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### A Mandatory Disclosure and Civil Justice Reform Proposal Based on the Civil Justice Reform Act Experiments

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#### Recommended Citation

Note, A Mandatory Disclosure and Civil Justice Reform Proposal Based on the Civil Justice Reform Act Experiments, 43 Clev. St. L. Rev. 147 (1995)

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# A MANDATORY DISCLOSURE AND CIVIL JUSTICE REFORM PROPOSAL BASED ON THE CIVIL JUSTICE REFORM ACT EXPERIMENTS<sup>1</sup>

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<sup>1</sup>The author would like to express his appreciation and gratitude to Professors Susan J. Becker and Deborah A. Geier, the Honorable Solomon Oliver, Jr., Gregory Gordillo, Esq. and Will Spade, Jr., Esq., for their advice and constructive criticism regarding numerous drafts of this note.

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## I. INTRODUCTION

The civil justice system of the United States has been indicted for failing to efficiently handle the increased burdens placed on it by modern society; some have even charged that it has become an excessive economic burden on America.<sup>2</sup> The system has been plagued for the past thirty years with excessive costs and long delays.<sup>3</sup> The United States annually spends an estimated \$80 billion in direct costs and another \$300 billion in indirect costs on a legal system which is no longer viewed as providing expedient results.<sup>4</sup> Some in the federal judiciary, most notably former Chief Justice Warren Burger, have asserted that there is rampant abuse and misuse of the civil justice system by attorneys, especially during the discovery phase of litigation.<sup>5</sup> Abuse of the discovery rules<sup>6</sup> is perceived by practitioners, judges, and academics as the primary cause of excessive costs and delay in civil litigation.<sup>7</sup>

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<sup>2</sup>Dan Quayle, *Agenda for Civil Justice Reform in America*, 60 U. CIN. L. REV. 979, 979 (1992); Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 560 (1992); see also Edwin W. Green & Douglas S. Brown, *Back to the Future: Proposals for Restructuring Civil Discovery*, 26 U.S.F. L. REV. 225, 235 (1992) (proclaiming that "[w]e no longer can afford the current system").

<sup>3</sup>Quayle, *Agenda for Civil Justice Reform in America*, *supra* note 2, at 979. Also, the annual number of lawsuits filed in federal courts has quadrupled from approximately 51,000 in 1960 to almost 218,000 in 1990. Quayle, *Civil Justice Reform*, *supra* note 2, at 560 (citing FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 30 (June 1, 1990); DIRECTOR OF ADMIN. OFF. OF U.S. CTS. ANN. REP. 133 (1990)).

<sup>4</sup>Quayle, *Agenda for Civil Justice Reform in America*, *supra* note 2, at 979; Quayle, *Civil Justice Reform*, *supra* note 2, at 560. Whether the civil justice system is providing just results will not be discussed here, although costs and expediency are components of a just system.

<sup>5</sup>See Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 79, 95-96 (1976); see also Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 39 (1988) (tracing the diagnosis of the discovery abuse problem to former Chief Justice Burger's keynote address at the Pound Conference in 1976).

<sup>6</sup>Discovery abuse can be categorized as: (1) overuse of discovery, and (2) misuse of discovery procedures. Wolfson, *supra* note 5, at 42. The objective in overuse is to overwhelm your opposing party with discovery information by making overly broad discovery requests or by broadly interpreting an opponent's discovery requests. *Id.* The objective in misuse is to avoid disclosure of relevant information through strained or technical interpretations of discovery requests and the federal rules. *Id.*

<sup>7</sup>Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 190 n.4 (1992); BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION 6-7 (1989). *Contra* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 386 n.29 (1992) (asserting that the civil justice reform movement is based on the unproven assumption that cost and delay is a problem in all federal district courts).

Judge Barefoot Sanders, United States District Court for the Northern District of Texas, assessed the discovery abuse situation by commenting:

I estimate that two-thirds to three-fourths of our civil cases, probably more, have little or no problem with respect to discovery

Numerous discovery reform proposals have been debated during the past twenty years in response to the purported civil justice crisis.<sup>8</sup> Congress enacted the Civil Justice Reform Act<sup>9</sup> in 1990 to address concerns "about litigation and discovery abuse in civil lawsuits, mounting expense and delay in those cases, and declining federal court access."<sup>10</sup> The CJRA encouraged federal district courts to experiment with mandatory disclosure in discovery as one of many avenues of civil justice reform.<sup>11</sup> These experiments are on-going in many federal district courts.

Concurrent with the implementation of the CJRA, the Judicial Conference of the United States undertook its own reform program.<sup>12</sup> On November 27, 1992, the Judicial Conference transmitted its proposed amendments to the Federal Rules of Civil Procedure to the Supreme Court.<sup>13</sup> The amendments included a major overhaul of Federal Rule of Civil Procedure 26 that gives district courts the option of requiring the mandatory disclosure of certain information prior to the commencement of formal discovery.<sup>14</sup> The Supreme Court transmitted the amendments to Congress without an endorsement.<sup>15</sup> The amended rules subsequently went into effect on December 1, 1993, when

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matters. A relatively few cases require massive and constant intervention; . . .

A few lawyers overwhelm their opponents with discovery. The problem exists almost exclusively in metropolitan areas . . .

Comments of Judge Barefoot Sanders, United States District for the Northern District of Texas (Dec. 2, 1991), quoted in Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 41 (1992).

<sup>8</sup>See, e.g., William E. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989); John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 (1989); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Marvin E. Frankel, *The Search for Truth: An Unpireal View*, 123 U. PA. L. REV. 1031 (1975); see also Frank F. Flegal, *Discovery Abuse: Causes, Effects, and Reform*, 3 REV. LITIG. 1, 2, 3 n.14, 4 (1982) (discussing the explosion of legal commentary on discovery abuse).

<sup>9</sup>Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089-98 (codified at 28 U.S.C. §§ 471-82 (Supp. II 1990)) [hereinafter CJRA].

<sup>10</sup>Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507, 508 (citing S. Rep. No. 416, 101st Cong., 2d Sess. 103 (1990)).

<sup>11</sup>28 U.S.C. § 473(a)(4) (Supp. II 1990).

<sup>12</sup>Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139 (1993).

<sup>13</sup>Transmittal letter from L. Ralph Mecham to the Supreme Court (Nov. 27, 1992), reprinted in ORDERS, AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 113 S. Ct. 475, 588 (1992).

<sup>14</sup>See FED. R. CIV. P. 26(a)(1).

<sup>15</sup>Transmittal letter from Chief Justice William H. Rehnquist to Rep. Thomas S. Foley (Apr. 22, 1993), reprinted in ORDERS, AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 113 S. Ct. 475, 477 (1992) (Scalia, Thomas, and Souter, J.J., dissenting).

Congress failed to act on them.<sup>16</sup> By its inaction, Congress has arguably placed the cart before the horse by implementing mandatory disclosure before the completion of the CJRA experiments with mandatory disclosure.

The objective of this note is to examine the CJRA experiments with mandatory disclosure and, based on that examination, to propose an alternative approach to the current trend of micromanaging case management through the Federal Rules of Civil Procedure. This note begins by defining mandatory disclosure and providing a brief account of its origin. Next, the Civil Justice Reform Act is described, followed by an examination of the various CJRA mandatory disclosure experiments conducted by district courts nationwide. The main portion of this note endeavors to apply some of the lessons learned in the CJRA context to the flawed approach taken by the Federal Rules of Civil Procedure. I propose that the micromanagement of federal judges through detailed, uniform case management rules should be abandoned. Instead, district courts should be provided greater discretion in devising case management rules which meet the unique needs of each district court. Finally, I propose that some district courts may find that a resource-differentiated approach to mandatory disclosure is an effective means of case management.

## II. MANDATORY DISCLOSURE

### A. General Definition of Mandatory Disclosure

Informal, voluntary exchanges of information have long been practiced by lawyers to avoid burdening judges<sup>17</sup> with discovery requests and to expedite an efficient exchange of information.<sup>18</sup> The growing lack of cooperation and loss of civility among lawyers in recent years, however, has resulted in the need for a more structured system of information exchanges in some courts. Thus, a formal system of mandatory disclosure has been adopted in some state<sup>19</sup> and federal courts.

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<sup>16</sup>Randall Samborn, *New Discovery Rules Take Effect*, NAT'L L.J., Dec. 6, 1993, at 39.

<sup>17</sup>For strategic reasons, lawyers usually avoid burdening judges with discovery request problems out of a fear of being viewed as uncooperative. See Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's The Barrister and the Bomb*, 69 B.U. L. REV. 649, 651 (1989).

<sup>18</sup>Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 797-98 (1991).

<sup>19</sup>Arizona, for example, adopted mandatory disclosure on July 1, 1992. ARIZ. R. CIV. P. 26.1. For an analysis of the Arizona rules, see generally *Symposium: Mandating Disclosure and Limiting Discovery: The 1992 Amendments to Arizona's Rules of Civil Procedure and Comparable Federal Proposals*, 25 ARIZ. ST. L.J. 1 (1993). Alaska has also adopted mandatory disclosure, and Illinois is considering a mandatory disclosure rule. Jill Schachner Chanen, *States Considering Discovery Reform—Alaska Next State to Adopt Early, Automatic Disclosure; Illinois May Follow Suit*, A.B.A. J., Apr. 1995, at 20. Arizona Supreme Court Justice Thomas Zlaket, who chaired the committee which drafted the

Mandatory disclosure, sometimes termed automatic disclosure,<sup>20</sup> is an approach to discovery requiring the voluntary disclosure of basic factual information by all parties at the commencement of litigation.<sup>21</sup> Mandatory disclosure usually includes a continuing duty to supplement earlier disclosures as new information becomes available.<sup>22</sup>

### *B. A Brief History of Discovery and Mandatory Disclosure*

Formal discovery in civil litigation is the pretrial process through which litigants may compel other litigants and third parties to disclose information relevant to issues in dispute.<sup>23</sup> Before the mid-nineteenth century, pretrial discovery did not exist in English or American legal systems.<sup>24</sup> Instead, the facts of a case were developed through an exchange of pleadings.<sup>25</sup> State courts in America led the way in liberalizing discovery with innovations such as depositions and interrogatories.<sup>26</sup> The modern age of civil litigation in the federal courts began with the merger of law and equity and the enactment of the Federal Rules of Civil Procedure in 1938.<sup>27</sup>

The Supreme Court, pursuant to the Rules Enabling Act of 1934,<sup>28</sup> appointed an Advisory Committee to promulgate procedural rules for a unified court

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Arizona mandatory disclosure rule, has stated that at least fifteen other states have inquired about Arizona's discovery rules. *Id.*

<sup>20</sup>See, e.g., Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 265-66 (1992); Bell et al., *supra* note 7, at 3. A report on the CJRA by the Litigation Section of the American Bar Association noted:

[D]isclosure is given many names, among them automatic disclosure, automatic pre-discovery disclosure and mandatory disclosure. As one attorney has aptly noted, the difference between automatic disclosure and mandatory disclosure is not dissimilar to the fine line between a necessary party and an indispensable party—the distinction is a gray area at best.

LITIGATION SECTION, AMERICAN BAR ASSOCIATION, REPORT OF THE TASK FORCE ON THE CIVIL JUSTICE REFORM ACT 25 (1992).

<sup>21</sup>Winter, *supra* note 20, at 265-66.

<sup>22</sup>*Id.*

<sup>23</sup>Wolfson, *supra* note 5, at 20 n.19.

<sup>24</sup>*Id.* at 21. For comprehensive discussions of early common law practice, see generally GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* (1932); Robert W. Millar, *The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure*, 32 ILL. L. REV. 424 (1937); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863 (1933).

<sup>25</sup>Wolfson, *supra* note 5, at 21.

<sup>26</sup>*Id.* at 25-26.

<sup>27</sup>*Id.* at 28.

<sup>28</sup>Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (1934).

system.<sup>29</sup> The Advisory Committee made its recommendations to the Supreme Court in late 1937, and the Court reported the proposed rules to Congress in January 1938.<sup>30</sup> Congress praised the new rules, which took effect on September 16, 1938.<sup>31</sup>

The federal rules established pretrial discovery procedures, consigning the pleadings to the role of mere notice devices.<sup>32</sup> The pretrial discovery procedures provided for depositions, interrogatories, document requests, requests for admissions, and physical and mental examinations—the basic discovery tools of the modern litigator.<sup>33</sup> The scope of discovery included all non-privileged information relevant to the subject matter of the case, which was defined broadly to include inadmissible evidence that could reasonably assist a party preparing for trial.<sup>34</sup> The Supreme Court reaffirmed its liberal approach to discovery a few years after enactment of the federal rules in *Hickman v. Taylor*<sup>35</sup> when it stated that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."<sup>36</sup> The Court has continued to advocate a liberal perspective toward discoverable information.<sup>37</sup>

The intent of the draftsmen of the original federal rules, which has been repeatedly echoed by the Supreme Court, was to eliminate the "sporting theory of justice"<sup>38</sup> by providing a "just, speedy and inexpensive determination of every action."<sup>39</sup> To carry out their intent, the drafters of the federal rules believed that civil discovery should result in "the location and disclosure of all the unprivileged evidentiary data that might prove useful in resolving a given

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<sup>29</sup>Wolfson, *supra* note 5, at 32-33; Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 326 (1991).

<sup>30</sup>Wolfson, *supra* note 5, at 33.

<sup>31</sup>*Id.* at 33-34.

<sup>32</sup>*Id.* at 34.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* (citing *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469 (2d Cir. 1943)).

<sup>35</sup>329 U.S. 495 (1947).

<sup>36</sup>*Id.* at 507.

<sup>37</sup>*See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 400-02 (1981) (explaining the substantial need and undue hardship standard for disclosure of attorney work-product).

<sup>38</sup>Schwarzer, *supra* note 8, at 703 (quoting Charles A. Wright, *Discovery*, 35 F.R.D. 39, 40 (1964)). The framers' intent was for a party's victory in a case to be based on all the facts, instead of going to the party who was best at manipulating the system. *Id.*; *see also* Janice Toran, *'Tis A Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 394 (1990) (describing the underlying philosophy of the original Federal Rules of Civil Procedure).

<sup>39</sup>*See* FED. R. CIV. P. 1.



dispute."<sup>40</sup> The noble intent of the framers of the original federal rules, however, have been undermined in modern times by discovery abuse problems.<sup>41</sup>

The recent inability of the federal rules to fulfill their original objective of providing a just, expedient, and efficient resolution of cases resulted in two amendments of the federal rules in the early 1980s geared to transform the role of the judge from a neutral, passive participant to that of an active case manager.<sup>42</sup> In 1980, Rule 26(f) was adopted, allowing judges to supervise discovery conferences.<sup>43</sup> The 1983 amendments to Rules 11, 16, and 26 mandated sanctions for frivolous litigation and discovery abuse while expanding judicial case management.<sup>44</sup> These changes, however, failed to rectify the perceived crisis in the civil justice system,<sup>45</sup> causing civil justice reform to become a political issue in the late 1980s.<sup>46</sup>

The suggestion of mandatory disclosure as a reform measure, which has been controversial from its beginning, can be traced back to a proposal by Judge Marvin E. Frankel.<sup>47</sup> Other mandatory disclosure proposals followed.<sup>48</sup> The

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<sup>40</sup>Brazil, *supra* note 8, at 1298-99; see JAMES W. MOORE & JOSEPH FRIEDMAN, 2 MOORE'S FEDERAL PRACTICE UNDER THE NEW FEDERAL RULES § 26.01, at 2441-45 (1938); Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737 (1939).

<sup>41</sup>Schwarzer, *supra* note 8, at 704.

<sup>42</sup>*Id.* The changes reflect a revolutionary cultural change in American civil justice. Having a civil justice system designed to preserve the judge as a neutral referee became illogical in modern times because about 95 percent of all civil cases filed in federal courts terminate without going to trial. *Id.* at 707-08. Negotiated settlements are preferred over trial judgments as a less expensive form of resolving disputes. Consequently, the premise of maintaining judicial neutrality through ignorance and impartiality was abandoned in favor of thrusting judges into the role of an aggressive pretrial manager who could encourage parties to settle their dispute without a trial. *Id.* at 706-09. But see Stephan Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFF. L. REV. 487, 525-28 (1980) (defending the adversarial system).

<sup>43</sup>Schwarzer, *supra* note 8, at 704.

<sup>44</sup>*Id.*

<sup>45</sup>Dudley, *supra* note 7, at 199-204.

<sup>46</sup>See Mullenix, *supra* note 7, at 385-88. All three branches of the federal government devised civil justice reform plans (all largely identical) in the late 1980s and early 1990s: Congress passed the Civil Justice Reform Act of 1990; the President's Council on Competitiveness issued its *Agenda for Civil Justice Reform in America* in August 1991; a Presidential Executive Order in October 1991 imposed reforms on executive branch departments and agencies; and the Judicial Conference developed its amendments to the Federal Rules of Civil Procedure which took effect December 1, 1993. *Id.*

<sup>47</sup>Marvin E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51 (1982); Frankel, *supra* note 8, at 1057-59; see Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975) (attacking Judge Frankel's

interest in mandatory disclosure spread steadily, culminating with its inclusion in the CJRA and the adoption of Rule 26(a)(1). Also, at least two state courts have adopted mandatory disclosure.<sup>49</sup>

### III. THE CIVIL JUSTICE REFORM ACT AND RULE 26

#### A. A Description of the Civil Justice Reform Act

The CJRA<sup>50</sup> provides for the most radical procedural changes in the civil justice system since the adoption of the Federal Rules of Civil Procedure in 1938.<sup>51</sup> As explained by Professor Linda S. Mullenix,

The Act mandates local, grassroots rulemaking by civilian advisory groups, a novel process that essentially circumvents the usual judicial advisory committee system for civil procedure rule reform that has been in place since 1938 . . . .

The central importance of the Civil Justice Reform Act is this: the Act has effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch.<sup>52</sup>

The CJRA effectively decentralized the rulemaking process by mandating that each federal district court adopt local rules.<sup>53</sup> Attorneys practicing civil

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proposal); H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067 (1975) (attacking Judge Frankel's proposal).

<sup>48</sup> See, e.g., Schwarzer, *supra* note 8, at 721-23; Brazil, *supra* note 8, at 1348-61.

<sup>49</sup> See *infra* note 19 (noting the adoption of mandatory disclosure by Arizona and Alaska).

<sup>50</sup> Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089-98 (codified at 28 U.S.C. §§ 471-82 (Supp. 1990)).

<sup>51</sup> Mullenix, *supra* note 7, at 377; see Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105, 105 (1991).

<sup>52</sup> Mullenix, *supra* note 7, at 377, 379. One goal of the legislation was "to achieve justice from the 'bottom up,' from the 'users' of the system." *Id.* at 385; see Peck, *supra* note 51, at 109-10.

<sup>53</sup> Mullenix, *supra* note 7, at 380; see generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992). Pursuant to FED. R. CIV. P. 83, however, district courts have always had the power to adopt local rules, provided they are adopted by a majority of the district judges and are not inconsistent with the federal rules. Furthermore, some judges issue standing orders. Rule 83 permits standing orders so long as they are not inconsistent with the federal rules or district court rules. See Notes of Advisory Committee on Rules, 1985 Amendment of the Federal Rules of Civil Procedure. A study by the Judicial Conference of the United States identified more than 5,000 local rules. See COMMITTEE ON RULES PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES OF CIVIL PRACTICE (1989). Some legal commentators have advocated reforms to make local rules uniform. See A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1585-95 (1991); Note, *Rule 83 and the Local*

litigation in federal courts now have to research the local rules of the district court where they bring their cases (or where they are brought or removed to).<sup>54</sup> Additionally, attorneys have to adapt to the regional nuances in the local rules which may widen<sup>55</sup> the disadvantage for out-of-district practitioners.<sup>56</sup>

The CJRA required all federal district courts to develop and implement civil justice expense and delay reduction plans by December 1993.<sup>57</sup> Section 472 of the CJRA required local advisory groups<sup>58</sup> to assess the state of their district court docket, to identify cost and delay problems, and to recommend an expense and delay reduction plan for the district court.<sup>59</sup> Section 473 states that the advisory groups were to "consider and may include" the following procedural devices to improve litigation management by reducing costs and delays: differential case management; setting early, firm trial dates; controlling the scope and timing of discovery; setting deadlines for disposition of motions; judicial management of complex cases; mandatory disclosure; and authorizing the use of alternative dispute resolution programs.<sup>60</sup>

Each district court devised its expense and delay reduction plan in consultation with the advisory group and each plan was reviewed by a two-person committee comprised of the chief judge of the district court and the chief judge of the district court's respective circuit court of appeals.<sup>61</sup> The CJRA also required all plans to be submitted to the Judicial Conference for review.<sup>62</sup> All ninety-four district courts have submitted their plans to the Administrative Office of the United States Courts and the Federal Judicial

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*Federal Rules*, 67 COLUM. L. REV. 1251 (1967); Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011.

<sup>54</sup>Mullenix, *supra* note 7, at 380-81; see also Tobias, *supra* note 53, at 1422-27 (discussing numerous consequences for litigants under the promulgation of varying local rules). Actually, it is a common, long-standing practice for litigators to familiarize themselves with the local district court rules and standing orders of judges before which they are to appear.

<sup>55</sup>In-district practitioners may already have advantages resulting from their local reputations and rapport with judges in their district.

<sup>56</sup>Tobias, *supra* note 53, at 1422-23.

<sup>57</sup>Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 103(b)(1), 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82 (Supp. II 1990)).

<sup>58</sup>Section 478 of the Act required the chief judge of each district court to select a "balanced" advisory group "representative of major categories of litigants in such court." *Id.* § 478.

<sup>59</sup>28 U.S.C. § 472 (Supp. II 1990).

<sup>60</sup>*Id.* § 473.

<sup>61</sup>*Id.* §§ 473-74.

<sup>62</sup>*Id.* § 474.

Center, which have acted as a clearinghouse for the plans.<sup>63</sup> The district court plans, which are to remain in effect for seven years from enactment of the CJRA, will remain effective until December 1, 1997.<sup>64</sup>

The CJRA also provided for experimentation through a Demonstration Program,<sup>65</sup> a Pilot Program,<sup>66</sup> and Early Implementation District Courts.<sup>67</sup> The mandatory disclosure provisions resulting from the Expense and Delay Reduction Plans of the thirty-four CJRA early implementation district courts are the focus of this note. Only twenty of the CJRA early implementation district courts<sup>68</sup> adopted mandatory disclosure provisions. The remaining fourteen courts experimented with other types of reform measures.

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<sup>63</sup>Telephone interview with Mark D. Shapiro, Attorney-Advisor for the Court Administration Division, Administrative Office of the United States Courts (Jan. 4, 1994); see 28 U.S.C. §§ 472(d), 479 (Supp. II 1990). Copies of all CJRA documents filed with the Administrative Office are available in WESTLAW, CJRA database (to obtain a list of all documents on the database, use the search term "civil").

Also, the directors of the Administrative Office of the United States Courts and the Federal Judicial Center are to assist the Judicial Conference in preparing a report to Congress and in devising a Manual for Litigation Management and Cost and Delay Reduction. *Id.* The report and manual will be based on the results of a RAND Corporation study of the CJRA which is currently underway. *Id.* The RAND Corporation study is using ten CJRA pilot courts as a study group, and ten comparable district courts as a control group. *Id.* The RAND Corporation study was due in mid-1995, and the Judicial Conference was supposed to issue its report by the end of 1995. *Id.* Congress, however, has extended the deadlines by one year. Judicial Amendments Act of 1994, Pub. L. No. 103-420, 108 Stat. 4343, 4345, § 4.

<sup>64</sup>Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 103(b)(2).

<sup>65</sup>Five district courts were designated by the Act as demonstration courts: Northern District of Ohio, Western District of Michigan, Northern District of California, Northern District of West Virginia, and the Western District of Missouri. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 104.

<sup>66</sup>Ten district courts were designated by the Judicial Conference as pilot courts: Southern District of California, District of Delaware, Northern District of Georgia, Southern District of New York, Western District of Oklahoma, Eastern District of Pennsylvania, Western District of Tennessee, Southern District of Texas, District of Utah, and the Eastern District of Wisconsin. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 105.

<sup>67</sup>Thirty-four district courts, which include the demonstration and pilot courts, became Early Implementation District Courts by submitting their plans by December 31, 1991. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 103(c).

<sup>68</sup>District of Alaska, Northern District of California, District of Delaware, Southern District of Florida, Northern District of Georgia, District of Idaho, Southern District of Illinois, Northern District of Indiana, District of Massachusetts, District of Montana, Eastern District of New York, Southern District of New York, Western District of Oklahoma, Eastern District of Pennsylvania, Eastern District of Texas, Southern District of Texas, District of the Virgin Islands, Northern District of West Virginia, Eastern District of Wisconsin, and the District of Wyoming.

*B. The New Federal Rule of Civil Procedure 26*

While the Civil Justice Reform Act was being implemented, the Judicial Conference of the United States proceeded with amending the Federal Rules of Civil Procedure.<sup>69</sup> The Advisory Committee stated its rationale for the amendment of Rule 26: "The information explosion of recent decades has greatly increased the potential costs of wide-ranging discovery and thus increased the potential for discovery to be used as an instrument for delay or oppression."<sup>70</sup> Despite overwhelming objections by lawyers,<sup>71</sup> the amended rules went into effect on December 1, 1993, pursuant to 28 U.S.C. § 2072, when Congress failed to act on them.<sup>72</sup> The amendments included changes to numerous Federal Rules of Civil Procedure, including the addition of a mandatory disclosure provision in Rule 26.

The Advisory Committee on Rules of Practice and Procedure of the Judicial Conference, chaired by Chief Judge Sam C. Pointer, Jr.,<sup>73</sup> developed its initial mandatory disclosure rule proposal in June of 1990.<sup>74</sup> The proposed rule was circulated for comment in August of 1991.<sup>75</sup> The mandatory disclosure proposal was intensely criticized at two public hearings,<sup>76</sup> and the Advisory Committee withdrew its initial mandatory disclosure proposal in the face of overwhelming opposition by practitioners.<sup>77</sup> The Advisory Committee stated that it was withdrawing the proposed amendment so that a future federal rule could benefit from the mandatory disclosure experiences of the district courts

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<sup>69</sup>See *supra* note 12 and accompanying text.

<sup>70</sup>COMMITTEE ON RULES OF PRACTICE & PROCEDURES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE, proposed Rule 26(b) (Aug. 1991), reprinted in 137 F.R.D. 53, 104 (1991) [hereinafter COMMITTEE ON RULES AUGUST 1991 DRAFT].

<sup>71</sup>See, e.g., Letter with an attached Memorandum from Dean Erwin N. Griswold, Jones, Day, Reavis & Pogue, to the Justices of the Supreme Court, app. C (Feb. 10, 1993) (on file with author) (listing 49 bar associations, business associations and government agencies, 66 corporations, and more than 150 law firms, individual attorneys and judges who filed formal comments in opposition to Rule 26(a)(1)). Associations, agencies and organizations listed in the Memorandum as in opposition to Rule 26(a)(1) include the American Bar Association Litigation Section, the American Civil Liberties Union, the American Corporate Counsel Association, the Association of Trial Lawyers, the U.S. Department of Justice, the NAACP, and various state bar associations. *Id.*

<sup>72</sup>Samborn, *supra* note 16, at 39-40.

<sup>73</sup>United States District Court for the Northern District of Alabama.

<sup>74</sup>Bell et al., *supra* note 7, at 3.

<sup>75</sup>D. Jeffrey Campbell & Jonathon R. Kuhlman, *Civil Justice Reform Act of 1990: An Experiment Gone Awry*, DEF. COUNS. J. 17, 17 (Jan. 1993).

<sup>76</sup>The hearings were in Los Angeles in November 1991 and Atlanta in February 1992. Campbell & Kuhlman, *supra* note 75, at 17.

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

under the CJRA.<sup>78</sup> In May 1992, however, the Advisory Committee reversed itself by approving a modified mandatory disclosure proposal,<sup>79</sup> which became the current Federal Rule of Civil Procedure 26(a)(1).<sup>80</sup>

Rule 26(a)(1)<sup>81</sup> is important to this discussion for two reasons. First, its drafting influenced the mandatory disclosure rules adopted by some early implementation district courts under the CJRA.<sup>82</sup> Second, it shows that when

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<sup>78</sup>Bell et al., *supra* note 7, at 34; Tobias, *supra* note 12, at 141.

<sup>79</sup>See JUDICIAL CONFERENCE OF THE UNITED STATES COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE (May 1992).

<sup>80</sup>Tobias, *supra* note 12, at 141-42. Judge Ralph K. Winter, Jr., persuaded the committee to reconsider the modified proposal. *Id.*; Winter, *supra* note 20, at 268-69.

<sup>81</sup>The new FED. R. CIV. P. 26(a)(1) states:

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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

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

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

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

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

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

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

<sup>82</sup>See, e.g., Campbell & Kuhlman, *supra* note 75, at 18-19 (noting that many CJRA mandatory disclosure provisions contain language similar to the preliminary draft of Rule 26).

district court judges are given discretion in whether to use a case management rule, many judges will opt out of the standard federal rule.<sup>83</sup>

The evolution of Rule 26(a)(1) influenced the construction of some of the mandatory disclosure rules adopted by district courts under the CJRA. For example, the August 1991 draft of Rule 26(a)(1) limited the scope of mandatory disclosure to information "likely to bear significantly on any claim or defense."<sup>84</sup> Many of the CJRA early implementation district courts use similar language in defining the scope of their mandatory disclosure programs.<sup>85</sup> The "likely to bear significantly" language, which was heavily criticized as ambiguous, was one reason why the Advisory Committee withdrew its initial proposal.<sup>86</sup> The Advisory Committee redefined the scope of discoverable information from the "likely to bear significantly" language to that information "relevant to disputed facts alleged with particularity in the pleadings."<sup>87</sup> The Advisory Committee's objective in modifying the standard was to even "an uneven playing field favoring the plaintiffs in disclosure by requiring the parties to 'trigger disclosure by pleading nonconclusionary facts. Where facts are sparsely pleaded, as is often the situation in product liability cases, little disclosure will be required.'"<sup>88</sup> How many of the district courts will adopt this standard remains an open question.

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<sup>83</sup> See *infra* text accompanying notes 90-91.

<sup>84</sup> See COMMITTEE ON RULES AUGUST 1991 DRAFT, *supra* note 70, at proposed Rule 26(a)(1).

<sup>85</sup> See, e.g., United States District Court for the District of Delaware, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3 (Dec. 23, 1991) [hereinafter District of Delaware Plan]; United States District Court for the Southern District of Illinois, CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN 11 (Dec. 27, 1991) [hereinafter Southern District of Illinois Plan]; United States District Court for the Eastern District of New York, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 4 (Dec. 17, 1991) [hereinafter Eastern District of New York Plan]; United States District Court for the Eastern District of Texas, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 2-3 (Dec. 31, 1991) [hereinafter Eastern District of Texas Plan].

<sup>86</sup> Bell et al., *supra* note 7, at 34; Tobias, *supra* note 12, at 141-42; Winter, *supra* note 20, at 266-69.

<sup>87</sup> Bell et al., *supra* note 7, at 34; Tobias, *supra* note 12, at 141-42; Winter, *supra* note 20, at 266-69. Compare FED. R. CIV. P. 26(a)(1) with COMMITTEE ON RULES AUGUST 1991 DRAFT, *supra* note 70, at proposed Rule 26(a)(1). But see Memorandum to the Chief Justice of the United States and the Associate Justice of the Supreme Court: Comments on Proposed "Disclosure" Amendment to Federal Rule of Civil Procedure 26(a)(1) from Erwin N. Griswold et al. 14-15 (Feb. 10, 1993) (criticizing the "relevant to disputed facts alleged with particularity in the pleadings" as a broad definition which will lead to increased satellite litigation to clarify disclosure obligations).

<sup>88</sup> Bell et al., *supra* note 7, at 36 n.137 (quoting a letter from Circuit Judge Ralph K. Winter to District Chief Judge Sam C. Pointer, Jr., Chairman of the Advisory Committee (Apr. 8, 1992) (on file with the Advisory Committee)). The letter was signed by six of the fourteen Advisory Committee members.

District courts can opt out of Rule 26(a)(1) by issuing standing orders setting forth their own mandatory disclosure rules, by limiting the application of the rule to certain types of cases, or by completely proscribing its use.<sup>89</sup> The Federal Judicial Center is tracking the actions taken by the 94 federal district courts in response to the new Rule 26(a)(1). As of March 24, 1995, the Federal Judicial Center found that 94 United States District Courts, Rule 26(a)(1) was in effect in 45 courts, and it was not in effect in 49 courts.<sup>90</sup> Six of the district courts with Rule 26(a)(1) in effect are using it with a significant revision.<sup>91</sup> Of the 49 district courts where it is not in effect, 5 courts have their own variation of mandatory disclosure through the CJRA or by local rule; 15 courts permit their judges to use mandatory disclosure in specific cases; and, 1 court has mandatory disclosure in effect for limited types of cases.<sup>92</sup> Thus, 21 of the 49 district courts without Rule 26(A)(1) in effect may still use mandatory disclosure by order of the judge or through local rules. In summary the Federal Judicial Center found,

[C]ompared to a year ago, the number of courts requiring initial disclosure has increased somewhat, including an increase in the number of large courts requiring initial disclosure. There is also greater stability in the Rule 26 picture now, in the sense that most courts have reached a decision regarding implementation of the rule. As more experience is gained with the rule, this picture may, of course, change.<sup>93</sup>

The Federal Judicial Center's findings must be cautiously considered because Rule 26(a)(1) is still relatively new. The survey results show, however, that a significant number of district courts are either entirely opting out of the federal rule or are opting in favor of their own mandatory disclosure provision.

#### IV. THE CJRA EARLY IMPLEMENTATION DISTRICT COURT EXPERIMENTS WITH MANDATORY DISCLOSURE

The CJRA permitted each district court to address its own unique problems, if any were found to exist, by tailoring individualized solutions.<sup>94</sup> The experiments with mandatory disclosure by twenty of the CJRA early

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<sup>89</sup> See, e.g., United States District Court for the Southern District of New York, ORDER IN RE LOCAL RULES OF CIVIL PROCEDURE (Dec. 1, 1993) (standing order that Rule 26(a)(1) will have no effect until further notice).

<sup>90</sup> Memorandum from Donna Stienstra, *Research Division of the Federal Judicial Center*, to Those With an Interest in the Federal District Courts' Response to Amended Federal Rule of Civil Procedure 26, 4-5 (Mar. 24, 1995) (on file with author).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 5.

<sup>93</sup> *Id.* at 6.

<sup>94</sup> Peck, *supra* note 51, at 109-10.



implementation district courts exemplify how diverse the district courts can be in developing local rules.

### *A. Variations in the Scope of Discoverable Information*

More than half of the CJRA early implementation district courts with mandatory disclosure define the scope of disclosure as information "likely to bear significantly on any claim or defense."<sup>95</sup> Other CJRA early implementation districts have widely dissimilar standards regarding the scope of their mandated disclosures.<sup>96</sup> The new Rule 26(a)(1) modified its definition of the

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<sup>95</sup>See District of Delaware Plan, *supra* note 85, at 3; United States District and Bankruptcy Court for the District of Idaho, THE CIVIL JUSTICE REFORM ACT OF 1990 EXPENSE AND DELAY REDUCTION PLAN 10 (Dec. 19, 1991) [hereinafter District of Idaho Plan]; Southern District of Illinois Plan, *supra* note 85, at 11; United States District Court for the Northern District of Indiana, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 29, app. B (Dec. 20, 1991) (Judge Miller's experimental program) [hereinafter Northern District of Indiana, Judge Miller's Plan]; Eastern District of New York Plan, *supra* note 85, at 4; United States District Court for the Western District of Oklahoma, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 11 (Dec. 31, 1991) [hereinafter Western District of Oklahoma Plan]; United States District Court for the Eastern District of Pennsylvania, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 13 (Dec. 31, 1991) [hereinafter Eastern District of Pennsylvania]; Eastern District of Texas Plan, *supra* note 85, at 2-3; United States District Court for the Southern District of Texas, Standing Order for Accelerated Discovery § 1.B (adopted Oct. 24, 1991), *reprinted in* Texas Rules of Court—Federal—1993 (West 1993) [hereinafter Southern District of Texas Plan]; United States District Court for the Virgin Islands, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 37 (Dec. 23, 1991) [hereinafter District of the Virgin Islands Plan]; Report of the Advisory Group, United States District Court for the Northern District of West Virginia 78 (1991) [hereinafter Northern District of West Virginia Advisory Group Report]; United States District Court for the District of Wyoming, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 12 (Dec. 31, 1991) [hereinafter District of Wyoming Plan].

<sup>96</sup>*Compare* United States District Court for the District of Montana, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN AND RELATED AMENDMENTS TO THE RULES OF PROCEDURE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, Rule 200-5 (Apr. 1, 1992) [hereinafter District of Montana Plan] (using a "reasonably likely to bear on the claims or defenses" standard) *with* United States Court for the Northern District of California, AMENDED GENERAL ORDER NO. 34, CASE MANAGEMENT PILOT PROGRAM, § VII.B (July 1, 1993) [hereinafter Northern District of California Plan] (requiring identification of persons "known to have discoverable information about factual matters relevant to the case" and reasonably available unprivileged documents "that tend to support the positions that the disclosing party has taken or is reasonably likely to take in the case") *and* United States District Court for the Northern District of Indiana, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 30-31, app. D (Dec. 20, 1991) (Judge Rodovich's experimental program) [hereinafter Northern District of Indiana, Judge Rodovich's Plan] (requiring identification of persons believed to have "information relating to the allegations contained in the complaint") *and* United States District Court for the Southern District of New York, GUIDE TO THE SOUTHERN DISTRICT OF NEW YORK CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 11 (Jan. 1993) [hereinafter Southern District of New York Plan] (requiring the exchange of "all documents relevant to the subject matter of the answer" and defining a document as relevant "if it either (1) supports the material averments of the pleading or (2) contradicts or otherwise makes less probable the material averments of the pleading").

scope to include information "relevant to disputed facts alleged with particularity in the pleadings."<sup>97</sup> Not all district courts, however, follow the Rule 26(a)(1) standard.<sup>98</sup>

Additionally, some CJRA plans<sup>99</sup> require the identification of legal issues and supporting legal authority; these requirements are problematic in that they may result in the inadvertent disclosure of the mental impressions and work product of attorneys.<sup>100</sup> A common criticism of mandatory disclosure is that it impinges on the privileges that protect the attorney-client relationship.<sup>101</sup> Indeed, Judge Frankel's proposal preferred disclosure of relevant evidence over preservation of the privileges.<sup>102</sup> More recent mandatory disclosure proposals,<sup>103</sup> including Rule 26(b)(1), leave intact the attorney-client privilege.<sup>104</sup>

### *B. Variations in the Extent of Required Disclosure*

The early implementation district plans also differ in the extent of their mandated disclosures. For instance, some districts only require a description of relevant<sup>105</sup> core information,<sup>106</sup> while other districts require production of

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<sup>97</sup>The Advisory Committee took this definition from FED. R. CIV. P. 9(b), which governs the special pleading requirements for "averments of fraud or mistake." Winter, *supra* note 20, at 268-69; see FED. R. CIV. P. 9(b). The District of Massachusetts Plan also defines the scope of discoverable information using the "relevant to disputed facts alleged with particularity in the pleadings" standard. D. MASS. R. 26.2.

<sup>98</sup>See sources cited *supra* note 96.

<sup>99</sup>N.D. GA. R. 201-2; United States District Court for the Northern District of Indiana, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, app. A (Dec. 20, 1991) (experimental program of Judges Lee and Cosbey) [hereinafter Northern District of Indiana, Plan of Judges Lee & Cosbey]; E.D. Wis. R. 7.07.

<sup>100</sup>See District of Montana Plan, *supra* note 96, at 16 (requiring the disclosure of the legal theory supporting each claim or defense and requiring attorneys to summarize the information believed to be held by identified persons); N.D. GA. R. 201-2 (requiring disclosure of a succinct statement of the legal issues in the case; all applicable statutes, codes, regulations, legal principles, standards and customs or usages, and caselaw; pending or previously adjudicated related cases; and a detailed outline of expected discovery); Northern District of Indiana, Plan of Judges Lee & Cosbey, *supra* note 99, at 28-29, app. A (requiring disclosure of the supporting legal authority for each cause of action and/or defense).

<sup>101</sup>See Bell et al., *supra* note 7, at 46-48; Campbell & Kuhlman, *supra* note 75, at 20.

<sup>102</sup>Frankel, *supra* note 47, at 52.

<sup>103</sup>See Schwarzer, *supra* note 8, at 721 n.58; Brazil, *supra* note 8, at 1351 (noting, however, that the attorney-client privilege may need to be narrowed).

<sup>104</sup>I am in favor of protecting the attorney-client privilege in connection with mandatory disclosure. See Proposal *infra* part V.B.3.a.

<sup>105</sup>In this section, the generic term "relevant" is used to describe responsive information since the scope of disclosure varies from court plan to court plan.

all relevant documents known to the attorneys.<sup>107</sup> The extent of mandated disclosure in the early implementation district plans can be categorized as core information disclosure plans, automatic document production plans, or as plans that provide litigants the option to exchange either disclosure statements or documents.

### 1. Core Information Disclosure Plans

Core information disclosure plans mandate the disclosure of basic factual information in one of two ways: exchange of statements disclosing certain types of information, or exchange of court-constructed interrogatories.

#### *a. Disclosure Statement Programs*

Ten of the early implementation districts are experimenting with rules that require each party to serve upon the opposing party a disclosure statement that provides three basic types of information: (1) identification of persons known to have information or knowledge relevant to the litigation; (2) a general description of and the location of all documents relevant to the litigation; and (3) the existence and content of insurance agreements relevant to the litigation.<sup>108</sup> Additionally, the District of Delaware, the District of Montana, the Eastern District of New York, and the Western District of Oklahoma require the

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<sup>106</sup>See, e.g., District of Delaware Plan, *supra* note 85, at 3; Southern District of Illinois Plan, *supra* note 85, at 11-12; District of Montana Plan, *supra* note 96, at 16-17; Eastern District of New York Plan, *supra* note 85, at 4; Western District of Oklahoma Plan, *supra* note 95, at 11-12; Eastern District of Pennsylvania Plan, *supra* note 95, at 13.

<sup>107</sup>See Northern District of California Plan, *supra* note 96, § VII.B.2; Civil Justice Advisory Group for the Southern District of Florida, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION REPORT AND PLAN 36 (1991) [hereinafter Southern District of Florida Plan]; Southern District of New York Plan, *supra* note 96, at 11.

<sup>108</sup>See District of Delaware Plan, *supra* note 85, at 3; Southern District of Illinois Plan, *supra* note 85, at 11-12; District of Montana Plan, *supra* note 96, at 16-17; Eastern District of New York Plan, *supra* note 85, at 4; Western District of Oklahoma Plan, *supra* note 95, at 11-12; Eastern District of Pennsylvania Plan, *supra* note 95, at 13; Northern District of West Virginia Advisory Group Report, *supra* note 95, at 83; District of the Virgin Islands Plan, *supra* note 95, at 37. The experimental program of Judges Moody and Lozano require a joint report disclosing witnesses, damages computations, insurance coverage, medical and employment records and authorization to obtain such records, and expert witness opinions. United States District Court for the Northern District of Indiana, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 30, app. C (Dec. 20, 1991) (experimental program of Judges Moody & Lozano). The disclosure mechanism for the District of Alaska is called a Form Preliminary Pre-Trial Order and it requires disclosure of known witnesses, location of relevant records, and identification of experts and expert records. United States District Court for the District of Alaska, CIVIL JUSTICE EXPENSE & DELAY REDUCTION PLAN § II.B (Dec. 13, 1991) [hereinafter District of Alaska Plan]. The Western District of Oklahoma does not require identification of persons. See Western District of Oklahoma Plan, *supra* note 95, at 11-12.

disclosure of additional basic information through mandatory disclosure statements.<sup>109</sup>

### *b. Interrogatory Programs*

Three of the early implementation districts use interrogatories drafted by the court as a means of requiring litigants to disclose core factual information about the case.<sup>110</sup> The experimental program of Judges Lee and Cosbey utilized both court-constructed interrogatories and production of all relevant documents.<sup>111</sup> In their court-constructed interrogatories, the Northern District of Georgia and the Eastern District of Wisconsin mandate identification of known witnesses, location of relevant documents, and disclosure of insurance agreements.<sup>112</sup> The exact scope of disclosure under these rules can vary from question to question and the courts usually frame the interrogatories in a very narrow manner.<sup>113</sup>

The effectiveness of court-constructed interrogatories has been questioned. First, standardized interrogatories are of limited effectiveness since the questions asked are not fact specific.<sup>114</sup> Second, interrogatories often are ineffective in eliciting useful information from crafty lawyers bent on being uncooperative.<sup>115</sup> On the other hand, lawyers may be wary about evading questions or objecting to questions drafted by the court itself.

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<sup>109</sup>See District of Delaware Plan, *supra* note 85, at 3 (requiring the additional disclosure of persons interviewed in connection with the litigation and the interviewers as well as identification of retained expert witnesses); District of Montana Plan, *supra* note 96, at 16-17 (requiring the additional disclosure of the factual basis of every claim or defense, the legal theory supporting each claim or defense, a summary of what information believed to be held by identified persons, and a computation of any damages claimed); Eastern District of New York Plan, *supra* note 85, at 4 (requiring both authorization to obtain medical, hospital, no-fault and worker's compensation records and exchange of the documents relied on by parties in preparing the pleadings or to be used to support allegations); Western District of Oklahoma Plan, *supra* note 95, at 11-12 (requiring the additional disclosure of (1) expert witnesses together with the expert's qualifications, a statement of the experts expected testimony, and a summary of the grounds for the expert's opinion and (2) a log listing all privileged documents).

<sup>110</sup>See, e.g., N.D. GA. R. 201-2; Northern District of Indiana, Plan of Judges Lee & Cosbey, *supra* note 99, at app. A; E.D. Wis. R. 7.07.

<sup>111</sup>Northern District of Indiana, Plan of Judges Lee & Cosbey, *supra* note 99, at app. A.

<sup>112</sup>N.D. GA. R. 201-2; E.D. Wis. R. 7.07.

<sup>113</sup>For example, the Northern District of Georgia Plan states: "Describe or produce for inspection (see FRCP 33(c)) each document in your custody or control or of which you have knowledge which you contend supports your claim or claims." N.D. GA. R. 201-2.

<sup>114</sup>Cf. Jeffrey J. Mayer, *Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of Civil Procedure*, 12 REV. LITIG. 77, 126-27 (1992) (discussing the limited effectiveness of standard, court-constructed interrogatories).

<sup>115</sup>Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 158 (1991); Lawrence M. Frankel, *Disclosure in the Federal*

In addition to requiring basic information, the Northern District of Georgia requires disclosure of the precise classification of the cause of action being filed with a brief factual outline of the case; a succinct statement of the legal issues in the case; identification of all applicable statutes, codes, regulations, legal principles, standards and customs or usages, and caselaw; disclosure of pending or previously adjudicated related cases; and a detailed outline of expected discovery.<sup>116</sup> The Eastern District of Wisconsin requires the additional disclosure by defendants of the defendant's correct identification if the defendant is improperly identified.<sup>117</sup> The interrogatories of Judges Lee and Cosbey in the Northern District of Indiana require the additional disclosure of the legal authority supporting each cause of action and/or defense.<sup>118</sup>

## 2. Automatic Document Production Plans

Rather than just mandating disclosure of the existence and location of documents, document disclosure plans require the automatic production of all relevant documents.<sup>119</sup> Four of the early implementation districts require automatic production of all relevant documents.<sup>120</sup> These districts also use dis-

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*Courts: A Cure for Discovery Ills?*, 25 ARIZ. ST. L.J. 249, 273-74 (1993). Professor Mengler noted that Magistrate Judge Wayne Brazil "has recounted that many litigants and judges regard interrogatories as 'useless because any lawyer who can't answer interrogatories without giving [an] opponent useful information is not worth his salt.'" Mengler, *supra*, at 158 (quoting Wayne D. Brazil, *View from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, AM. B. FOUND. RES. J. 219, 233 (1980)).

<sup>116</sup>N.D. GA. R. 201-2.

<sup>117</sup>E.D. WIS. R. 7.07.

<sup>118</sup>Northern District of Indiana, Plan of Judges Lee & Cosbey, *supra* note 99, at app. A.

<sup>119</sup>See, e.g., Northern District of California Plan, *supra* note 96, § VII.B.2 (requiring disclosure of "[a]ll unprivileged documents in the party's custody or control that are then reasonably available that tend to support the positions that the disclosing party has taken or is reasonably likely to take in the case"); Southern District of New York Plan, *supra* note 96, at 11 (in designated cases the court may mandate, within twenty-one days of such designation, service on the opposing party of "all documents relevant to the subject matter" of the complaint or answer).

<sup>120</sup>Northern District of California Plan, *supra* note 96, § VII.B.2; Southern District of Florida Plan, *supra* note 107, at 36; Northern District of Indiana, Plan of Judges Lee & Cosbey, *supra* note 99, at app. A (requiring response to court constructed interrogatories and production of "[a]ll documents, records, writings and things which show or tend to show any fact pertaining to any claims or defenses you are asserting"); Southern District of New York Plan, *supra* note 96, at 11 (using automatic document production in expedited cases). *But see* Southern District of Florida Plan, *supra* note 107, at 36-37 (acknowledging that "it is our experience that lawyers in this District routinely ignore the voluntary exchange requirements of Local Rule 14 unless specifically ordered by the Court in either a scheduling order or at a scheduling conference").

closure statements for party identification of persons known to have information relevant to the case.<sup>121</sup>

### 3. Early Implementation District Plans with Optional Means of Disclosure

Four of the early implementation districts and the new Federal Rule of Civil Procedure 26(a)(1) use disclosure statements but allow parties the option of producing documents rather than just disclosing the existence and location of the documents.<sup>122</sup> All of these plans require the parties to exchange a copy of, or a description by category and location of, all documents relevant to the litigation; the disclosure of the identity of persons known to have information or knowledge relevant to the litigation; and the disclosure of the content of insurance agreements relevant to the litigation.<sup>123</sup>

The District of Massachusetts, the Southern District of Texas, Judge Miller's program in the Northern District of Indiana, and Rule 26(a)(1) also require parties to provide a computation of damages.<sup>124</sup>

#### *C. Variations in the Duty Placed on Parties and Counsel*

The early implementation districts also place varying duties on parties and counsel for ensuring good faith compliance with their mandatory disclosure rules. Many of the districts, such as the Northern District of California, require each disclosure to be

[s]igned by at least one attorney of record whose signature constitutes a certification that, to the best of his or her knowledge, information, and belief, formed after an inquiry that is reasonable under the circumstances, the disclosure or supplementation is complete and correct as of the time it is made.<sup>125</sup>

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<sup>121</sup>See, e.g., Northern District of California Plan, *supra* note 96, § VII.B.2; Southern District of Florida Plan, *supra* note 107, at 36; Northern District of Indiana, Plan of Judges Lee & Cosbey, *supra* note 99, at app. I.

<sup>122</sup>District of Idaho Plan, *supra* note 95, at 10; Northern District of Indiana, Judge Miller's Plan, *supra* note 95, at 29, app. B; D. MASS. R. 26.2; Southern District of Texas Plan, *supra* note 95, § 1.B.

<sup>123</sup>See sources cited *supra* note 122.

<sup>124</sup>Northern District of Indiana, Judge Miller's Plan, *supra* note 95, at 29, app. B; D. MASS. R. 26.1; Southern District of Texas Plan, *supra* note 95, § 1.B. The Northern District of Indiana and FED. R. CIV. P. 26(a)(1) also require the parties to make available the underlying documents supporting the damages claimed.

<sup>125</sup>Northern District of California Plan, *supra* note 96, § VII.B.2; see also District of Montana Plan, *supra* note 96, at 32; Western District of Oklahoma Plan, *supra* note 95, at 12; Eastern District of Pennsylvania Plan, *supra* note 95, at 14; Northern District of West Virginia Advisory Group Report, *supra* note 95, at 88.

Other districts require every disclosure and supplement to be signed by an attorney of record or by the party if unrepresented. The signature

[c]onstitutes a certification under, and is consequently governed by, the provisions of the Federal Rules of Civil Procedure, and, in addition, constitutes a certification that the signer has read the disclosure, and to the best of signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete as of the time it was made.<sup>126</sup>

A few of the early implementation districts tie the duty of disclosure to the sanction provisions of the federal rules, specifically Rules 11 and 37.<sup>127</sup>

The Eastern District of Wisconsin's plan requires that,

[i]f, after the exercise of reasonable diligence, a party is unable to answer fully a mandatory interrogatory, the party is required to provide the information currently known or available to the party and to explain why the party cannot answer fully, to state what must be done in order for the party to be in a position to answer fully, and to estimate when the party will be in that position.<sup>128</sup>

Several of the early implementation districts require only that the mandatory disclosures be signed by the party or its counsel.<sup>129</sup> Finally, some districts, such as the Southern District of New York, do not discuss the compliance duty of the attorneys or parties.<sup>130</sup>

#### *D. Other Noteworthy Differences Between the Early Implementation Districts*

##### **1. Timing**

One striking difference among the various early implementation district plans is the timing of the mandatory disclosures. Depending on the plan, timing of the mandatory disclosures may be tied to the date when the complaint or answer is filed, when a party appears in the action, the date of the scheduling conference, or a date set by the court.

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<sup>126</sup>Southern District of Illinois Plan, *supra* note 85, at 13.

<sup>127</sup>N.D. GA. R. 201-2; Eastern District of New York Plan, *supra* note 85, at 5; Eastern District of Texas Plan, *supra*, note 85, at 5.

<sup>128</sup>E.D. Wis. R. 7.07(c)(1).

<sup>129</sup>*See, e.g.*, Northern District of Indiana, Plan of Judges Lee and Cosbey, *supra* note 99, at app. A (requiring their court constructed interrogatories to be signed by the party); Southern District of Texas Plan, *supra* note 95, § 4 (requiring the disclosures "shall be made in writing and signed by the party or counsel").

<sup>130</sup>Southern District of New York Plan, *supra* note 96, at 11; *see also* District of Idaho Plan, *supra* note 95, at 10-11 (placing no specific duty on attorneys or counsel with regard to their initial disclosure requirements); D. MASS. R. 26.2 (placing no duty on the attorneys or parties for their automatic document disclosure rule).

Two of the early implementation districts require parties to serve each other with their initial mandatory disclosures within ninety days of the filing of the complaint, regardless of whether the defendant has filed an answer to the complaint.<sup>131</sup> Some of the early implementation districts require mandatory disclosures within thirty days after the defendant answers the complaint.<sup>132</sup> The Eastern District of Wisconsin requires the plaintiff to file its mandatory interrogatories within thirty days of being served with an answer to its complaint, and each defendant is given thirty days after being served with the plaintiff's mandatory interrogatories.<sup>133</sup> Two of the early implementation districts require each party to file its disclosure with its initial pleading.<sup>134</sup> A few of the early implementation districts and Rule 26(a)(1) structure the timing of disclosure around a discovery scheduling conference.<sup>135</sup> In other early implementation districts the court issues an order scheduling the timing of the mandatory disclosure.<sup>136</sup>

## 2. Restrictions on Discovery and Supplementation of Disclosures

Some of the early implementation districts forbid additional discovery until the disclosure is made.<sup>137</sup> Additionally, most of the early implementation

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<sup>131</sup>Northern District of California Plan, *supra* note 96, § VII.A; Southern District of Florida Plan, *supra* note 107, at 36.

<sup>132</sup>*See, e.g.*, Northern District of Indiana, Judge Miller's Plan, *supra* note 95, at 29, app. B; Eastern District of Pennsylvania Plan, *supra* note 95, at 13; Eastern District of New York Plan, *supra* note 85, at 4; Eastern District of Texas Plan, *supra* note 85, at 2-3; Southern District of Texas Plan, *supra* note 95, § I.D; District of the Virgin Islands Plan, *supra* note 95, at 37; *see also* Southern District of Illinois Plan, *supra* note 85, at 12 (requiring the disclosures to be made within 20 days of the defendant's appearance in the action).

<sup>133</sup>E.D. Wis. R. 7.07.

<sup>134</sup>District of Delaware Plan, *supra* note 85, at 3; N.D. GA. R. 201-2; *see also* District of Idaho Plan, *supra* note 95, at 10 (requiring the plaintiff to make its disclosure within 30 days after service of the complaint and requiring the defendant to make its disclosure within 30 days after service of its answer to the complaint).

Opponents of mandatory disclosure argue that mandating disclosure of information at the beginning of a case is inherently flawed because crafty litigators attempt to be vague in their pleadings. *See* Bell et al., *supra* note 7, at 42-43; Campbell & Kuhlman, *supra* note 75, at 22. If, however, a complaint or answer is too vague to provide a disclosure response, a party may always file a Rule 12(e) Motion for More Definite Statement.

<sup>135</sup>*See* District of Montana Plan, *supra* note 96, at 16-17; Western District of Oklahoma Plan, *supra* note 95, at 11-12.

<sup>136</sup>*See, e.g.*, United States District Court for the Northern District of Indiana, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, 28-31, apps. A, B, C, & D (Dec. 20, 1991) (experimental programs of Judges Lee and Cosbey, Moody and Lozano, and Rodovich); Southern District of New York Plan, *supra* note 96, at 11.

<sup>137</sup>Southern District of Illinois Plan, *supra* note 85, at 12; Northern District of Indiana, Judge Miller's Plan, *supra* note 95, at 29, app. B; D. MASS. R. 26.2; District of Montana Plan, *supra* note 96, at 17; Eastern District of Pennsylvania Plan, *supra* note 95, at 14.



districts require the mandatory disclosures to be supplemented on a continuing basis throughout the action.<sup>138</sup> Other districts, such as the Southern District of New York, use mandatory disclosure only as an initial discovery mechanism.<sup>139</sup>

### 3. Restrictions on the Use of Mandatory Disclosure

Some of the early implementation districts limit their experiment with mandatory disclosure to certain classifications of cases. The District of Delaware restricts the use of mandatory disclosure to personal injury, medical malpractice, employment discrimination, and civil RICO cases; the court did not explain why it limited mandatory disclosure to these cases.<sup>140</sup> The Southern District of Texas is limiting its experiment with mandatory disclosure to a minimum of twenty cases for at least one year.<sup>141</sup> The Eastern District of Wisconsin, which uses mandatory disclosure only for cases that have relatively complex discovery needs, exempted the following types of cases from the mandatory disclosure program: reviews of administrative proceedings, habeas corpus cases, collection cases, pro se prisoner litigation, cases in which the only relief sought is an order forcing arbitration, and very simple cases.<sup>142</sup> The Southern District of Illinois and the Eastern District of Pennsylvania permit judges the discretion to exclude any case from the mandatory disclosure requirements.<sup>143</sup>

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<sup>138</sup>See, e.g., Northern District of California Plan, *supra* note 96, § VII.E; Southern District of Illinois Plan, *supra* note 85, at 12-13; Eastern District of Texas Plan, *supra* note 85, at 5.

<sup>139</sup>Southern District of New York Plan, *supra* note 96, at 11; *see also* District of Delaware Plan, *supra* note 85, at 2-3; District of Idaho Plan, *supra* note 95, at 10-11.

<sup>140</sup>District of Delaware Plan, *supra* note 85, at 2-3; United States District Court for the District of Delaware, Final Report from the Advisory Group Appointed Pursuant to the Civil Justice Reform Act of 1990, § 11.E.2(d) (Oct. 1, 1991).

<sup>141</sup>United States District Court for the Southern District of Texas, Cost and Delay Reduction Plan Under the Civil Justice Reform Act of 1990, 5 (Oct. 24, 1991); Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing A Cost and Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 REV. LITIG. 165, 188-89 (1992).

<sup>142</sup>E.D. Wis. R. 7.07(e) (defining simple cases as requiring no more than three depositions, no more than fifteen interrogatories, discovery completed within nine months, and requiring no more than twenty hours of trial time); *see also* Eastern District of New York Plan, *supra* note 85, at 4 (excluding social security, habeas corpus, pro se cases, and certain civil rights cases); Southern District of New York Plan, *supra* note 96, at 2, 11 (using automatic document disclosure in cases designated as "expedited" because of their "relative simplicity").

<sup>143</sup>Southern District of Illinois Plan, *supra* note 85, at 11; Eastern District of Pennsylvania Plan, *supra* note 95, at 13.

*E. Litigation Involving CJRA Mandatory Disclosure*

The various CJRA mandatory disclosure provisions have resulted in a number of reported cases involving disputes over compliance with disclosure requirements.<sup>144</sup> Initially, some disputes over mandatory disclosure must be expected since it is a major departure from our traditional adversarial system.

Judge Robert L. Miller, Jr.,<sup>145</sup> has had to resolve mandatory disclosure disputes during his CJRA experiment. In a patent infringement case, *Paradigm Sales, Inc. v. Weber Marking Systems, Inc.*,<sup>146</sup> the plaintiff challenged the defendant's narrow construction of Judge Miller's disclosure rule. The defendant, construing the rule as only requiring disclosure of information bearing significantly on its own claims and defenses, claimed that the "only developed defense at this time is the defense of noninfringement."<sup>147</sup> Judge Miller stated that his "order cannot be construed to require a party to disclose information concerning unpleaded claims and defenses."<sup>148</sup> Judge Miller denied as premature the plaintiff's motion for exclusion of evidence, to compel evidence, and for sanctions.<sup>149</sup> But, Judge Miller also stated, "If full disclosure has been made on the noninfringement defense and Paradigm suspects Weber is holding back other defenses for tactical purposes, Paradigm may object on that ground to any motion to amend the pleadings."<sup>150</sup>

In *Hunter v. Surgitek/Medical Engineering Corp.*,<sup>151</sup> the plaintiffs obtained the mandatory disclosure from the defendants pursuant to Judge Miller's CJRA mandatory disclosure rule.<sup>152</sup> The plaintiffs, without providing their own disclosures, then sought to dismiss the case without prejudice so they could refile in a state court which did not use mandatory disclosure.<sup>153</sup> The defendants, opposing the dismissal, argued they would have been unduly prejudiced because the plaintiffs had an unfair tactical advantage due to their

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<sup>144</sup>See, e.g., *Clarke v. Mellon Bank*, 1993 WL 170950 (E.D. Pa. 1993) (concerning a dispute over the disclosures required by an informal agreement negotiated by the parties under the court's CJRA plan); *Japan Halon Co. v. Great Lakes Chem. Corp.*, 155 F.R.D. 626, 629 (N.D. Ind. 1993) (holding that the parent company of the plaintiff was subject to mandatory disclosure requirements of the court's CJRA plan).

<sup>145</sup>United States District Court for the Northern District of Indiana. In the Northern District of Indiana, cited *supra* note 136, six judges and magistrate judges adopted four different experimental programs.

<sup>146</sup>151 F.R.D. 98 (N.D. Ind. 1993).

<sup>147</sup>*Id.* at 99.

<sup>148</sup>*Id.*

<sup>149</sup>*Id.* at 100.

<sup>150</sup>*Id.* at 99.

<sup>151</sup>1992 WL 165819 (N.D. Ind. 1992).

<sup>152</sup>*Id.* at \*1.

<sup>153</sup>*Id.*

failure to disclose.<sup>154</sup> Judge Miller granted the plaintiffs' motion to dismiss without prejudice on the condition that the plaintiffs pay the defendants' costs for removing the action to state court and the costs for the defendants' disclosures made pursuant to Judge Miller's mandatory disclosure rule.<sup>155</sup> The tactics utilized by the plaintiff in *Hunter* show how even under mandatory disclosure a lackadaisical or unscrupulous party can unfairly benefit from the preparation of a party opponent.<sup>156</sup>

In a case in the District of Montana, *Scheetz v. Bridgestone/Firestone, Inc.*,<sup>157</sup> the plaintiff objected to Bridgestone's prediscovery disclosure statement.<sup>158</sup> Agreeing with the plaintiff, Chief Judge Paul Hatfield<sup>159</sup> ordered Bridgestone to disclose all potential witnesses and documents "relevant to disputed facts as framed by the pleadings."<sup>160</sup>

These mandatory disclosure disputes show how it is inevitable that some parties will be uncooperative or will seek to manipulate the mandatory disclosure rules to their tactical advantage. Those judges who utilize mandatory disclosure in the future must be prepared to force compliance with the disclosure requirements, using sanctions if necessary.

Opponents of mandatory disclosure will undoubtedly argue that these cases are examples of satellite litigation caused by mandatory disclosure, and hence, they show that mandatory disclosure has failed to reduce expense and delays in litigation.<sup>161</sup> The benefits of mandatory disclosure,<sup>162</sup> however, outweigh

<sup>154</sup>*Id.*

<sup>155</sup>*Id.* at \*4-5.

<sup>156</sup>Justice Robert H. Jackson noted in his concurring opinion in *Hickman v. Taylor*: "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." 329 U.S. 495, 516 (1947).

<sup>157</sup>152 F.R.D. 628 (D. Mont. 1993).

<sup>158</sup>*Id.* at 629.

<sup>159</sup>United States District Court for the District of Montana.

<sup>160</sup>152 F.R.D. at 632.

<sup>161</sup>The ABA Litigation Section, which examined fifteen CJRA expense and delay reduction plans that experimented with mandatory disclosure, foresaw the problem of satellite litigation in a comment regarding the differences among the plans:

. . . [T]he nuances of language used by the different plans in their disclosure requirements are subtle. Yet, these subtleties can greatly impact the type of disclosure required. What, for example, is the difference between documents that are "likely" and those that are "reasonably likely" to bear significantly on the claims and defenses? How does a "general description" differ from a "description"? Is providing a "description" of an insurance agreement tantamount to providing its "contents"? And, importantly, upon whom does the duty of interpretation fall? These and other ambiguities leave the area of automatic disclosure ripe for controversy.

LITIGATION SECTION, *supra* note 20, at 25-26.

<sup>162</sup>*See* discussion of mandatory disclosure benefits in Part V.B.1.

the costs of litigation incidental to mandatory disclosure. Further, while mandatory disclosure may cause some new satellite litigation, there will be a corresponding reduction of satellite litigation from the old system of discovery. Finally, whereas the old system of adversarial discovery encourages satellite litigation, litigation incidental to mandatory disclosure should taper off as parties become accustomed to the new system of cooperative discovery.

#### *F. CJRA as a Justification for Courts to Curb Discovery Abuse*

The Civil Justice Reform Act appears to have heightened the awareness of some federal judges to the expense and delays caused by discovery abuse. Also, a number of judges have invoked the Civil Justice Reform Act to justify discovery orders,<sup>163</sup> and a few judges have repeatedly relied on the CJRA in issuing discovery orders.<sup>164</sup>

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<sup>163</sup>See, e.g., *Mindek v. Rigatti*, 964 F.2d 1369, 1374-75 (3d Cir. 1992) (CJRA justified dismissal with prejudice of plaintiff's case when delay resulted from a deliberate defiance of a court order); *Sussman v. Stern*, 1994 WL 177788 at \*1 (S.D.N.Y. 1994) (CJRA justified denial of plaintiff's request for a three-year extension of discovery deadlines); *Vakharia v. Swedish Covenant Hosp.*, 1994 WL 75055 at \*2 (N.D. Ill. 1994) (denying plaintiff's discovery motions because the benefits would not exceed the costs under the district court's CJRA plan); *Tagupa v. Odo*, 843 F. Supp. 630, 633 (D. Haw. 1994) (CJRA justified denial of an interpreter so plaintiff could answer defendant's deposition questions in the Hawaiian language instead of English); *Wilson v. Bradlees of New England*, 1994 WL 263695 at \*3 (D. N.H. 1994) (CJRA justified a motion to compel discovery because the benefit to the plaintiff's case outweighed the burden of the cost to the defendant in producing the information); *Foray v. Cooper*, 1993 WL 453473 at \*1 (E.D. Pa. 1993) (CJRA delay concerns justified limiting the extension of time given to a plaintiff to find a new expert witness when the request was made five weeks prior to date set for trial); *Austin Fireworks, Inc. v. T.H.E. Ins. Co.*, 1993 WL 340033 at \*1 (D. Kan. 1993) (Judge Theis found the CJRA justified denying a motion to reconsider plaintiff's motion to dismiss the case without prejudice so plaintiff could refile with additional claims); *Anthis v. Shalala*, 1993 WL 108066 at \*1 (D. Kan. 1993) (Judge Theis found CJRA justified a court policy of limiting continuances in social security cases); *Black v. Shalala*, 1993 WL 108067 at \*1 (D. Kan. 1993) (Judge Theis found CJRA justified a court policy of limiting continuances in social security cases); *Standard Havens Prods., Inc. v. Gencor Industries, Inc.*, 810 F. Supp. 1072, 1077 (W.D. Miss. 1993) (CJRA delay concerns justified a denial of defendant's stay of a judgment for plaintiff patent holder pending appeal); *Schwarzkopf Technologies Corp. v. Ingersoll Cutting Tool Co.*, 142 F.R.D. 420, 423 (D. Del. 1992) (CJRA plan required counsel to certify that their clients had been advised of the estimated cost of the litigation); *Harlan v. Lewis*, 141 F.R.D. 107, 108 (E.D. Ark. 1992) (CJRA plan justified sanctioning defense attorneys who abused litigation).

<sup>164</sup>For example, Judge Eduardo Robreno, United States District Court for the Eastern District of Pennsylvania, has used the Eastern District of Pennsylvania's CJRA plan when parties delayed discovery. See *Capek v. Mendelson*, 143 F.R.D. 97, 97-98 (E.D. Pa. 1992) ("[L]eft to their own devices, the litigants in this case will continue to squander not only their own time and money but will continue to call upon scarce judicial resources. [citation to CJRA omitted] In light of this . . . I will deny all the discovery motions now pending and, in their place, will enter a case management order . . . setting forth in detail the procedure which will govern future progress of the litigation."); *Martin v. Cooper Plumbing & Heating, Inc.*, 145 F.R.D. 372, 373-74 (E.D. Pa. 1992) (invoking the CJRA as justification for denying the parties an extension of discovery time when the parties ignored the scheduling order under the court's CJRA plan).

In *Mindek v. Rigatti*,<sup>165</sup> the Third Circuit affirmed the dismissal with prejudice of the plaintiffs' case because the plaintiffs had failed to follow a magistrate judge's order directing them to file an amended complaint alleging their injury in more specific terms.<sup>166</sup> The dismissal was justified by the CJRA despite the fact that the Mindeks' complaint was filed prior to Congress's passage of the CJRA.<sup>167</sup> The Third Circuit stated, "To tolerate the delays caused by the Mindeks, or to equivocate over lesser sanctions, would make a mockery of the very objectives of the 'civil justice expense and delay reduction plans' which the district courts have developed and implemented pursuant to the Civil Justice Reform Act of 1990 . . . ."<sup>168</sup>

Judge Roderick R. McKelvie<sup>169</sup> has cited to the CJRA in three opinions.<sup>170</sup> In *Wesley-Jessen Corp. v. Pilkington Visioncare, Inc.*,<sup>171</sup> Visioncare sought a motion to compel Wesley-Jessen to provide interrogatory responses after it found Wesley-Jessen's original answers to be "vague and unresponsive."<sup>172</sup> Judge McKelvie, in ordering that Wesley-Jessen would be limited at trial to using only witnesses and documents disclosed in response to Visioncare's discovery requests, explained,

This type of discovery dance occurs fairly frequently in patent cases, as counsel work to maneuver the case from complaint through

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Also, Magistrate Judge Mark W. Bennett, United States District Court for the Southern District of Iowa, has cited to the CJRA in four of his opinions: *Hose v. Chicago & Northwestern Transportation Co.*, 154 F.R.D. 222, 228 (S.D. Iowa 1994) (citing the CJRA to justify a reduction of expert witness fees from \$800 per hour to \$400 per hour for an expert neurologist); *Jochims v. Isuzu Motors, Ltd.*, 148 F.R.D. 624, 633 (S.D. Iowa 1993) (citing to the CJRA in modifying a protective order to allow intervenors access to the discovery of the original parties); *Foxley Cattle Co. v. Grain Dealers Mutual Ins. Co.*, 142 F.R.D. 677, 682 (S.D. Iowa 1992) (citing the CJRA as justification for reducing an award of attorneys fees from a requested \$2,205.86 to \$294 following a successful motion to compel answers to interrogatories); and *Jochims v. Isuzu Motors, Ltd.*, 141 F.R.D. 493, 497 (S.D. Iowa 1992) (citing the CJRA to justify a reduction of expert witness fees from \$500 per hour to \$250 per hour for an engineer/accident reconstruction expert).

<sup>165</sup>964 F.2d 1369 (1992).

<sup>166</sup>*Id.* at 1371.

<sup>167</sup>*Id.* at 1374-75.

<sup>168</sup>*Id.* at 1374.

<sup>169</sup>United States District Court for the District of Delaware.

<sup>170</sup>*Wesley-Jessen Corp. v. Pilkington Visioncare, Inc.*, 844 F. Supp. 987, 989-90 (D. Del. 1994) (citing the CJRA as a reason for limiting discovery); *Thorn EMI North Am., Inc. v. Micron Tech., Inc.*, 837 F. Supp. 616, 623 (D. Del. 1993) (citing CJRA in limiting discovery); *Harleysville Mutual Ins. Co. v. Sussex County*, 831 F. Supp. 1111, 1130 (D. Del. 1993) (preventing delay under the CJRA cited as a reason for denying a motion to certify a state law issue).

<sup>171</sup>844 F. Supp. 987 (D. Del. 1994).

<sup>172</sup>*Id.* at 989.

discovery to settlement or trial. To a judge, it can look like a mild stonewall, a ploy to force the opposing party to be the first to disclose the basis for its contentions, or an invitation to settle a case before the costs get out of control. With the passage of the Civil Justice Reform Act and the implementation of early trial dates, the tempo of the [discovery] dance is becoming a little faster. As a consequence, counsel take on an increased risk in accepting a non-responsive discovery response, whether it is a failure to answer contention interrogatories, a refusal to identify expert opinions to be offered at trial, or a delay in making available confidential commercial information.<sup>173</sup>

In *Wilson v. Bradlees of New England*,<sup>174</sup> the court upheld a magistrate judge's order compelling the defendant to answer interrogatories. Chief Judge Joseph A. Diclerico, Jr.,<sup>175</sup> set forth a general warning to litigants in his district,

[S]ince all civil cases currently pending in this district will be handled in accordance with the [CJRA] plan, counsel can anticipate closer scrutiny by the court of discovery matters. Counsel are advised that they are expected to exercise reasonable restraint in discovery matters and to engage in good faith communications with each other to resolve discovery disputes through cooperation and agreement. Counsel have an obligation to 'tailor interrogatories to suit the particular exigencies of the litigation. They ought not be permitted to use broadswords where scalpels will suffice, nor to undertake wholly exploratory operations in the vague hope that something helpful will turn up.' *Mack v. Great Atl. and Pac. Tea Co., Inc.*, 871 F.2d 179, 187 (1st Cir. 1989). Failure to heed the court's warning will result in the imposition of sanctions on any counsel found by the court to have acted unreasonably in any discovery matter.<sup>176</sup>

In *Vakharia v. Swedish Covenant Hospital*,<sup>177</sup> the plaintiff had taken eight depositions, seven of which took two to six days to conduct.<sup>178</sup> The plaintiff's depositions generated 5,400 pages of transcripts, of which only 16 pages involved defense counsel.<sup>179</sup> The plaintiff then sought additional depositions, additional interrogatories, and 190 requests for admissions in addition to 64 prior requests for admissions.<sup>180</sup> The plaintiff also issued a "Fourth" and

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<sup>173</sup>*Id.* at 989-90.

<sup>174</sup>1994 WL 263695 (D. N.H. 1994).

<sup>175</sup>United States District Court for the District of New Hampshire.

<sup>176</sup>*Bradlees*, 1994 WL 263695 at \*3.

<sup>177</sup>1994 WL 75055 (N.D. Ill. 1994).

<sup>178</sup>*Id.* at \*1.

<sup>179</sup>*Id.*

<sup>180</sup>*Id.*

"Amended Fifth" set of document requests.<sup>181</sup> Chief Judge James B. Moran<sup>182</sup> denied the plaintiff's discovery motions, explaining,

Discovery in a civil action is not some fundamental right, to be pursued as long and to whatever extent as a party may desire. It is a rather recent innovation. Indeed, in criminal cases, where the stakes are often far higher than they are in civil cases, the discovery remains limited. Experience has demonstrated that the discovery rules can be and sometimes are abused, and there is presently an ongoing effort to curb such abuses . . . .

The Advisory Group, which developed the recommendations upon which the Plan is based, concluded that the scope of allowable discovery should balance cost against likely benefit. It suggests that cost-shifting be considered when the scope of discovery moves toward being overly burdensome and expensive. That suggestion echoes the clear results of a survey of federal practitioners in this district.

The discovery rules are not a ticket to an unlimited, never-ending exploration of every conceivable matter that captures an attorney's interest. Parties are entitled to a reasonable opportunity to investigate the facts—and no more. . . .<sup>183</sup>

It is interesting that the CJRA appears to have heightened the awareness of some federal judges to the expense and delays caused by discovery abuse. Also, it is notable that some judges have used the Act as a sort of congressional mandate for cracking down on discovery abuse.

#### *G. Lessons from the CJRA Early Implementation Districts*

It is still too early to draw conclusions from the CJRA experiments in civil justice reform. The pending RAND Corporation study<sup>184</sup> of the CJRA reform experiments, due in mid-1996, will provide the best information available about the success of the reform experiments.

Clearly, one lesson can be learned from the CJRA early implementation districts: given the opportunity, district courts will devise case management rules that are non-uniform. Non-uniform rules, however, should not automatically be deemed inefficient. Instead of micromanaging district court judges through uniform rules, greater efficiency will be achieved by allowing district court judges the freedom to devise their own case management rules.

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<sup>181</sup>*Id.*

<sup>182</sup>United States District Court for the Northern District of Illinois.

<sup>183</sup>1994 WL 75055 \*1-2.

<sup>184</sup>See RAND Corporation study discussion *supra* note 63.

## V. A PROPOSAL FOR THE FUTURE

The reforms resulting from the Civil Justice Reform Act will take the American civil justice system into the next century. While it is too soon to evaluate the CJRA experiments, the experiments and the Local Rules Project<sup>185</sup> have shown that district court judges are concerned about case management and will develop their own case management rules to address those concerns.

### A. A Proposal for Balkanizing Case Management Rules

The CJRA has been criticized as "balkanizing" the Federal Rules of Civil Procedure.<sup>186</sup> As demonstrated by the Local Rules Project, however, the uniformity created by the Federal Rules of Civil Procedure is a fallacy. The local rules which permeate the federal court system should not be automatically viewed as a negative; on the contrary, they can result in greater case management efficiency in the federal courts.

#### 1. The Planned Reversion to "Uniform" Rules

The Civil Justice Reform Act culminates with the Judicial Conference (with the assistance of the RAND Corporation's Institute for Civil Justice) undertaking "an unprecedented empirical analysis of the plans' effectiveness in the pilot and demonstration districts so that it may recommend uniform solutions to Congress by the end of 1995."<sup>187</sup> The Judicial Conference is supposed to reinstate uniformity to the federal system based on the results of the CJRA study.<sup>188</sup> The Civil Justice Reform Act experiments are supposed to conclude in 1997, and by that time a new set of uniform Federal Rules of Civil Procedure utilizing the successful experiments will presumably have been crafted.<sup>189</sup>

#### 2. Why Uniform Case Management Rules Should Be Abandoned

The worst thing the Judicial Conference and Congress could do at the end of the CJRA experiment is to ignore its most plain lesson—given the opportunity, district courts and district court judges will devise their own distinct case management rules. Additional support for this conclusion was

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<sup>185</sup>See Discussion of Local Rules Project *supra* note 53. If federal district court judges were not concerned about case management, why would they promulgate more than 5,000 local rules nationwide?

<sup>186</sup>See, e.g., Tobias, *supra* note 53.

<sup>187</sup>Joseph R. Biden, Jr., *Symposium on Civil Justice Reform: Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1287 (1994) (citing to 28 U.S.C. § 471 (Supp. IV 1992)). The Judicial Conference's deadline for reporting to Congress has been extended to the end of 1996. Judicial Amendments Act of 1994, Pub. L. No. 103-420, 108 Stat. 4343, 4345, § 4.

<sup>188</sup>Biden, *supra* note 187, at 1294.

<sup>189</sup>*Id.*



provided by the Local Rules Project, which found more than 5,000 local rules in the federal court system.<sup>190</sup> Many of the local rules, which primarily concerned pretrial procedures, were found to conflict with the Federal Rules of Civil Procedure and to conflict district court to district court.<sup>191</sup> It is not surprising that district courts would devise their own pretrial rules in the absence of national rules. But, it is surprising that district courts will create their own pretrial rules in spite of the existence of uniform federal rules.

*a. The Distinction Between Civil Procedure and Case Management*

As noted earlier,<sup>192</sup> the Federal Rules of Civil Procedure were promulgated for a unified federal court system with a goal of eliminating the "sporting theory of justice." The Federal Rules of Civil Procedure remain an important unifying feature of the federal court system, and it would be unwise to completely abandon them. The 1994 amendment to the Federal Rules of Civil Procedure carried forward the 1980 and 1983 amendment's propensity to mandate "active" judicial case management by requiring judges to control discovery and to sanction attorneys for discovery abuse.<sup>193</sup> The Federal Rules of Civil Procedure, however, should be rules of civil procedure—not rules of judicial case management.

The Federal Rules of Civil Procedure should set forth uniform procedures for things such as service of process, joinder of parties, conducting trials, providing judgments, and issuing injunctions. How a judge manages the pretrial discovery of his cases, however, should be left to the discretion of each district court.<sup>194</sup>

*b. The Benefits of Decentralized Case Management*

The concept that the United States is indivisible is a vital element of our nation; the diversity of our nation's people, however, is one of the tremendous strengths of our nation. All federal judges are not the same: they come from different backgrounds and cultures and have differing world views and habits. It is natural for each federal judge to have his own approach to his duties. Consequently, a single uniform set of case management rules will not make the judges uniform, more efficient, or more just. In the end, we must have faith in the case management competence of our unbeholden, life-tenured Article III

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<sup>190</sup>COMMITTEE ON ROF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE 1 (1989).

<sup>191</sup>*Id.* at 1-2.

<sup>192</sup>*See supra* part II.B.

<sup>193</sup>*See* Dudley, *supra* note 7, at 189-90 (discussing how the 1980 and 1983 amendments "encourage judges to become pervasively and actively involved in case management early in litigation and to ride herd on discovery").

<sup>194</sup>The Federal Rules of Civil Procedure, however, can be a useful means of providing a model case management system for judges. *See infra* Part V.A.4.

judges, and we must have confidence in their dedication to maintaining their dockets.

Decentralization of case management will benefit our justice system in many ways. Different regions of the nation have differing needs when it comes to case management.<sup>195</sup> Since before the adoption of the federal rules in 1938, it has been recognized that different regions of the nation have varied needs.<sup>196</sup> Permitting federal judges the independence to devise their own case management techniques will allow regional needs to be met.

Additionally, there is no consensus on the need for discovery reform.<sup>197</sup> Decentralization of case management will allow those courts with no discovery abuse problems to maintain a system which works (and does not need to be fixed). Providing judges with greater discretion in case management also will provide federal judges the flexibility to specially craft a discovery plan for problem cases. For example, if a judge believes that a particular case needs special "hands on" case management—perhaps because the attorneys have a reputation for discovery abuse—then decentralization of case management will allow the judge to address the problem by crafting a special case management plan.<sup>198</sup>

Finally, allowing district court judges discretion in how to manage their dockets will allow innovative procedures, such as mandatory disclosure and summary jury trials, to develop in the federal system.<sup>199</sup> Requiring judges to follow a uniform set of case management rules through the Federal Rules of Civil Procedure will stagnate the development of new case management techniques. The development of new case management techniques is vital to our civil justice system's ability to keep pace with the future demands of American society.

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<sup>195</sup>See Judge Sanders' comment that discovery abuse is primarily a problem in metropolitan areas *supra* note 7.

<sup>196</sup>See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2008 (1989) (discussing how Senator Thomas Walsh, a progressive Democrat from Montana who opposed uniform federal rules, believed that different regions of the country need different rules).

<sup>197</sup>See, e.g., *supra* note 7. Also, the CJRA advisory groups of some district courts discovered no expense or delay problems in their civil litigation dockets. See, e.g., United States District Court for the Southern District of Illinois, REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, § II (Dec. 12, 1991) (stating "that there are no unusual cost and delay problems in this District at this time").

<sup>198</sup>See *supra* part IV.F (citing examples of special discovery orders).

<sup>199</sup>See Levin, *supra* note 53, at 1581-82 (discussing how the local rules of district courts can act as experiments in laboratories).

### 3. Providing Greater Judicial Discretion in Case Management

District court judges should be allowed the freedom to devise their own individual approach to case management. After all, it is the district judges who must work day-in and day-out with their dockets. When the Judicial Conference and Congress redraft the case management aspect of the Federal Rules of Civil Procedure,<sup>200</sup> they should not draft a detailed set of uniform case management rules that reduce trial judges to glorified calendaring clerks.<sup>201</sup> Instead, they should draft a model set of case management rules which will allow district courts the discretion to devise their own case management systems.<sup>202</sup>

Justice Ben F. Overton<sup>203</sup> turned to *Bouvier's Law Dictionary* in defining Judicial Discretion,

"That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of the case, and as to which the judgment of the court is uncontrolled by fixed rules of law.

The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court."<sup>204</sup>

Justice Overton also identified two reasons for providing judges discretion: "First, the trial judge is the only objective person who is on the scene and who is able to see, hear and evaluate the situation from firsthand knowledge. Second, no strict rule can be made applicable for every conceivable situation in the many areas of the law."<sup>205</sup> These two reasons exist in the area of judicial

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<sup>200</sup>See *supra* part V.A.1 (discussing the planned reinstatement of uniformity to the federal rules).

<sup>201</sup>I have taken this language from Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States—Opportunity for Learning from 'Civilized' European Procedure Instead of Continued Isolation?*, 42 AM. J. COMP. L. 147, 153-54 (1994). Stiefel and Maxeiner argue that the move in federal courts toward active case management makes "the judge a glorified calendaring clerk," and they support the adoption of a German civil law type system of civil justice along the lines of Professor Langbein's proposal. *Id.* at 157; see citation to Professor Langbein's proposal *infra* note 228. I favor active case management, although I do not believe it should be or can be forced upon Article III judges.

<sup>202</sup>The current Rule 26(a)(1), which allows district courts the ability to opt out of the Rule's mandatory disclosure scheme, provides an example of how district courts can be reserved this power.

<sup>203</sup>Supreme Court, State of Florida.

<sup>204</sup>Ben F. Overton, *The Meaning of Judicial Discretion*, in JUDICIAL DISCRETION 1991 8 (National Judicial College, ABA 1991) (quoting BOUVIER'S LAW DICTIONARY 884-85 (3d ed. 1914)).

<sup>205</sup>*Id.* at 3.

case management. While judicial discretion in case management may be appropriate, to what extent should discretion be given to judges in managing cases?

Professor Maurice Rosenberg classifies judicial discretion as primary or secondary.<sup>206</sup> The primary form of judicial discretion focuses on whether a rule provides a judge with decision-making discretion; the secondary form of judicial discretion focuses on the appellate court's ability to review and reverse the trial court.<sup>207</sup> The primary form is liberating, while the secondary form is restraining.<sup>208</sup>

In the context of case management rulings, the authority for providing judges with discretion in case management should be granted through the Federal Rules of Civil Procedure. The secondary form of discretion would be the standard of review which would be applied to the resulting case management decisions.

Justice Richard W. Wallach<sup>209</sup> classifies the standards of review applied to judicial discretion into four categories: (1) unfettered discretion; (2) a presumption of validity, with a high degree of appellate deference to the trial judge; (3) some appellate deference but the trial judge's basis for exercising discretion must appear; and, (4) lip service obeisance to the trial court's discretion.<sup>210</sup> Case management and trial procedural rulings have been subject to a presumption of validity, with appellate courts giving a high degree of deference to the trial judge.<sup>211</sup> The rationale for presuming that the case management rulings of a trial judge are valid is that the trial judge has a "superior vantage point" in assessing the circumstances of the parties and the needs of the case.<sup>212</sup> Thus, a district court judge's discretionary rulings on case management should have a presumption of validity with a high degree of deference by reviewing courts. This means that the standard of review used by appellate courts would be an abuse of discretion standard and that an appellate court's review would be limited to whether the trial judge acted arbitrarily or irrationally.

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<sup>206</sup>Maurice Rosenberg, *Judicial Discretion of the Trial Court*, 22 SYRACUSE L. REV. 635, 637 (1971).

<sup>207</sup>*Id.*

<sup>208</sup>*Id.*

<sup>209</sup>Supreme Court, State of New York.

<sup>210</sup>Richard W. Wallach, *Judicial Discretion: How Much*, in JUDICIAL DISCRETION 1991 8-12 (National Judicial College, ABA 1991).

<sup>211</sup>*Id.* at 10-11 (citing to *McCrosen v. United States*, 339 F.2d 810 (10th Cir. 1965) (presuming the validity of a ruling limiting a cross-examination on the ground of repetition); *Thurmond v. Superior Court*, 427 P.2d 985 (Cal. 1967) (sustaining the power of the trial court to manage its own calendar except where an abuse of discretion appears)).

<sup>212</sup>*Cf. id.* at 10.

#### 4. Establishing a Case Management Model

While the Federal Rules of Civil Procedure should not dictate to district court judges how to manage their cases, the rules can be a source of guidance by providing discovery goals and model case management rules.

For example, one discovery goal could be: "Parties should be encouraged to cooperate from the outset of litigation by meeting to plan their discovery so that it is conducted in the most just, speedy and cost efficient manner."<sup>213</sup> The federal rules could then provide a series of model case management rules<sup>214</sup> which district courts would be free to adopt, modify, or opt out of in favor of devising their own case management rules.

This approach is basically a variation on the Federal Rules of Civil Procedure as they currently exist since Rule 83 permits district courts to make rules that are not inconsistent with the Federal Rules of Civil Procedure. Under my approach, however, the district courts would be given greater latitude in making case management rules.<sup>215</sup>

As Rule 83 currently requires, control over the case management rules can be maintained by making them subject to approval by the respective circuit courts. If a judge oversteps the bounds of the Constitution by misapplying local case management rules (previously approved by the circuit court), then he will run the risk of being overturned on appeal.

For example, district courts have struggled with the issue of whether summary jury trials are permitted under the Constitution and the statutory framework of the federal courts. Summary jury trials are non-binding proceedings designed to expedite settlement. A jury is empaneled, both parties provide a cursory explanation of what evidence they would produce at trial, and the jury then gives a non-binding verdict which enables the parties to assess whether to settle the case.<sup>216</sup> The Sixth Circuit has held that district judges cannot force parties to participate in summary jury trials.<sup>217</sup> This experience with the summary jury trial shows how judicial discretion in case management can be kept in check.

Thus, district court judges and practitioners should be able to look to the Federal Rules of Civil Procedure as a general guide which sets forth discovery goals and model case management techniques. If a judge finds that a certain case management technique works, that judge should have the option of utilizing that technique. In regard to mandatory disclosure, some district court judges have established very efficient means of managing discovery without

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<sup>213</sup>See, e.g., FED. R. CIV. P. 1.

<sup>214</sup>These "model" federal rules could implement the case management techniques found to be successful in the Civil Justice Reform Act experiments.

<sup>215</sup>Rule 83, however, should be modified so district courts and judges cannot devise or implement rules in a manner which is inconsistent with the U.S. Constitution.

<sup>216</sup>*In re NLO, Inc.*, 5 F.3d 154, 156 (6th Cir. 1993).

<sup>217</sup>*Id.* at 157-58.

mandatory disclosure; other judges may have already found mandatory disclosure to be of use in some circumstances.

### *B. The Utility of Mandatory Disclosure as a Discretionary Local Rule*

Mandatory disclosure provides an example of how a case management technique can be incorporated as a model rule in the Federal Rules of Civil Procedure. The district courts with the busiest dockets may find a resource differentiated discovery approach to mandatory disclosure appealing. As previously explained, it is improbable that this approach would work in all federal courts.<sup>218</sup>

#### 1. Rationale for Adopting Mandatory Disclosure

Historically, the civil procedure rules have strived to achieve just ends by the most efficient means. No civil justice system will be perfect, primarily because the system is applied to a constantly changing society with infinite variables.<sup>219</sup> We can, however, seek perfection by adjusting the system to meet the changing needs of society.

The goals in drafting the federal rules were to simplify civil procedure by merging law and equity and to reduce procedural injustices while increasing efficiency through the use of uniform procedures.<sup>220</sup> The needs of society today, however, are very different than they were in 1939.<sup>221</sup> Although there may not be a need for civil justice reform in all district courts,<sup>222</sup> some of the changes, such as the transformation of judges from neutral referees to managers,<sup>223</sup> will resound nationwide.

Another emerging transformation in the civil justice system is a shift in the culture of discovery from an adversarial game to a cooperative joint effort, which includes the development of mandatory disclosure.<sup>224</sup> The trend toward forced cooperation in discovery also can be discerned from the recently

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<sup>218</sup>See *supra* part V.A.2.b.

<sup>219</sup>Cf. Subrin, *supra* note 196, at 2046, 2051 (commenting on how the legal culture constantly reshapes the demands placed on our procedural system); Frank H. Easterbrook, *Comment: Discovery as Abuse*, 69 B.U. L. REV. 635, 640-41, 648 (1989) (commenting on the problem of multi-factor standards and characterizing the problem as one of legal culture); see also Green & Brown, *supra* note 2, at 228-29 (attributing the civil justice crisis to societal changes, such as individual expectations of a risk-free environment).

<sup>220</sup>See Brazil, *supra* note 8, at 1298-1300; Wolfson, *supra* note 5, at 36-38.

<sup>221</sup>See Wolfson, *supra* note 5, at 38-41.

<sup>222</sup>See *supra* note 7 (comment of Judge Barefoot Sanders).

<sup>223</sup>See Schwarzer, *supra* note 8, at 704.

<sup>224</sup>See Wolfson, *supra* note 5, at 48-51; see also Landsman, *supra* note 42, at 501-21 (discussing the declining reliance on various facets of the adversarial process in the pursuit of civil justice reform).

developed "spoliation of evidence" tort<sup>225</sup> and from the willingness of courts to impose sanctions for the destruction of documents prior to litigation being initiated.<sup>226</sup>

The adversarial process has been used by courts in the United States since its inception,<sup>227</sup> but this approach has been attacked in recent decades as fomenting abuse and misuse of the civil justice system.<sup>228</sup> The duty placed on counsel to disclose relevant information in civil litigation has lagged behind criminal discovery where, in *Brady v. Maryland*,<sup>229</sup> the Supreme Court mandated that criminal prosecutors disclose relevant information to the defendant.<sup>230</sup>

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<sup>225</sup>See *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463-64 (Alaska 1986); *Smith v. Superior Court*, 198 Cal.Rptr. 829, 832-33 (Cal. Ct. App. 1984); *Bondu v. Gurvich*, 473 So.2d 1307, 1312 (Fla. Dist. Ct. App. 1984), *review denied*, 484 So.2d 7 (Fla. 1986); Ricardo G. Cedillo & David Lopez, *Document Destruction in Business Litigation from a Practitioner's Point-of-View: The Ethical Rules vs. Practical Realities*, 20 ST. MARY'S L.J. 637, 652-53 (1989); Lawrence B. Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1091-94 (1987). But see *Baughner v. Gates Rubber Co., Inc.*, 863 S.W.2d 905, 909 (Mo. App. E.D. 1993), for a discussion of jurisdictions that have refused to recognize a claim for intentional spoliation of evidence where the facts of the case would not support a cause of action even if the tort were recognized.

<sup>226</sup>See, e.g., *William T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984); *Lewis v. Darce Towing Co., Inc.*, 94 F.R.D. 262 (W.D. La. 1982); *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 750, 751 (E.D.N.Y. 1980); *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed. R. Serv. 2d (Callaghan) 423, 426-27 (N.D. Ind. 1977).

Well-counseled businesses have document-retention plans, whereby documents and computer files are stored for a specific period of time and then destroyed. The strategy behind a document retention plan is two-fold: to eliminate potentially damaging evidence (to destroy the paper-trail) before a duty to disclose ripens and to streamline business operations by reducing the amount of unnecessary information floating around (a clean house is an efficient house). Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1185-87 (1983); see Cedillo & Lopez, *supra* note 225, at 646-49; Solum & Marzen, *supra* note 225, at 1196-97. Mandatory disclosure further cements the emerging duty on lawyers and parties to preserve and turn over relevant evidence.

<sup>227</sup>*Landsman, supra* note 42, at 487; see also STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 18-25 (1984) (chronicling the development of the American adversarial justice system).

<sup>228</sup>See, e.g., Brazil, *supra* note 8, at 1303-05; John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 841-48 (1985); see also Landsman, *supra* note 42, at 501-21 (discussing reform efforts affecting the adversarial process).

<sup>229</sup>373 U.S. 83 (1963).

<sup>230</sup>See Frankel, *supra* note 47, at 53; Colin Campbell & John Rea, *Civil Litigation and The Ethics of Mandatory Disclosure: Moving Toward Brady v. Maryland*, 25 ARIZ. ST. L.J. 237, 238-40, 247 (1993). Also, Criminal Rule of Procedure 16(a)(1)(C) states:

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects,

The objective of mandatory disclosure—to require litigants to cooperate in the disclosure and exchange of basic factual information—will drastically change the adversarial nature of discovery in civil litigation.<sup>231</sup> Like criminal prosecutions, though, the adversarial nature of civil litigation need not be entirely abandoned—particularly when a genuine dispute of material fact exists.<sup>232</sup> If discovery with mandatory disclosure shows that each party's position has merit, then our adversarial trial system remains the best system for resolving the dispute. Mandatory disclosure will help parties expeditiously resolve those cases where the parties believe the benefit of negotiated settlement outweighs the risk of losing at trial. Thus, the earlier that basic information is disclosed and exchanged in a civil case, the greater the likelihood that the parties will achieve an early negotiated settlement. This speedier termination of cases will result in reduced litigation for the parties and will help speed up the turnaround of cases on federal court dockets.

## 2. Why a Resource-Differentiated Discovery Approach to Mandatory Disclosure Should Be Undertaken

The federal rules developed as transsubstantive rules, that is, as a uniform set of rules to be applied uniformly to all types of substantive law.<sup>233</sup> Some legal commentators have asserted, however, that greater efficiency would result if different procedural rules existed for different substantive cases.<sup>234</sup> Attempting

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buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Criminal Procedure Rule 16(a)(2) protects the government's privileged information, except for statements of witnesses subject to disclosure at trial under the Jencks Act, 18 U.S.C. § 3500.

<sup>231</sup>See generally Brazil, *supra* note 8.

<sup>232</sup>See LANDSMAN, *supra* note 227, at 44-51 (providing a cogent defense of various components of the adversarial system).

<sup>233</sup>See Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975); see also Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2175-76 (1989) (explaining how the premise of trans-substantive rules has been eroded by ad hoc informal, customized procedures devised by judges to cope with the difficulties posed by the modern caseload); Subrin, *supra* note 196, at 2012 (noting that the plethora of local rules promulgated under FED. R. CIV. P. 83 has become "a gaping hole" in "the wall of uniformity").

<sup>234</sup>See Cover, *supra* note 233, at 732-33; Subrin, *supra* note 196, at 2000, 2006, 2042-43. Professor Subrin explained the possible application of uniform federal rules that are not trans-substantive by stating:

It is logically possible that one could have the same procedural rules in all federal courts, but that those rules would not be trans-substantive. There could be different procedural rules for different substantive



to tailor procedure around substance by developing non-transsubstantive rules, however, is inherently impractical because of technical and political obstacles.<sup>235</sup>

While I disagree with tailoring procedural rules to the substantive matter of specific cases, there is truth to Professor Maurice Rosenberg's statement that: "The key point is that different *categories* of cases have different processing needs. These are identifiable, classifiable, and usable in putting them through the judicial process."<sup>236</sup> Instead of categorizing cases by the substantive law they involve, I propose that they be categorized according to the different resources that certain types of cases commonly require. My proposal for resource differentiated mandatory disclosure is a variation on the CJRA experiment with Differentiated Case Management.<sup>237</sup>

### 3. A Proposal for Resource-Differentiated Mandatory Disclosure

Some courts could effectively utilize mandatory disclosure by structuring mandatory disclosure so that it will fulfill the different discovery needs of different categories of cases. To do this, cases must be categorized, not by their substantive law content, but by the different court resources they utilize. As noted by the Advisory Group for the Southern District of New York: "In theory, [differentiated case management] represents a rethinking of the assumption that it is appropriate to subject all cases to the same procedural rules. Instead, [differentiated case management] seeks to make an assessment of the managerial and procedural requirements of each case and then tailor judicial resources accordingly."<sup>238</sup>

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cases. For example, the pleading requirements required in antitrust cases might differ from those in automobile tort suits.

Subrin, *supra* note 196, at 2006. One practical problem with classifying cases according to substantive law is that some cases could not be placed into a single substantive law category since cases frequently contain combinations of substantive law. For example, breach of contract cases frequently include actions for fraud.

<sup>235</sup>See Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244 (1989).

<sup>236</sup>Maurice Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243, 248 (1984).

<sup>237</sup>28 U.S.C. § 473(a)(1) (Supp. II 1990). A report by the Brookings Institution Task Force on Civil Justice Reform provided the basis for the CJRA experimentation with differentiated case management. Mullenix, *supra* note 7, at 389; United States District Court for the Southern District of New York, PILOT DISTRICT, REPORT AND RECOMMENDATIONS OF THE SOUTHERN DISTRICT OF NEW YORK CIVIL JUSTICE REFORM ACT ADVISORY GROUP, § IV.A (Nov. 1, 1991) [hereinafter Southern District of New York Advisory Group Report]; see BROOKINGS INSTITUTION, *supra* note 7, at 3.

<sup>238</sup>Southern District of New York Advisory Group Report, *supra* note 237, § IV.B.

Mandatory disclosure should be classified into two tracks: discovery-simple cases and discovery-intensive cases.<sup>239</sup> Designation of a case as discovery-simple or discovery-intensive would be made by a judge during the scheduling conference after conferring with the parties.<sup>240</sup> Some flexibility, of course, is necessary in designating cases as discovery-simple or discovery-intensive; the judge must be able to redesignate a case in the event that a case, initially tracked as being discovery-simple, evolves<sup>241</sup> into a discovery-intensive case.

#### *a. Discovery-Simple Cases*

Discovery-simple cases would be those cases that: (1) require the discovery of not more than 10,000 pages of documents for each party; (2) have not more than five real parties in interest; (3) have not more than ten fact witnesses; (4) have not more than three expert witnesses; and (5) would require not more than ten days of trial time.<sup>242</sup> Mandatory disclosure in discovery-simple cases should be structured to complete discovery as expeditiously as possible because of the relative simplicity of the discovery needs of these cases.

Automatic document production of all nonprivileged documents is the key element to expediting discovery-simple cases. Four of the early

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<sup>239</sup>In devising my proposal, I examined various CJRA early implementation district court experiments with differentiated case management. The Southern District of New York developed a differential case management system which classified cases as complex, standard, or expedited. Southern District of New York Plan, *supra* note 96, at 1-4. The Northern District of Ohio, which was designated as a demonstration district under the CJRA, also experimented with differentiated case management. See United States District Court for the Northern District of Ohio, DIFFERENTIATED CASE MANAGEMENT PLAN OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, § 8 (Dec. 13, 1991) [hereinafter Northern District of Ohio Plan] (outlining five case management tracks: expedited, standard, complex, administrative, and mass tort). I propose that only two tracks are needed for mandatory disclosure. Cases could, however, be broken down further into other resource-based categories to improve management in other areas of discovery.

<sup>240</sup>The CJRA pilot plan for the District of Delaware established a variation on differentiated case management by setting up special procedures for cases designated as complex. See generally District of Delaware Plan, *supra* note 85. In *United States v. Diamond Indus., Inc.*, 145 F.R.D. 48 (D. Del. 1992), the court denied the parties request to have their case redesignated as complex.

<sup>241</sup>For example, a case can become complex when a plaintiff amends its complaint to add additional causes of action.

<sup>242</sup>See Southern District of New York Plan, *supra* note 96, at 2 (defining an expedited case as "one which is relatively simple, where it is believed that there will be no more than one or two depositions by each party; where the documents to be exchanged are clear-cut in nature and relatively small in volume; where the use of interrogatories will be minimal; where there will be little or no motion practice; and where relatively little judicial supervision is needed") Northern District of Ohio Plan, *supra* note 239, at Rule 8:2.2 (characterizing an expedited case as involving a few legal issues, having few parties in interest, having more than five witnesses, having no expert witnesses, and requiring more than five trial days).

implementation districts mandated the production of all relevant documents.<sup>243</sup> The provision requiring automatic document production should be modeled after the Northern District of California Plan,<sup>244</sup> which set forth very specific procedures requiring a party whose disclosure includes more than one hundred pages of documents to contact opposing counsel to plan the exchange.<sup>245</sup>

In addition to automatic document production, parties with discovery-simple cases would be required to exchange disclosure statements revealing the identity of persons known to have information or knowledge relevant to the litigation, the existence and content of insurance agreements relevant to the litigation, and a calculation of any damages claimed in any pleading.<sup>246</sup>

### *b. Discovery-Intensive Cases*

Discovery-intensive cases would be those cases that: (1) require the discovery of more than 10,000 pages of documents for each party; (2) have more than five real parties in interest; (3) have more than ten fact witnesses; (4) have more than three expert witnesses; or (5) would take more than seven days of trial time.<sup>247</sup> Because discovery in these cases is more complex, mandatory disclosure should be structured to quickly exchange basic information so that the parties can more efficiently proceed with further discovery through document requests, depositions, interrogatories, and requests for admissions. Therefore, mandatory disclosure in discovery-intensive cases should be accomplished through the means of standardized disclosure statements directed at basic categories of information.

The disclosure statement model was experimented with by ten of the early implementation districts.<sup>248</sup> Drawing on these examples, the standardized

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<sup>243</sup>See *supra* note 119 and accompanying text.

<sup>244</sup>Northern District of California Plan, *supra* note 96, § VII.C.

<sup>245</sup>*Id.*

<sup>246</sup>See text accompanying *supra* note 122 for discussion of experimental plans requiring disclosure of this type of information.

<sup>247</sup>See Southern District of New York Plan, *supra* note 96, at 3-4 (defining a complex case as involving "numerous depositions, exchanges of large quantities of documents, lengthy interrogatories" and defining a standard case as that "which the parties do not believe can be tried within one year of filing *but* which do not involve an unusually large number of parties, complex issues, or anticipated discovery disputes and motions" (emphasis in original); Northern District of Ohio Plan, *supra* note 239, at Rule 8:2.2 (characterizing a complex case as involving numerous legal issues, having more than five parties in interest, having more than ten witnesses, having more than three expert witnesses, and requiring more than ten trial days; and, characterizing a standard case as involving more than a few legal issues, with up to five parties in interest, with up to ten witnesses, with two or three expert witnesses, and requiring five to ten trial days).

<sup>248</sup>See *supra* note 108 and accompanying text for a discussion of these experimental plans.

disclosure statements should disclose: (1) a general description and the location of all documents relevant to the litigation; (2) the identity of persons known to have information or knowledge relevant to the litigation; (3) the existence and content of insurance agreements relevant to the litigation; (4) a calculation of any damages claimed in any pleading; and (5) whether any indispensable parties need to be added.

### *c. Timing*

The CJRA early implementation districts tie the initial mandatory disclosure to various events in the litigation, such as when the complaint or its answer is filed, when a party enters into the action, by the date of the scheduling conference, or by a date set by the court.<sup>249</sup> Federal Rule of Civil Procedure 26(a) requires the mandatory disclosures "be made at or within 10 days after the meeting of the parties" which must be held at least fourteen days prior to the scheduling conference. The timing prescribed by Rule 26(a) is unnecessarily complicated<sup>250</sup> and does not permit a judicial assessment of the discovery needs of a case prior to jumping into mandatory disclosure.

Instead, I propose that a scheduling conference be held between the parties and the judicial officer assigned to the case within thirty days after the filing of the defendant's answer<sup>251</sup> or removal of the case.<sup>252</sup> At the scheduling conference, the judicial officer would decide whether the case would be tracked for simple or complex discovery. The initial mandatory disclosures for discovery-simple cases would be filed within fifteen days of this conference. The mandatory disclosures for cases requiring complex discovery would be filed within thirty days of the scheduling conference.

If a case is initially designated as discovery-simple, but evolves into a discovery-intensive case, the parties would begin using the disclosure statements for all subsequent disclosures upon redesignation.

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<sup>249</sup>See *supra* part IV.D.1 (discussing time variations in the early implementation districts).

<sup>250</sup>Rule 26(a)(1) states that mandatory disclosures must be made "within 10 days after the meeting of the parties under subdivision (f)." FED. R. CIV. P. 26(a)(1). Subdivision (f) states that parties shall meet "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)." FED. R. CIV. P. 26(f). Rule 16(b) states that a scheduling order "shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant." FED. R. CIV. P. 16(b). In total, 116 days could elapse between service of the complaint on the defendant and mandatory disclosure under Rule 26(a)(1).

<sup>251</sup>Placing the scheduling conference after the defendant files his answer accounts for the possibility of the defendant filing a FED. R. CIV. P. 12(e) Motion for More Definite Statement, which would delay the timing of the defendant's answer.

<sup>252</sup>Some of the CJRA early implementation districts provided for mandatory disclosure in removed cases. See, e.g., N.D. GA. R. 201-2a; Southern District of Illinois Plan, *supra* note 85, at 13-14; Eastern District of Texas Plan, *supra* note 85, at 2-3.

*d. Retaining District Court Discretion*

Mandatory disclosure, as I propose it, should be a rather simple discovery mechanism that enhances the arsenal of litigation management techniques available to judicial officers. As explained, it is important for district courts to retain the ability to devise their own forms of mandatory disclosure.

## VI. CONCLUSION

Mandatory disclosure is not a panacea for the problems currently plaguing our civil justice system, but it can be a case management technique that will improve the efficiency of some courts by reducing litigation costs and by improving the quality and access of information. To be effective, however, mandatory disclosure does not need to be a Federal Rule of Civil Procedure.

The micromanagement of federal judges through case management rules in the Federal Rules of Civil Procedure should be abandoned and district courts should be provided greater discretion in devising case management rules which meet the unique needs of each district court. Finally, some district courts may find that greater efficiency also will result by taking a resource-differentiated approach to mandatory disclosure. If properly utilized as a Model Rule in the Federal Rules of Civil Procedure, mandatory disclosure could be an effective reform measure for some courts.

ERIC F. SPADE<sup>253</sup>

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<sup>253</sup>Law Clerk for the Honorable Monroe G. McKay, United States Court of Appeals for the Tenth Circuit. Admitted to bar, Ohio, 1995. J.D., 1995, Cleveland-Marshall College of Law, Cleveland State University; B.A., 1989, American University.