Cleveland State Law Review

Volume 43 | Issue 1 Note

1995

An Application of Federal Rule of Civil Procedure 26(A)(1) to Section 1983 Actions: Does Rule 26(A)(1) Violate the Rules Enabling Act

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AN APPLICATION OF FEDERAL RULE OF CIVIL PROCEDURE 26(A)(1) TO SECTION 1983 ACTIONS: DOES RULE 26(A)(1) VIOLATE THE RULES ENABLING ACT?

I. INTRODUCTION

The most controversial amendment to the Federal Rules of Civil Procedure, requiring pre-discovery mandatory disclosure, became effective on December 1, 1993, after a House-passed version of the bill, H.R. 2814, enacted to kill Rule 26(a)(1), failed in the Senate.[1] The House passed the bill on November 3, 1993, in order to eliminate the mandatory disclosure provision of Rule 26(a)(1) and several other amendments from the package of rules under congressional consideration.[2] Amended Rule 26(a)(1) requires parties to exchange certain core information prior to pretrial discovery without waiting for a discovery request.[3] Attorneys, who practice in federal courts, which have chosen not to "opt out"[4] of the disclosure requirements, will be under a duty to divulge the names, addresses, and telephone numbers of people "likely to have

[1]Randall Samborn, *New Discovery Rules Take Effect*, NAT'L L.J., Dec. 6, 1993, at 3, 40.

[2]Randall Samborn, *Rules for Discovery Uncertain*, NAT'L L.J., Dec. 20, 1993, at 1, 26.

[3]Linda S. Mullenix, *Civil Rule Revisions a Mixed Bag*, NAT'L L.J., Aug. 23, 1993, at S14.

[4]Carl Tobias, *New Rule in Need of Trial Run*, NAT'L L.J., June 21, 1993, at 15 (arguing that since federal districts can adopt their own version of mandatory disclosure by "opting out" of Federal Rule of Civil Procedure 26(a)(1), there will be widespread variation among the district courts).

discoverable information relevant to disputed facts alleged with particularity in the pleadings."[5] Additionally, lawyers will be under a duty to furnish a copy of, or the location of, relevant documents, reveal a computation of damages, and provide for inspection of any insurance agreements under the new rule.[6]

Under the Rules Enabling Act, the Supreme Court in fashioning the Federal Rules of Civil Procedure, "shall not abridge, enlarge, or modify any substantive right."[7] This means that the Federal Rules of Civil Procedure must specifically regulate the court's procedure, and not affect any substantive right applied in the federal courts. Since the enactment of the Rules Enabling Act in 1934, the Supreme Court has never found a Federal Rule of Civil Procedure to be in violation of the Enabling Act's prohibition on substantive rulemaking.[8]

The purpose of this note is to generally explain the problems associated with Rule 26(a)(1), and to specifically examine whether it violates the Rules Enabling Act's prohibition on affecting substantive rights. To illustrate the problem with applying Rule 26(a)(1) to all cases, the note will examine mandatory disclosure as it applies to civil rights cases brought under 42 U.S.C. § 1983. The note concludes that Rule 26(a)(1) infringes on substantive rights in violation of the Rules Enabling Act; however, instead of invalidating the mandatory disclosure rule entirely, federal courts should not apply Rule 26(a)(1) to cases brought under § 1983 against defendant public officials.

The first section discusses Rule 26(a)(1) with a focus upon the impetus for the amendment, the rulemaking process, the model upon which the rule was formulated, and the criticism surrounding the enactment of mandatory pre-discovery disclosure. The second section focuses on the limitations imposed upon the Supreme Court in fashioning rules of procedure. The third section explores whether the Supreme Court has exceeded its federal rulemaking power in fashioning Rule 26(a)(1) with respect to civil rights cases brought under § 1983. Finally, the fourth section discusses the trans-substantive nature of the Federal Rules of Civil Procedure.

II. RULE 26(a)(1)

A. Impetus for Rule 26(a)(1)

The call for a change in discovery came about as a result of the heightened criticism surrounding the civil litigation system.[9] When the discovery rules

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

[6]*Id.*

[7]28 U.S.C. § 2072(b)(1988).

[8]Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1328 (1993).

[9]Griffin B. Bell et al., *Automatic Disclosure in Discovery-The Rush to Reform*, 27 GA. L.REV. 1 (1992). *But see* Linda S. Mullenix, *Symposium on Civil Justice Reform: Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Un-*

were first promulgated in 1938, the drafters of the Federal Rules of Civil Procedure intended the rules to facilitate the full disclosure of material information.[10] The discovery rules seemed to have worked for the first thirty years.[11] However, in the mid-1970s problems of abusive discovery began to surface.[12] In 1976, Chief Justice Warren E. Burger, head of the Pound Conference, a body convened to evaluate the troubled state of litigation and the problems associated with discovery, stated:

> There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm. Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy.[13]

Widespread dissatisfaction with discovery lead to amendments to the Federal Rules of Civil Procedure in 1980 and again in 1983.[14] The 1980 amendment created Rule 26(f), the provision establishing a discovery conference.[15] In 1983, Rule 26(g), similar in form to Rule 11, authorized judicial power to impose sanctions for discovery requests and responses that were unreasonably burdensome or expensive given prior discovery and the issues in the case.[16] Despite this attempt at reform, the criticism surrounding discovery continued.

In August of 1991, then Vice-President Dan Quayle reiterated the same concerns as the Pound Conference had addressed over a decade ago regarding abusive discovery in his speech at the Annual Meeting of the American Bar

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founded Rulemaking, 46 STAN. L. REV. 1393 (1994) (arguing that civil litigation reform resulted from hysteria in the media rather than reliable empirical research).

[10]Paul W. Green, *Reassessment of the Lawyers' Discovery Responsibilities*, 53 ALA. LAW. 278 (1992); *see generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 7.1, at 380 (1st ed. 1985) (explaining the history and purpose of modern discovery under the Federal Rules of Civil Procedure).

[11]William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 704 (1989) (stating that in a 1968 survey of lawyers, less than ten percent of those responding complained of abusive discovery practices such as excessive delay, expense, or harassment).

[12]*Id.*

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

[14]William Schwarzer, *Slaying the Monster of Cost and Delay: Would Disclosure be More Effective Than Discovery?*, 74 JUDICATURE 178 (1991).

[15]*Id.*

[16]*Id.*

Association in Atlanta, Georgia.[17] Placing much of the blame of the litigation crisis upon the discovery process, Vice-President Quayle noted that over eighty percent of the time and cost associated with litigation resulted from pretrial discovery.[18] Thus, the Judicial Conference Advisory Committee on Civil Rules (hereinafter Advisory Committee) responded to this avalanche of criticism by proposing the most comprehensive amendments to the Federal Rules of Civil Procedure.

B. History of Amended Rule 26

The Advisory Committee initiated the rulemaking process by making a proposal to alter the rules.[19] In August of 1991, the debate over mandatory disclosure exploded when the Advisory Committee circulated its second proposal[20] to amend Rule 26 to require mandatory pre-discovery disclosure of the names and addresses of individuals who had information that was "likely to bear significantly on any claim or defense."[21] In accordance with The Judicial Improvements and Access to Justice Act of 1988, the Advisory Committee held two public hearings, one in Los Angeles in November of 1991 and the other in Atlanta in February of 1992, to increase public input into the rulemaking

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[17] Bell, *supra* note 9, at 9 (citing Vice-President Dan Quayle, Prepared Remarks to the Annual Meeting of the American Bar Association (Aug. 13, 1991) (transcript available from the Vice-President's Office)).

[18] Bell, *supra* note 9, at 10 (citing Agenda for Civil Justice Reform in America, A Report from the President's Council on Competitiveness (Aug. 1991) (on file with the GA. L. REV.)). One recommendation from the President's Council on Competitiveness was to require limited automatic disclosure of certain basic or core information such as the names and addresses of individuals likely to have information on the claims, defenses, and location of documents relevant to the case. *Id.* at 10 n.23.

[19] *See generally* Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323 (1991) (describing the rulemaking process from historical to modern times); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455 (1993) (describing the process of civil rule making in section I).

[20] D. Jeffrey Campbell & Jonathan R. Kuhlman, *Civil Justice Reform Act of 1990: An Experiment Gone Awry*, 60 DEF. COUNS. J. Jan. 1993, at 17. The Advisory Committee's initial proposal was not an amendment to Rule 26, but rather an entirely new rule. Proposed Rule 25.1 entitled "Disclosure" required parties to disclose within twenty-eight days of the filing of an answer the names, addresses, and telephone numbers of those people having personal knowledge of any fact alleged in the pleading. Additionally, both parties were required to disclose the location and description of any tangible evidence or relevant documents that had any bearing on any fact alleged in any pleading and a computation of damages. The Advisory Committee modified this version and proposed that the disclosure obligation be a new section of Rule 26 under the heading Rule 26(a)(1). *See generally* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991) (critiquing Proposed Rule 25.1).

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

process.[22] The results from the Los Angeles public hearing were clearly not in favor of the proposed amendment. The proposal for requiring mandatory disclosure "provoked the most intense response from the bench and bar of any proposed amendments."[23] According to the Reporter for the Advisory Committee's summary of comments, only a dozen out of over three hundred submissions on the proposed amendment were in support of mandatory disclosure.[24]

Instead of abandoning the mandatory disclosure proposal, the Advisory Committee published another version of the disclosure rule.[25] The new revision provided for a differing standard of disclosure in which parties would disclose information "reasonably calculated to lead to discovery of admissible evidence."[26] Faced with even more intense opposition against the amendment, the Advisory Committee abandoned the mandatory disclosure proposal in March of 1992.[27]

Reversing its position of six weeks prior, the Advisory Committee recommended on May 1, 1992, to amend Rule 26 to include a mandatory disclosure provision to the Judicial Conference Standing Committee on Rules of Practice and Procedure (hereinafter Standing Committee).[28] The standard for disclosure under this proposal, which is the standard that became effective on December 1, 1993, requires parties to disclose the names and addresses of individuals likely to have information that is "relevant to disputed facts alleged with particularity in the pleadings."[29] The second step in the five step rulemaking process requires the Standing Committee to approve the proposed amendments.[30] The Standing Committee, after acknowledging the opposition to the amendment, approved and forwarded the proposal to the Judicial Conference at large for consideration without significant modification.[31]

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[22]Campbell & Kulhman, *supra* note 20, at 17. Prior to 1988, there was concern that there was insufficient public participation in the rulemaking process. Congress responded to this concern by enacting legislation, entitled The Judicial Improvements and Access to Justice Act of 1988, to increase public input into the rulemaking process. Bell, *supra* note 9, at 23.

[23]Bell, *supra* note 9, at 28 (quoting Letter from the Honorable Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Robert E. Keeton, Chairman, Standing Committee of Rules of Practice and Procedure (May 1, 1992) (on file with the Advisory Committee on Civil Rules, Judicial Conference of the United States)).

[24]Bell, *supra* note 9, at 28.

[25]Campbell & Kulhman, *supra* note 20, at 17.

[26]Bell, *supra* note 9, at 33.

[27]*Id.* at 34.

[28]*Id.* at 35.

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

[30]Samborn, *supra* note 1, at 40.

[31]Bell, *supra* note 9, at 39.

On September 23, 1992, the Judicial Conference advanced the amendment to the Supreme Court.[32] According to Professor Linda Mullenix, the most important decision made by the Supreme Court in the 1993 term was not rendered in any case, but was its approval of the revisions of the federal discovery rules.[33] However, opposition to mandatory disclosure was also apparent in the dissenting opinions of Justices Antonin Scalia, Clarence Thomas, and David Souter.[34] Justice Scalia voiced his opposition stating, "The proposed radical reforms to the discovery process are potentially disastrous and certainly premature."[35] Nevertheless, the Supreme Court forwarded the package of reforms to Congress, the final body in the rulemaking process, on April 22, 1993.[36]

Congress had until November 1, 1993, to take action; if Congress failed to take action before this time then the amendment would automatically become effective on December 1, 1993.[37] On November 3, 1993, the House of Representatives passed a bill, the Civil Rules Amendment Act of 1993, H.R. 2814, ironically labeled "noncontroversial," to eliminate the controversial mandatory disclosure rule from the package of reforms under consideration.[38] The bill, blocked by Ohio Democratic Senator Howard Metzenbaum, died in the Senate.[39] Thus, on December 1, 1993, a package of the most comprehensive changes to the Federal Rules of Civil Procedure, including the pre-discovery mandatory disclosure requirement, became effective.[40]

C. Mandatory Disclosure Model

The Advisory Committee, in the formulation of the pre-discovery mandatory disclosure requirement, relied primarily upon two law review

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[32]*Id.* at 1; *see generally* Charles E. Clark, *The Role of the Supreme Court in Federal Rulemaking*, 46 JUDICATURE 250 (1963). "The strength of the Federal Rules of [Civil] Procedure is based not wholly or perhaps even largely upon their undoubted worth, but upon the fact of their authorization and promulgation by the Supreme Court of the United States." Clark, *supra* at 258.

[33]Mullenix, *supra* note 3, at S14.

[34]*Id.*

[35]Amendments to the Federal Rules of Civil Procedure, *reprinted in* 61 U.S.L.W. at 4393.

[36]Randall Samborn, *On Sanctions, Discovery Rules Changes Go To Congress*, NAT'L L.J., May 3, 1993, at 3.

[37]*Id.*

[38]Samborn, *supra* note 2, at 1.

[39]Samborn, *supra* note 1, at 3.

[40]*Id.* Professor Linda S. Mullenix questioned whether Congress has the power to retract changes in rules after the rules take effect. Samborn, *supra* note 2, at 26.

articles, one written by Professor and United States Magistrate Wayne Brazil[41] and the other written by Judge William Schwarzer.[42] Professor Brazil, in his seminal 1978 law review article, argued that "adversar[ial] pressures and competitive economic impulses inevitably work to impair significantly, if not frustrate completely, the attainment of the discovery system's primary objectives."[43] In order to better accomplish the function of gathering and sharing evidence, Professor Brazil proposed a system of automatic disclosure that would dismantle the adversarial process during discovery, and shift the lawyer's obligations away from the pursuit of the client's interests towards the court.[44] According to Brazil, the formulation of a nonadversarial system during pre-trial discovery will enhance the goal of gathering and sharing evidence.[45]

Ten years after the Brazil article, United States District Court Judge William Schwarzer, formerly Director of the Federal Judicial Center, similarly concluded that the adversarial nature under current discovery practices was inimical to accomplishing the objective of discovery, namely disclosure.[46] Judge Schwarzer further explained that adversarial techniques are counterproductive as it is "intuitively inconsistent with the adversarial ideal to be helpful to one's opponent."[47] Judge Schwarzer did not advocate a total abandonment of the adversarial system, but rather a noncompetitive pretrial system of disclosure. Judge Schwarzer, like Professor Brazil, proposed a rule intended to shift the emphasis from discovery, a process, to disclosure, an objective.[48] However, under Judge Schwarzer's proposed rule, disclosure would be designed to restrict and to a great extent replace formal discovery.[49] Under Judge Schwarzer's proposal, a litigant may only resort to formal discovery after obtaining a court order, which requires a judicial finding that there is "a reasonable basis for asserting the claim or defense," and that equivalent information is not obtainable through informal investigation or the opposing side's disclosures.[50] Such a rule is intended to increase the efficiency

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[41] Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposal for Change*, 31 VAND. L. REV. 1295, 1303-04 (1978).

[42] Bell, *supra* note 9, at 15.

[43] Brazil, *supra* note 41, at 1303.

[44] *Id.* at 1349.

[45] *Id.*

[46] Bell, *supra* note 9, at 16.

[47] Schwarzer, *supra* note 11, at 714.

[48] *Id.*

[49] Schwarzer, *supra* note 14, at 178. *But see* Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155 (1991) (critiquing Judge Schwarzer's disclosure plan).

[50] Schwarzer, *supra* note 14, at 180-81.

of the civil litigation system by eliminating the gamesmanship associated with discovery requests.[51]

D. Requirements of Rule 26(a)(1)

The Rule 26 mandatory disclosure requirement is not as radical as the Brazil or Schwarzer proposals as it is not intended to replace formal discovery. Rather, the rule is intended to serve as the functional equivalent of court-ordered interrogatories.[52] Parties will disclose four types of information that have typically been obtained through formal discovery under Rule 26(a)(1).[53] Unless otherwise provided for by local rule or court order, parties will be under an obligation to disclose the following within ten days after the meeting of the parties at a discovery conference under subdivision (f) of Rule 26:[54]

> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;
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> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;
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> (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and
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> (D) for inspection and copying as under Rule 34 any insurance agreement 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.[55]

Under subparagraph (A), parties will be required to disclose all persons with such information regardless of whether the testimony is damaging to the disclosing party.[56] Additionally, the identity of those individuals who may be

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[51] Mullenix, *supra* note 20, at 809.

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

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

called as witnesses by either party must be disclosed.[57] Parties should also briefly indicate the subject matter on which said persons have knowledge.[58]

Subparagraph (B) requires parties to describe and categorize, to the extent possible after an initial investigation, the contents and location of all relevant documents and records, including computerized data and other forms of electronically-recorded information.[59] The rule does not require the production of any documents at this stage, but in some circumstances it may be more convenient to provide the document itself rather than a description of the contents. The purpose of this disclosure is to allow both parties to later frame their document requests, and to prevent disputes resulting from the wording of the requests. Compliance with this section will not prevent parties from claiming any privilege or work product protection once parties commence with the production of documents under Rule 34.[60]

Disclosure under subparagraphs (A) and (B) is limited to information that is "relevant to disputed facts alleged with particularity in the pleadings."[61] The Advisory Committee warns that parties should apply the disclosure requirement with common sense and in light of the purpose of the rule which is to accelerate the basic exchange of information and to eliminate the excessive paperwork associated with requesting such core information.[62] Thus, "the greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence."[63]

Both subparagraphs (C) and (D) require parties to produce documents.[64] Subparagraph (C) requires parties to produce the documents supporting a claim for damages or monetary relief that are reasonably available to it and are not protected by work product or privilege.[65] This disclosure is the functional equivalent of a Rule 34 standing request for production.[66] Finally, subparagraph (D) requires the disclosure of liability insurance policies.[67]

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

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

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

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

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

E. Criticisms of Rule 26(a)(1)

Although the Advisory Committee's proposal was not as radical as the Brazil or Schwarzer proposals, there was intense opposition from a coalition made up of a wide spectrum of unlikely allies, including both plaintiff and defense oriented groups, the American Bar Association, and the United States Justice Department.[68] One problem that critics have identified is the potential clash between Rule 8 of the Federal Rules of Civil Procedure and Rule 26.[69] Under the notice pleading requirement of Rule 8, a pleader has only to make a "short and plain statement of the claim showing that the pleader is entitled to relief."[70] However, amended Rule 26 requires disclosure of information based upon facts that are "alleged with particularity in the pleadings."[71] Thus, both rules seem to be at odds with one another. The result from this inconsistency will be an end to notice pleading as the plaintiff will draft a specific complaint in order to trigger the defendant's disclosure obligation, and the defendant will likewise tailor a specific answer since the answer will also determine the plaintiff's disclosure obligations.[72]

Additionally, parties will be in disagreement as to how much information must be disclosed in the pleadings.[73] Parties claiming that they were not required to disclose the information will rely upon notice pleading in Rule 8 while the other side will counter by arguing that the opposing party did not plead with particularity as required by Rule 26.[74]

Another problem closely associated with the vague standard of disclosure required under Rule 26(a)(1) is the inevitable increase in motion practice and the overproduction of documents.[75] Since parties will not have discovery requests from the opposing side, there will be uncertainty as to what

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[68]Harrison Osborne, *Sweeping Changes for Federal Court Discovery*, MASS. LAWS. WKLY., Dec. 6, 1993, at 1.

[69]J. Stratton Shartel, *Litigators Voice Numerous Objections to Proposed Discovery Rule Changes*, INSIDE LITIG., Dec. 1992, at 25.

[70]FED. R. CIV. P. 8(a).

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

[72]Shartel, *supra* note 69, at 25. Loren Kieve, an attorney with the Washington D.C. firm Debevoise & Plimpton, says that defendants will no longer use denials such as "without knowledge or information." *Id.* Instead, defendants will frame their answers more specifically in order to force plaintiffs to disclose the required relevant information. *Id.*

[73]*Id.*

[74]*Id.*

[75]Bell, *supra* note 9, at 41. Canadian courts have experienced an increase in motion practice concerning the appropriate scope of disclosure required under their pre-discovery mandatory disclosure rule in spite of the fact that Canadian courts require quite specific pleadings. The Canadian experience indicates that mandatory pre-discovery disclosure may have the opposite effect of increasing the time and cost associated with civil litigation. Campbell & Kulhman, *supra* note 20, at 21.

information must be disclosed.[76] The opposing party and the court may view the standard of disclosure differently than the disclosing party.[77] As a result of this ambiguity, motions to dismiss under Federal Rule of Civil Procedure 12, motions for protective orders under Rule 26(c), and motions for sanctions under Rule 37 will increase.[78] Motions to dismiss or motions for a more definite statement may be filed more frequently by defendants who will be under a duty to automatically disclose information within fifty-six to ninety-six days of the filing of the answer.[79]

In order to gain extra time, defendants may strategically use such motions to delay automatic disclosure.[80] These motions will lead to more delay as plaintiffs will be forced to respond with more specificity in their pleadings.[81] It is likely that there will also be an increase in motions for protective orders under Rule 26(c) since both parties will try to seek protection from unclear interpretations of the amount of information that is "relevant" to the opponent's pleadings.[82] Motions for sanctions under Rule 37 will also increase as a result of pre-discovery disclosure. After the initial disclosure phase and the commencement of discovery, parties will undoubtedly gain information that they will argue should have been produced during the disclosure phase.[83]

An additional problem with the vague disclosure standard is the likelihood that it will cause an overproduction of marginally relevant information.[84] Lawyers may use disclosure as a strategic weapon employed to overwhelm a less equipped adversary with an abundance of information.[85] Lawyers may also fear sanctions and produce more documents than are necessary.[86] Thus, the ambiguous language of the disclosure requirement will lead to an increase

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[76] Campbell & Kulhman, *supra* note 20, at 19.

[77] *Id.*

[78] Bell, *supra* note 9, at 42-43.

[79] *Id.* at 43 n.163. Bell explains,

> Determining the timing of disclosure is itself problematic. Disclosure is required 10 days before the meeting of the parties under subdivision (f), which is to be held 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), which requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after an answer has been served on any defendant.

Id.

[80] *Id.* at 43.

[81] *Id.*

[82] *Id.*

[83] Bell, *supra* note 9, at 43.

[84] *Id.*

[85] *Id.*

[86] *Id.*

in the time and costs associated with litigation. The unresolved question that remains to be answered is whether the increase in the new time and monetary costs associated with mandatory disclosure will be less than those the rule was designed to limit.

Practitioners have also cited as a concern the conflict that disclosure requirements will have on their ethical responsibilities to their clients.[87] Under professional responsibility codes, lawyers must act zealously for their clients within the bounds of the law, but Rule 26(a)(1) creates a conflict between lawyers' duties to their clients and their duties to the court.[88] When lawyers comply with the disclosure requirement they will be going against the interest of their client by aiding the opposing side in the formulation of their case.[89] William T. Hangley, co-chairperson of the American Bar Association litigation section's federal procedure committee, envisions the following dialogue between attorneys and their clients: "Attorney: You have to tell me all the facts and about all the important documents. If I think they are relevant to a well-drafted pleading, I will give them to the other side. Client: That's crazy!"[90] Furthermore, savvy clients may not disclose valuable information to their attorneys for fear that the attorney will divulge the information to the opposing side.[91]

Another distinct but closely related concern for practitioners is the effect that the disclosure requirement will have upon the work product doctrine.[92] Litigators argue that the work product doctrine will be weakened as attorneys' impressions of the case are revealed through forced disclosure of witnesses and documents that the attorney predicts relate to the case.[93]

Plaintiffs' lawyers also express concern over Rule 26(a)(1) because in personal injury and public interest types of litigation plaintiffs typically lack the necessary information to prove their cases.[94] The bulk of information is usually held by the defendants, who naturally oppose relinquishing the information. If plaintiffs are required to fully disclose all the information they have prior to formal discovery, then there may be a tendency on the district

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[87]Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 142-43 (1993).

[88]*Id.*

[89]*Id.* Lynn Pasahow, who has co-authored a book with Judge Schwarzer on discovery, disagrees that Rule 26 will create any ethical problems because even under the old Rule 26 when a party received a discovery request that was relevant, but against the client's interest it still had to produce the information. She says the difference between the old rule and the revision is more of one of form than substance. Shartel, *supra* note 69, at 26.

[90]Osborne, *supra* note 68, at 16.

[91]*Id.*

[92]*Id.*

[93]Campbell & Kulhman, *supra* note 20, at 20.

[94]Tobias, *supra* note 87, at 143.

court judge's part to limit the scope of discovery to those issues for which the plaintiff already has support.[95]

Critics seem to agree that the standard requiring lawyers to disclose information "relevant to disputed facts alleged with particularity in the pleadings"[96] will lead to an increase in the cost and time of discovery. Rule 26(a)(1) may increase costs to litigants in cases that might have been settled prior to the triggering of disclosure.[97] Additionally, the increase in motion practice will cost clients more time and money.[98]

Finally, critics of mandatory disclosure take issue with the implementation of Rule 26(a)(1) prior[99] to evaluating the results[100] of the local rules experiments pursuant to the Civil Justice Reform Act of 1990.[101] The Civil Justice Reform Act requires, among other things, that each of the ninety-four United States District Courts assess litigation conditions in their districts and adopt plans to increase the efficiency of civil litigation in their district courts.[102] In July of 1992, the Judicial Conference Committee on Court Administration and Case Management, designated thirty-four districts as Early Implementation District Courts (hereinafter EIDC).[103] The EIDCs each submitted their civil justice plans by December 31, 1991. The Civil Justice Reform Act required the remaining sixty districts to submit their plans by December 31, 1993.[104] The Act suggests

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[95] *Id.*

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

[97] John Heller, *Excerpts from the Civil Justice Expense and Delay Reduction Plans Pursuant to the Civil Justice Reform Act*, Q214 ALI-ABA 515, 569 (1993).

[98] Bell, *supra* note 9, at 49.

[99] Senator Joseph Biden takes issue with the criticism that the proposed amendments should not have been passed prior to the results of the Civil Justice Reform Act stating that the vitality of the Act "is not dependent on the outcome of the debate on the proposed changes to the discovery rules." *See* Statement of Chairman Joseph R. Biden, Jr. on the Proposed Changes to the Federal Rules of Civil Procedure Submitted to The Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary, July 28, 1993.

[100] Mullenix, *supra* note 3, at S14. Local rules experiments under the Civil Justice Reform Act will be concluded on December 31, 1995. Randall Samborn, *Administration Opposes New Disclosure Rule*, NAT'L L. J., July 26, 1993, at 5.

[101] Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990). The Civil Justice Reform Act, also known as the Biden Bill, is the culmination of a joint task force study from the Brookings Institute and the Foundation for Change which concluded that the high cost of litigation effectively limited access to the federal courts to deep-pocket litigants. *See generally* Jeffrey J. Peck, *User's United: The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105 (1991).

[102] Heller, *supra* note 97, at 521.

[103] Tobias, *supra* note 87, at 144.

[104] *Id.* The following districts were designated as EIDC: Alaska, E.D. Arkansas, E.D. California, N.D. California, S.D. California, Delaware, S.D. Florida, N.D. Georgia, Idaho, S.D. Illinois, N.D. Indiana, S.D. Indiana, Kansas, Massachusetts, W.D. Michigan,

several principles that may be considered by the districts in formulating their expense and delay reduction plans, including the use of cooperative discovery devices.[105] Of the thirty-four EIDCs, twenty included some form of a mandatory pre-discovery disclosure requirement; however, these district courts adopted disclosure standards that differed from Rule 26(a)(1) since at the time of their adoption the Advisory Committee was considering a prior proposal.[106] The variation among local rules and Rule 26(a)(1) fosters disuniformity and confusion throughout the federal system.[107] Judges in EIDCs have expressed concern over how to mesh their district's rules with the federal rule.[108] Attorneys practicing in multiple districts, such as government litigators, also raise the issue of having to deal with conflicting discovery procedures.[109] According to Professor Tobias, the tension between varied local rules and Rule 26 is good "in terms of experimentation, but it just makes it difficult in terms of practice."[110]

Given the overwhelming amount of criticism surrounding the passage of Rule 26(a)(1), one cannot help but wonder why the rule was enacted. The strongest argument favoring mandatory disclosure[111] seems to be the perceived need for a change in the discovery process.[112]"According to Judge Phillips, '[t]he pressures have been mounting against discovery and this [mandatory pre-trial disclosure] is the only and best idea we have, to create a different environment.'"[113]

Montana, New Jersey, E.D. New York, S.D. New York, N.D. Ohio, W.D. Oklahoma, Oregon, E.D. Pennsylvania, W.D. Texas, E.D. Texas, S.D. Texas, Utah, Virgin Islands, E.D. Virginia, N.D. West Virginia, S.D. West Virginia, E.D. Wisconsin, W.D. Wisconsin, and Wyoming. Heller, *supra* note 97, at 573.

[105]The district courts may choose to include the following principles in their expense and delay reduction plans: differentiated case management, early and ongoing control of pretrial matters, special treatment of cases designated as "complex," voluntary and cooperative discovery, certification of discovery motions, and alternative dispute resolution. 28 U.S.C. § 473(a) (Supp. V 1993).

[106]Tobias, *supra* note 87, at 144.

[107]*Id.* at 145.

[108]Samborn, *supra* note 2, at 26.

[109]Tobias, *supra* note 87, at 145.

[110]Samborn, *supra* note 2, at 26.

[111]*See* Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992) (arguing in favor of automatic disclosure).

[112]Bell, *supra* note 9, at 56-57.

[113]*Id.* (quoting Minutes of the Advisory Committee on Civil Rules 2 (Nov. 29-Dec. 1, 1990) (on file with the *Georgia Law Review*)).

III. LIMITATIONS ON FEDERAL RULEMAKING

Congress delegated its rulemaking power to regulate procedure in the federal courts to the Supreme Court in the first sentence of the 1934 Rules Enabling Act,[114] which confers in the Supreme Court the power to "prescribe general rules of practice and procedure . . . in the United States district courts . . . and courts of appeals."[115] A conflict arises in this situation since the Court may be called upon to determine the validity of rules which the Court itself has promulgated.

Although the first sentence of the Rules Enabling Act seems to grant the Supreme Court unlimited discretion in promulgating rules which regulate practice in the federal courts, the Court's power is limited by congressional retention of the ability to reject rules which it does not favor.[116] In order for a rule to become effective by December 1, under current practice, the Supreme Court must forward the proposal to Congress by May 1 of the same year, thereby providing a seven month period in which Congress may accept or reject the proposed rule.[117] For example, Congress could have eliminated Rule 26(a)(1) if H.R. 2814 had not failed in the Senate.

The second sentence of the Rules Enabling Act[118] also purports to limit the Supreme Court's power to promulgate federal rules[119] by requiring that the Court not adopt rules that "abridge, enlarge, or modify any substantive right."[120] However, Supreme Court interpretation of this sentence of the Rules Enabling Act, or more correctly the failure to interpret this sentence, seems to augment rather than limit the Court's power. The correct interpretation of this provision has been the subject of much controversy and confusion among commentators.[121] One area of disagreement focuses on whether and to what extent the second sentence prohibiting modification of substantive rights differs from the first sentence requiring rules to be procedural.[122] In other words, does the prohibition on affecting substantive rights simply reiterate the

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[114] 28 U.S.C. § 2072(a) (1988); Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L. J. 281, 283 (1989). Some commentators argue that the Supreme Court has inherent power to promulgate rules to govern the procedure in the courts. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1116 (1982).

[115] 28 U.S.C. § 2072(a) (1988).

[116] Karen N. Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L. J. 1039, 1040 (1993).

[117] *Id.*

[118] 28 U.S.C. § 2072(b) (1988).

[119] Moore, *supra* note 116, at 1042.

[120] 28 U.S.C. § 2072(b) (1988); *see* United States v. Sherwood, 312 U.S. 584, 589-91 (1941).

[121] Moore, *supra* note 116, at 1042.

[122] *Id.*

requirement that the Supreme Court only fashion procedural rules?[123] Or, in the alternative, can a rule which satisfies the first sentence as being procedural fail under the second sentence by affecting substantive rights?[124] Another aspect of the controversy surrounding this provision of the Rules Enabling Act is whether Congress intended the restriction on affecting substantive rights to further federalism principles or separation of power principles.[125] Is the restriction on affecting substantive rights designed to limit the federal government's encroachment on rights granted by the states to its citizens or is the purpose of the provision to enable Congress to limit the power of the Supreme Court in fashioning rules?[126]

The two major Supreme Court decisions construing the Rules Enabling Act have avoided the controversial issue of whether the second sentence of the Act imposes further limitations on the Court's power to promulgate rules by collapsing the two requirements into one.[127] In *Sibabach v. Wilson & Co.*[128] the Court stated that the test to determine the validity of a federal rule is "whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[129] By testing the validity of a rule under this standard, the Court is saying that if a rule satisfies the first sentence of the Act by being a procedural rule, then it also satisfies the second sentence by not affecting substantive rights.[130] In other words, the Court has not accepted that a rule may be procedural and simultaneously affect substantive rights.[131] By asking the wrong question, the Court is able to avoid defining substantive rights beyond the notion that it does not mean "important" or "substantial."[132] The Court avoids this conflict because if it were to begin to invalidate federal rules based on a violation of the Rules Enabling Act's prohibition on affecting substantive rights there would be catastrophic harm to the federal system. Every rule would inevitably be challenged as being violative of the Act by abridging, enlarging, or modifying a substantive right.

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[123] *Id.*

[124] Professor Paul Carrington argues that § 2072(b) is excess verbiage and is not necessary since the Supreme Court cannot make substantive rules by means other than writing opinions in "cases or controversies." Carrington, *supra* note 114, at 287.

[125] Moore, *supra* note 116, at 1042.

[126] *Id.*

[127] Marcia L. Finkelstein, *Comity and Tragedy: The Case of Rule 407*, 38 VAND. L. REV. 585, 594 (1985).

[128] 312 U.S. 1 (1941).

[129] *Id.* at 14.

[130] Finkelstein, *supra* note 127, at 594.

[131] *Id.*

[132] *Sibbach*, 312 U.S. at 11-14.

The Court would be on a slippery slope by having to define which rights were substantive and which were not, and which were abridged, enlarged, or modified as opposed to being only "incidentally"[133] affected. Furthermore, the authority of the Court would diminish because invalidating rules, which the Court itself promulagated, would be an admission of incompetency. Therefore, by simply avoiding the issue the Court is able to maintain control over its rulemaking power.

More than twenty years later, in *Hanna v. Plumer*[134] the Court once again bypassed the issue of defining substantive rights[135] and chose to rely upon the *Sibbach* "really regulates procedure" test to uphold the validity of the challenged rule. However, the Court did find that there is a presumption of validity for any rule that has been promulgated properly by the enabling process.[136] To this date the Court has never rejected a federal rule as being violative of the Rules Enabling Act.[137] Even though neither *Sibbach* nor *Hanna* resolve the issue of what constitutes a substantive right, the Court has acknowledged that a federal rule should be invalidated if it affects a substantive right.[138]

Although the majority in *Hanna* did not explicate a test for determining what constitutes a substantive right, Justice John Marshall Harlan, in his concurrence, formulated his own standard. Justice Harlan characterized the majority standard, which he termed the "arguably procedural ergo constitutional"[139] test, as being far too deferential to the federal rules. The Harlan test attempts to differentiate between those "rules which are part of the

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[133]Burlington N.R.R. v. Woods, 480 U.S. 1 (1987).

[134]380 U.S. 460 (1965).

[135]Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act*, 98 HARV. L. REV. 828, 830-31 (1985).

[136]*Id.* at 831. *See* CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4509 (1982). Wright's treatise explains:

> By virtue of this process, the Rules, once they have become effective carry a presumptive validity; any possible intrusions upon substantive rights presumably have been thoroughly considered; whatever balancing is required between procedural objectives and substantive policy concerns, it may be assumed, already has been done.

Id. at 146-47.

[137]Mullenix, *supra* note 8, at 1328; *see also* Business Guides, Inc. v. Chromatic Communications Enter., 111 S. Ct. 922, 933-35 (1991) (challenging Rule 11); Colgrove v. Battin, 413 U.S. 149, 162-63 (1973) (challenging Rule 48); Hanna v. Plumer, 380 U.S. 460, 464-65 (1965) (challenging Rule 4(d)(1)); Schlagenhauf v. Holder, 379 U.S. 104, 112-14 (1964) (challenging Rule 35(a)(1)); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 433-35 (1956) (challenging Rule 54(b)); Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 445 (1946) (challenging Rule 4(f)); Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) (challenging Rule 35).

[138]*Hanna*, 380 U.S. at 465 (stating that Rule 4(f) may have incidental effects on substantive rights but that itself is not enough to invalidate the rule).

[139]*Id.* at 476.

. . . legal rights to be applied . . . from those rules which structure the process for trying claims to such rights."[140] Under Harlan's approach the focus of the inquiry shifts from the "use of rules in the courtroom to their use as guides for 'primary decisions respecting human conduct' outside of the courthouse."[141]

Another test for determining what constitutes a substantive right for the purpose of determining whether the Supreme Court has overstepped its federal rulemaking power has been formulated by Dean John Hart Ely.[142] In Dean Ely's seminal article, *The Irrepressible Myth of Erie*,[143] he defines a substantive right as "a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process."[144] Thus, under the Ely test, there must be a determination of the purposes of the right involved. Although lower courts have not readily accepted the Harlan or Ely test to determine whether federal rules abridge, enlarge, or modify substantive rights, the tests can prove useful for those courts which give effect to the second sentence of the Rules Enabling Act.[145] An application of these tests for determining whether Rule 26(a)(1) abridges a substantive right will be explored following a brief discussion of § 1983 actions.

IV. SECTION 1983 ACTIONS

The cause of action created by 42 U.S.C. § 1983[146] provides for a broad federal remedy for individuals who have been deprived of their federal rights by persons acting under color of state law.[147] Section 1983 does not itself create

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[140]Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L. J. 678, 695 (1976).

[141]*Id.*

[142]Note, *supra* note 135, at 833.

[143]87 HARV. L. REV. 693 (1974).

[144]*Id.* at 725.

[145]*See* McCollum Aviation, Inc. v. Cim Assocs., 438 F. Supp. 245 (D.C. Fla. 1977) (accepting Ely's argument that a rule can be both procedural and still be invalid as affecting substantive rights).

[146]*See generally* STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS §§ 2.1-2.6 (1993) (Release #10 10/93) (explaining the remedial attributes of § 1983); William Hawkins, 12 AM. J. TRIAL ADVOC. 355 (1988) (discussing the elements of § 1983 cases).

[147]The entire text of 42 U.S.C. § 1983 (1988) is as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of

any substantive rights, it merely creates a procedural device through which a party may seek relief for the deprivation of a constitutional right.[148]

Section 1983, the current version of § 1 of the Civil Rights Act of 1871, was primarily enacted in order to enforce the Fourteenth Amendment against private conduct.[149] More specifically, the statute was necessary to compel state authorities to control the widespread violence of Klu Klux Klan members.[150] In 1871, the statute did not create much debate;[151] however, as the use of § 1983 increased over the years,[152] some critics began to argue that the statute was being used for situations that the 1871 Congress did not intend.[153] For example, in *Parratt v. Taylor*,[154] Justice Lewis F. Powell, Jr., complained that § 1983 has already "burst its historical bounds."[155] But others, including Justice Harry A. Blackmun, argued that § 1983 was necessary and served as "a symbol and working mechanism for all of us to protect the constitutional liberties we treasure."[156]

A. Requirements of Section 1983 Cause of Action

In order to establish a civil rights violation using the procedural mechanism of § 1983, a plaintiff must generally satisfy two elements (some courts however require the plaintiff to prove causation): (1) "the plaintiff must allege that some person has deprived him of a federal right," and (2) "he must allege that the person who has deprived him of that right acted under color of state or terri-

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Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[148]Steven H. Steinglass, *Section 1983 Litigation in the Ohio Courts: An Introduction for Ohio Lawyers and Judges*, 41 CLEV. ST. L. REV. 407 (1993).

[149]For a legislative history of § 1983 see the following cases: Patsy v. Board of Regents, 457 U.S. 496 (1982); Allen v. McCurry, 449 U.S. 90 (1980); Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979); Monell v. Department of Social Servs., 436 U.S. 658 (1978); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Ortero, 426 U.S. 572 (1976); District of Columbia v. Carter, 409 U.S. 418 (1973); Mitchum v. Foster, 407 U.S. 225 (1972); Monroe v. Pape, 365 U.S. 167 (1961); *see also* Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1141-56 (1977).

[150]MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES 6 (1986).

[151]Monell v. Department of Social Servs., 436 U.S. 658, 665 (1978).

[152]Steinglass, *supra* note 148, at 409 n.7.

[153]Schwartz & Kirklin, *supra* note 150, at 7.

[154]451 U.S. 527 (1981).

[155]*Id.* at 554 (Powell, J., concurring).

[156]Justice Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U.L. REV. 1, 29 (1985).

torial law."[157] Plaintiffs may allege a deprivation of a federal right by demonstrating a violation of a right protected by the federal Constitution or a federal statute.[158] Given the original purpose of § 1983, to enforce blacks' Fourteenth Amendment rights, many courts were reluctant to extend § 1983 beyond claims based upon Fourteenth Amendment violations.[159] However, the Supreme Court in *Dennis v. Higgins*,[160] held that dormant commerce clause claims were actionable under § 1983.[161] The conclusion to be drawn from the *Dennis* Court is that § 1983 claims are not limited to Fourteenth Amendment cases.[162]

Additionally, plaintiffs may also satisfy the first requirement necessary to establish a claim under § 1983, by alleging a violation of a federal statute.[163] The Supreme Court in *Maine v. Thiboutot*,[164] construed the language "and laws" in the phrase "deprivation of . . . rights . . . secured by the Constitution and laws"[165] to mean that § 1983 applies to violations of federal statutes. However, the Supreme Court has limited the availability of § 1983 when Congress has explicitly provided for a remedy in the statute.[166]

In order to maintain a cause of action under § 1983, the plaintiff must also allege that the defendant was acting under color of law.[167] The Supreme Court has broadly construed this requirement to include conduct that is unauthorized by state law in addition to conduct that is authorized by state law. Thus, the Supreme Court has stated that an official's "[m]isuse of power, possessed by

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[157]Gomez v. Toledo, 446 U.S. 635, 640 (1980). *Accord* Baker v. McCollan, 443 U.S. 137, 140 (1979); Flagg Bros. v. Brooks, 436 U.S. 149, 155 (1978); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

[158]Schwartz & Kirklin, *supra* note 150, at 8.

[159]Steinglass, *supra* note 148, at 418.

[160]498 U.S. 439 (1991).

[161]Steinglass, *supra* note 148, at 418.

[162]*Dennis*, 498 U.S. at 463. Justice Kennedy in his dissenting opinion says of the majority that their "logic extends far beyond the Commerce Clause and creates a whole new class of § 1983 suits derived from Article I." *Id.* (Kennedy, J., dissenting).

[163]Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979). *Accord* Wilson v. Garcia, 471 U.S. 261, 278 (1985); Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985); Baker v. McCollan, 443 U.S. 137, 140 n.3 (1979).

[164]448 U.S. 1 (1980).

[165]42 U.S.C. § 1983 (1988).

[166]Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20 (1981).

[167]42 U.S.C. § 1983 (1988); *see generally* Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992).

virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[168]

B. Immunity

In most § 1983 cases, the plaintiff seeks to hold the defendant government official personally liable for monetary damages.[169] Section 1983, does not expressly provide for any immunities that government officials may claim to defeat liability; however, the Supreme Court has consistently taken the position that the 1871 Congress intended the common law immunities, existent in 1871, to apply to § 1983 cases absent any specific provision to the contrary.[170] Thus, government officials may be able to defeat personal liability by asserting a common-law immunity.

Government officials will be entitled to either an absolute or qualified immunity depending upon the nature of the official's governmental function.[171] Immunities in § 1983 actions are immunities from suit, not merely from judgments.[172] Absolute immunity "bars a suit at the outset and frees the defendant official of any obligation to justify his action" while qualified immunity is an affirmative defense[173] that will protect an official from liability if the official can prove that a reasonable official would not have known of the illegality of the conduct in question.[174] Determining whether the defendant is entitled to absolute or qualified immunity, if any at all, based upon the nature of the official's function, is known as a "functional approach" to immunity law.[175] Under a functional approach, the Supreme Court has recognized that judicial, prosecutorial, and legislative functions require absolute immunity.[176] However, the Supreme Court in *Harlow v. Fitzgerald*[177] cautioned that absolute immunity will only apply to officials who were performing the recognized acts necessary to their official capacity.[178] Thus, a judge performing a judicial task may be entitled to absolute immunity for that judicial function, but may only

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[168]United States v. Classic, 313 U.S. 299, 326 (1941).

[169]Schwartz & Kirklin, *supra* note 150, at 141.

[170]Pierson v. Ray, 386 U.S. 547, 554 (1967).

[171]Schwartz & Kirklin, *supra* note 150, at 143 (citing Briscoe v. LaHue, 460 U.S. 325 (1983); Harlow v. Fitzgerald, 457 U.S. 800, 811 (1982)).

[172]Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

[173]Gomez v. Toledo, 446 U.S. 635 (1980).

[174]Schwartz & Kirklin, *supra* note 150, at 143 (internal citation omitted).

[175]*Id.* at 810; *see generally* Supreme Court of Va. v. Consumer Union, 446 U.S. 719 (1980) (providing an illustration of the functional approach).

[176]457 U.S. at 811.

[177]457 U.S. 800 (1982).

[178]*Id.*

be entitled to qualified immunity for administrative or executive functions.[179] There is a strong presumption against the use of absolute immunity and most § 1983 defendants are only entitled to claim a qualified immunity.[180]

In *Wood v. Strickland*,[181] the Supreme Court defined qualified or good faith immunity in § 1983 cases using subjective and objective components. The subjective prong referred to "permissible intentions" and the objective prong referred to the presumption of knowledge of and respect for "basic, unquestioned constitutional rights."[182] Thus, an official would not be entitled to qualified immunity if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . ."[183]

In *Harlow* the Supreme Court redefined qualified immunity leaving intact only the objective prong of the test.[184] The Court rejected the subjective component of the test since judicial inquiry into the official's motivation through broad ranging discovery would be disruptive of effective government.[185] Under the *Harlow* test, government officials performing discretionary functions are entitled to qualified immunity when it can be established that the official's conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[186]

In *Anderson v. Creighton*,[187] the Supreme Court stated that in order for a right to be clearly established, "[t]he 'contours' of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . [and] in the light of preexisting law the unlawfulness must be apparent."[188] Thus, under *Anderson*, a plaintiff, in order to defeat the defendant's defense of qualified immunity, must prove a violation of a clearly established right at the time of the act in question.[189] Under this standard,

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[179]Schwartz & Kirklin, *supra* note 150, at 143.

[180]Steinglass, *supra* note 148, at 449.

[181]420 U.S. 308 (1975).

[182]*Id.* at 322.

[183]*Id.*

[184]457 U.S. at 818.

[185]*Id.* at 817.

[186]*Id.* at 818.

[187]483 U.S. 635 (1987).

[188]*Id.* at 640.

[189]Elliot v. Thomas, 937 F.2d 338, 341 (7th Cir. 1991), *cert. denied*, 502 U.S. 1121 (1992).

courts will be required to define the right with a high degree of specificity[190] and defendant public officials will be given the benefit of legal doubts.[191]

Defendant public officials must raise the defense of qualified immunity in the pleadings[192] because it is a kind of defense to be asserted before trial, not at trial. The Supreme Court in *Siegert v. Gilley*,[193] in clarifying the structure for analyzing qualified immunity, stated that once the defendant raises the defense of qualified immunity, "[o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred . . . . Until this threshold immunity question is resolved, discovery should not be allowed."[194] The *Siegert* Court, noting that the qualified immunity defense is a threshold question, further stated,

> [A] necessary concomitant to the determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits.[195]

Thus, under *Harlow*, the court must determine the qualified immunity issue and stay discovery, except in limited circumstances as the *Anderson* Court suggests, until the issue has been determined.[196]

V. VALIDITY OF RULE 26(a)(1)

There is a strong presumption, indeed one that has not been overcome, that all federal rules that are promulgated according to proper procedure are valid under the Rules Enabling Act.[197] Under the *Hanna* majority test which upholds a rule that "really regulates procedure," Rule 26(a)(1) clearly passes muster. The Rule prescribes the manner in which parties must exchange certain core information within the federal court system. The purpose of Rule 26(a)(1) is to

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[190]Steinglass, *supra* note 148, at 453.

[191]*Id.*

[192]Gomez v. Toledo, 446 U.S. 635 (1980).

[193]500 U.S. 226, 231 (1991).

[194]Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[195]*Siegert*, 500 U.S. at 232.

[196]*Harlow*, 457 U.S. at 818. *But see* Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987) (acknowledging that limited discovery may be necessary when parties allege differing facts prior to resolving the qualified immunity issue on a motion for summary judgment).

[197]Mullenix, *supra* note 8, at 1328.

expedite the discovery process and create a better exchange of information which relates to the procedure of the courts.

Lower courts,[198] which have chosen to construe § 2072(b) as a limitation on the Supreme Court's power to fashion rules, unlike the high Court, have found that federal rules that regulate procedure can still be invalid if they affect substantive rights.[199] Since the Court has refused to engage in defining what constitutes a substantive right, except stating that it is not merely "important" or "substantial,"[200] lower courts, which choose to give effect to the second sentence of the Rules Enabling Act, should turn to the formulations by Justice Harlan and Dean Ely to determine when a rule affects a substantive right.

Qualified immunity may be characterized as a procedural device, a substantive right, or both. Even if qualified immunity is a procedural device the Rules Enabling Act may still be violated if qualified immunity is also a substantive right because Rule 26(a)(1) infringes upon this right by requiring mandatory disclosure before the resolution of the threshold issue of qualified immunity.

Under the Harlan test, the inquiry focuses on the use of the rule outside the courtroom as a guide for making "primary decisions respecting human conduct."[201] Although qualified immunity, the right not to be tried, may be viewed as a procedural device, the rule also affects litigants outside the courtroom by altering their "primary" behavior. The rule which threatens discovery prior to a resolution of the availabilty of qualified immunity may alter the defendant's behavior. Defendants may view their right to qualified immunity as so crucial to the performance of their duties as public officials that without the protection of qualified immunity, people may be discouraged from seeking public positions for fear of the burdens of discovery. Thus, under the Harlan test the right to qualified immunity is substantive as it shapes the "primary" behavior of litigants outside of the courtroom.

Furthermore, qualified immunity is also a substantive right under the test formulated by Dean Ely. According to this test, a substantive right is "a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process."[202] The purpose of qualified immunity is to strike a balance between deterring public officials from depriving plaintiffs of their constitutional rights and protecting public officials from liability so that they do not become overly preoccupied

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[198] *See* Perry v. Allen, 239 F.2d 107 (5th Cir. 1956)(holding Federal Rule of Civil Procedure 25(a)(1) invalid for abridging plaintiff's substantive right to bring an action to trial on the merits).

[199] Finkelstein, *supra* note 127, at 598.

[200] *Sibbach*, 312 U.S. at 11.

[201] *Hanna*, 380 U.S. at 475.

[202] Note, *supra* note 135, at 833.

with the fear of litigation thereby crippling performance of their duties.[203] In a recent Fifth Circuit decision, *Elliott v. Perez*,[204] the court stated that "[t]he public goals sought by official immunity are not procedural. Indeed, they go to very fundamental substantive objectives."[205] These substantive objectives include protecting public officials from the disruptive burden of litigation so that they may effectively perform their duties.

If the reader accepts qualified immunity as a substantive right, then it is possible to understand why Rule 26(a)(1) burdens this right. The defense of qualified immunity is a defense that defendants assert prior to trial,[206] thus, any pre-discovery mandatory disclosure prior to court resolution of the threshold issue of qualified immunity abridges this right. Additionally, the problem cannot be solved if courts take the position that Rule 26(a)(1) will apply in all cases unless the defendant makes a motion for a protective order. Requiring defendants to seek a protective order is itself burdensome on the substantive right. Furthermore, this position places too much discretion in the hands of the court so that if a protective order is not issued the defendant's substantive right in qualified immunity will still be abridged. Finally, adopting a position which requires plaintiffs in § 1983 actions to ask the court for permission to allow the rule to apply is too burdensome for the plaintiff, who already has to carry the burden of proof. Furthermore, it would be unfair for plaintiffs to have to prove to the court that Rule 26(a)(1) should apply since plaintiffs may not have the necessary facts to make this kind of showing.

What should courts do in this kind of situation? The best solution is prevention. If the federal rule could be written with exceptions in place, the task for the courts would be easier; however, it is impossible to foresee all the situations in which the rule would not apply. Moreover, rules are written to apply to all types of cases under our trans-substantive system. The hardest position to take would be to invalidate the rule given the Supreme Court's position on this issue in *Sibbach* and *Hanna*. Thus, lower courts should try to uphold the federal rule to accomodate the interest of litigants and to preserve the integrity of the federal rules. In *Douglas v. NCNB Texas National Bank*,[207] the Fifth Circuit found implicit in *Hanna* that a court must not apply a federal rule of civil procedure to a particular case if it affects a substantive right in violation of the Rules Enabling Act.[208] In this case the court found that since Federal Rule of Civil Procedure 13(a) abridged lenders' substantive rights to elect judicial

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[203]Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 601 (1989).

[204]751 F.2d 1472 (1985).

[205]*Id.* at 1479.

[206]*Mitchell*, 472 U.S. at 526.

[207]979 F.2d 1128 (1992).

[208]*Id.* at 1129.

foreclosure, the rule would have no application.[209] Similarly, federal courts should also refuse to apply Rule 26(a)(1) to § 1983 actions against individual defendants since their substantive rights will be affected not only by a strict application of the rule, but also in situations where the court may not apply the rule if the defendant motions for a protective order. The following section is included to illustrate how federal courts may consider applying different rules for different types of cases since the uniform system of procedure that was once intended by the drafters of the federal rules no longer exists.

VI. TRANS-SUBSTANTIVE RULES

Prior to the enactment of the Federal Rules of Civil Procedure in 1938 and the code pleading system, procedural rules were based entirely upon the writ system.[210] Under the writ system, an action was instituted when the court issued the appropriate writ ordering a defendant to appear in court and defend the action.[211] The writ system was non-trans-substantive as each cause of action required its own writ with its own procedural rules.[212] State courts, rejecting the writ system, began to adopt the code approach, which required the application of a uniform set of rules to all cases, regardless of the type of claim. The federal courts followed with the enactment of the Federal Rules of Civil Procedure in 1938.

The drafters of the Federal Rules of Civil Procedure specifically attempted to address the problem of "balkanization,"[213] created by this earlier highly technical procedural system,[214] by devising a code of civil procedure that would prescribe the same procedure[215] for almost all federal cases in the federal

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209 *Id.*

210 JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.1, at 237 (1985).

211 *Id.*

212 *Id.*

213 Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L. J. 1393 n.1 (1992) (defining balkanization as "the fragmentation of federal civil procedure, which is manifested more specifically in the increasingly disuniform and complex nature of the procedural system").

214 *See, e.g.*, Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914-21, 926-73 (1987).

215 Proponents of the Rules Enabling Act when advocating a system of uniform procedural rules argued that the alleged disuniformity caused the following inefficiencies: 1. confusion regarding whether to conform to state or federal procedure; 2. the time and expense of appealing these decisions; 3. cost to clients especially those clients engaged in interstate commerce who had to retain different lawyers in different federal courts. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2002 (1989).

courts.[216] The debate over whether the rules should be trans-substantive[217] seems to be moot given the increase in different procedural rules for various categories of cases since the mid-1970s,[218] especially through the proliferation of local rules, the Civil Justice Reform Act, and the passage of Rule 26(a)(1) with its "opt out" provision.

Professor Robert Cover has perhaps most incisively expressed the criticism against a uniform or trans-substantive application of the rules.[219] He argues that "[t]he fine tuning of remedial and procedural instruments for implementing substantive preferences . . . is severely retarded once procedural norms are codified in a trans-substantive structure."[220] Professor Cover's critique of the federal rules contemplates a separate set of rules for civil rights cases, antitrust cases, negligence cases, and environmental class action cases.[221] According to Professor Stephen Subrin, the issue of advocating or not advocating trans-substantive procedure has already been resolved "[a]s the exploration of local and state variations has suggested, non-trans-substantive procedure is already here."[222]

The proliferation of local rules,[223] the enactment of the Civil Justice Reform Act, and the passage of Rule 26 have contributed to a non-trans-substantive procedural system. The original purpose of Federal Rule of Civil Procedure 83,[224] permitting local rules not inconsistent with the federal rules, was to meet

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216Tobias, *supra* note 213, at 1396.

217Subrin, *supra* note 215, at 2001 n.13. Trans-substantive as used here means applying the same set of procedural rules, namely the Federal Rules of Civil Procedure, to a myriad of substantive claims.

218Tobias, *supra* note 213, at 1396.

219Geoffrey C. Hazard, *Discovery Vices and Trans-substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244 (1989).

220Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732 (1975). *But see* Hazard, *supra* note 219, at 2244 (arguing that the trans-substantive critique exposed by Professor Cover "overstates the reach of the Federal Rules and underestimates the technical and political difficulties of trying to tailor procedures to specific controversies"); 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 (concluding that non-trans-substantive rulemaking should be rejected).

221Cover, *supra* note 220, at 732.

222Subrin, *supra* note 215, at 2048.

223*Id.*

224The entire text of FED. R. CIV. P. 83 (1992) is as follows:

> Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in

local conditions and fill in gaps not covered by the federal rules.[225] In the fifty years since the promulgation of the federal rules, the number of local rules has proliferated at an alarming rate.[226] One reason behind the vast number of local rules is the sheer increase in the number of cases in federal court, and the increased complexity of cases, which the drafters of the federal rules could not have possibly anticipated.[227] All local rules are not inconsistent with the notion of a trans-substantive system; however, those local rules which fashion procedure differently for particular types of cases are inconsistent with a trans-substantive system. In 1985, the Committee on Rules of Practice and Procedure of the United States Judicial Conference conducted a massive study of local rules[228] in ninety-four federal district courts. In 1988, the Committee presented the results of the Local Rules Project finding that the ninety-four districts have approximately five thousand local rules.[229] Some local rules[230] fashion procedure differently for particular types of cases suggesting the move toward non-trans-substantive rules governing civil litigation.[231] In the area of discovery, for example, according to the results of the Local Rules Project, six federal district courts limit initial discovery in class action suits to facts pertaining to the class certification requirements.[232] Two federal district courts only allow pro se civil rights plaintiffs to engage in discovery if the judge, in his discretion, and after a showing of good cause grants leave to do so, but not otherwise.[233] Similar non-trans-substantive local rules also exist for cases dealing with various types of topics such as social security, black lung, naturalization, bankruptcy, and admiralty.[234] In § 1983 civil rights cases many

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> which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by [the] rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

225 Subrin, *supra* note 215, at 2013.

226 *Id.* at 2018.

227 *Id.*

228 *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, LOCAL RULES PROJECT pt. I, at 1, 4 (Ten. Draft Dec. 31, 1988) [hereinafter LOCAL RULES PROJECT].

229 *Id.* at 1.

230 *See generally* A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991) (describing the advantages and disadvantages of local rules made pursuant to FED. R. CIV. P. 83).

231 Subrin, *supra* note 215, at 2025.

232 *Id.*

233 *Id.*

234 *Id.* at 2026 n.135.

federal district courts require that the complaint be verified which stands directly at odds with Rule 11 of the Federal Rules of Civil Procedure.[235] Additionally, some courts require a heightened pleading standard,[236] by either judicial decision or local rule, which is directly contrary to Rule 8 of the Federal Rules.[237] The Local Rules Project reported that in pro se cases, thirty-two districts "have local rules requiring civil rights actions to be filed on standard forms available from the court."[238] The Committee found these local rules to be inconsistent with the federal rules, and recommended that the rules be rescinded.[239] Thus, the proliferation of local rules has contributed to a non-trans-substantive procedural system.

The Civil Justice Reform Act will also increase the divergence from a single set of rules for all cases to a non-trans-substantive system. Under the directives of the Civil Justice Reform Act, each district must consider six principles and guidelines.[240] Most of these principles foster intercase procedural disuniformity.[241] The first principle that district courts are required to consider is a system of differentiated judicial management tailored to the needs of various cases.[242] Under the Judicial Conference's Model Plan,[243] the differentiated case management system incorporates a five track plan with the following tracks: expedited,[244] standard,[245] complex,[246] administrative,[247] and

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[235]Levin, *supra* note 230, at 1580.

[236]*See* Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993) (rejecting the application of a strict pleading requirement in § 1983 actions in federal court, but leaving open the question of whether heightened pleading could be required by state courts in § 1983 suits).

[237]Levin, *supra* note 230, at 1581 n.49.

[238]*Id.*

[239]*Id.*

[240]Tobias, *supra* note 213, at 1418.

[241]*Id.*

[242]*Id.*

[243]Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Peaceful Co-Existence?*, in A.L.I. A.B.A. VIDEO LAW REVIEW: NEW DIRECTIONS IN FEDERAL CIVIL PRACTICE AND PROCEDURE 465, 480-81 (Sol Schreiber ed., Dec. 9, 1993).

[244]The Civil Justice Reform Act Model Plan's Expedited Track is as follows:

> Cases on the Expedited Track shall be completed within nine (9) months or less after filing, and shall have a discovery cut-off no later than one-hundred (100) days after filing of the [case management plan] ("CMP"). Discovery guidelines for this track include interrogatories limited to fifteen (15) single-part questions, no more than one (1) fact witness deposition per party without prior approval of the court, and such other discovery, if any, as may be provided for in the CMP.

Id. at 480.

mass tort.[248] Each case will be placed on a track and be subject to different procedural guidelines. The Civil Justice Reform Act also requires each court to consider the use of case management conferences in complex cases to monitor discovery, among other things.[249] Courts may also consider alternate dispute resolution for certain types of cases.[250]

In the Eastern District of New York, for example, the expense and delay reduction plan for the district, incorporates a differential case management or tracking system.[251] The basic structure of the tracking system requires a judicial officer to designate cases as either standard or complex.[252] Under the district's plan, a special arbitration track exists for cases involving damages of one-hundred thousand dollars or less.[253] However, local rule prevents certain cases from being designated to the arbitration track such as social security, prisoner, constitutional, and civil rights cases.[254] The expense and delay reduction plan also incorporates a specialized track for habeas corpus and

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[245]The Standard Track is as follows:
Cases on the Standard Track shall be completed within fifteen (15) months or less after filing, and shall have a discovery cut-off no later than two-hundred (200) days after filing of the CMP. Discovery guidelines for this track include interrogatories limited to thirty-five (35) single-part questions, no more than three (3) fact witness depositions per party without prior approval of the court, and such other discovery, if any, as may be provided for in the CMP.
Id. at 481.

[246]The Complex Track is as follows:
Cases on the Complex Track shall have the discovery cut-off established in CMP and shall have a case completion goal of not more than twenty-four (24) months.
Id.

[247]The Administrative Track is as follows:
Cases on the Administrative Track shall be referred by court personnel directly to a Magistrate Judge for a report and recommendation. Discovery guidelines for this track include no discovery without prior leave of court, and such cases shall normally be determined on the pleadings or by motion.
Cavanagh, *supra* note 243, at 481.

[248]The Mass Tort Track is as follows:
Cases on the Mass Tort Track shall be treated in accordance with the special management plan adopted by the court.
Id.

[249]Tobias, *supra* note 213, at 1418-19.

[250]*Id.* at 1419.

[251]Heller, *supra* note 97, at 527.

[252]*Id.*

[253]*Id.* at 528.

[254]*Id.*

social security cases.[255] The Eastern District of New York also has a mandatory disclosure provision for all cases except social security, habeas corpus, civil rights cases, in which an immunity defense is available, government forfeiture cases, and pro se matters.[256]

Rule 26(a)(1) will also add to the increasing trend towards a non-trans-substantive system. The mandatory disclosure provision establishes a default provision, also known as the "opt out" provision, which district courts may choose to ignore if the district has its own procedures for discovery.[257] When district courts adopt differing standards of disclosure and exempt certain types of cases from the disclosure requirement, as in the Eastern District of New York, there will be an increase in non-trans-substantive rulemaking.

Critics of non-trans-substantive procedural rules argue that transaction costs increase under this system, and that different procedures for different cases render procedure too political.[258] Transaction costs will increase as attorneys will argue about which category is appropriate for the case, and clients will pay the costs associated with a judicial decision.[259] Critics of non-trans-substantive rules also argue that different rules for different cases will become politicized, and lead to advantages for those litigants who lobby for procedural rulemaking.[260]

Although there is no movement to return to the writ system, there is a definite trend towards sculpting different procedural rules for different cases.[261] Perhaps Professor Subrin has stated the future of procedure best:

> History teaches that any American procedural model will be modified by the ingenuity of lawyers who have learned to manipulate the rules to the benefit of their clients. Non-trans-substantive procedure cannot avoid a similar fate. Fifty years from now critics will surely complain that some of us who could see the flaws of generality, flexibility, and discretion were blind to the inefficiencies and injustices of linedrawing. We will just as surely be accused of undervaluing equity in the fruitless search for certainty.[262]

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[255] *Id.* at 528.

[256] Cavanagh, *supra* note 243, at 474.

[257] Robert P. Taylor & Deborah M. Lerner, *Proposed Amendments to Rules 16, 26, 30, 31, and 33 of the Federal Rules of Civil Procedure*, in A.L.I. A.B.A. VIDEO LAW REVIEW: NEW DIRECTIONS IN FEDERAL CIVIL PRACTICE AND PROCEDURE 229, 236 n.9 (Sol Schreiber ed., Dec. 9, 1993).

[258] Subrin, *supra* note 215, at 2049-50.

[259] *Id.* at 2049.

[260] *Id.* at 2050.

[261] *Id.* at 2048-49.

[262] *Id.* at 2051.

VII. CONCLUSION

This note has attempted to familiarize the reader with the problems associated with the application of Rule 26(a)(1), which will continue to surface as the courts struggle to implement the mandatory disclosure provision. The note has also attempted to demonstrate, through the application of mandatory disclosure in § 1983 cases, how a strict application of Rule 26(a)(1) in all cases may be inappropriate. If the defendant's qualified immunity right in § 1983 cases is substantive in nature, then courts may protect this right by exempting these cases from the requirements of Rule 26(a)(1) in order to both save the rule and satisfy the requirements of the Rules Enabling Act. Courts may also find that a strict application of mandatory disclosure may be inappropriate in other types of cases as well.[263] District courts should respond by exempting inappropriate cases from mandatory disclosure as the trans-substantive system envisioned by the drafters of the Federal Rules of Civil Procedure no longer exists.

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[263] In addition to § 1983 cases, there are other types of cases in which immunities may apply.