good Intentions Gone Awry?*, Address Before the National Conference on Causes of Popular Dissatisfaction with the Administration of Justice (April 1976), *reprinted in* 70 F.R.D. 1993 (1976); *see also* Herbert v. Lando, 441 U.S. 153, 179 (1979) (Powell, J., concurring) (noting that "discovery techniques and tactics have become a highly developed litigation art - one not infrequently exploited to the disadvantage of justice").

22 *See* 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).

23 *See* REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR

Discovery abuse can take several forms including: the withholding of information; misuse of interrogatories; over-discovery; delay; and harassment.[24] Discovery is sometimes used as a weapon against the opposing party to discourage the adversary from pursuing his claim, to exhaust him financially, or to force him into a settlement.[25] These abuses increase the expenses of litigation and cause unnecessary delay without bringing the case any closer to a resolution on the merits.[26]

B. *The Causes of Discovery Abuse*

Several potential causes have been identified for the abuses of discovery which saturate the present system. The first cause is the "no-stone-left-unturned" philosophy.[27] Sometimes out of fear of malpractice suits, attorneys feel the need to conduct over-discovery in order to "leave no stone unturned."[28] Other attorneys may feel that they must utilize every available method of discovery to zealously represent their clients.[29] In the process, attorneys may uncover an overwhelming amount of irrelevant information, needlessly increasing the cost and length of the discovery process.

The second cause of the discovery problem stems from the "informational asymmetry" inherent in the discovery process.[30] During discovery, one party has information the other side wants to acquire.[31] The party seeking that information begins the discov-

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THE EASTERN DISTRICT OF PENNSYLVANIA APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, *reprinted in* 138 F.R.D. 167, 234 (1991).

24 *See* Mitchell, *supra* note 16, at 746.

25 *See* Frankel, *supra* note 21, at 255; *see also* Winter, *supra* note 21, at 264 explaining that:

> Unlimited discovery allows a party to impose costs upon an adversary solely to increase the adversary's expenses. The anticipation that bringing or defending a lawsuit will be costly, regardless of the merits, may cause a party with a meritorious claim or defense either not to sue, to give up early, or to settle for an amount less than defense costs.

Winter, *supra* note 21, at 264. It has been reported that between eighty to ninety-two percent of Chicago lawyers use financial pressure to coerce settlements. *See* Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 244 (1985).

26 *See* Levin & Colliers, *supra* note 25, at 244.

27 *See* Winter, *supra* note 21, at 264.

28 *See* Mitchell, *supra* note 16, at 747; *see also* Frankel, *supra* note 21, at 258.

29 *See* Bell, *supra* note 14, at 12.

30 *See* Frankel, *supra* note 21, at 259.

31 *See* Frankel, *supra* note 21, at 259.

ery process by making requests for disclosure.[32] This party must decide which documents he wants produced, which questions he wants answered, which statements he wants admitted and which witnesses he wants deposed.[33] However, the information-seeker is "in the dark" and lacks knowledge of the important facts he needs to intelligently seek useful and relevant information.[34] This is especially true, for example, in document requests. The party requesting the documents often does not know what documents exist and which ones will be particularly pertinent and helpful to his case. Therefore, the requesting party may acquire an enormous amount of information, only a small portion of which may be material.[35] This increases the time and money spent on discovering relevant and necessary information without any offsetting benefits.

Another cause of discovery misuse has been identified as the gameplaying by attorneys, which is partially brought on by the competitive nature of the adversarial system.[36] Some argue that discovery abuse occurs "because lawyers trained in and committed to a system governed by the adversarial process are not conditioned to function effectively in the pretrial environment envisioned by the Federal Rules."[37] In the adversarial system, although attorneys are considered officers of the court,[38] they are also advocates of their clients, and are ethically bound to represent their clients' interests

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32 *See* Frankel, *supra* note 21, at 259

33 *See* Frankel, *supra* note 21, at 259-60.

34 *See* Frankel, *supra* note 21, at 260; *see also* Mayer, *supra* note 3, at 97 (explaining that "discovery requests are often hastily drafted or adopted from general formulas, and based upon limited information").

35 *See* Frankel, *supra* note 21, at 260.

36 *See* Frankel, *supra* note 21, at 262.

37 *See* Schwarzer, *supra* note 18, at 705.

38 *See* Schwarzer, *supra* note 18, at 705; *see also* Model Rules of Professional Conduct pmbl. (1993) (stating that "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.") The preamble to the Model Rules of Professional Conduct explains:

> A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Id.

zealously.[39] This adversarial ideal may encourage lawyers to hide relevant information or increase their adversaries' costs by resisting discovery requests.[40]

Finally, some commentators contend that over-discovery is used by law firms to maximize profits by increasing their "billable" hours.[41] Discovery is a significant source of revenue for litigation firms with some firms acquiring half or more of their gross earnings through discovery.[42] Former Vice-President Dan Quayle estimated that over eighty percent of the expense and time of litigation is spent on discovery.[43]

IV. The Need For Change

Many recognized the need to change the discovery process long before the enactment of the 1993 amendments to the Federal

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39 *See* Model Rules of Professional Conduct, Canon 7 (1993) (stating that "[a] lawyer should represent a client zealously within the bounds of the law"). The preamble to the Model Rules of Professional Conduct explains a lawyer's various duties to his client as follows:

> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1993).

40 *See* Frankel, *supra* note 21, at 262. Frankel notes that the accent on advocacy leads to over-discovery by encouraging gameplaying. *Id.* The adversarial ideal "encourages attorneys to configure any method within the possible boundaries of the rules, to conceal a document, prohibit a witness from revealing harmful evidence, and to generally be non-cooperative, making adversaries perform unnecessary and excessive work to get the evidence needed for the fair adjudication of the matter." Mitchell, *supra* note 16, at 750-51.

41 *See* Frankel, *supra* note 21, at 258; *see also* William O. Bertelsman, *The 1994 Annual Meeting of the Association of American Law Schools: Changing the Rules of Pretrial Fact Disclosure*, 46 FLA. L. REV. 105, 112 (1994) (stating that in his view, "attorneys have abused the [discovery] system in pursuing the almighty billable hour").

42 *See* Schwarzer, *supra* note 21, at 179; *see also* Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 771 (1985) (noting that "pretrial discovery is where litigators earn the bulk of their fees").

43 *See* AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA, A REPORT FROM THE PRESIDENT'S COUNSEL ON COMPETITIVENESS (August 1991), at 1.

Rules of Civil Procedure. The problems associated with the discovery process have induced requests for reformation since the 1970s.[44] The primary resolution suggested at this time was increased judicial intervention.[45] Consequently, in the early 1980's, attempts were made to enlarge the powers of judges in federal courts.[46] In 1983, major changes were made to Rules 7, 11, 16, and 26 in order to encourage more sanctions.[47] For example, Rule 26(g) was amended to require attorneys and *pro se* parties to sign every discovery request, response, or objection certifying the reasonableness of the discovery action.[48] The amendment mandated that attorneys be sanctioned for violations of the rule; however, the type of sanction was left to the court's discretion.[49]

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44 *See* FED. R. CIV. P. 26 (Advisory Committee Notes, 1980 amendment) (noting an enormous amount of criticism regarding discovery abuse); *see also* Mark A. Nordenburg, *The Supreme Court and Discovery Reform: The Continuing Need for an Umpire*, 31 SYRACUSE L. REV. 543 (1980).

45 *See* FED. R. CIV. P. 26 (Advisory Committee Notes, 1980 amendments) (noting that in the committee's judgment discovery abuse can best be circumvented by early judicial involvement: that is as soon as abuse is even threatened).

46 *See* 446 U.S. 995 (1980) (Amendments to Federal Rules of Civil Procedure); *see also* 97 F.R.D. 165 (1983) (discussing the 1983 rule changes); *see also* FED. R. CIV. P. 26 (Advisory Committee Notes, 1980 amendments); *see also* Fed. R. Civ. P. 26 (Advisory Committee Notes, 1983 amendments).

47 *See* Mitchell, *supra* note 16, at 753; *see also* Susan A. Yager, *Discovery Abuse: Have the 1983 Amendments to the Federal Rules Curbed the Problem?*, 37 FED'N INS. & CORP. COUNS. Q. 399, 401 (1987) (noting that the 1983 amendments were aimed at controlling discovery abuse and, therefore, the rule changes promoted judicial sanctions).

48 *See* FED. R. CIV. P. 26 (Advisory Committee Notes, 1983 amendments).

49 *See* FED. R. CIV. P. 26. The Advisory Committee explained:

> Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. *ACF Industries, Inc. v. EEOC*, 439 U.S. 1081 (1979) (certiorari denied) (Powell, J., dissenting). Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 634 (1976); *see also* Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978). Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefore.

Id. The Advisory Committee further noted the judicial reluctance to impose penalties on lawyers who abuse discovery and, therefore, the Committee chose to make the authority of judges explicit and to require that judges exercise that authority. *See id.*

A. *The Civil Justice Reform Act of 1990*

These rule changes did little to restrain discovery abuse.[50] In the late 1980s, Congress attempted to impose solutions. In 1990, Congress adopted a Civil Justice Expense and Delay Reduction Plan.[51] The Plan required each United States District Court to implement their own version of a civil justice cost and delay reduction plan by December 31, 1993.[52] The purposes of the plans were to: (1) aid in the resolution of civil cases on the merits; (2) monitor discovery; (3) enhance litigation management; and (4) assure the just, speedy, and inexpensive resolutions of civil matters.[53] The Act also mandated that ten pilot districts activate plans by December 31, 1991, to provide the other districts guidance.[54] Congress di-

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50 *See* Mitchell, *supra* note 16, at 753.

51 *See* 28 U.S.C. §§ 471-482 (1993).

52 *See id.* at § 471.

53 *See id.* Specifically, the law states the district courts should consider:

> (2) early and ongoing control of the pretrial process through involvement of a judicial officer in—
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> . . .
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> (C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion;
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> . . .
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> (3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through monitoring a discovery-case management conference or a series of such conferences at which the presiding judicial officer—
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> . . .
>
> (C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to—
> (i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and
> (ii) phase discovery into two or more stages; . . .
> (4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;
> (5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on matters set forth in the motion.

Id. at § 473(a)(2)-(5).

54 *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 105, 104 Stat. 5097-98 (1990); *see also* Bell, *supra* note 14, at 19. The ten pilot districts include: the Southern Districts of California, New York, Texas; the Eastern Districts of Pennsylvania, and Wisconsin; the Western Districts of Oklahoma and Tennessee; the Northern District of Georgia and the Districts of Delaware and Utah. *See* Civil Justice Reform Act of

rected the Judicial Conference of the United States ("Judicial Conference") to prepare and submit an independent study of the plans by December 31, 1996.[55] The results of these studies may demonstrate that the Federal Rules need to be revised; however, any revisions will not be incorporated into the Federal Rules until December, 1998.[56] Therefore, discovery abuse will continue until future revisions are adopted.

B. *The 1993 Amendments to the Federal Rules of Civil Procedure*

In 1990, recognizing the urgency of the discovery problem and the lingering abuses in the modern discovery scheme, the Federal Rules Advisory Committee began considering amending the rules.[57] After numerous hearings and revisions of the rules, the Advisory Committee approved rule amendments on May 1, 1992.[58] Less than one year later, the United States Supreme Court approved the amendments which became effective on December 1, 1993.[59]

V. Judicial Rule Making Procedure

In 1934, Congress delegated the power to make court rules to the United States Supreme Court through the Rules Enabling Act.[60] The Judicial Conference has the primary task of studying

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1990, *supra* at 5097-98. All of the pilot districts had their plans in place by the December 1991 due date. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL JUSTICE REFORM ACT REPORT 2, at 1-2 (December 1, 1994) [hereinafter JUDICIAL CONFERENCE REPORT].

55 *See* 28 U.S.C. § 471. The Judicial Conference's Report was originally due on December 1, 1995, however, the Judicial Amendments Act of 1994 subsequently amended the law giving the Judicial Conference one additional year. *Id.* This independent study must be completed by an independent organization with expertise in the area of federal court management. *Id.* The RAND Corporation contracted with the Judicial Conference to complete the report and has recently completed the study. *See* JUDICIAL CONFERENCE REPORT, *supra* note 55, at 25.

56 *See* FED. R. CIV. P. 26 (Advisory Committee Notes, 1993 amendments). The December 1998 date was approximated taking into consideration that the Judicial Conference's Report would be submitted to Congress in December 1995. *Id.* Since the due date of the final report has been changed to December, 1996, it is likely that no final rule changes will be implemented until December, 1998.

57 *See* Bell, *supra* note 14, at 24. The 1993 amendments were the judiciary branch's response to Congress' adoption of the CJRA. *See* Bertelsman, *supra* note 41, at 109.

58 *See supra* Part VI (discussing the amendments in depth).

59 *See supra* Part VI (discussing the amendments in depth).

60 *See* Rules Enabling Act, Pub. L. No. 73-415, ch. 651, 48 Stat. 1063 (1934) (cur-

potential rule changes.[61] Until recently, the rule making process was a fairly private and benign function of the Judicial Conference.[62] The Judicial Conference has the duty to "carry on a continuous study of the operation and effect of the general rules of practice and procedure."[63] It recommends to the Supreme Court any changes to the Federal Rules which it "deem[ed] desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[64]

The Judicial Conference drafts, reviews and promulgates rules through the Standing Committee on Rules of Practice and Procedure ("Standing Committee").[65] The Standing Committee typically receives proposals to modify, delete, or add rules through one of its five Advisory Committees, including one on "practice and procedure in civil cases."[66]

The Advisory Committee has the responsibility of carrying "on a continuous study of the operation and effect of the rules of practice and procedure" and recommending changes to the Standing Committee.[67] The Advisory Committee has traditionally enjoyed enormous discretion; the Standing Committee and the Judicial

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rent version at 28 U.S.C. §§ 2071-74 (1988)). The Act provided that the Supreme Court "shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States District Courts." 28 U.S.C. § 2072(a) (1988). However, the rules cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (1988).

61 *See* 28 U.S.C. § 331 (1988).

62 *See* Bell, *supra* note 14, at 21. Recently, due to widespread concern that the rulemaking process governed by 28 U.S.C. § 331 lacked openness, the process was reformed allowing additional input from the bar and the public. *See id.* at 21-22; *see also* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 799 (1991); *see generally* A SELF STUDY OF FEDERAL JUDICIAL RULEMAKING: A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *reprinted in*, 168 F.R.D. 679, 683-92 (Dec. 1995) (for an in depth review of the judicial rulemaking process).

63 *See* 28 U.S.C. § 331 (1988).

64 *See id.*

65 *See* Bell, *supra* note 14, at 21; *see also* Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 467 (1993).

66 *See* Walker, *supra* note 65, at 467; *see also* Honorable William J. Hughes, *Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 SETON HALL LEG. J. 1 (1993).

67 *See* Walker, *supra* note 65, at 467.

Conference typically accept their recommendations.[68] Since 1958, the Standing Committee has made only four negligible changes to proposed rules submitted by the Advisory Committee while the Judicial Conference has made only three.[69] However, Congress limited the discretion of the Advisory Committee in 1988 when it passed the Judicial Improvements and Access to Justice Act.[70] The Act provides for open hearings and commentary on any rule changes proposed by the Advisory Committee.[71]

Initially, the Advisory Committee Reporter drafts the proposed rule changes and submits them to the Advisory Committee, which review and edit the draft of the changes.[72] The Advisory Committee then transmits all of its proposed rules to the Standing Committee for its publication approval.[73] When the Standing Committee approves the proposed rules for publication, the Committee prints a notice of proposed rule making in the Federal Register which provides for a comment period.[74] The Advisory Committee also

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68 *See* Walker, *supra* note 65, at 468.

69 *See* Walker, *supra* note 65, at 468 n.105-06 (citations omitted).

70 *See* 28 U.S.C. § 2073 (1988) (Commentary on 1988 Revision).

71 *See id.* The Act provides:

> (c)(1) Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting.
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> (2) Any meeting for the transaction of business under this chapter, by a committee appointed under this section, shall be preceded by sufficient notice to enable all interested persons to attend.
>
> (d) In making a recommendation under this section or under section 2072, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

28 U.S.C. § 2072(c)(1)-(2), (d).

72 *See* Bell, *supra* note 14, at 23.

73 *See* Bell, *supra* note 14, at 23 (providing a flow chart which includes all of the steps and time frames involved in the rulemaking process); *see also* Hughes, *supra* note 66, at 2 n.5 (citations omitted).

74 *See* Bell, *supra* note 14, at 23.

conducts public hearings on the proposed rules.[75] After the time for comment has expired, the Advisory Committee Reporter drafts a synopsis of the written comments and testimony.[76] The Advisory Committee subsequently submits the proposed rules or amendments it supports along with the committee notes to the Standing Committee.[77] Next, the Standing Committee prepares and submits its report along with the Advisory Committee report to the Judicial Conference.[78] When the Judicial Conference supports a proposal, it is submitted to the Supreme Court.[79] If the proposed rule is approved by the Supreme Court, the Chief Justice presents it to Congress.[80] Congress retains the power to reject the rules,[81] however, if Congress does not act within seven months, the proposed rules automatically become effective.[82]

VI. The Road to the 1993 Amendments

A. *The Original Proposals*

The Advisory Committee first began considering amendments to the discovery rules at its meeting in November 1989.[83] The Committee discussed the need for change and authorized its Reporter to draft a proposed rule to be considered at the June 1990 meeting.[84] The proposed rule, Rule 25.1, required mandatory dis-

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75 *See* Bell, *supra* note 14, at 23.

76 *See* Bell, *supra* note 14, at 23.

77 *See* Bell, *supra* note 14, at 23.

78 *See* Bell, *supra* note 14, at 23.

79 *See* Bell, *supra* note 14, at 24.

80 *See* Bell, *supra* note 14, at 24. The Supreme Court usually defers to the Judicial Conference and approves the rule changes it suggests. *See* Amendments to the Federal Rules of Civil Procedure, Statement of the Court, (White, J.) (April 22, 1993), *reprinted in* H.R. Doc. No. 103-74, 101-02 (1993) [hereinafter Supreme Court Statement].

81 *See* Hughes, *supra* note 66, at 2. However, Congress has rejected Court-approved rules twice, once when the Federal Rules of Evidence had been proposed and once when it rejected a change to Rule 4 which deals with the service of process. *Id.; see also* Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 5583 (1973); *see also* Federal Rules of Civil Procedure Amendments Act of 1983, Pub. L. No. 97-462, 96 Stat. 2527 (1983).

82 *See* 28 U.S.C. § 2074 (1988) (Commentary on 1988 Revision by David D. Siegel). The Supreme Court must submit the rules to Congress by the first of May in the year they will be effective and if Congress does not act they become effective on December 1 of that same year. *Id.* However, theoretically, Congress' power never ends because it can always pass legislation to repeal the rules.

83 *See* Mullenix, *supra* note 62, at 822.

84 *See id; see also* Bell, *supra* note 14, at 25.

closure, embodying the concept that litigants should reveal evidence to their adversaries in the early stages of litigation to alleviate the need for numerous motions, interrogatories, and depositions.[85] Rule 25.1 required each party to disclose the following to their adversary within twenty-eight days after the filing of an answer: the names, locations, and telephone numbers of persons having knowledge of the facts alleged in the pleadings; a description of tangible evidence; any relevant documents bearing on the facts alleged in the pleadings and their location and custodian; and a statement of damages.[86]

The Advisory Committee modified the original version of the Rule in August, 1991,[87] embodying the disclosure requirement in Rule 26.[88] The Advisory Committee's objective was to "accelerate the exchange of basic information about the case and to eliminate the paperwork involved in requesting such information."[89] The new rule provided litigants thirty days after filing an answer to: identify persons who are likely to have significant information involving claims and defenses; describe or produce documents "likely to bear significantly on claims or defenses;" and disclose information about damages and insurance.[90] Prior to making any disclosures, the parties had an obligation to reasonably inquire into the facts of the case.[91] There was no safe harbor provision; therefore, one party was not exempt from making disclosures if the other party failed to sufficiently disclose.[92] However, the proposal did include new sanctions if a party failed to make the required disclosures. The court was granted discretionary authority to preclude evidence at trial, award costs and fees, and apprise the jury that the party failed to make necessary disclosure.[93] Moreover, the proposal prohibited formal discovery until initial disclosures had been

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85 *See* Mullenix, *supra* note 62, at 858-60.

86 *See* Mullenix, *supra* note 62, at 858-9.

87 *See* Bell, *supra* note 14, at 25.

88 *See* Bell, *supra* note 14, at 25.

89 *See* Judicial Conference of the United States Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, *reprinted in* 137 F.R.D. 63, 99 (1991) (Advisory Committee Notes).

90 *See id.* at 88. Note that the court was given the power to specify a different time table for disclosure than the thirty day limit delineated in the rule. *See id.* at 101.

91 *See id.* at 88.

92 *See id.* at 101.

93 *See id.* at 131.

made.[94] Furthermore, local courts were given discretion to create their own rules restricting the number of interrogatories and depositions.[95]

B. *The Hearings*

Many were surprised when the mandatory disclosure provision of Rule 26 generated an unprecedented amount of criticism.[96] In 1991 and 1992, Los Angeles and Atlanta, respectively, became the forums for hearings.[97] Critics wrote over three hundred written comments with few of them supporting the mandatory disclosure requirement.[98] The criticisms of the disclosure requirement came from a diverse group including: judges; law firms; insurance companies; bar associations; legal scholars; public interest groups; corporations; plaintiff's trial attorneys' associations; and defense attorneys' associations.[99]

A major criticism of the early proposal was that the language in the Rule governing the scope of mandatory disclosure - "likely to bear significantly on any claim or defense" - was too ambiguous.[100] Additionally, many argued that the mandatory disclosure provision

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94 *See* Bell, *supra* note 14, at 27.

95 *See* Proposed FED. R. CIV. P. 37(c)(1), *reprinted in* 137 F.R.D. at 91-92.

96 *See* Bell, *supra* note 14, at 28 (noting that "[t]he radical nature of the proposed changes to Rule 26 triggered a storm of criticism" from bar representatives, practitioners, scholars and many others); *see also* Ann Pelham, *Judges Make Quite a Discovery: Litigators Erupt, Kill Plan to Reform Civil Rules*, LEGAL TIMES, Mar. 16, 1992, at 1 (noting that the discovery proposal "brought a flood of objections unprecedented in the 50-plus years of judicial rulemaking"); *see also* Hughes, *supra* note 66, at 5 (stating that Rule 26 has been subject to widespread criticism).

It seems that no one on the committee fathomed that the amendments would be so controversial. *See* Bertelsman, *supra* note 41, at 110. Judge Bertelsman, a member of the Standing Committee when the Rules were proposed and adopted, stated that "no one realized how controversial the disclosure concept was going to be" when the changes to Rule 26 where first considered. *Id.* A member of the Advisory Committee recently commented that "the reaction to recently proposed amendments to the Federal Rules of Civil Procedure suggests that even amendments best characterized as trivial or incremental may encounter enormous resistance." *See* Winter, *supra* note 21, at 263.

97 *See* Hughes, *supra* note 66, at 1-2.

98 *See* Bell, *supra* note 14, at 28.

99 *See* Bell, *supra* note 14. The American Bar Association (ABA), the Association of Trial Attorneys (ATLA), the NAACP Legal Defense Fund, the Defense Research Institute, and the Product Liability Advisory Council were just a few organizations to critique the proposed rule. *See id.* at 29, n.100 (citations omitted).

100 *See* Winter, *supra* note 21, at 266-67.

conflicted with the philosophy of notice pleading.[101] Critics complained that parties may be subject to sanctions because they may not appreciate the breadth of opponents' claims and thus fail to make a full disclosure.[102] Critics also argued that general pleadings could lead to vast disclosures of irrelevant information thereby increasing, rather than diminishing, costs.[103] In response to critics' concerns, the Advisory Committee modified the proposed Rule before submitting it to the Standing Committee.

C. *The Final Proposal*

The Advisory Committee ultimately agreed with the critics and decided the standard "likely to bear significantly on any claim or defense" was flawed.[104] At first, the Advisory Committee decided to discontinue the entire disclosure project;[105] however, it later chose to continue the project opting instead to change the language.[106] In lieu of modifying the notice pleading standard, the Advisory Committee drafted a proposal to accommodate the notice pleading practice.[107] The new adopted language states that parties are only required to disclose information "relevant to disputed facts alleged with particularity in the pleadings."[108] Therefore, if the pleadings are in general terms and do not include any specific facts, the disclosure provision will not be triggered.[109]

The new rule requires parties to disclose to their adversaries four categories of information. First, parties must disclose the names of any individuals and, if known, their location and telephone number, who are "likely to have discoverable information

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101 *See* FED. R. CIV. P. 8. Notice pleading only requires parties to plead facts and legal theories in general terms. *Id.*

102 *See* Winter, *supra* note 21, at 267.

103 *See id.*

104 *See id.* at 268.

105 *See id.; see also* Bell, *supra* note 14, at 34 (noting that the Advisory Committee retreated from its position and issued new rules in March 1992, which eliminated the automatic disclosure requirement).

106 *See* Winter, *supra* note 21, at 268.

107 *See id.*

108 *See* FED. R. CIV. P. 26(a)(1). This language was taken from Rule 9, which states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *See* FED. R. CIV. P. 9(b); *see also* Winter, *supra* note 21, at 268-69.

109 *See* Winter, *supra* note 21, at 269; *see also* FED. R. CIV. P. 26 (Advisory Committee Notes).

relevant to disputed facts alleged with particularity in the pleadings."[110] Second, parties must provide a copy or a description and location of documents, data compilations, and any tangible items under their custody or control which are "relevant to disputed facts alleged with particularity in the pleadings."[111] Third, parties must supply a computation of damages along with existing supporting documents.[112] Last, parties are required to provide their adversaries with the opportunity to inspect and copy any insurance agreements.[113] These disclosure rules apply unless the parties stipulate otherwise, the court directs otherwise, or the district court adopts a local rule opting out of the requirements.[114]

Under the disclosure requirements, parties must disclose information reasonably available to them. As under the original proposal, there is no safe harbor provision. Parties are not exempt from making the required disclosure if they have not finished their

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110 *See* FED. R. CIV. P. 26(a)(1)(A) (Advisory Committee Notes).

111 *See* FED. R. CIV. P. 26(a)(1)(B).

112 *See* FED. R. CIV. P. 26(a)(1)(C).

113 *See* FED. R. CIV. P. 26(a)(1)(D). Specifically, the new rule states:

> (1) *INITIAL DISCLOSURES*. . Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without waiting a discovery request, provide to other parties:
>
> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;
>
> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;
>
> (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and the extent of injuries suffered; and
>
> (D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Id. In addition to the above disclosure requirements, Rule 26(a)(2) was amended to require expert disclosure and Rule 26(a)(3) was amended to require parties to provide pretrial information about the evidence they plan to introduce at trial. *See* FED. R. CIV. P. 26(a)(2) and (3).

114 *See* FED. R. CIV. P. 26(a)(1).

case investigation or if they dispute the sufficiency of adversaries' disclosures.[115]

Disclosures must be made at or within ten days following the initial meeting of parties.[116] This initial meeting must be held as soon as practicable and no later than 14 days before the scheduling conference or before a scheduling order is due.[117] At the meeting, the parties are directed to discuss the nature and grounds of their claims and defenses and the prospects for a settlement of the case. They must also arrange for or make the required disclosures and draft a discovery plan.[118] The plan must manifest the litigants' views and proposals regarding: (1) the changes that should be made to the timing, form, or requirements of disclosures under Rule 26(a); (2) the topics that require discovery, when discovery should be concluded, and whether discovery will be handled in phases or will be limited to specific issues; and (3) any changes which ought to be made to the limitations on discovery pursuant to the federal rules or local rules and what additional limitations should be imposed.[119]

Additionally, Rule 26 provides that every disclosure must be signed by the attorneys or the parties if they are *pro se*.[120] The signature "constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete and correct as of the time it is made."[121] After the initial disclosure, each party has a continuing duty to supplement his disclosure "if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."[122]

The new rule also delineates sanctions for a party's failure to comply with the initial disclosure requirements. The court may: penalize a party's noncompliance by prohibiting their use of non-

115 *See* FED. R. CIV. P. 26(a)(1).
116 *See* FED. R. CIV. P. 26(a)(1).
117 *See* FED. R. CIV. P. 26(f).
118 *See* FED. R. CIV. P. 26(f).
119 *See* FED. R. CIV. P. 26(f).
120 *See* FED. R. CIV. P. 26(g).
121 *See* FED. R. CIV. P. 26(g).
122 *See* FED. R. CIV. P. 26(e).

disclosed evidence at trial, hearings or motions; apprise the jury of the party's failure to disclose; or award attorneys' fees and costs.[123] However, the sanctions may not be applied if the court finds that the party's nondisclosure was substantially justified or harmless.[124]

The new rules also contain other provisions which modify the discovery process. Rule 30 limits the number of depositions that can be taken to ten.[125] However, the court can permit additional depositions at its discretion or the parties can stipulate to taking more than ten depositions.[126] Rule 33 limits the number of interrogatories that one party can serve on another party to twenty-five interrogatories.[127] This number can also be increased by a stipulation of the parties or court order.[128]

D. *The Adoption of the New Rules*

The Advisory Committee approved these rule changes, along with several others,[129] and on May 1, 1992, submitted them to the Standing Committee.[130] The Standing Committee acknowledged the enormous opposition to the mandatory disclosure requirements, but nonetheless approved the proposal and submitted it without substantial modification on June 20, 1992, to the Judicial Conference.[131] On September 22, 1992, the Judicial Conference approved the proposed rule changes without modification and, November 27, 1992, forwarded them to the Supreme Court.[132] Although Justice Scalia presented a strong dissent, the Court approved the rules and transmitted them to Congress on April 22, 1993.[133] Congress had until December 1, 1993, to prevent the

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123 *See* FED. R. CIV. P. 37(c)(1).

124 *See* FED. R. CIV. P. 37(c)(1).

125 *See* FED. R. CIV. P. 30(a)(2).

126 *See* FED. R. CIV. P. 30(a)(2).

127 *See* FED. R. CIV. P. 33(a).

128 *See* FED. R. CIV. P. 33(a).

129 *See* H.R. DOC. NO. 103-74, at 1 (1993) hereinafter H.R. DOC. NO. 103-74]. There were a total of 40 proposed changes to the Federal Rules of Civil Procedure including Rules 1, 4, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, 76, Forms 2, 33, 34, 34A, new 4.1 & Forms 1A, 1B, & 35; & the abolition of Form 18-A. *Id.*

130 *See* Bell, *supra* note 14, at 39.

131 *See id.*

132 *See* MacDonald, *supra* note 6, at 824.

133 *See* H.R. DOC. NO. 103-74, *supra* note 129.

rules from becoming effective.[134]

E. *Congressional Reaction*

On July 30, 1993, The Honorable William J. Hughes introduced a bill in the House of Representatives which would have deleted the disclosure requirements of Rule 26.[135] The Subcommittee on Intellectual Property and Judicial Administration marked up the bill and on August 5, 1993, reported it favorably to the Judiciary Committee.[136] The Judiciary Committee also favorably reported the bill to the House of Representatives who passed the legislation on November 3, 1993.[137] However, the Senate did not pass the proposed legislation and therefore, on December 1, 1993, the rules became effective with the mandatory disclosure provision as submitted by the Supreme Court to Congress.[138]

VII. Concerns of Mandatory Disclosure

The mandatory disclosure requirement has been attacked on various grounds. Many have argued that the standard delineated in the rule is ambiguous and insist that the new Rule will actually cause an increase in motions[139] and an overproduction of irrelevant information thereby increasing the costs of discovery.[140] Opponents have also claimed that the Rule undermines attorney-client confidentiality, ignores the ethical responsibilities of attorneys to their clients, infringes on the work-product privilege[141] and fails to reduce the practice of gamesmanship.[142] Many are concerned the Rule will promote a lack of uniformity in the federal courts due to the experiments under the Civil Justice Reform Act and the ability of the district courts to opt out of the rule by adopt-

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134 *See* MacDonald, *supra* note 6, at 824.

135 *See* H.R. 2814, 103d Cong., § 2 (1993); *see also* Hughes, *supra* note 66, at 4.

136 *See* Hughes, *supra* note 66, at 4.

137 *See* 139 CONG. REC. H8747 (daily ed. Nov. 3, 1993).

138 *See* Hughes, *supra* note 66, at 9-11; *see also* Randall Samborn, *New Discovery Rules Take Effect*, NAT'L L. J., Dec. 6, 1993, at 3 (noting that the bill perished in the Senate unexpectedly right before the Thanksgiving break).

139 *See infra* notes 144-53 and accompanying text.

140 *See infra* notes 154-57 and accompanying text.

141 *See infra* notes 158-71 and accompanying text.

142 *See infra* notes 172-75 and accompanying text.

ing their own local rules.[143]

A. *Relevancy Standard is too Vague and Will Cause an Increase in Satellite Litigation*

Many have asserted that the fundamental defect in Rule 26 is that it seeks to apply one standard for all types of civil cases.[144] Therefore, the drafters of the Rule had to choose a broad standard for the disclosure requirement - information must be disclosed when it is "relevant to disputed facts alleged with particularity."[145] It is contended that this vague standard may increase satellite litigation because parties will spend their energies litigating what the standard means.[146]

Justice Scalia, in his dissent to the adoption of Rule 26, took the position that the new scheme would actually "*add[ ] a further layer of discovery.*"[147] He argued that a disclosure regime would likely increase the burdens on federal judges because parties would "litigate about what is 'relevant' to 'disputed facts,' whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure."[148]

In addition, many fear that motions to dismiss and motions for

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143 *See supra* notes 50-56 and accompanying text for a discussion of the Civil Justice Reform Act.

144 *See* Bell, *supra* note 14, at 39.

145 *See id.*

146 *See* Frankel, *supra* note 21, at 273 (stating that the costs and delays of satellite litigation over the interpretation of the language could potentially overshadow any improvements in the systems); *see also* Bell, *supra* note 14, at 39 (noting the vagueness of the standard and stating that "the result of this vagueness will inevitably be confusion, disagreement, cost, and delay."); *see also* Hughes, *supra* note 66, at 6 (noting that many opponents testified that the vagueness of the standard "will only increase the discovery burdens on the system rather than reducing them"); *see also* Roy Alan Cohen & Angela D. Slater, *Proposed FRCP Amendment is Unworkable*, 135 N.J.L.J. 1146 (Nov. 15, 1993) (explaining that "the amendment is ambiguous, at best, and leaves open the question of whether a party who fails to make the initial disclosures based upon its objections . . . will face sanctions. . .").

147 *See* Amendments to the Federal Rules of Civil Procedure, Dissenting Statement of Justice Scalia, *reprinted in* H.R. DOC. NO. 103-74, at 107 (1993) (emphasis added) [hereinafter Justice Scalia's Dissent]. In dissenting from the adoption of the amendments to the rules relating to discovery, Justice Scalia was joined by Justice Thomas and Justice Souter. *Id.* at 104.

148 *See id.* at 107.

a more definite statement under Rule 12(b) and (e)[149] will increase because notice pleading only requires a general averment of a claim and opposing parties will be unable to make adequate initial disclosures.[150] Some theorize that Rule 26 motions for protective orders will increase "to seek protection from unclear or ambiguous interpretations of exactly how much information or how many documents might be 'relevant' to the adversary's pleadings."[151] In addition, opponents assert that motions for sanctions under Rule 37 will also increase due to the adversarial nature of litigation.[152] Attorneys could then easily argue that information obtained in the later stages of discovery should have been disclosed during the initial disclosure periods.[153]

B. *Production of Irrelevant Information*

Opponents assert that the vagueness of the disclosure standard and the threat of sanctions may encourage the production of marginally relevant information.[154] At the earlier stages of litigation, the parties may not have a clear understanding of the issues involved in the case and may innocently over-disclose information wasting time and money.[155] Additionally, the litigants may over-disclose information in an attempt to hide harmful details in a mountain of documents[156] or to inundate their adversary.[157] Regardless of the reasons for over-disclosure, it certainly would increase the cost and time of discovery.

C. *Undermining Attorney-Client Confidentiality, the Ethical Obligations of Attorneys and the Work-Product Privilege*

Another major criticism of mandatory disclosure is that it un-

149 *See* FED. R. CIV. P. 12.

150 *See* Bell, *supra* note 14, at 43.

151 *See* Bell, *supra* note 14, at 43.

152 *See* Bell, *supra* note 14, at 43.

153 *See* Bell, *supra* note 14, at 43. The authors further argue that the motivation for sanctions is increased because the court can bar the use of undisclosed evidence at trial. *See id.*

154 *See* Bell, *supra* note 14, at 43-44.

155 *See* Bell, *supra* note 14, at 44; *see also* Justice Scalia's Dissent, *supra* note 150, at 107 (noting that "[d]ocuments will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty"). *Id.*

156 *See* Frankel, *supra* note 21, at 273.

157 *See* Bell, *supra* note 14, at 44.

dermines attorney-client confidentiality and conflicts with the adversarial system.[158] Under a discovery scheme, the party seeking information must describe the information needed to build a case with some amount of specificity.[159] However, under a disclosure regime, parties making disclosure must place themselves in their opponents' shoes and determine what type of information their opponents will need before surrendering it.[160] Many argue this is incompatible with the adversarial tradition and may violate the ethical obligations attorneys owe their clients.[161]

The tradition of American jurisprudence is to protect the communications between a client and his attorney.[162] The mandatory disclosure provision "could damage attorney-client relationships because it requires counsel to disclose to the client's adversary what counsel has learned during his investigation, good or

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158 *See* STATEMENT OF BUSINESS ROUNDTABLE LAWYERS COMM. ET AL., *submitted to* THE SUBCOMM. ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION 18 (June 16, 1993) [hereinafter STATEMENT OF BRLC, ET AL.]; *see also* Bell, *supra* note 14, at 46-8; *see also* FED. R. EVID. 803.

159 *See* Bell, *supra* note 14, at 47.

160 *See* Bell, *supra* note 14, at 47.

161 *See Bell, supra* note 14, at 47; *see, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT, Canon 7 (1993) (stating that "[a] lawyer should represent a client zealously within the bounds of the law"); *see also* Model Code of Professional Responsibility 1.6 (1993) (attorney-client confidentiality). The comments to the rule of confidentiality in ethics law explain the purposes of the rule and the lawyer's duty as follows:

> The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
>
> Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure . . . .
>
> A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY 1.6 cmt. (1993).

162 *See* STATEMENT OF BRLC, ET AL., *supra* note 158, at 18. Other organizations that joined in the statement include: the Chamber of Commerce of the United States, the National Association of Manufacturers, the American Association of Railroads, the American Automobile Manufacturers Association, the American Bankers Association, the Product Liability Advisory Council, Inc., the Defense Research Institute, the Federation of Insurance and Corporate Counsel, the International Association of Defense Counsel, and the Lawyers for Civil Justice. *Id.*

bad, about the client's case."[163] The Rule may actually penalize the thorough attorney because the more information he unveils, "the greater the potential disclosure he must make—perhaps contrary to his client's interests."[164] Similarly, many fear the rule will infringe upon the work-product privilege because it compels the attorney to interpret his opponent's claim in order to comply with the rule.[165]

Justice Scalia succinctly explained in his dissent to the adoption of the Rule 26 amendments:

> By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional judgment in the service of the adversary.[166]

Justice Scalia's reasoning is similar to the Supreme Court's rationale in the seminal case, *Hickman v. Taylor*,[167] where the Court recog-

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163 *See* STATEMENT OF BRLC, ET AL., *supra* note 158, at 18.

164 *See* STATEMENT OF BRLC, ET AL., *supra* note 158, at 18. The organizations further explained that:

> Clients do not and should not expect their own attorney to vigorously search through their files, sometimes finding negative or self-critical information, only to dutifully—and without a request—turn it over to the client's adversary in litigation. Yet, that is what disclosure would require, contrary to the deeply ingrained tradition whereby the attorney protects the client's confidences and the law nurtures the relationship between attorney and client in order to promote candor and trust.
>
> The law traditionally has protected this relationship even at the expense of potentially relevant information which is either kept completely confidential under the attorney-client privilege, or may be used in the litigation subject to stringent protective orders or a court-order seal. Although the proposed disclosure process does not modify the attorney-client privilege directly, it will undermine essential aspects of the relationship that the privilege was created to protect and unduly complicate protecting the confidentiality of such information in litigation.

Id.

165 *See* Cohen & Slater, *supra* note 146, at 1146; *see also* Bell, *supra* note 14, at 46-47.

166 *See* Justice Scalia's Dissent, *supra* note 147, at 108 (citing Advisory Committee Note's to Proposed Rule 26, p. 96).

167 *See* 329 U.S. 495 (1947).

nized the work-product doctrine for the first time. In Hickman, one of the parties sought access to witness statements that were prepared by an opposing party in anticipation of litigation.[168] The Court held that the statements were not discoverable because they were the "work-product" of the attorney.[169] The Court reasoned that it is crucial for an attorney to be permitted to work "with a certain degree of privacy" in order for the attorney to properly prepare a case.[170] The Court opined that "[i]nefficiency, unfairness and sharp practices would inevitably develop" if it allowed discovery of work-product.[171] Many opponents of mandatory disclosure believe that the new Rule 26 will intrude upon the work-product privilege recognized in *Hickman* and the interests that the Court was attempting to protect.

D. *Gamesmanship Will Continue*

Opponents of mandatory disclosure also contend that contrary to the intentions of the Advisory Committee, the new Rule will not reduce gamesmanship but will instead provide immense opportunities for attorneys to use the Rule to their strategic advantage.[172] Due to the vagueness of the disclosure standard, attorneys may interpret what is "relevant to disputed facts alleged with particularity" and can later defend their interpretation of the standard at conferences and on motions.[173] Parties can also simply describe

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168 *See id.* at 489-99.

169 *See id.* at 509, 512-13.

170 *See id.* at 510-11. The Court explained:

> Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interests. . . . Were such materials [interviews, statements, etc.] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own.

Id. at 511.

171 *See id.*

172 *See, e.g.*, Mayer, *supra* note 3, at 116-20; *see also* Frankel, *supra* note 21, at 272-73; *see also* FED. R. CIV. P. 26 (Advisory Committee Notes).

173 *See* Mayer, *supra* note 3, at 116; *see also* Frankel, *supra* note 21, at 274. However, once a body of case law develops defining and interpreting the standard and delineating what must be disclosed under the rule, this will be less likely. *See* Frankel, *supra* note 21, at 274.

certain documents rather than disclose them.[174] Some assert that any reduction in gameplaying will probably be limited because attorneys will still have the opportunity to evade and manipulate the mandatory disclosure rule.[175]

E. *Lack of Uniformity and Empirical Research*

The final concern raised by the amendments to Rule 26 is that they will lead to a lack of uniformity among the district courts because of the Civil Justice Reform Act.[176] At the time the Rule went into effect, over twenty district courts were already experimenting with different types of disclosure plans, as directed by the Civil Justice Reform Act.[177] The new rule allows these district courts and others the opportunity to "opt out" of the mandatory disclosure provision by adopting a local rule.[178] Therefore, many fear that a lack of uniformity will result should the district courts "opt out" of the provision.[179]

Moreover, many believe that the 1993 amendments are premature and that the Advisory Committee should have waited for the results of pilot programs before implementing any amendments.[180] Some posit that the Advisory Committee approved the amendments based on good intentions and anecdotal information of a few attorneys and judges.[181] Since no reliable empirical evidence exists regarding the effects of mandatory disclosure requirements,[182] many think that the adoption of a nationwide scheme is

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174 *See* Mayer, *supra* note 3, 116.

175 *See* Frankel, *supra* note 21, at 272, 275; *see also* Mayer, *supra* note 3, at 117.

176 *See* Cohen & Slater, *supra* note 146, at 1146; *see also* Samborn, *supra* note 138, at 40; *see supra* notes 50-56 and accompanying text for a discussion of the CJRA.

177 *See* Samborn, *supra* note 138, at 40.

178 *See* FED. R. CIV. P. 26(a)(1).

179 *See* Samborn, *supra* note 138, at 40.

180 *See* Hughes, *supra* note 66, at 7 (stating that himself and his colleagues on the House Committee on the Judiciary "believed that during the period of local experimentation mandated under the Civil Justice Reform Act of 1900 it would be premature to change the Federal Rules of Civil Procedure by establishing any particular method for mandatory, early disclosure").

181 *See* Mullenix, *supra* note 62, at 821.

182 *See, e.g.*, Mullenix, *supra* note 62, at 810-11. Professor Mullenix explains that:

> [T]here is virtually no empirical study of the current practice of such informal discovery, the efficacy of such experiences or the results of informal discovery. There is no literature describing the types of cases in which lawyers elect to use informal discovery, whether the attorney discusses this choice with the client, or the extent to which opposing counsel cooper-

unwise.[183]

VIII. Examination of Rule 26 in The Years Following Its Adoption

More than three years have now lapsed since the adoption of Rule 26. It is still difficult at this stage to ascertain with any degree of certainty whether the concerns raised by the critics of mandatory disclosure are valid. However, there are several reported decisions applying the standard for mandatory disclosure delineated in Rule 26 which provide some general guidance into the interpretation of the Rule. Additionally, at least one of the opponents' concerns regarding Rule 26 has materialized; a lack of uniformity in the rules of different district courts has developed. Finally, although the debate continues, a recent survey conducted by the ABA's Section of Litigation Committee on Pretrial Practice and Discovery indicated "that federal practitioners feel that the mandatory disclosure provisions of Rule 26(a)(1) have had little impact on their practice and strongly urge that the Rule be repealed."[184]

A. *Case Law Applying New Rule 26*

In one of the first cases decided under Rule 26, *Pulsecard, Inc. v. Discover Card Serv., Inc.*,[185] the United States District Court for the District of Kansas found that the defendants did not violate the Rule.[186] In the *Pulsecard* case, the plaintiffs brought a motion to compel discovery alleging, *inter alia,* the defendant failed to pro-

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ates. There are no analyses of the use of these methods and the relative ease in obtaining information needed for adequate trial preparation. There has been neither empirical research assessing the efficiency and cost savings achieved through informal discovery methods, nor any assessment of attorney and client satisfaction with informal discovery.

Id.

183 *See* Bell, *supra* note 14, at 58 (stating that the actions taken by the Advisory Committee and Judicial Conference are unwise and precipitous and that reforms should be tested under the CJRA before they are implemented nationwide); *see also* Mullenix, *supra* note 62, at 828 (citing Letter from Laura Macklin to Paul Carrington, at 3 (Mar. 20, 1990)) (stating that it is imperative that detailed empirical evidence be gathered before the implementation of a federal rule requiring mandatory disclosure).

184 *See* Jasmina A. Theodore, *Amendment to Rule 26(a)(1) may have Limited Impact on Federal Pretrial Practice,* LITIGATION NEWS, Vol. 26, No. 6, at 8, Sept. 1996.

185 *See* No. 94-2304-EEO, 1995 WL 526533 (D. Kan. Aug. 31, 1995)

186 *See id.*

vide all relevant documents as required by Rule 26.[187] The defendants opposed the motion contending that they complied with the Rule and provided all relevant documents.[188] The court first held that it would accept the defendants' representation that all relevant documents had been disclosed as made in good faith and true, absent some persuasive showing by the plaintiffs to the contrary.[189] The court then found that documents as to how a party characterizes or interprets a contract are not relevant to any disputed facts within the meaning of the Rule.[190] The court held that such documents relate to a disputed issue of law and not one of fact.[191]

In a Massachusetts' discrimination case, *Taydus v. Cisneros*,[192] the United States District Court for the District of Massachusetts found that the defendant, the Secretary of the Department of Housing and Urban Development (HUD), should have disclosed information concerning job applications of unsuccessful candidates and candidates who were offered positions but declined them.[193] This case involved a veteran who unsuccessfully applied for a position with HUD.[194] The veteran subsequently filed suit against the Secretary of HUD alleging that HUD failed to comply with certain regulations giving veterans' preferential treatment.[195] A dispute arose during the course of discovery when a director of HUD referred to documents at his deposition that HUD never produced.[196] The plaintiff filed a motion seeking sanctions for the defendant's failure to comply with the mandatory disclosure provisions of Rule 26(a).[197] Thereafter, the defendant produced some of the documentation, but not all, claiming it was either irrelevant or privileged information.[198]

The court found that most of the documents were not covered

187 *See id.*
188 *See id.*
189 *See id.*
190 *See id.* at *2.
191 *See id.*
192 *See* 902 F. Supp. 288 (D. Mass. 1995)
193 *See id.*
194 *See id.*
195 *See id.*
196 *See id.*
197 *See id.*
198 *See id.*

by Rule 26, with the exception of one. First, the court found that a generic recruitment letter fell outside the scope of Rule 26(a)(1)(B).[199] In addition, the court found that three other documents were only marginally relevant and not subject to mandatory disclosure.[200] These documents included: (1) a handwritten note that was attached to a rejection letter of an unsuccessful candidate; (2) an incomplete standard form used for applicants when applying to the HUD agencies; and (3) an incomplete standard form application that was completed before the application process began for the position the plaintiff was seeking.[201] The court found that such documents were not subject to Rule 26 noting that the Rule was only meant to apply "as a substitute for the inquiries routinely made about the existence and location of documents."[202] The court found that the above three documents were only marginally relevant and were not the type of documents that are routinely requested.[203]

Finally, the court found that the defendant should have disclosed information concerning job applications of unsuccessful candidates and candidates who were offered positions but declined them.[204] The court found that such information was relevant, however, the court did not expand on its analysis.[205] Additionally, the court rejected a claim of privilege by the defendant, noting that Rule 26 requires a party to claim the privilege and briefly describe withheld documents at the outset, which the defendant failed to do.[206] The court ordered the defendant to show cause as to why the court should not impose sanctions.[207]

In *Dixon v. CertainTeed Corp.*,[208] a Kansas District Court found that the defendant's denial of allegations in plaintiff's negligence complaint, alleging that plaintiff leaned on a railing which was not securely attached and gave way causing plaintiff to fall, placed the

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199 *See id.*

200 *See id.*

201 *See id.*

202 *See id.* at 296-97 (citing FED. R. CIV. P. 26 (Advisory Committee Notes)).

203 *See Taydus*, 902 F. Supp. 288 (D. Mass. 1995).

204 *See id.*

205 *See id.* at 296-97 (citing FED. R. CIV. P.26(Advisory Committee Notes)).

206 *See Taydus*, 902 F. Supp. 288.

207 *See id.* at 298.

208 *See* 164 F.R.D. 685 (D. Kan. 1996).

issue of the safety of the railing in dispute.[209] Consequently, the court found that the defendant should have identified all individuals likely to have information relevant to the railing's stability and safety.[210] Although the defendant identified numerous individuals, the defendant failed to disclose the addresses or telephone numbers of current employees arguing that plaintiff's attorney could not ethically interview current employees outside the presence of the defendant's counsel.[211] The court rejected that argument holding that the defendant "may not pose its concern as cause to unilaterally disregard its duties of disclosure under Rule 26(a)."[212]

Additionally, the defendant failed to identify in the initial disclosure stage a safety report prepared by its safety team regarding an inspection of the defendant's premises two weeks prior to the accident.[213] The court found that a reasonable investigation by the defendant prior to its initial disclosures would have revealed this inspection of the premises and an inspection report.[214] The safety report revealed that a nurse at the defendant's plant, who had already been deposed, was a member of that safety team.[215] The plaintiff argued and the court agreed, that the defendant's late disclosure of the safety report required the plaintiff to again depose the nurse.[216]

The court ordered the defendant and its counsel to show cause why the court should not order either or both of them to pay the reasonable costs and expenses incurred by the plaintiff regarding the motion to compel and the costs of deposing the nurse a second time.[217] However, in a subsequent decision, the court found that sanctions were not warranted because (1) the defendant acted upon a good faith interpretation of the Rule and (2) the defendant had substantial justification for failure to provide the safety report since a preliminary investigation of the matter led the defendant to believe safety inspections had not been conducted

209 *See id.*
210 *See id.*
211 *See id.* at 689.
212 *See id.*
213 *See id* at 685.
214 *See id.* at 691.
215 *See id.* at 685.
216 *See id.* at 692.
217 *See id.* at 685.

during the relevant time period.[218]

In another Kansas case, the District Court held that a party cannot meet or avoid its discovery obligations "by sticking its head in the sand and refusing to look for the answers and then saying it does not know the answer."[219] However, the court refused to order the extreme sanction of preclusion of evidence since (1) it was unclear whether the plaintiff intentionally withheld relevant evidence or was merely unable to obtain the information and (2) the prejudice to the defendant was minimal.[220] This appears to be the general rule.

Typically, courts will not preclude evidence absent proof of bad faith and severe prejudice.[221] In *DeFeo v. Allstate Ins. Co.*,[222] the Eastern District Court of Pennsylvania found such bad faith and prejudice and ordered the dismissal of a plaintiff's complaint subject to a two-week grace period.[223] The plaintiff failed for almost two years to make its initial disclosures or to respond to the defendant's interrogatories.[224] The court on a previous occasion had or-

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218 *See* Dixon v. CertainTeed Corp., No. 94-2310-GTV, 1996 WL 451415 (D. Kan. Aug. 7, 1996). A party is substantially justified for failing to provide discovery if reasonable persons could differ as to whether the party was required to comply with the disclosure request. *See id.* at *2 (citing Nguyen v. IBP, Inc., 162 F.R.D. 675, 679 (D. Kan. 1995)).

219 *See* In re Independent Serv. Organizations Antitrust, 168 F.R.D. 651, 653 (D. Kan. 1996).

220 *See id.* at 653-54.

221 *See id.*; *see also* Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156 (3d Cir. 1995) (The Third Circuit upheld a district court's refusal to exclude the testimony of two witnesses whose identities were allegedly not disclosed either with the initial disclosures or in response to interrogatories. The court reasoned that there was no basis for believing the defendant acted in bad faith. It was possible that the witnesses were identified in the defendant's self-executing disclosures. In any event, the plaintiff knew the names of the witnesses and the scope of their knowledge prior to trial and therefore did not suffer any prejudice); *see also* Asia Strategic Investment Alliances Ltd. v. General Elec. Capital Serv., Inc., No. 95-2479-GTV, 1997 WL 122568 at *6 (D. Kan. March 11, 1997) (refusing to issue the extreme sanction of the preclusion of evidence finding there was no evidence of bad faith or callous disregard of the rules of discovery); *see also* In re TMI Litigation Cases Consol. II, 922 F. Supp. 997, 1004 (M.D. Pa. 1996). *Cf.* Wern v. Davis, 99 F.3d 1151 (Table), No. 94-8105, 1996 WL 621191 (10th Cir. Oct. 28, 1996) (refusing to order a new trial based upon the defendant's failure to identify a witness during discovery because there was no actual prejudice to the plaintiff where plaintiff was able to introduce the witness at trial as a rebuttal witness).

222 *See* No. 95-244, 1996 WL 711273 (E.D. Pa. Dec. 6, 1996).

223 *See id.* at *3.

224 *See id.* at *1.

dered plaintiff to comply with discovery or show cause why the action should not be dismissed.[225] Plaintiff failed to provide any response to the court's prior order and failed to file a response to the defendant's motion to dismiss before the court.[226] Therefore, the court found that plaintiff's continued failure to provide discovery without any explanation was willful.[227] The court held that "[t]he extensiveness of the delay, the flagrancy of the violations, the absence of any justification and the continuing prejudice to the defendant militate[d] in favor of dismissal."[228]

Additionally, courts have held that a party may not refuse to comply with Rule 26 because he believes he was improperly named as a party or because the other party has not fully complied with the automatic disclosure provisions.[229] In *Smiley v. City of Philadelphia,* the defendant refused to comply with the initial disclosure requirements under Rule 26(a)(1) arguing that it was improperly named as a defendant in the case.[230] The court ordered the City of Philadelphia to comply with the discovery rules and found that if a defendant believes it should be dismissed from the case, the appropriate procedure is to file a motion for summary judgment.[231] With respect to plaintiff's motion to compel the production of documents that should have been provided with another defendant's initial disclosures, the court found that plaintiff's mere suspicions that there may be other documents that the defendant did not disclose was insufficient for the court to issue an order requiring disclosure.[232]

In another decision by the Kansas District Court, *Comas v. United Telephone Co. of Kansas,*[233] the court found that the defendant violated Rule 26 when it failed to produce certain documents

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225 *See id.*

226 *See id.*

227 *See id.* at *2.

228 *See id.*

229 *See* Smiley v. City of Philadelphia, No. 95-0804, 1995 WL 639799 (E.D. Pa. Oct. 30, 1995); *see also* Tropix, Inc. v. Lyon & Lyon, 169 F.R.D. 3, 4 (D. Mass. 1996).

230 *See* No. 95-0804, 1995 WL 639799, at *1.

231 *See id.*

232 *See id.* at *2; *see also* Connecticut General Life Ins. Co. v. Thomas, 910 F. Supp. 297, 303 (S.D. Tex. 1995) (rejecting a party's bare allegation, that the other party must have known about witnesses when she filed her initial disclosures, as insufficient to establish that the party's initial disclosures were incomplete and sanctions were warranted).

233 *See* No. 94-2376-GTV, 1995 WL 476691 (D. Kan. Aug. 10, 1995)

as agreed upon by the parties.[234] In Comas, plaintiff filed an employment discrimination action[235] and sought the production of the personnel files of four other individuals whose treatment was at issue as well as an internal investigation file prepared by the defendant in connection with an EEOC investigation.[236] Prior to a hearing on the motion, the defendant agreed to produce redacted portions of the personnel files and the EEOC investigation file without waiving the claim of privilege.[237]

The court stated that such production would suffice, noting however that defendant failed to produce its initial disclosure until three weeks after the plaintiff filed a discovery motion.[238] Due to defendant's late compliance, the court found that Rule 37 called for sanctions; specifically, the plaintiff's reasonable expenses incurred in the preparation and defense of the motion.[239] The court gave defendant twenty-five days to show cause why the court should not impose sanctions.[240] Pursuant to Rule 37, several other cases have similarly imposed as a sanction for late compliance with Rule 26, the payment of attorney's fees and costs associated with a motion to compel discovery.[241]

In another case from Massachusetts, *In re Lotus Development Corp. Securities Litig.*, the District Court of Massachusetts discussed the conflict between Rule 26(a) and Rule 9(b).[242] The *Lotus* case involved a suit brought by investors of Lotus alleging that Lotus

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234 *See id.; see also* FED. R. CIV. P. 26(a)(1)(B). A party is not required to produce documents in the initial mandatory disclosure stage under Rule 26(a)(1)(B) and may choose to merely describe or characterize the relevant documents. *See* Fed. R. Civ. P. 26(a)(1)(B). However, the Rule also permits the parties to stipulate to the form of mandatory disclosure. *See id.* In this case the parties stipulated that they would voluntarily produce all relevant materials. *See id.*

235 *See Comas*, No. 94-2376-GTV, 1995 WL 476691.

236 *See id.*

237 *See id.* at *1.

238 *See* FED. R. CIV. P. 26. The Rule requires the parties to produce all relevant materials within ten days of the Rule 26 meeting among the parties. *See id.*

239 *See Comas*, No. 94-2376-GTV, 1995 WL 476691 at *2.

240 *See id.*

241 *See, e.g.*, Asia Strategic Investment Alliances Ltd. v. General Elec. Capital Serv., Inc., No. 95-2479-GTV, 1997 WL 122568 at *6 (D. Kan. March 11, 1997) (awarding the defendant attorney's fees and other expenses caused by plaintiff's late compliance with defendant's initial disclosure requests and finding that plaintiff had no substantial justification for its untimeliness); *see also* Williams v. Morris, No. 96-0008-D, 1996 WL 788700 (W.D. Va. Nov. 27, 1996).

242 *See* 875 F. Supp. 48 (D. Mass. 1995); *see also infra* note 250 and accompanying text.

committed securities fraud by knowingly making false and misleading public statements which the investors relied upon in purchasing shares of common stock.[243] At a scheduling conference, defendant argued that the complaint should be dismissed pursuant to Rule 9(b) and that proceeding with the automatic disclosure requirements would unnecessarily impose upon them an undue expense.[244] The court stayed the automatic disclosure requirements subject to an expedited briefing so that defendant could file a formal motion to stay automatic disclosure.[245] The defendant thereafter filed a formal motion to stay discovery pending the outcome of its motion to dismiss.[246] The court noted the conflicting policies underlying Rule 26(a) and Rule 9(b).[247] The court explained that the purpose of Rule 26(a) is to facilitate the exchange of basic information and to eradicate the paperwork involved in requesting such information thereby eliminating the cost and delay of discovery.[248] Although some specificity is required to trigger the mandatory disclosure requirements of Rule 26, the court explained that the Rule contemplates that factual disputes outlined in the pleadings will be refined and clarified at the Rule 26 meeting of the parties.[249]

By contrast, Rule 9(b) requires that a party plead fraud with specificity.[250] In particular, the Rule requires that a plaintiff specify the time, place, and content of each alleged false representation and where any allegation is based upon information and belief, the complaint must include the source of the information and the reasons for the belief.[251] The purposes of Rule 9(b) are three-fold: (1) to put defendants on notice; (2) to safeguard defendants from unjustified damage to their reputations; and (3) to protect defendants from strike suits.[252]

The court pointed to several options that would reconcile poli-

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243 *See In re Lotus Dev. Corp.* 875 F. Supp. at 49.

244 *See id.*

245 *See id.*

246 *See id.*

247 *See id.* at 51-52.

248 *See id.* at 50.

249 *See id.* (citing FED. R. CIV. P. 26 (Advisory Committee Notes)).

250 *See* FED. R. CIV. P. 9.

251 *See In re Lotus Dev. Corp.*, 875 F. Supp. at 51.

252 *See id.*

cies underlying Rule 26(a) and Rule 9(b).[253] The first possibility would be to give superiority to Rule 26(a) and require disclosure automatically without any consideration of the merits of the defendant's motion to dismiss.[254] However, the court rejected this option finding that it ignores the primary goal of Rule 26(a) to avoid unnecessary expense and would not serve the goals of Rule 9(b).[255]

A second option would be to give Rule 9(b) primacy and stay mandatory disclosure until the motion to dismiss is decided.[256] The court also rejected this option, finding that such an approach would carve out an exception to Rule 26 that was not specifically contemplated by the drafters of the Rule.[257] The court held that a middle ground approach was most appropriate and adopted a summary procedure whereby the defendant would have a "stiff" burden to demonstrate that their motion to dismiss would likely be granted.[258] Diverting its attention to the case before it, the court found that plaintiff's complaint contained sufficient factual information regarding the defendant's knowledge or reckless disregard of their financial forecasts and an illegal motive.[259] Therefore, the court concluded that a stay of automatic disclosure would not be justified, however, the court did not preclude the defendants from bringing their motion to dismiss or a motion to stay discovery at a later date in "fuller form."[260]

However, in a recent decision by the Ninth Circuit, the court held that the Private Securities Litigation Reform Act of 1995, where applicable, stays the initial disclosure requirements embod-

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253 *See id.* at 48.

254 *See id.* at 51.

255 *See id.*

256 *See id.*

257 *See id.*

258 *See id.*

259 *See id.* at 53.

260 *See id.* at 53.; *see also* Scheetz v. Bridgestone/Firestone, Inc., 152 F.R.D. 628 (D. Mont. 1993). The court in the *Scheetz* case applying a local rule similar to Rule 26 made two notable holdings. *See* Scheetz v. Bridgestone/Firestone, Inc., 152 F.R.D. 628 (D. Mont. 1993). First, the court held that the defendant's attorney was not relieved of complying with mandatory disclosure simply because the plaintiff's attorney had participated in previous litigation involving the same issues and was aware of the information. *See id.* at 631. Second, the court held disclosure obligations require a party to identify all potential witnesses and documents relevant to the disputed facts and not just those that support the party's contentions. *See id.* at 631-632.

ied in Rule 26(a)(1) pending the disposition of a defendant's motion to dismiss.[261] The Act provides that "all discovery and other proceedings" must be stayed pending the determination of a defendant's motion to dismiss a securities action covered by the Act.[262] The issue before the court was whether the initial disclosure requirements of Rule 26(a)(1) constitute "discovery" or "other proceedings" for purposes of the stay provision under the Act.[263] The Ninth Circuit found that initial disclosures are a supplement to discovery and therefore are included in the Act's stay provision.[264] Furthermore, the court concluded that to the extent it can be argued that initial disclosures are not the same as discovery, such disclosures are at a minimum included in the "other proceedings" ban in the Act.[265]

The above decisions provide a general, useful guide for interpreting and applying Rule 26. First, it seems that courts will likely accept as true a party's representation that he provided all relevant information as required by the Rule, absent some proof to the contrary. Second, documents that are not the type of documents routinely requested are not subject to mandatory disclosure. Third, the extreme sanctions of preclusion of evidence or dismissal will generally not be imposed absent bad faith and prejudice. Fourth, a party is not relieved from complying with Rule 26 because the other party has failed to comply or because it alleges it was improperly named as a party. Fifth, defendants charged with fraud probably will not be exempt from providing the initial disclosures because they are filing a motion to dismiss under Rule 9(b), unless the case is governed by the Private Securities Reform Act of 1995 or they can demonstrate a strong likelihood of success of a motion to dismiss.[266] Finally, at least one court has held that documents regarding how a party characterizes or interprets a contract relate to

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261 *See* Medhekar v. United States District Court for the Northern District of California, 99 F.3d 325, 326 (9th Cir. 1996).

262 *See* 15 U.S.C. § 78u-4(b)(3)(B).

263 *See* Medhekar, 99 F.3d at 328.

264 *See id.*

265 *See id.* Courts have also held that reinsurance agreements are discoverable under Rule 26(a)(1)(D). *See* In Great Lakes Dredge & Dock v. Commercial Union Assur., 159 F.R.D. 502, 504 (N.D. Ill. 1995); *see also* Missouri Pacific RR Co. v. Aetna Cas. & Sur. Co., No. 3:93-CV-1898-D, 1995 WL 861147 (N.D. Tex. Nov. 6, 1995).

266 This standard is similar to the standard used for granting temporary restraining orders.

issues of law and not issues of fact and, therefore, are not subject to mandatory disclosure under Rule 26.

B. *Lack of Uniformity*

One of the criticisms of the 1993 amendments to Rule 26, was that they would produce a lack of uniformity in the rules of different district courts because of the CJRA.[267] The drafters of the amendments included a provision in Rule 26 that permitted district courts to "opt out" of Rule 26.[268] The purpose of this provision was to accommodate the district courts that had adopted civil justice cost and delay reduction plans pursuant to the CJRA.[269] Although "[i]t was never anticipated that individual districts would opt out of disclosure en masse," it seems that this has happened.[270] In analyzing this development, Judge Bertelsman opined "[n]o longer is there nationwide uniformity in federal practice."[271]

According to a March 1997 survey conducted by the Research Division at the Federal Judicial Center in Washington, forty-five out of ninety-four federal districts chose to opt out of the mandatory disclosure requirement of Rule 26(a)(1).[272] Adding a further layer of confusion to the non-uniform system, eighteen of the forty-five districts that have opted out of Rule 26, grant individual judges the authority to require mandatory disclosure.[273] Another four districts, require mandatory disclosure under local rules or plans adopted under the CJRA. That leaves a total of twenty-three districts where no form of mandatory disclosure has been adopted.[274]

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267 *See* Cohen & Slater, *supra* note 146, at 1146; *see also* Samborn, *supra* note 138, at 40; *see supra* notes 50-56 and accompanying text for a discussion of the CJRA.

268 *See* FED. R. CIV. P. 26 (Advisory Committee Notes); *see also* Bertelsman, *supra* note 41, at 112.

269 *See* FED. R. CIV. P. 26 (Advisory Committee Notes); *see also* Bertelsman, *supra* note 41, at 112.

270 *See* Bertelsman, *supra* note 41, at 113. Judge Bertelsman attributes the resulting non-uniformity to local pressure on the district courts by the bar. *See id.* Judge Bertelsman stated: "I do not think mass opt-outs would have occurred except under pressure from the bar. I submit this pressure was ill advised, and should be withdrawn." *Id.*

271 *See* Bertelsman, *supra* note 41, at 112.

272 *See* Donna Stiensra, *Implementation of Disclosure in the United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26*, 5 (Federal Judicial Center, March 28, 1996).

273 *See id.*

274 *See id.* Although approximately two-thirds of the district courts apply some form of mandatory disclosure, the standards differ from district to district. *See id.* Interest-

The resulting non-uniformity of the federal discovery system which has occurred in the last few years has several negative consequences. First and most obvious, is the burden placed upon attorneys who practice in multiple districts. Each time they appear they must determine whether that district applies Rule 26 or a local variant.[275] This may not be as easy as it seems at first glance because disclosure requirements may be contained in several sources besides Rule 26 including "local rules, civil justice expense delay and reduction plans, general or standing orders, individual judges' procedures, or they could be part of informal practices."[276]

In addition, the resulting lack of uniformity may lead to forum shopping by the parties.[277] For example, a plaintiff with a choice of different courts to bring an action may consider discovery policies when deciding where to file a complaint.[278] In addition, it seems

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ingly, Rule 26 does not provide an opting out provision for Rule 26(a)(2) relating to expert disclosures or Rule 26(a) pertaining to pretrial disclosure of anticipated trial evidence. *See id.* Despite the absence of an opting out provision for Rule 26(a), approximately one-fifth of the district courts have interpreted the rule to allow opting out for those provisions as well. *See id.*

275 *See* Russell Leibson, *Solving the Corporation's Dilemma: How to Comply with Mandatory Disclosure*, 62 DEF. COUNS. J. 378, 382 (July 1995); *see also* Lang, *supra* note 17, at 675.

276 *See* Randall Samborn, *Districts' Discovery Rules Differ, A Year After Reforms in Federal Rules "Balkanization" of Courts has Occurred*, NAT'L. L. J., at A1 (Nov. 14, 1994) (citing a statement by Carl Tobias, Professor of Civil Procedure at the University of Montana School of Law).

277 *See* Ron Coleman, *Civil Disclosure - Skepticism Runs Rampant as the Federal Courts' Experiment with Discovery Reform Hits the Two-Year Mark*, 81 ABA J. 76 (Oct. 1995).

278 *See id.* at 78-79 (citing Edwin Wesely of Winthrop, Stimson, Putnam & Roberts in New York City); *see also* Al-Site Corp. v. USI International, Inc., 842 F. Supp. 507 (S.D. Fla. 1993) (refusing to apply Rule 26 because it conflicted with a Florida state statute finding that application of Rule 26 would lead to forum shopping).

In the *Al-Site* case, the plaintiffs filed a complaint alleging a cause of action arising under the common law of unfair competition. *See id.* In its second amended complaint, the plaintiffs made a claim for punitive damages. *See id.* Thereafter, the plaintiffs sought discovery of all of the defendant's financial statements and tax returns. *See id.* The court noted that under Rule 26, the defendant would have to produce such information even without a discovery request. *See id.* at 513. However, a Florida statute prohibited the discovery of financial worth information until certain pleading requirements had been met. *See id.* Specifically, a claim for punitive damages is not allowed in Florida until there is an evidentiary hearing and the party demonstrates that it has a reasonable basis for recovery of punitive damages. *See id.* at 508-09 (citing FLA. STAT. § 768.72 (1992)). Therefore, a party may only discover financial information regarding the financial worth of another party after the evidentiary hearing. *See id.* The court applied the *Erie* doctrine and found that the Florida statute should be applied as substantive law and denied the plaintiffs' discovery request. *See*

that courts (at least in Texas) are now considering their mandatory disclosure system when deciding a party's motion to transfer venue to another district.[279] Since a non-uniform system increases uncertainty and creates the opportunity for procedural gamesmanship without providing any offsetting benefits, many have argued that the opt out provision should be deleted.[280]

C. *Debate Continues: ABA Section of Litigation Survey*

The debate over mandatory disclosure continues. In order to investigate whether the mandatory disclosure amendments have had any effect, the ABA's Section of Litigation Committee on Pretrial Practice and Discovery established the Subcommittee on Mandatory Prediscovery Disclosure Rules.[281] The Subcommittee recently issued its report entitled, *Mandatory Disclosure Survey: Federal Rule 26(a)(1) After One Year.*[282] The results of the survey indicate that the amendments have "not had a significant impact on federal civil litigation."[283]

The Subcommittee conducted its survey by a random sampling of approximately one-half of the Section of Litigation's 60,000 members by mailing questionnaires.[284] A separate mailing was also sent to every judge and magistrate judge in each federal court district.[285] Of those responding, approximately 75% said that Rule 26(a)(1) should not be continued as a procedural rule.[286]

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842 F. Supp. 507. The court noted, however, that if only Rule 26 applied a party could obtain financial information prematurely in federal court leading to forum shopping. *See id.* at 513. However, there is presently a conflict among the courts in the Southern District of Florida regarding whether the Florida rule is a matter of substantive or procedural law. *See* Teel v. United Technologies Pratt & Whitney, No. 96-8405-Civ., 1997 WL 71826 at *2 (S.D. Fla. Feb. 17, 1997) (discussing conflicting case law).

279 *See* Samborn, *supra* note 276.

280 *See* Lang, *supra* note 17, at 676; *see also* Barry Friedman & Erwin Chemerinsky, *The Fragmentation of the Federal Rules*, 79 JUDICATURE 67 (1995) (stating that the federal rules should be uniform and that "[d]ifferent procedural rules will affect substantive justice. Varying procedures will lead to forum shopping, unnecessary cost, and widespread confusion.").

281 *See* Theodore, *supra* note 184, at 8.

282 *See* Theodore, *supra* note 184, at 78-79.

283 *See* Theodore, *supra* note 184, at 78-79.

284 *See* Theodore, *supra* note 184, at 5.

285 *See* Theodore, *supra* note 184, at 5.

286 *See* Theodore, *supra* note 184, at 8.

The survey provided no evidence that Rule 26(a)(1) has decreased discovery costs, delays, or conflict between opposing attorneys.[287] "[N]or has it been as negative as critics thought it would be."[288] However, the report cautions that the number of responses received were not significant enough to draw any conclusions and suggests that overall responses are "best viewed as a snapshot of opinions and experiences after one year."[289]

The Federal Judicial Center ("FJC") recently challenged the methodology and findings of the survey and report, and identified three fundamental problems with the survey.[290] The three weaknesses identified by the FJC are: (1) the very low response rate of the survey; (2) the fact that 65% of the respondents identified themselves as defense attorneys, which indicates, according to the FJC, that the survey does not provide a representative sample of the bar and raises difficulties in interpreting results; and (3) the questionnaires, mailed approximately fifteen months after the effective date of the amendments, provided too short a time frame to permit experience with the Rule.[291]

In any event, the shortcomings of the survey aptly identified by both the FJC and the Committee itself, simply suggest that the survey should not be taken as "gospel." However, the survey did collect more than three times the number of comments and opinions which were available to the Advisory Committee during consideration of the amendments[292] and certainly provides some insight into the effect of the Rule.

IX. Conclusion

Discovery is an important component of civil litigation and its role in American jurisprudence cannot be underestimated. Discov-

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287 *See* Theodore, *supra* note 184, at 8. In fact, 44% of the respondents indicated that the Rule has increased the cost of discovery. *See id.* at 5. Additionally, while 75% of the respondents stated that the Rule did not increase satellite litigation, 15% reported an increased in sanctions' motions and 20% reported disputes regarding the scope of the disclosure obligations. *See id.*

288 *See* Theodore, *supra* note 184, at 8 (quoting Lisa L. Smith, Subcommittee Co-Chair).

289 *See* Theodore, *supra* note 184, at 5.

290 *See* Jasmina A. Theodore, *Rule 26(a)(1): An Update, Federal Judicial Center Challenges Rule 26(a)(1) Survey*, LITIGATION NEWS, Vol. 22, No. 1, at 12 (Nov. 1996).

291 *See id.*

292 *See id.*

ery shapes the legal and factual theories of cases, determines the strategies to be utilized, molds settlement offers and advances resolutions of cases on the merits. However, in the last few decades, the civil discovery process has not functioned effectively due to abuses of the process, which in turn has caused an increase in the costs and delays of civil litigation. In response to the rampant abuses, Congress stepped in, and, in 1990 adopted the CJRA. The Act required each federal district court to implement a civil justice cost and delay reduction plan by December 1, 1993.

Three years later, the judicial branch, despite immense opposition, adopted amendments to the Federal Rules of Civil Procedure which included a mandatory disclosure requirement embodied in Rule 26. The purpose of the mandatory disclosure requirement was to facilitate the exchange of basic information thereby reducing the costs and delay of civil litigation. More than three years have elapsed since the mandatory disclosure requirement went into effect and at this time it is still difficult to determine whether the Rule has achieved its objective. The delay in the results of mandatory disclosure is due in part to the fact that approximately one-half of the district courts have opted out of the Rule. Consequently, it seems that "the jury is still out" regarding the effects of mandatory disclosure and the debate still continues.