

Alaska Rule 26: A Quixotic Venture Into the World of Mandatory Disclosure

The Alaska Supreme Court has recently voted to amend Civil Rule 26, which sets forth the general provisions governing discovery. The new rule mandates that parties disclose certain types of information without waiting for a formal discovery request. This note argues that while the requirements for mandatory disclosure are a positive step in reducing cost, abuse and delay in litigation, they are too limited in scope and, hence, fail to address the problems inherent in the discovery process. This note concludes by offering an alternative to Rule 26, linking the use of mandatory disclosure to a system of differentiated case management.

I. INTRODUCTION

Alaska Rule of Civil Procedure 1 states that “these rules shall be construed to secure the just, speedy and inexpensive determination of every action and proceeding.”¹ In an effort to ensure that this mandate was being met, a special Alaska Bar Association Committee was created by Special Order of Chief Justice Daniel A. Moore, effective November 5, 1992. The Committee was “established for the general purpose of studying civil litigation abuse, cost and delay; and for the express purpose of proposing rules which will reduce discovery abuse and to make the civil judicial system in Alaska more efficient, expeditious, less costly, and more accessible to the public.”² The order also directed the Committee to “review and investigate” the Arizona Rules of Civil Procedure,³ which were amended in July of 1992 as part of an effort by the Arizona bar to improve the civil litigation process in that state.⁴ The central feature of the new Arizona Rules was a system of mandatory

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1. ALASKA R. CIV. P. 1.

2. Chief Justice’s Special Order Creating Special Alaska Bar Association Committee (Nov. 5, 1992) (on file with author).

3. *Id.*

4. See ARIZ. R. CIV. P. 26.1, court cmt. to 1991 amend.

disclosure that replaced, in large part, the traditional discovery system formerly operating in Arizona.⁵

Following its review of the Arizona Rules of Civil Procedure, the Alaska Special Committee drafted proposed Rule 26.1, modelled after Arizona Rule 26.1, which would have instituted sweeping disclosure requirements in Alaska. The full Civil Rules Committee reviewed the proposal and decided to draft a new, less radical proposal. This second proposal was closely modelled on the new Federal Rule 26, which includes fairly limited disclosure requirements.⁶ The Alaska Supreme Court then reviewed both proposals and in June of 1994 adopted a new version of Rule 26 that is very similar but not identical to the new federal rule.⁷

Mandated disclosure, even in a limited form, should streamline and simplify litigation, and, in that sense, the Alaska Supreme Court's adoption of Rule 26 is a positive step. Rule 26 is too conservative, however, to effect significant changes in the way litigation, in general, and discovery, in particular, are conducted. Unlike Arizona Rule 26.1, the new Alaska Rule 26 does not fundamentally alter the discovery process. Rather, like the federal rule upon which it is based, Alaska Rule 26 is best viewed as an attempt to refine the existing system of discovery, a system that is inherently flawed. Although the ultimate success of Rule 26 in improving the litigation process can be judged only after the rule has been in effect for a period of time, the failure of Rule 26 to effectively address the problems inherent in a system of discovery suggests that it will fail to bring about significant reductions in "civil litigation cost, abuse or delay."

Part II of this note discusses why discovery is inherently flawed as a system for gathering information in litigation and specifically analyzes why Alaska Rule 26 fails to address those flaws. Part III of this note examines the benefits of a disclosure system, as well as the problems that such a system either fails to address or creates on its own. Part IV sets forth an alternative proposal for reforming Alaska's civil litigation process. By establishing a differentiated case management system in which the relative amounts of disclosure and discovery would vary according to the complexity of the

5. ARIZ. R. CIV. P. 26.1.

6. Federal Rule of Civil Procedure 26 was amended as of December 1, 1993, to include disclosure requirements.

7. See *infra* Appendix A for the text of Rule 26. This new rule will apply to all cases filed on or after July 15, 1995.

case, this proposal attempts to retain the best parts of a disclosure system while minimizing its negative aspects.

II. THE NEED FOR REFORM

A. The System of Discovery Is Inherently Flawed

The Federal Rules of Civil Procedure have been immensely influential in the years since their adoption in 1938. To a significant degree, many states, including Alaska, have modelled their own rules of civil procedure after the Federal Rules. The adoption of rules providing for the exchange of information by the opposing parties before trial through the use of various discovery procedures was a major innovation in federal civil procedure. These rules attempted to eliminate “trial by ambush,” while ensuring that disputes were resolved on the basis of all relevant information.⁸ Instead of opening up the litigation process, however, discovery has become, in many cases, an obstacle to resolving cases on the merits. Dissatisfaction with the discovery process has become increasingly prevalent, and many commentators contend that the time has come for a major revamping of the process through which information is exchanged before trial.⁹

Critics of the discovery process argue that it drives up costs, lengthens the time needed to resolve disputes and encourages lawyers to act in an overly aggressive and adversarial manner.¹⁰ Unfortunately, there is little statistical evidence to support these contentions, and most critics tend to offer strictly anecdotal evidence. Nevertheless, the pervasive nature and high level of dissatisfaction with discovery is reflected in both critical complaints about the system in law review articles¹¹ and in recent efforts at the federal level and in many states to reform the process.¹²

8. Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2197-98 (1989).

9. See, e.g., William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989) (“Discovery, originally conceived as the servant of the litigants to assist them in reaching a just outcome, now tends to dominate the litigation and inflict disproportionate costs and burdens.”).

10. See, e.g., Thomas A. Zlaket, *Encouraging Litigators to Be Lawyers: Arizona’s New Civil Rules*, 25 ARIZ. ST. L.J. 1 (1993).

11. See, e.g., Schwarzer, *supra* note 9.

12. Efforts to reform the discovery process have taken place at both the federal and state levels. Federal Rule of Civil Procedure 26 was revised as of

In 1983, in response to the growing criticism of discovery, the Federal Rules of Civil Procedure were amended to give judges a greater role in the management of all pretrial proceedings,¹³ a move designed to take some control over discovery out of the hands of the lawyers and place it in the hands of an impartial party. At the same time, Federal Rule 26 was amended to require sanctions for abuse of the discovery process.¹⁴ Alaska has also incorporated provisions for judicial involvement in pretrial proceedings into its code of civil procedure,¹⁵ but these provisions have apparently done little to solve the problems associated with discovery, as evidenced by the recent push for reform.¹⁶ Authors continue to publish articles critical of discovery,¹⁷ and further amendments to the Federal Rules dealing with discovery have recently been adopted.¹⁸

The failure of previous reforms to solve the problems with discovery is not surprising because the source of those problems is based not in the phrasing of the rules, but rather in the very nature of the American legal system.¹⁹ America's litigation process is grounded in an adversary system in which opposing attorneys attempt to present the facts and issues in the light most favorable to their side. The prevailing belief is that through this adversarial process the truth will ultimately emerge, and cases will be correctly decided. Ideally, discovery is supposed to complement the adversarial process by allowing each side to obtain whatever relevant information may be in the other party's possession before trial. If discovery works as planned, both sides should be able to

December 1, 1993, to provide for limited pretrial disclosure of information. In addition, under the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (1993), several federal district courts have experimented with various ways of improving the litigation process. At the state level, Arizona shifted in July 1992 from a system of discovery modelled on the Federal Rules to a system involving a high degree of mandatory disclosure.

13. FED. R. CIV. P. 16.

14. *Id.* 26(g)(3).

15. See the versions of Alaska Rules of Civil Procedure 16 and 26 that are effective until July 15, 1995. ALASKA R. CIV. P. 16, 26 (1992).

16. Alaska Rule of Civil Procedure 16 has been significantly revised. The new Rule 16 will take effect on July 15, 1995.

17. See, e.g., Zlaket, *supra* note 10.

18. Federal Rule of Civil Procedure 26 is indicative, having recently been amended to include disclosure requirements. FED. R. CIV. P. 26.

19. See Schwarzer, *supra* note 9, at 704-05, 712-16.

realistically evaluate their case, which should in turn promote settlement or, in the alternative, ensure that all the relevant facts are brought out at trial.²⁰ Unfortunately, the fundamental premises that underlie the system of discovery are at odds with the nature of the adversary process.²¹

The notion that the adversary system has produced undesirable patterns in the process of litigation in America is not new. As early as 1906, Roscoe Pound stated:

A no less potent source of irritation [with the administration of justice] lies in our American exaggerations of the common law contentious procedure. . . . It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of sport.²²

For better or worse, in recent years a lawyer's ethical duty to represent his client zealously²³ has become intertwined with the adversary system to the extent that a lawyer is now required to do anything and everything within the bounds of the law to ensure that his client prevails.²⁴ Such a philosophy lends itself to abuse of the discovery process.

To ensure that every possible angle has been covered, a lawyer may feel compelled to engage in excessive discovery, driving up costs and lengthening the time to trial.²⁵ The recipient of a discovery request, on the other hand, has a natural tendency to view that request in the narrowest possible light.²⁶ The result is that these two trends are mutually reinforcing. The Special Committee explicitly recognized this problem in its comments on proposed Rule 26.1, stating that "[a] party possessing information clearly relevant and harmful to its own case is permitted to remain silent, hoping the other party will not properly ask for disclosure."²⁷ The adversary process rewards and encourages such

20. *Id.* at 703.

21. *Id.* at 705.

22. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Address Before a Convention of the American Bar Association (Aug. 26, 1906), in 35 F.R.D. 241, 281 (1964).

23. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

24. Schwarzer, *supra* note 9, at 714-16.

25. Lawrence M. Frankel, *Disclosure in the Federal Courts: A Cure for Discovery Ills?*, 25 ARIZ. ST. L.J. 249, 256-57, 262 (1993).

26. *Id.* at 262.

27. Proposed ALASKA R. CIV. P. 26.1, committee cmt. (on file with author). Although this first proposal, based on Arizona Rule 26.1, was ultimately rejected,

behavior by allowing a party that can avoid disclosing damaging information to improve its chances of winning the lawsuit.

Consequently, discovery becomes an increasingly burdensome, yet important, part of litigation. Parties strive to use discovery not as a simple means of placing the relevant information on the table, but as a weapon to be used to control the outcome of the litigation itself. Judge Karl S. Johnstone, a member of the Committee that drafted the new rules, wrote that “[t]oday, trial, which was the focus of dispute resolution many years ago, is but the tip of the litigation iceberg. Discovery has become the main event in litigation. The price of this event is greatly increased cost, and delay.”²⁸ Some attorneys and their clients may even use the cost of discovery to their advantage, as they attempt to use discovery to grind down a financially weaker opponent. Judge Johnstone has written, “[v]iewing the problem objectively, however, there is no doubt that at times discovery is being used as a weapon to harass, discourage and exhaust the opponent rather than to gather needed information.”²⁹ Such a strategy is fundamentally at odds with the goal of the Alaska Rules of Civil Procedure to provide for the just and inexpensive resolution of disputes.³⁰

The solution is either to change lawyers’ attitudes or to change the system of exchanging information so that it no longer fundamentally conflicts with the adversary process. Although the former might be more effective in the long run, changing deeply rooted attitudes takes time and may be impossible. For this reason, the better short-term solution is to reconstruct the system of exchanging information so as to insulate it as much as possible from the corrupting influence of the adversary process. In time, a system of disclosure may reshape lawyers’ attitudes and lead to greater cooperation and professionalism among the members of the bar.³¹

the Committee’s comments are still useful for their insight into the problems with discovery.

28. Karl S. Johnstone, *Litigation Reform: The Public Wins 1* (unpublished manuscript, on file with author).

29. *Id.* at 3.

30. ALASKA R. CIV. P. 1.

31. ARIZ. R. CIV. R. 26.1, state bar committee notes.

B. The Shortcomings of Alaska Rule 26

Although Rule 26 does represent an improvement over the old rules in which no disclosure was required, its disclosure requirements fail to resolve the problems with discovery on both a practical and a theoretical basis. The limited disclosure requirements largely leave intact the current system of discovery, complete with all of its inherent flaws. These disclosure requirements appear to be aimed at refining and improving the discovery process, not replacing it. From a practical standpoint, Rule 26 is fairly limited in scope, with the result being that many cases may still require extensive discovery. The disclosure requirements of Rule 26 function essentially as a set of standard interrogatories that any competent litigator would file early in a case.³² In adopting Rule 26, the Alaska Supreme Court failed to recognize that incremental refinements in the process cannot address the fundamental flaws of discovery.

The disclosure required under Rule 26(a)(1)(B), (D) and (E) is limited to information "relevant to disputed facts alleged with particularity in the pleadings,"³³ a limitation that is lacking under Arizona Rule 26.1.³⁴ This limitation was likely incorporated in response to fears that without such limitation, an incompetent or lazy attorney would be able to file a complaint and then rely on his opponent to supply the information necessary to make his or her case. Ultimately, however, the limitation restricts the amount of information that must be disclosed and inevitably leads a party to engage in discovery to obtain necessary information. To the extent that the "pled with particularity" requirement necessitates reliance on discovery, it simply fosters a continuation of the problems in the litigation process bred by the use of discovery.

This limitation also creates a rather perverse situation when examined in light of Alaska's notice pleading system. Under Rule 26, information must be disclosed by the opponent only with regard to the facts pled with particularity. Thus, a party needs to offer specific and detailed factual information in its pleading to take full

32. FED. R. CIV. P. 26, advisory committee notes. The disclosure required under the federal rule and under Alaska Rule 26 is very similar in scope.

33. ALASKA R. CIV. P. 26(a)(1)(A),(B),(D),(E).

34. Arizona Rule of Civil Procedure 26.1(a)(9), in general, requires disclosure of all information a party "believes may be relevant." This is a much broader standard than one that is limited to facts alleged with particularity in the pleadings.

advantage of the disclosure provisions. If a party does not possess details and facts about its claim because the majority of the relevant information lies in the hands of its opponent, that party will be unable to make specific factual allegations, and the disclosure required of its opponent will be limited correspondingly. Consequently, parties most in need of information from their opponent are the least likely to receive such information through disclosure. Although the party seeking information may ultimately get what it needs through discovery, the fact that it is forced to use discovery to obtain basic information undermines the very purpose for instituting a system of disclosure.

Under Alaska Rule 26(a)(1)(D), a party must describe documents only by category and location; it need not furnish them. Moreover, as previously noted, disclosure of documents is limited to those documents relevant to disputed facts alleged with particularity in the pleadings.³⁵ These limitations on disclosure built into Rule 26(a)(1)(D) are such that parties can still hide damaging documents, either by burying them under broad categories or by simply keeping them secret altogether if the other party does not allege sufficient facts to mandate disclosure. The result of these loopholes in the disclosure requirements is the use of discovery to obtain the necessary information.

Finally, although parties must identify their witnesses, they need not disclose the substance of the expected testimony.³⁶ Although these witnesses will often be deposed, at which time the opposing counsel can discover the substance of their testimony, the length and cost of the depositions will be greater than if counsel knows what the substance of the testimony will be prior to the deposition.

III. THE MERITS OF A DISCLOSURE-BASED SYSTEM IN THE LITIGATION PROCESS

A. The Advantages of a Disclosure-Based System

1. *Arizona Rule 26.1 as a Model.* In recent years, the concept of replacing traditional discovery with a system of mandatory disclosure has been a popular proposal for remedying

35. ALASKA R. CIV. P. 26(a)(1)(B).

36. *Id.* 26(a)(3)(A).

the ills of discovery.³⁷ The extent to which states have been willing to embrace a system of disclosure, however, has varied considerably. Arizona Rule 26.1, adopted in 1992, incorporates extensive disclosure requirements and will be used in this note as a model for the type of disclosure requirements that should be instituted in Alaska.

Under Arizona Rule 26.1, disclosure is extensive and discovery has largely been relegated to a process for filling gaps in the disclosure statement.³⁸ Arizona Rule 26.1 requires parties, in general, to turn over any information that the party believes may be relevant to the issues in the case.³⁹ The language of this proposal is very broad and was undoubtedly drafted as part of an effort to prevent creative attorneys from using technicalities to refrain from disclosing damaging information. Specifically, Arizona Rule 26.1 forces a party to disclose everything from the names of persons whom the party believes may have relevant information⁴⁰ to the legal theory upon which each claim or defense is based.⁴¹ The Rule also requires that a party provide a list and copies of relevant documents that the party knows to exist, regardless of whether those documents are in the party's possession, custody or control.⁴² Regarding witnesses, Arizona Rule 26.1 requires a party to disclose the identity of witnesses that it expects to call at trial and to provide a summary of the subject matter about which each witness might be called to testify.⁴³ Furthermore, the duty to disclose under the Arizona rule is a continuing one: as new information comes into the knowledge or possession of one party, that party must disclose the information in a timely fashion.⁴⁴

The penalties for violating the disclosure requirements are severe, ranging from the exclusion of undisclosed evidence⁴⁵ to

37. New disclosure requirements of Federal Rule of Civil Procedure 26 were effective as of December 1, 1993. Commentators such as Judge William Schwarzer, *supra* note 9, and Judge Thomas Zlaket, *supra* note 10, have also argued in favor of disclosure.

38. Traditional discovery methods are still available under Arizona Rule 26.1, but they are subject to strict numerical limits.

39. See ARIZ. R. CIV. P. 26.1(a)(4).

40. *Id.* 26.1(a)(4).

41. *Id.* 26.1(a)(2).

42. *Id.* 26.1(a)(9).

43. *Id.* 26.1(a)(3).

44. *Id.* 26.1(b)(2).

45. *Id.* 26.1(c).

monetary sanctions.⁴⁶ Indeed, a strict sanctioning system must be a cornerstone of any new disclosure system and can be viewed as a response to the perception that many of the problems with discovery are exacerbated by the failure of judges to punish violations.⁴⁷

The theoretical advantage of an extensive disclosure system is that it removes many of the opportunities for abuse that exist with discovery. In essence, disclosure is designed to remove the adversarial component from the pretrial exchange of information, confining the adversary process to the location where it properly belongs, the trial.⁴⁸ Disclosure is also designed to elevate substance over form, a goal that Arizona Rule 26.1 particularly stresses through the requirement that a party disclose information "it believes may be relevant."⁴⁹ This language creates a broad standard and indicates an intent to promote liberal disclosure to avoid the technical game playing that can occur under discovery. The standard under Arizona Rule 26.1 is simple. If information is relevant and would have to be disclosed if properly requested, then that information, good and bad, must be turned over, without request, as part of the disclosure statement. Assuming both sides make a good faith effort to comply with these standards, the time needed for and the cost of obtaining information in litigation should decrease.

2. *Disclosure Should Accelerate the Resolution of Cases.*

Disclosure as implemented under Arizona Rule 26.1 should accelerate the resolution of cases for two reasons. First, because both parties must hand over all relevant information at an early point in the litigation process, they should be able to promptly assess the merits of their respective positions and move toward settlement.⁵⁰ Parties will also no longer have an incentive to delay settlement in the hope that they will be able to win an undeserved victory at trial because their opponent failed to discover an important piece of information. Second, disclosure will eliminate

46. *Id.* 26.1(e).

47. The court comment to Rule 26.1 stresses the need to deal with abuses in a "strong and forthright fashion." *Id.* 26.1, court cmt.

48. *Id.*

49. *See, e.g., id.* 26.1(a)(4).

50. *Id.*, state bar committee notes.

the time-consuming task of developing a formal discovery request, thereby reducing preparation time for trial.

The available statistics bear out these conclusions. Prior to adopting a disclosure system statewide, Arizona implemented its disclosure rule in a test program in a single county.⁵¹ Under the test program, the Superior Court was assigned 8,288 cases during an eighteen-month period.⁵² Cases employing disclosure were terminated almost two months earlier on average than cases using traditional discovery methods.⁵³ In all but complex cases, parties using disclosure took fewer depositions and made fewer requests for admissions of fact, for answers to interrogatories and for production of documents.⁵⁴ Disclosure made no difference in the use of such techniques in complex cases.⁵⁵ Interviews with Arizona attorneys who operated under the disclosure system revealed that disclosure significantly reduced the amount of time needed to exchange information.⁵⁶

3. *Decreased Costs.* A system based on disclosure rather than discovery should also prove to be a less expensive method of exchanging information. Discovery has two features that tend to drive up costs. First, when combined with a lawyer's natural desire to make sure that every possible angle has been explored, the billable hour system lends itself to excessive discovery.⁵⁷ Indeed, some lawyers may believe that to effectively represent their client they must chase down every piece of information that is even remotely relevant.⁵⁸ If a disclosure-based system is put in place and disclosure is conducted in good faith, in most cases the need for additional discovery should be greatly reduced, and the discovery process should decline as a major source of revenue for lawyers.⁵⁹ Although this may be unfortunate from the perspective

51. Hon. Robert D. Myers, *MAD Track: An Experiment in Terror*, 25 Ariz. ST. L.J. 11 (1993) (publishing the results of the test program).

52. *Id.* at 20.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 23.

57. Frankel, *supra* note 25, at 258-59.

58. *Id.*

59. *See* Johnstone, *supra* note 28, at 5.

of the legal community, the public will benefit from such a development.⁶⁰

A second feature of discovery that results in increased costs is the requirement that a party ask the "right" questions in order to receive the desired information. One party has the information, while the other must attempt to extract it. One commentator has referred to this problem as informational asymmetry.⁶¹ The party receiving a discovery request has an incentive to play games and attempt to hide information. Perhaps the most common abuse of discovery is the tendency by the party receiving a discovery request to interpret that request in the narrowest possible manner, thereby allowing that party to conceal information on the grounds that his opponent never properly asked for it.⁶² This tendency encourages costly over-discovery by parties who are fearful that their opponent is being less than honest in responding to discovery requests.

Because disclosure decreases the need for the party seeking information to spend time attempting to determine exactly what relevant information the other party may have in its possession, it is more efficient than discovery. In discussing the proposed adoption of a rule based on the Arizona model, the Committee assigned to investigate the civil litigation process in Alaska stated that Rule 26.1 "should reduce the inefficient groping in the dark which is a significant component of present discovery practice."⁶³ Disclosure places the burden of determining what information is relevant and should be turned over on the party best equipped to make that decision, namely the party in possession of that information.⁶⁴ The key advantage of disclosure is that it minimizes the opportunities that exist under discovery for opposing parties to play games with each other.

4. *Disclosure Should Produce Fairer Results.* It is a fundamental principle of the modern rules of civil procedure that cases should be decided on their merits.⁶⁵ What disturbs many

60. *Id.*

61. Frankel, *supra* note 25, at 259.

62. See JoJene Mills, *Practical Implications of the Zlaket Rules from a Plaintiff's Lawyer's Perspective*, 25 ARIZ. ST. L.J. 149, 158 (1993).

63. Proposed ALASKA R. CIV. P. 26.1, committee cmt. (on file with author).

64. Frankel, *supra* note 25, at 264.

65. See *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) ("If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be

attorneys about a disclosure system is that if they are forced to hand over information damaging to their case, they will, at worst, lose the case, and at best, upset the client.⁶⁶ They worry, possibly with some degree of justification, that clients simply will not understand that their attorney has to help the other side by volunteering information.⁶⁷ Under a disclosure system, however, every attorney would be subject to the same rules, so every attorney would be able to explain that he is simply following the rules. Ultimately, if one has a poor case, then one should either settle or lose at trial. If a lawyer is able to misuse the discovery process either to hide information or grind down a financially disadvantaged opponent, that lawyer may have "won," but the system as a whole suffers a loss of integrity.

5. *Changing Lawyers' Attitudes.* Many commentators believe that discovery brings out the worst in lawyers and that the process has in fact become little more than a costly game.⁶⁸ The popular perception is that far too many lawyers view discovery as a means of wearing down their opponents, either by refusing to answer discovery requests made in good faith or by burying the other side in an avalanche of paper. Furthermore, modern lawyers are trained to represent their clients zealously,⁶⁹ which has led to the belief that a lawyer must do anything and everything possible to hinder his opponent in a lawsuit.⁷⁰ In essence, then, disclosure runs counter to the instincts and training of many attorneys,⁷¹ and this resulting tension is the source of much of the opposition to a disclosure system in Alaska and elsewhere.

Judge Thomas Zlaket, the driving force behind the adoption of a disclosure system in Arizona, has written about the development of a legal culture that has spawned "Rambo" lawyers and

carried to an adjudication on the merits."); *Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

66. Carol C. Cure, *Practical Considerations Concerning Arizona's New Rules of Civil Procedure: A Defense Perspective*, 25 ARIZ. ST. L.J. 55, 66 (1993).

67. *Id.*

68. *E.g.*, Zlaket, *supra* note 10, at 5.

69. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

70. Zlaket, *supra* note 10, at 4-6.

71. See Schwarzer, *supra* note 9, at 704-05, 714-16.

“scorched earth” litigation tactics.⁷² The notion that some lawyers have taken the adversary process beyond any reasonable limits, however, is not a new one. Roscoe Pound’s famous speech on the causes of dissatisfaction with the administration of justice provides an enlightening historical perspective on the types of problems that can arise within the confines of the adversary process. Pound wrote:

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it.⁷³

Arizona Rule 26.1 attempts to fundamentally alter the way the litigation process is conducted. Disclosure, coupled with presumptive limits on the use of traditional discovery devices, should help put an end to the abuses that have marred the discovery system. If conducted in good faith, disclosure requires attorneys to aid their opponents by providing them with information that may be damaging to the disclosing party’s case. As a result, the shift from discovery to a system requiring extensive disclosure would involve much more than a simple change in the Alaska Rules of Civil Procedure. Adopting disclosure requirements similar to those in place in Arizona would change the role of a lawyer in Alaska in the litigation process.⁷⁴ The Committee, in the notes to the rejected proposal based on Arizona Rule 26.1, stated that adoption of the rule “is a move towards having lawyers fill the role of advocates, arguing the legal significance of facts, rather than as adversaries, fighting over what facts will be available for consideration.”⁷⁵

Although a disclosure system is designed to minimize the opportunities for abuse that arise with discovery, it is also designed to strike at the attitudes that are the underlying cause of those

72. Zlaket, *supra* note 10, at 3.

73. Pound, *supra* note 22, at 282.

74. Colin Campbell & John Rea, *Civil Litigation and The Ethics of Mandatory Disclosure: Moving Toward Brady v. Maryland*, 25 ARIZ. ST. L.J. 237, 238 (1993) (“[C]ivil litigators now must temper their zealous advocacy of client interest with a higher ethical duty to the tribunal to seek the full presentation of the facts to the fact finder.”).

75. Proposed ALASKA R. CIV. P. 26.1, committee cmt. (on file with author).

abuses. In essence, disclosure aims to create a system in which the pretrial exchange of information is free from the adversarial elements that have become so ingrained in every aspect of American legal culture. The comments to Arizona Rule 26.1 state, "[t]he intent of the amendments was to limit the adversarial nature of the proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel."⁷⁶ Disclosure is designed to create a system in which attorneys are forced to cooperate and not compete in exchanging information.⁷⁷ It is hoped that disclosure will result in what discovery was intended to be, a simple means of exchanging relevant information and not a weapon in the litigation process.

It is undoubtedly true that attitudes will not change overnight simply as a result of the passage of a new set of rules. The real advantage of a disclosure system, however, is that it should result in a less costly and more efficient exchange of information simply because it inherently provides fewer opportunities for abuse. As lawyers become accustomed to disclosing information and cooperating with their opponents, attitudes may gradually change and compliance with disclosure may become accepted, not just as the rule, but as the proper way to conduct litigation. This transformation has apparently begun to take place in Arizona as a result of the new rule. Based on interviews with Arizona attorneys, one commentator has stated that "[a]s the experiment progressed, attorneys noticed that disclosure statements improved in quality. This resulted in fewer broad, all-encompassing discovery requests and more professional courtesy and honesty among attorneys in the latter stages of the experiment."⁷⁸ If a disclosure-based system can successfully change lawyers' attitudes, the manner in which civil litigation is conducted will profoundly improve.

B. The Problems with an Extensive Disclosure System

1. *Complex Cases.* Extensive disclosure should work most effectively and achieve the best results in fairly simple, straightforward cases. In simple cases, because the issues, and, correspondingly, the relevant witnesses and documents, should be clear to both

76. ARIZ. R. CIV. P. 26.1, court cmt. to the 1991 amend.

77. *Id.*

78. Myers, *supra* note 51, at 24.

parties and the court, the parties should have little difficulty in complying with disclosure in a timely manner, and it should be evident to both parties and the court if one side is not disclosing pertinent information.

Many of the benefits offered by a system based on disclosure, however, seem to disappear when a complex case is involved,⁷⁹ especially under the extensive disclosure requirements of Arizona Rule 26.1.⁸⁰ Although it is difficult to define a "complex" case, the term is used here to refer to a case that necessitates a greater than average amount of discovery. In complex cases, the scope of relevant information may be enormous, making it difficult for a party to determine exactly what information and documents must be disclosed. The issues in a complex case are also not likely to be well-defined in the early stages of the litigation, causing early disclosure statements to likely be inadequate. Statistics from the pilot program in Arizona reveal that in complex cases disclosure did not accelerate the pretrial process or reduce the amount of discovery both parties required to prepare their cases adequately.⁸¹

Arizona Rule 26.1 requires that initial disclosure be made "within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or for good cause, the Court shortens or extends the time."⁸² Given that Alaska employs a notice pleading system,⁸³ however, in a complex case, a defendant may have only a vague idea as to the exact nature of the plaintiff's claim.⁸⁴ If the disclosure requirements of Arizona Rule 26.1 were adopted in Alaska, the defendant would then have two options:

79. *Id.*

80. The amount of disclosure required under Alaska Rule 26 is limited and is confined to facts alleged with particularity in the pleadings. Therefore, the problems concerning the use of disclosure in complex cases will be much less likely to arise. Section IV.C.2 of this note proposes to limit the use of disclosure in complex cases. In effect, the section advocates the adoption of Arizona Rule 26.1's disclosure requirements for simple cases while retaining the disclosure requirements of Alaska Rule 26 for complex cases.

81. Complex cases litigated under the disclosure rules required the same number of depositions, interrogatories and requests as cases litigated under the standard discovery rules. Myers, *supra* note 51, at 20, 21, 24.

82. ARIZ. R. CIV. P. 26.1(b)(1).

83. ALASKA R. CIV. P. 8.

84. See Cure, *supra* note 66, at 64.

turn over a small amount of clearly relevant information and risk being sanctioned for not turning over something later revealed to have been relevant, or turn over everything that is even remotely relevant.⁸⁵ The former option is unfair to a defendant who is trying to act in good faith, while the latter is wasteful and costly. For reasons discussed below, the fact that a court could modify the deadlines by order does little to solve this problem because it forces the court to spend time and resources in order to determine if there is good cause for ordering a modification.

The best solution in complex cases is to require a very limited disclosure by the parties consistent with the limited disclosure requirements that have been made part of Alaska Rule 26. An example of an item that should be disclosed in complex cases is information about expert witnesses. Parties would then be free to develop their cases through unlimited discovery. Inevitably, however, the pretrial exchange of information in a complex case will be costly and time-consuming, and a disclosure requirement has only marginal utility in complex cases.⁸⁶

2. *Compliance and Enforcement.* Disclosure will be effective only if both sides act in good faith. Disclosure operates, in large part, on the honor system. Problems may occur if one attorney has made a full disclosure, while the other side has failed to turn over vital information, a deficiency that may not be exposed until the case has been settled or tried, if exposed at all. Furthermore, if disclosure statements are routinely inadequate, parties will feel compelled to conduct extensive discovery, and the benefits of a disclosure system will vanish.⁸⁷ Ultimately, if attorneys want to violate the spirit of a disclosure system by engaging in the type of abuses that were a major source of the current dissatisfaction with discovery, they will probably find a way to do so.

Nevertheless, disclosure should not be rejected as an alternative to discovery simply because creative attorneys may find

85. *See id.* at 61.

86. The complex case problem is discussed further in section IV.C of this note. *See infra.*

87. Attorneys who were interviewed in Arizona commented that the amount of discovery that had to be conducted varied in proportion to the quality of the disclosure statement. A well-prepared disclosure statement generally left the attorney receiving it with little need for additional discovery. Myers, *supra* note 51, at 24.

loopholes in the system. Disclosure should be given a chance to work, for it is unlikely that it could be more costly, inefficient or subject to abuse than discovery has been. Furthermore, the pilot program in Arizona offered encouraging results. Few abuses of the disclosure system were reported,⁸⁸ and the system operated with less difficulty and fewer problems as familiarity with the requirements and nature of disclosure increased.⁸⁹

Clearly, the threat of serious sanctions is necessary to ensure that the disclosure system works, and such sanctions are, in fact, part of Arizona Rule 26.1.⁹⁰ Attorneys in Arizona who participated in the pilot program cited the threat of sanctions as a major factor in the success of the disclosure rules.⁹¹ Although sanctions are a necessary component of any disclosure system, if the system is to maintain its integrity, those sanctions must be consistently applied by all judges. Unfortunately, the language of Arizona Rule 26.1 does not lend itself to uniform enforcement, particularly in complex cases.

Arizona Rule 26.1 requires a party to disclose information regarding persons whom the party "*believes* may have knowledge or information *relevant* to the events, transactions or occurrences that gave rise to the action"⁹² In a similar vein, Rule 26.1(a)(9) requires a party to disclose documents "which that party *believes* may be *relevant* to the subject matter of the action"⁹³ Terms such as "believes" and "relevant" are subjectively vague and may make the rule difficult to enforce.⁹⁴ It is easy to imagine a party making a good faith claim that he or she did not believe a particular document was relevant and needed to be disclosed. Although judges will be able to make common sense judgments about whether something should have been disclosed, variations in their interpretations are almost certain to result.

Complex cases that will require the most extensive disclosure will likely breed the most enforcement problems. In relatively

88. *Id.* at 25.

89. *Id.* at 24.

90. The sanctions available under Arizona Rule 26.1 include the exclusion of evidence not disclosed, as well as the shifting of costs if one side forces the other to engage in unnecessary discovery. ARIZ. R. CIV. P. 26.1(c),(e).

91. Myers, *supra* note 51, at 26.

92. ARIZ. R. CIV. P. 26.1(a)(4) (emphasis added).

93. *Id.* at 26.1(a)(9) (emphasis added).

94. See Cure, *supra* note 66, at 70.

simple cases, it should be clear to both parties as well as the court what is relevant, which in turn should make a determination of the adequacy of a disclosure statement relatively easy. In a complex case, where hundreds or thousands of documents may be at least somewhat relevant, however, determining whether a party has made a good faith disclosure may be extremely difficult. It follows, therefore, that complex cases will be the ones most likely to generate disputes between the parties during the disclosure process.

3. *Satellite Litigation.* Satellite litigation refers to disputes that arise during litigation that have little to do with the actual merits of the case. Satellite litigation is undesirable because it consumes valuable time and money that lawyers and courts could better spend elsewhere. A disclosure-based system has the potential to spawn satellite litigation in two areas.⁹⁵ First, parties may file endless motions attacking the adequacy of their opponent's disclosure statement. If courts are forced to entertain and investigate a large number of these motions, the court system may become even more clogged than it presently is. Second, given the vague standards contained in Arizona Rule 26.1, parties that are sanctioned can be expected to appeal, adding to the docket of the appellate courts.

Although there seems to be a substantial potential for satellite litigation in a disclosure system, such litigation did not arise during the course of the pilot program in Arizona. Seven judges who participated in the program expressed the consensus view that only one or two disputes arose per month in the cases operating under the disclosure system, while one or two disputes per week were the norm in cases using standard discovery.⁹⁶ Consequently, these judges spent less time settling disclosure/discovery disputes and had more time to devote to other matters. These results bode well for the success of a disclosure system in Alaska, as any reduction in satellite litigation represents a significant advantage.

4. *Disclosure's Impact on the Work-Product Privilege.* The work-product doctrine is well established in Alaska.⁹⁷ Essentially, the doctrine allows an attorney to refuse to disclose or turn over to

95. See *id.* for a discussion of how disclosure can create problems that might lead to satellite litigation.

96. Myers, *supra* note 51, at 21.

97. See ALASKA R. CIV. P. 26(b)(3).

the opposing party any documents prepared by the attorney in preparation for litigation. The mental impressions and opinions of an attorney, for example, are protected by the work-product privilege. The adoption of an Arizona style disclosure system in Alaska would almost certainly infringe on the work-product doctrine. By requiring parties to disclose the legal theories upon which each claim is based, including citations to pertinent authority,⁹⁸ Arizona Rule 26.1(a)(2) infringes on the work-product privilege. Many opponents of disclosure dislike the system for this very reason.⁹⁹ These opponents complain that incompetent or lazy attorneys will be able to freeload from their more skilled and energetic opponents by borrowing their opponent's work as contained in the disclosure statement. In some cases this will undoubtedly be true, although it seems intuitively unlikely that an attorney who routinely relies on his opponent's work will end up winning many cases. As a necessary evil, attorneys will have to accept a certain amount of erosion of the work-product doctrine to realize the full benefits of disclosure.¹⁰⁰

IV. COMBINING DISCLOSURE WITH A DIFFERENTIATED CASE MANAGEMENT SYSTEM: A PROPOSAL FOR IMPROVING THE DISCLOSURE SYSTEM

A. The Proposal

Many of the potential problems with a disclosure system could be avoided or minimized, while the benefits could be retained, if disclosure was combined with a tracking or differentiated case management system ("DCM"). DCM involves placing cases into categories, or tracks, based on the complexity of the issues and the amount of time necessary for completing the pretrial exchange of

98. ARIZ. R. CIV. P. 26.1(a)(2).

99. The Committee Comment to proposed Rule 26.1 recognized this infringement but justified it on the ground that it will "reduce the inefficient groping in the dark which is a significant component of present discovery practice." See Cure, *supra* note 66, at 75.

100. By comparison, the disclosure requirements contained in Alaska Rule 26 do not infringe on the work-product doctrine. Rule 26 does not require disclosure of a party's legal theories, and statements made by witnesses must be turned over only if they are not privileged or otherwise protected from disclosure. Alaska Rule 26 simply functions as the equivalent of standard interrogatories. Information that was previously privileged under the work-product doctrine is still privileged under Alaska Rule 26.

information.¹⁰¹ Each track would have its own rule regarding the amount of disclosure required, its own limits on the use of traditional discovery methods and its own trial schedule. For example, simple negligence cases would be assigned to the fast track, cases of average complexity, such as a medical malpractice action, would be assigned to the average track, and complex cases, such as an employment discrimination action, would be assigned to the complex track.¹⁰² These three options are merely offered as examples; the number and specification of tracks will be discussed below.¹⁰³

This proposed DCM system would vary the amounts of disclosure and discovery in a given case based on its track assignment. In a simple case, where the issues should be fairly narrow and clear to both parties, extensive disclosure would be required, while the use of traditional discovery methods would be capped at low levels. In a complex case, where disclosure does not work particularly well,¹⁰⁴ disclosure would be limited to a few basic items, such as a list of expert witnesses, while the use of traditional discovery methods would be unlimited. Cases of average complexity would require more disclosure than a complex case but less than a simple case, and the limits on discovery would be higher than those in a simple case.

Such a system would retain the benefits of a disclosure system, while avoiding or minimizing many of its flaws. Alaska already has some familiarity with a simplified version of a DCM system, as Rule 16.1 has been in effect in Anchorage Superior Courts for several years.¹⁰⁵ Several federal district courts have also experimented with a DCM system in recent years as part of the Civil Justice Reform Act.¹⁰⁶

101. For a good discussion of tracking, see Richard McMillan, Jr. & David B. Siegal, *Creating a Fast Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431 (1985).

102. It is important to note that cases would be classified on an individual basis. A medical malpractice case, for example, could be simple, average or complex depending on the facts of that particular case.

103. See *infra* notes 114-122 and accompanying text.

104. See *supra* notes 79-85 and accompanying text.

105. Alaska Rule of Civil Procedure 16.1 is Alaska's fast track rule, under which parties can elect to have their case placed on an accelerated trial track.

106. 28 U.S.C. §§ 471-482 (1993). Section 473(a)(1) allows for experimentation with

DCM is part of a larger debate on the merits of trans-substantive rules of civil procedure.¹⁰⁷ Some commentators argue that a simple negligence case should not be treated in the same manner or be subject to the same rules of procedure as a complex discrimination or product liability suit.¹⁰⁸ Other commentators contend that any effort to adopt different rules of procedure for different types of cases will prove unworkable and lead to a further politicization of the rulemaking process.¹⁰⁹

The disclosure requirements of Alaska Rule 26 are trans-substantive in that they will be uniformly applied to all types of cases. Such a broad application of the disclosure rules fails to take into account that the effectiveness of disclosure varies with the complexity of the case. Statistics from Arizona indicate that disclosure has little impact on the cost or time involved in exchanging information in complex cases, and, for reasons discussed earlier in this note, requiring extensive disclosure in complex cases may actually lead to negative results.¹¹⁰ By comparison, disclosure should be highly effective in simple or even average cases. By varying the amount of required disclosure with the complexity of the case, the disclosure rules can be made more case-specific and should be more effective.

The Alaska Supreme Court has also created presumptive limits on the use of traditional discovery procedures as part of the effort

systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case.

28 U.S.C. § 473(a)(1).

107. Although this debate has taken place within the context of the Federal Rules of Civil Procedure, the issues pertain to state rules of civil procedure as well.

108. See, e.g., John P. Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883, 1891 (1989); see also Rosenberg, *supra* note 8, at 2211-12.

109. See, e.g., Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2079-85 (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, 2244-46 (1989). The implications of this debate need only be considered for the purpose of this note insofar as they relate to the use of discovery and disclosure.

110. See *supra* notes 79-85 and accompanying text.

to reform pretrial proceedings.¹¹¹ These limits apply uniformly, but they can be exceeded upon stipulation of the parties¹¹² or by order of the court upon a showing of good cause.¹¹³ Clearly, the intent of the Alaska Supreme Court in allowing for exceptions was to provide for flexibility in the rules so that cases requiring more discovery than ordinary would not be subject to the presumptive limits. Thus, the court has recognized that not all cases are alike and that, in at least some cases, the rules will have to be revised.

The court's attempt to mitigate the rigidity inherent in trans-substantive rules, however, is likely to create problems. It may be difficult to get parties to stipulate to additional discovery, in which case the court will be forced to hear motions asking for additional discovery. Such motions will take up valuable resources of both the court and the parties. It is much more efficient to establish different rules in advance to govern different types of cases, thereby removing the need for parties to argue, in or out of court, over exactly how much additional discovery is needed.

B. Model DCM Systems

A major question in any DCM system is how to determine in what track or category a case belongs. Any system of classification is destined to be somewhat artificial, and some cases will end up being placed on an inappropriate track. The members of the Alaska Bar Association should determine the number of tracks and the types of cases that will be placed on those tracks because they are the most qualified to make such decisions. Several possible models for DCM do exist, however.

As a result of the Civil Justice Reform Act of 1990,¹¹⁴ two federal district courts have begun experimenting with DCM systems. The Western District of Michigan has implemented a plan, effective September 1, 1992, that employs six tracks: voluntary expedited, expedited, standard, complex, highly complex and administrative.¹¹⁵ Each track has a schedule for when discovery

111. Alaska Rules of Civil Procedure 30 and 33 establish presumptive limits for depositions and interrogatories, respectively.

112. ALASKA R. CIV. P. 29.

113. *Id.* 26(b)(2).

114. Codified at 28 U.S.C. §§ 471-482 (1993).

115. DIFFERENTIATED CASE MANAGEMENT IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN: ANNUAL ASSESSMENT, SEPTEMBER 1, 1992-AUGUST 31, 1993, at 4-6 (1994).

must be completed, and each requires that cases ultimately be disposed of within a certain time period. Mandatory disclosure is not a part of the Michigan plan, but each track establishes presumptive limits on the use of discovery.

To understand how the system works, it is worth setting out the exact components of two of the tracks. On the expedited track, cases are expected to be disposed of within nine to twelve months from the date the complaint is filed, and discovery must be completed within 120 days from the date of the case management conference. Furthermore, interrogatories are limited to twenty single-part questions, and no more than four fact witness depositions can be taken per party without prior approval of the court. By comparison, cases assigned to the complex track must be disposed of fifteen to twenty-four months from the date the complaint is filed, and discovery must be completed within 270 days of the date of the case management conference. Interrogatories are limited to fifty single-part questions, and no more than fifteen fact witness depositions per party can be taken without prior approval of the court.

It is still too early to assess the impact of the DCM program with any degree of certainty. However, statistics compiled by the court suggest that case dispositions may be occurring earlier under DCM.¹¹⁶

The Northern District of Ohio has also implemented a DCM plan under the Civil Justice Reform Act.¹¹⁷ The Ohio plan has five tracks: expedited, standard, complex, administrative and mass tort. It imposes even more extensive limits on the use of discovery than does the Michigan plan. Cases on the standard track in Ohio, for example, are limited to thirty-five single-part interrogatories, twenty requests for production of documents, twenty requests for admissions, three non-party fact witness depositions per party, in addition to party depositions, and such other discovery as may be provided for in the case management plan. The Ohio plan also provides a list of characteristics for the types of cases that should be assigned to each track.¹¹⁸ Track assignments are ultimately

116. *Id.* at 18.

117. N.D. OHIO R. 8:1.1-8:8.3.

118. *Id.* at 8:2.2. The characteristics of the standard cases can be described as follows:

Legal issues: More than a few, some unsettled.

Required Discovery: Routine.

determined at a case management conference following a recommendation as to the proper track from the court. As with the Michigan plan, the Ohio plan does not require any mandatory disclosure. The results of the plan have been encouraging so far, although it is still too soon for any final conclusions about its success.¹¹⁹

The Justices of the Superior Court in Massachusetts established a tracking system in 1988.¹²⁰ The Massachusetts plan uses three tracks: fast, average and accelerated. It also requires that items such as service and discovery requests be completed within a certain time frame and prescribes no presumptive limits on discovery nor any requirements for mandatory disclosure. What is of great interest, however, is the effort of the Superior Court to actually list the types of cases that should be placed on each track. The fast track includes seventeen different types of cases, grouped into four broad categories: contract, tort, real property and equitable remedies.¹²¹ The average track includes sixteen different types of cases, grouped into three broad categories: tort, equitable remedies and miscellaneous.¹²² Finally, the accelerated track contains thirteen different types of cases, all of which fall under a miscellaneous heading. Although the Massachusetts plan lacks discovery limits or a disclosure system, its attempt to establish such a detailed system of case classification warrants further investigation.

Number of Real Parties in Interest: Up to five.

Number of Fact Witnesses: Up to ten.

Expert Witnesses: Two or three.

Likely Trial Days: Five to ten.

Suitability for Alternative Dispute Resolution: Moderate to high.

Character and Nature of Damage Claims: Routine.

The other categories have similar classifications.

Id.

119. See UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, ANNUAL ASSESSMENT OF CIVIL AND CRIMINAL DOCKET PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990, at 5 (1993) [hereinafter N.D. OHIO REPORT].

120. Standing Order 1-88 of the Massachusetts Superior Court (last amended Apr. 25, 1990).

121. The fast track contract category, for example, includes service, labor and materials; goods sold and delivered; commercial paper; sales or lease of real estate; and other. *Id.*

122. The average track tort category includes products liability, malpractice-medical, malpractice-other, wrongful death, defamation and asbestos cases.

C. Benefits of Combining DCM with Rule 26.1

1. *DCM Should Further Accelerate the Resolution of Cases.*

Statistics from the United States District Court for the Northern District of Ohio, which has employed a system of DCM since January 1, 1992, tentatively indicate that DCM improves the speed with which cases are resolved.¹²³ The annual assessment states that "[n]ew case filings are being resolved at a significantly quicker pace under DCM. While thirty-nine percent of the cases filed in 1992 [using DCM] were terminated by December 31, only thirty-four percent of the cases filed during 1991 were closed by December 31 of that year."¹²⁴ The statistics are even more impressive when viewed on a monthly basis. Cases which have been on the docket for six months or longer are terminated at a substantially faster rate when DCM is employed than when it is not.¹²⁵

Although it is impossible to tell exactly how disclosure and DCM will work together in practice, the two should prove to be mutually reinforcing and further expedite the resolution of cases. Disclosure allows parties to make an early assessment of their case. It should also permit them to prepare more quickly for trial, as they will not have to spend as much time on discovery. These positive effects of disclosure should allow for faster tracks under a DCM system than would be possible if parties were forced to obtain information through traditional discovery methods.

2. *DCM Will Solve the Complex Case Problem.*

As discussed previously in this note,¹²⁶ disclosure is likely to prove unworkable, or at least highly inefficient, in complex cases. DCM addresses this problem by employing different rules on disclosure and discovery for different types of cases. By specifying, within fairly broad parameters, the amount of disclosure that is required and the amount of discovery that is allowed in certain types of cases, the benefits of disclosure can be maximized, while its problems can be minimized. In a complex case, where the issues

123. According to the report issued by the United States District Court for the Northern District of Ohio, it is still too early to determine the effects of DCM. N.D. OHIO REPORT, *supra* note 119, at 5.

124. *Id.* at 10.

125. *See id.* at 11 (chart).

126. *See supra* notes 79-85 and accompanying text.

are often muddled, it is more efficient to allow the parties to control the exchange of information through the use of extensive discovery. If parties are forced to make sweeping disclosures in a complex case, particularly at early stages in the litigation process, the disclosure statements run the risk of being highly over or under-inclusive. Compliance will also be difficult to monitor in complex cases.¹²⁷ Complex cases need to be treated differently from simple ones, and DCM accomplishes that.

3. *Compliance With Disclosure Rules Will be Easier to Monitor.* Given the vague standards involved in Arizona Rule 26.1, it will be increasingly difficult to monitor compliance with the disclosure rules as the complexity of the cases increase. The more complex the case is, the more difficult it will be to determine if a party has disclosed everything that it “believed” was “relevant.” The solution to this problem is to vary the amount of disclosure with the type of case. Such a system could be established as part of a larger DCM structure. Under a DCM system, extensive disclosure would be required in the cases assigned to the simple track. As a general rule, it should be fairly easy to monitor compliance with disclosure rules in simple cases because the relevant information that must be disclosed should be readily apparent to both parties as well as the court. In complex cases, disclosure would be limited to very basic information, such as a list of expert witnesses and a summary of the proposed testimony of those witnesses. By limiting disclosure in this manner, problems with enforcement will be unlikely to arise, as it should be apparent to both parties and the court if one party has failed to comply with the limited disclosure requirements.

As discussed above, DCM will also decrease the potential for satellite litigation under a disclosure system.¹²⁸ The majority of disputes in a disclosure system can be expected to arise in complex cases, where the relevance standard of Arizona Rule 26.1 would be particularly difficult to enforce. By limiting disclosure in complex cases to a few simple items, the potential for satellite litigation in these cases should significantly decrease.

127. See *infra* section IV.C.3.

128. Myers, *supra* note 51, at 21.

D. Potential Problems With the DCM System

1. *Lawyers' Attitudes.* The current dissatisfaction with discovery stems in large part from the fact that far too many lawyers violate the spirit, if not the rules, of the discovery system. Although a DCM system combining the use of disclosure and discovery should make it more difficult for lawyers to abuse the information exchange process, lawyers who find it in their best interests to do so will undoubtedly find ways to "beat the system." The simple truth is that there are no magical solutions to the problem of rising costs and excessively adversarial tactics in litigation. Changing the rules can help, but a real effort must be made on the part of the members of the bar if those rules are to be effective.¹²⁹ Disclosure is worth trying, however, because the system's inherent features leave it less vulnerable to abuse than the discovery system.

2. *Parties Will Fight Over Track Assignments.* Some commentators who support the use of trans-substantive rules do so in part because they fear that the adoption of multiple sets of rules will simply result in parties wasting time and resources fighting over which set of rules should apply.¹³⁰ If parties are allowed to select their track assignments, such fighting will undoubtedly result, as parties will attempt to pick a track that will give them a tactical advantage. The solution is to set up a system in which the parties have only a minimal voice in how matters such as the appropriate track assignment are determined. Track assignments should be determined by the judge on the basis of the complaint, answer, and, if necessary, short briefs from each party on which track assignment is proper. The judge's decision would not be appealable. Obviously, if the parties can agree on the appropriate track, then they should be allowed to have their case placed on that track.

129. Thomas Zlaket, a leading force behind the adoption of the disclosure system in Arizona, has written, "If the bench and bar are willing to give them a good faith try, the rules can succeed. Otherwise, they will likely fail." Zlaket, *supra* note 10, at 9.

130. See Carrington, *supra* note 109, at 2081. *But see* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2049 (1989).

V. CONCLUSION

In the past, efforts to make significant reforms in the litigation process by changing the rules of procedure have met with limited success at best. In some cases, creating new rules or revising old ones simply opens up more avenues for abuse and confusion. The same may be true of the disclosure systems discussed in this note. The system of discovery, at least in its present form, has generated a great deal of criticism, and sound proposals for revamping the system are worth exploring. Disclosure has the potential to reduce the cost of litigation, while helping to ensure that just results are achieved. In time, disclosure may even foster the creation of a more professional and cooperative legal environment, although changing the adversarial nature of pretrial proceedings may prove impossible.

Although disclosure has many potential benefits, it is not a perfect solution, and the effectiveness of disclosure varies with the complexity of the case at hand. For this reason, cases should be categorized, and the amount of disclosure required and the amount of discovery allowed should be varied depending on which category the case is placed in. In theory, such a system could maximize the benefits of disclosure while limiting the negative aspects. A system of differentiated case management in which mandatory disclosure is a key component has the potential to bring about significant improvements in the litigation process.

Jeffrey D. Collins

APPENDIX A

ALASKA RULE OF CIVIL PROCEDURE 26¹

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE.

(a) REQUIRED DISCLOSURES; METHODS TO DISCOVER ADDITIONAL MATTER. Disclosure under subparagraphs (a)(1) and (2) of this rule is required in all civil actions except domestic relations and adoption proceedings.

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

(A) the factual basis of each of its claims or defenses;

(B) 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 and whether the attorney-client privilege applies;

(C) the name and, if known, the address and telephone number of each individual who has made a written or recorded statement and, unless the statement is privileged or otherwise protected from disclosure, either a copy of the statement or the name and, if known, the address and telephone number of the custodian;

(D) subject to the provisions of Civil Rule 26(b)(3), a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings;

(E) subject to the provisions of Civil Rule 26(b)(3), all photographs, diagrams, and videotapes of persons, objects, scenes and occurrences that are relevant to disputed facts alleged with particularity in the pleadings;

(F) each 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; and

(G) all categories of damages claimed by the disclosing party, and a computation of each category of special damages, 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 claims are based, including materials bearing on the nature and extent of injuries suffered.

1. Effective July 15, 1995.

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

(2) DISCLOSURE OF EXPERT TESTIMONY.

(A) In addition to the disclosures required by subparagraph (a)(1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Evidence Rules 702, 703, or 705.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. The parties shall supplement these disclosures when required under subparagraph (e)(1).

(D) No more than three independent expert witness [sic] may testify for each side as to the same issue in any given case. For purposes of this rule, an independent expert is an expert from whom a report is required under section (a)(2)(B). The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

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

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

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

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately

identifying those which the party expects to offer and those which the party may offer if the need arises.

These disclosures shall be made at the times and in the sequence directed by the court. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Rules of Evidence, shall be waived unless excused by the court for good cause shown.

(4) **FORM OF DISCLOSURES.** Unless otherwise directed by the court, all disclosures under subparagraphs (a)(1) and (2) shall be made in writing, signed, and served in accordance with Rule 5.

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

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

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

(2) *Limitations.* The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under Rule 30, and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the

importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).

(3) *Trial Preparation: Materials.* Subject to the provisions of subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under section (a)(2)(B), the deposition shall not be conducted until after the report is provided.

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

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subparagraph; and (ii) with respect to discovery obtained under section (b)(4)(B) of this rule the court shall require the

party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) **PROTECTIVE ORDERS.** Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the judicial district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

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

(e) SUPPLEMENTATION OF DISCLOSURES AND RESPONSES.

A party who has made a disclosure under paragraph (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosure under paragraph (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information had not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect 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.

(f) MEETING OF PARTIES; PLANNING FOR DISCOVERY. Except when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, or to make or arrange for the disclosures required by subparagraph (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing or form of disclosures under paragraph (a), including a statement as to when disclosures under subparagraph (a)(1) were made or will be made, and what are appropriate intervals for supplementation of disclosure under Rule 26(e)(1);

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(4) whether a scheduling conference is unnecessary; and

(5) any other orders that should be entered by the court under paragraph (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for

submitting to the court within 10 days after the meeting a written report outlining the plan.

APPENDIX B

ARIZONA RULE OF CIVIL PROCEDURE 26.1

RULE 26.1 PROMPT DISCLOSURE OF INFORMATION

(a) DUTY TO DISCLOSE, SCOPE. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a designation of the subject matter about which each witness might be called to testify.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian and general description of any tangible evidence or relevant documents that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or, in case of voluminous documentary information, a list of the categories of documents, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissi-

ble evidence, and the date(s) upon which those documents will be made, or have been made, available for inspection and copying. Unless good cause is stated for not doing so, a copy of each document listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the document shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

(b) TIME FOR DISCLOSURE; A CONTINUING DUTY

(1) The parties shall make the initial disclosure required by subdivision(a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or for good cause, the Court shortens or extends the time. For good cause, the court may shorten or extend this time. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. Upon each service of a disclosure, a notice of disclosure shall be promptly filed with the court.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be made seasonably but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party, but in no event later than sixty (60) days before trial except by leave of court.

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

(c) EXCLUSIONS OF UNDISCLOSED EVIDENCE. In addition to any other sanction the court may impose, the court shall exclude at trial any evidence offered by a party that was not timely disclosed as required by this rule, except by leave of court for good cause shown, and no party shall be permitted to examine that party's witness to prove facts other than those identified in the written disclosure to the party's opponents except by leave of court for good cause shown.

(d) SIGNED DISCLOSURE. Each disclosure shall be made in writing under oath, signed by the party making the disclosure.

(e) MISLEADING DISCLOSURE. A party or attorney who makes a disclosure pursuant to this rule that the party or attorney knew or should have known was inaccurate and thereby causes an opposing party to engage in substantial unnecessary investigation or discovery shall be ordered by the court to reimburse the opposing party for the cost including attorneys' fees of such unnecessary investigation or discovery and may be subject to other appropriate sanctions as the court may direct.

(f) CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL PREPARATION MATERIALS. When information is withheld from disclosure or discovery on a claim that it is privileged or subject

to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(g) **FAILURE TO COMPLY.** If a party or attorney fails to comply with the provisions of this rule, the court upon motion of a party or on the court's own motion shall make such orders with regard to such conduct as are just, including any of the orders provided in Rule 16(f).

