NOTES

FRIEND OR FOE? - THE PROPOSED AMENDMENTS TO RULE 26 OF THE FEDERAL RULES OF CIVIL PROCEDURE

I. MODERN DISCOVERY

Modern discovery rules and practice continue to be the focal point of much criticism from the bench, bar, scholars, and journalists. Judges feel they should not have "to drag a party kicking and screaming through discovery"[1] and consequently they seek to minimize their involvement in the process. Members of the bar continuously abuse the letter and spirit of the discovery rules, thereby forcing the bench to play referee between bickering attorneys. In an address to the American Bar Association on discovery abuse, Chief Justice Warren E. Burger stated "that some lawyers have exploited pretrial discovery with at least an excess of adversary zeal."[2] Legal scholars offer a myriad of solutions to the whole affair while the journalists can not write fast enough to document it all. The discovery nightmare "has provoked local rules limiting discovery, proposals [for reform] by Vice President Quayle's Council on Competitiveness, and most recently proposals to amend the Federal Rules of Civil Procedure themselves."[3]

In August of 1991 the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published a *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure.*[4] The document contained a letter of submission which "requested that the proposals be circulated to

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1. Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 489 (S.D. Fla. 1984).
2. *Id.*
3. Loren Kieve, *Discovery Reform*, 77 A.B.A. J. 78, 79 (1991).
4. 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 (August 15, 1991). [hereinafter COMMITTEE PROPOSAL].

the bench and bar and to the public generally for comment."[5] In all, eighteen rules were the focus of proposed amendments.[6] Nine, or fifty-percent, of the proposed rules relate to the details of discovery procedure.[7] That half of the proposed amendments address discovery provides some indication of the legal profession's dissatisfaction with the efficiency of the current discovery rules. The Committee made provision to hear testimony concerning the rules at a hearing held in Los Angeles, California; they received "over 60 requests from individuals and organizations wishing to testify at the hearing on the proposed ... amendments."[8] Consequently "everyone could not be accommodated,"[9] and the Committee Chairman had to schedule a second hearing.

The changes that these rules propose for discovery are sweeping, and represent an aggressive plan by the advisory committee to sharpen the sword that discovery wields in modern litigation. "The demons being exorcised once again are abuse and excess and their affiliated costs and delays."[10] According to the Advisory Committee, "[t]he various proposals have a common theme and purpose; namely, to change current practices to achieve more effectively the objective stated in Rule 1—the 'just, speedy, and inexpensive determination of every [civil] action.' "[11] The Advisory Committee further stated that the "[a]mendments to the [current] rules can and should be made to reduce, if not totally eliminate, the excessive delays and expense involved in many civil cases, particularly in the conduct of discovery."[12] If the proposed rules were adopted, the Committee believes that the resulting "[c]urtailment and prompt elimination of frivolous claims and defenses [would] serve[] not only to reduce the burden on litigants, but also to preserve scarce judicial resources for

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5. *Id.* at vii.

6. *Id.* at v.

7. These are: Rule 16, Rule 26, Rule 29, Rule 30, Rule 31, Rule 32, Rule 33, Rule 33, Rule 34, Rule 37.

8. Letter from Joseph F. Spaniol, Jr., Secretary of the Committee on Rules of Practice and Procedure, to the Honorable Owen M. Panner (October 31, 1991) (Re: Hearings on the Proposed Amendments to the Federal Rules of Civil Procedure) (on file at the Rules Committee Office).

9. *Id.*

10. Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 156 (1991) [hereinafter *Abusive Discovery*].

11. COMMITTEE PROPOSAL, *supra* note 4, at 1 (attachment to letter to Hon. Robert E. Keeton, Chairman).

12. *Id.*

litigants with disputes requiring more extensive court time and attention."[13]

The proposed discovery rules attempt to streamline the discovery process while keeping the court uninvolved in pre-trial procedures. This is accomplished by (1) requiring disclosure of initial ("pre-discovery") information within prescribed time periods, (2) delaying formal discovery and the use of certain discovery tools until such disclosures have been made, (3) redefining the "sketchy and vague"[14] requirements that relate to disclosure of expert testimony pursuant to the current Rule 26(b)(4)(a), (4) requiring pre-trial disclosure of specific information, (5) placing presumptive limits on the number and length of depositions, (6) placing presumptive limits on the number of interrogatories a party may submit, and finally, (7) by preventing a party from filing a motion for a protective order unless the movant has made a good faith effort to resolve the dispute without court intervention.

The Advisory Committee received many comments on the proposed discovery amendments, a significant number of which focused primarily or exclusively on Rule 26. Professor Paul Carrington of the Advisory Committee on Civil Rules, in a letter to the Standing Committee on Rules of Practice and Procedure, characterized the proposed amendment as a "fairly radical new rule."[15] This note will attempt to provide insight into the potential success of the revised Rule 26 by analyzing it in light of comments made by the Bench and Bar in response to the Advisory Committee's invitation. The author has compiled a number of repeatedly mentioned criticisms of the proposed Rule 26. They are enumerated in summary fashion here and discussed at greater length below.

First, neither the proposed rule nor the existing rule has been studied in sufficient detail to justify such "radical" change to the nation's current discovery practices.[16] In fact, "[v]irtually no empirical study exists on the perceived problems of the

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13. *Id.*

14. *Id.* at 29 (advisory committee's note).

15. Cover Memorandum from Professor Paul Carrington, Office of the Reporter, Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (February 22, 1990).

16. Letter from Dilworth, Paxson, Kalish & Kaufman, Philadelphia, Pa. to The Committee on Rules of Practice and Procedure at 2 (November 19, 1991) (providing comments on the COMMITTEE PROPOSAL) (on file at the Rules Committee Office) [hereinafter Comments from DPK & K].

current discovery system"[17] or the potential problems with the proposed rule.

Second, the Committee's proposed amendments appear to be untimely, given recent Congressional enactment of the Civil Justice Reform Act of 1990. The purpose of the Act is to improve the litigation process in general, however, it focuses particularly on discovery. The resultant overlap of reform efforts could potentially frustrate both, and yield temporary practices that are worse than our current system. Moreover, to one commentator the Civil Justice Reform Act was a more appealing instrument for reform, as it mandates a "careful and thorough evaluation" of discovery reform mechanisms;[18] whereas the proposed amendments bring radical change with little insight as to their potential success.

Third, the initial disclosure requirement which is to be added to the present discovery process cannot be justified by the "meager information available about its potential efficacy."[19] The Committee's reliance on certain existing local rules is faulty because they differ markedly from the disclosure process the Committee proposes and likewise have not been systematically studied.[20]

Fourth, reliance on existing theories of disclosure is faulty.

Fifth, the key language in revised Rule 26 that establishes the standards governing the disclosure process is, at best, "vague and amorphous."[21] Such a standard will frustrate and foul the attempts of litigants to comply with disclosure requirements.

Sixth, the initial disclosure process is not consistent with the Rules' prescription for notice pleading. The negative effect of this inconsistency would be threefold: It would cause an increase in motion practice, waste the defendants' resources, and consume already scarce judicial resources.

Seventh, the unique requirements characteristic of complex litigation are neither addressed nor remedied by proposed Rule 26.

Eighth, better avenues of reform exist. Changes are needed to limit the scope of the current discovery process and redefine

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17. *Id.*

18. *Id.*

19. Letter from Lawyers for Civil Justice to The Committee on Rules of Practice and Procedure at 1 (November 7, 1991) (providing comments on the COMMITTEE PROPOSAL) (on file at the Rules Committee Office) [hereinafter Comments from LCJ].

20. *Id.*

21. *Id.* at 7.

an attorney's ethical obligations. The proposed amendments merely seek to place a band aid over a flawed system.

Ninth, the practices proposed Rule 26 would institute are contrary to the nature of the adversarial system.

Lastly, for some, the current system manages discovery adequately.

Before a sensible analysis of the rule can be conveyed, it is necessary to understand the general provisions regarding discovery adopted by the Advisory Committee and stated in the *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure.* The General Provisions are summarized below for the reader's convenience, but a reading of the rule in its amended form is recommended and will be useful for the reader; see the Appendix.

GENERAL PROVISIONS GOVERNING DISCOVERY - RULE 26

Revised Rule 26 requires litigants to disclose, without any request, three types of basic information that at present are almost invariably obtained through discovery requests or as a result of standard pretrial provisions and local rules. Failure to make the required disclosures can lead not only to imposition of traditional sanctions, but also to preclusion of the use of evidence and notification to the jury that evidence was not disclosed as required, much as in the situation of spoliation of evidence. The parties are required to update these disclosures on the basis of information learned during the litigation.

Early in the case—within 30 days after a defendant has answered, unless the court sets another time—the parties must identify the persons likely to have significant information about the claims and defenses, must describe the documents likely to bear significantly on these issues, must provide information concerning any damages they claim, and provide insurance information. Formal discovery ordinarily will not commence until after these disclosures have been made. The rule permits the time for disclosure to be accelerated when, for example, answers are being delayed for an extensive period of time awaiting a ruling on a Rule 12 motion.

Later—30 days before trial, unless the court sets another time—the parties must specifically identify the witnesses and the particular documents they may present at trial (except solely for impeachment purposes). Objections to admissibility of listed documents, other than under Fed. R. Evid. 402 and 403, will be waived unless made within 14 days after the list is provided.

A third type of required disclosure relates to expert testimony. At an appropriate point during pretrial proceedings, a party expecting to use expert testimony must, unless excused by the court, provide other litigants with a written report from its expert. The report must be detailed and complete—in essence, a preview of the direct testimony from such person, including any exhibits to be used to summarize or support the person's opinions. After the report has been provided, the expert can be deposed, though it is expected that, given the detailed nature of the report, there will often be little need for such a deposition. Before trial, litigants must disclose any changes in such information, and the direct examination of the expert at trial will be limited to that which has been so disclosed.

The court has wide discretion to alter these disclosure requirements, or the times disclosures are to be made, as well as to change the presumptive limits on depositions and interrogatories contained in the proposed revisions of Rules 30, 31, and 33. These powers are particularly needed in view of the mandate of the Civil Justice Reform Act of 1990 that courts adopt local plans to reduce costs and delays in civil litigation. The court can exempt from the disclosure requirements those cases in which little or no discovery is typically needed (e.g., reviews of administrative records, bankruptcy appeals, government collection cases, etc.).

Under the proposed amendments to Rule 26 and the other discovery rules, scheduling conferences under Rule 16(b) will have increased importance, affording the court the opportunity to tailor the timing and limitations of discovery to the circumstances of the particular case. It is anticipated that ordinarily the initial disclosure will be made before the scheduling conference, and thus provide the court and parties with information needed to structure further pretrial proceedings and discovery. These disclosures should ordinarily be exchanged in a preliminary meeting of the attorneys, at which time they would clarify the information provided and discuss the discovery needs in the case. For this reason, the Advisory Committee concluded that, absent another directive from the court, the initial disclosures should be due from the parties simultaneously rather than in a sequential manner.

The revision of Rule 26 provides that a person not file a motion for a protective order unless the movant "in good faith has conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court order." Similar

changes are proposed with respect to motions under Rule 37. Experience by many courts demonstrates that such a requirement is workable and serves to reduce unnecessary motion practice.[22]

II. GENERAL PROBLEMS

The following represents a compilation and coordination of the most prominent arguments against the adoption of the proposed changes to Rule 26.

A. Such Radical Change in Litigation Procedure Mandates a Preliminary Study

Some believe that such a "radical" change in the nation's litigation process should not be implemented in the absence of conclusive empirical evidence supporting the potential success of the amendments. Furthermore, virtually no empirical study exists as to the problems with the present system of discovery.[23] Adoption of proposed Rule 26 would bury the old system, without conducting an autopsy, and bring in an unknown new. Granted, many professionals agree that the time has come for radical discovery reform,[24] but should we attempt to create such reform without systematically identifying the problems with the current system? Moreover, to repair the current system without knowing the potential success of the refinements could prove hasty and foolhardy. Even the districts where informal discovery is required by local rules have not been studied to determine the efficiency of disclosure procedures.[25]

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22. COMMITTEE PROPOSAL, *supra* note 4, at 3-5 (attachment to letter to Hon. Robert E. Keeton, Chairman).

23. Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rule Making*, 69 N.C. L. REV. 795, 810 (1991) [hereinafter *Informal Discovery*].

24. *See, e.g.*, William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178 (1991); Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U.L. REV. 635 (1989); William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989); Samuel Mandelbaum, *Discovery Abuse: Some New Possibilities for Rescuing Sisyphus*, 3 INSIDE LITIGATION 1 (1989); John F. Grady, *The Unsteady Triumvirate*, 63 NOTRE DAME L. REV. 830 (1988); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 334-36 (1986); Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579; Amendments to Federal Rules of Civil Procedure, 446 U.S. 995, 997-1001 (1980) (Powell, J., dissenting); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

25. Linda S. Mullenix, *Informal Discovery*, *supra* note 23, at 810.

Educated decisions should be based not upon mere speculation but upon hard facts garnered from a comprehensive study. A "study should focus on both those districts where informal discovery is required and those where it is not. It is only after such a study is accomplished, that change should be allowed to take place on the scale now envisioned."[26] One litigator went so far as to state that the proposed Rule 26 needs considerably more study before even releasing it for public comment.[27] Given the nationwide impact of the proposed rule if adopted, there are legitimate grounds for the concern voiced to the Advisory Committee.

B. Proposed Amendments May be Premature in Light of the "Judicial Improvements Act of 1990"

The recently enacted Judicial Improvements Act requires each federal district court to formulate and implement an expense and delay reduction plan in order to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolution of civil disputes."[28] The terms of the Act require that advisory groups should already have been established to implement the Act in every district court.[29] Within the next four years, a Judicial Conference Report will be composed documenting plans that were proposed, revised, and finally established.[30] The Act further mandates the establishment of demonstration and pilot programs formulated to enhance the overall litigation process and discovery in particular.[31] By the end of 1995, the terms of the Act require that reports be issued detailing the effectiveness of the tested programs.[32]

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26. Comments from DPK & K, *supra* note 16, at 10; *see also* Thomas M. Mengler, *Abusive Discovery*, *supra* note 10, at 8 ("Perhaps, if there is to be experimentation with voluntary disclosure schemes, that experimentation should come through a select number of local district courts; from the bottom up, rather than from the top down.").

27. Letter from Harvey, Kruse, Westen & Milan, P.C., Troy, Michigan to Secretary, Standing Committee on Rules of Practice & Procedure at 1 (November 1, 1991) (providing comments on the COMMITTEE PROPOSAL) (on file at the Rules Committee Office) [hereinafter Comments from HKW & M].

28. 28 U.S.C. § 471 (1990).

29. Letter from The Association of the Bar of the City of New York to The Committee on Rules of Practice and Procedure at 2 (May 10, 1991) (providing comments on the COMMITTEE PROPOSAL) (citing 28 U.S.C. § 478) (on file at the Rules Committee Office) [hereinafter Comments from Bar of New York].

30. *Id.* (citing 28 U.S.C. § 478).

31. *Id.* (citing 28 U.S.C. § 478).

32. *Id.* (citing 136 Cong. Rec. S17906).

"In short, Congress has mandated major experimentation and evaluation concerning the very issues that spurred the proposed discovery amendments ...."[33] The Act creates an ideal mechanism for conducting a meaningful empirical study and adopting effective reform.[34] It seems prudent that the Advisory Committee should delay promotion of proposed Rule 26 pending the findings of the Judicial Improvements Act which will be available in 1995. In less than three years, the Advisory Committee will be in a superior position to assess a range of alternatives with the benefit of empirical data.[35] "That juncture provides a more promising time for any significant change in the discovery rules."[36]

C. Local Rules have not Proven Promising

The Advisory Committee purports to have structured its disclosure process upon the voluntary disclosure processes in place in the Southern District of Florida and the Central District of California.[37] The processes used in these districts, however, are substantially different from the Committee's proposal.[38] The disclosure process in use in Florida and California is "self-reflective,"[39] meaning that each party is only required to disclose information relevant to his own claims and defenses.[40] Contrary to the Committee's proposal, parties are not required "to speculate as to the nature of an opponent's claims and defenses, and then go further and guess at what information in one's own possession may have a significant bearing on those issues."[41]

It is troubling that the Committee uses the Florida and California disclosure processes as the foundation for its proposal, yet the final product adopted by the Committee is significantly

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33. *Id.*

34. Comments from DPK & K, *supra* note 16, at 13.

35. Comments from Bar of New York, *supra* note 29, at 2.

36. *Id.*

37. Minutes of the November 17-18, 1989 meeting, Committee on Rules of Practice and Procedure.

38. Comments from LCJ, *supra* note 19, at 6.

39. *Id.*

40. *See* Cal. (C.D.) Local Rule 6.1.1 and Fla. (S.D.) Local Rule 14.A.1 (requiring "exchange [of] all documents then reasonably available to a party which are then contemplated *to be used in support of the allegations of the pleading filed by the party*" (emphasis added); Cal. (C.D.) Local Rule 6.1.4 and Fla. (S.D.) Local Rule 14.A.4 ("exchange [of] a list of witnesses then known to have knowledge of the *facts supporting the material allegations of the pleading filed by the party*") (emphasis added).

41. Comments from LCJ, *supra* note 19, at 7.

different. Equally troubling is that the potential success of the Committee's proposal cannot be gleaned by comparing it with the rules that purportedly serve as its pattern, because they are so different.[42] Furthermore, a limited survey of Florida attorneys revealed "that if lawyers did not cooperate in informal discovery, their cases would be delayed because judges, busy with other pressing demands, would not make themselves available to referee discovery disputes."[43]

Currently, no study or evaluation has been undertaken to determine the consequences or efficacy of these local rules.[44] However, in those experimental districts adopting disclosure processes, informal surveys "reveal problems, delays and general dissatisfaction" with the rules.[45]

> Even if the Committee's disclosure proposal were identical to those in effect in Florida and California, there has been no serious study or evaluation of how voluntary disclosure is working in those districts. While some may assume it is working well, practitioners are not so sanguine.[46] Before the pending proposal is enacted on the strength of a favorable reference to the alleged effectiveness of the disclosure processes in these two districts, it would be appropriate to study how these rules, and the litigants and the courts using them, are faring. The Committee's disclosure proposal cannot be justified by reference to voluntary disclosure requirements in effect in a few district courts.[47]

The danger that lies ahead may prove to be faulty reliance upon disclosure systems that are different from the system embodied in the Committee's proposal. Given the lack of supporting empirical data for proposed Rule 26, it is axiomatic that the foundation the Committee rests its proposal upon should be, at a minimum, similar substantively and procedurally. Such is not the case here.

D. Proposed Rule 26 Cannot be Justified by Reliance on Existing Theories of Disclosure

The Committee Notes offer as a second basis for the proposed Rule 26 two law review articles that set forth the "concepts

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42. *Id.* at 5.
43. Linda S. Mullenix, *Informal Discovery*, *supra* note 23, at 815.
44. Comments from DPK & K, *supra* note 16, at 9.
45. *Id.*
46. Comments from LCJ, *supra* note 19, at 7 (footnote omitted).
47. *Id.*

of imposing a duty of disclosure."[48] One article was written by Magistrate Judge Wayne Brazil, a member of the Advisory Committee that promulgated the proposed amendments.[49] The other article was authored by Judge Schwarzer of the Federal Judicial Center.[50] Here again, as with the reliance placed upon local rules, the Committee's proposal is "substantially dissimilar" to the proposals detailed in the two articles.[51] Both the proposals embodied in the articles endeavor to address discovery flaws with a more comprehensive plan than that which the Committee ultimately adopted.

"The Brazil proposal call[s] for reform of ... ethical and economic issues ... as well as imposition of voluntary disclosure. Moreover, Brazil advocated a significant increase in the oversight responsibilities and involvement of judges ...."[52] Consistent with Brazil's theory, and equally "consistent with the Federal Rules' commitment to merits resolution, is to put down the rule making pen and to provide the necessary resources to manage formal discovery effectively."[53] One litigator believes that the only people who can accomplish the noble goals of proposed Rule 26 "are the lawyers and clients involved in the litigation, with the aid of the court as necessary."[54] "The United States Supreme Court in *ACF Industries, Inc., Carter Carburetor Division v. Equal Employment Opportunity Commissions,*[55] emphasized the need for district court supervision over discovery."[56] Judge Schwarzer advocated a system that would abolish discovery and replace it with disclosure, thereby requiring the parties to conduct more initial investigation themselves prior to filing their claims, instead

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48. Committee Proposal, *supra* note 4, at 26-27 (Committee Notes).

49. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978) [hereinafter *Civil Discovery*].

50. William W. Schwarzer, *The Federal Rules, The Adversary Process and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).

51. Comments from DPK & K, *supra* note 16, at 7-10.

52. Comments from LCJ, *supra* note 19, at 6.

53. Thomas M. Mengler, *Abusive Discovery*, *supra* note 10, at 17.

54. Letter from Thompson & Mitchell, St. Louis, Mo. to The Committee on Rules of Practice and Procedure at 3 (Oct. 23, 1991) (providing comments on the COMMITTEE PROPOSAL) (on file at the Rules Committee Office) [hereinafter Comments from T & M].

55. ACF Indust., Inc., Carter Carburetor Div. v. EEOC, 439 U.S. 1081 (1979) (JJ. Powell, Stewart, Rehnquist, dissenting).

56. Committee on Discovery of the New York State Bar Association Section on Commercial and Federal Litigation, *Report on Discovery Under Rule 26(b)(1)*, 127 F.R.D. 625, 626 (1989).

of allowing them to engage in lengthy fishing expeditions under the cloak of the court's authority.[57]

The Brazil and Schwarzer proposals attack the heart of the problem by creating an entirely new process that redefines and realigns the "duties and obligations of the parties and the court."[58] Neither proposal seeks to bandage a broken system back together. The Committee's proposal, however, attempts reform of the underlying discovery system using "patch work" in the form of pre-discovery disclosure. "As such, the Committee's reliance on the Brazil and Schwarzer proposals as justification for its very different approach to disclosure is inapposite."[59]

Furthermore, it is unsettling that the Committee places such a hearty reliance on Judge Brazil's article while Judge "Brazil himself laments the fact that no effective large scale empirical study existed in the field of discovery as of 1978."[60] Moreover, Judge Brazil recognizes that his theory is based upon "antidotal [sic] evidence" and his limited experience as a litigator.[61] While calling for a change in the current discovery process, Judge Brazil acknowledges that sweeping change should be the product of an extensive empirical study.

E. Vagueness of Key Language

Proposed Rule 26 requires parties to voluntarily identify and disclose to the other party several types of information that are "likely" to "bear[] significantly on any claim or defense."[62] Surely, the Committee members had a standard in mind when they drafted Rule 26 to include this language. Before criticizing their endeavors, one must concede that it is indeed a strenuous task to compose such a standard given the innumerable variables at play in litigation.

Unfortunately, this standard is not linked to any current legal rule of discovery or evidence,[63] nor is the standard tied to

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57. William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178, 181 (1991) [hereinafter *Slaying the Monsters*].

58. Comments from LCJ, *supra* note 19, at 6.

59. *Id.*

60. Comments from DPK & K, *supra* note 16, at 9 (citing Wayne D. Brazil, *Civil Discovery*, *supra* note 49, at 1305-10).

61. Comments from DPK & K, *supra* note 16, at 9.

62. Committee Proposal, *supra* note 4, at 14-15 (proposed Rule 26(a)(1)(A)).

63. Comments from DPK & K, *supra* note 16, at 3.

any existing standard "such as relevancy or admissibility."[64] "Perhaps it means something more than relevancy, but neither the language of the rule nor the Committee notes offer any insight as to how much more."[65] Certainly, the drafters intended the standard for disclosure to be "substantially more limited than the scope of [current] discovery."[66] What, however, is "likely" to "bear significantly" remains to be seen and will gather clarity, if adopted, at the expense of many litigants. "How can a party make those determinations when the claims are not fully described and no discovery has yet taken place?"[67] Unfortunately, "likely" to "bear[] significantly," the key language of Rule 26, "has little or no legal meaning."[68]

There was even controversy among the Committee members as to the proper articulation of the standard for disclosure. Justice Zimmerman related concerns to the Advisory Committee over the language "likely" to "bear[] significantly."[69] Judge Bertelsman, a member of the Standing Committee on Rules of Practice and Procedure, "thought most cases involve interrogatories that are equally vague. Judge Brazil thought interrogatories even broader."[70] Judge Winter, a member of the Advisory Committee, "thought the present language about as good as the Committee can do."[71] Quite possibly the Committee, clearly cognizant of a weak link in their proposal, feels dogmatically that blind reform is still appropriate.

Initially, Rule 26 will prove to be problematic because of its vagueness. This vagueness will cause litigants to "pursue motions, hearings, and appellate review" in order to define and clarify the rule as necessary,[72] all at the cost of time, money and expenditure of scarce judicial resources. The initial disclosure provision "may also produce satellite litigation over the adequacy of the initial disclosures . . . ."[73] "Many litigants may find this too little guidance too late, particularly in light of the proposed sanctions under Rule 37(c), which include exclusion of the evidence, notice to the

64. Comments from LCJ, *supra* note 19, at 7.
65. *Id.*
66. *Id.*
67. Comments from DPK & K, *supra* note 16, at 4.
68. Comments from LCJ, *supra* note 19, at 7.
69. Committee Proposal, *supra* note 4, at 14 (proposed Rule 26(a)(1)(A)).
70. Minutes of the May 22-24, 1989 meeting, Committee on Rules of Practice and Procedure at 1.
71. *Id.*
72. Comments from LCJ, *supra* note 19, at 8.
73. Thomas M. Mengler, *Abusive Discovery*, *supra* note 10, at 7.

jury of the failure to disclose, plus the full panoply of other sanctions already authorized under Rules 37 and 11."[74] One litigation firm suggested that the Committee Notes

> should further define the term "bear(s) significantly" ... and articulate in what respect it differs from the term "relevant" used in the current Rule 26(b)(1). Since litigants will be required to produce information ..., it is most important to describe in careful detail if the proposed rules have not only changed *when* information must be disclosed but *how much* information must be disclosed.[75]

The most frequent criticism of proposed Rule 26 is the "vague and amorphous"[76] standard it embodies.[77] This standard will undoubtedly generate the proposal's initial stumbling blocks unless it is supplemented in some way.

F. The Proposed Disclosure Process is Inconsistent with the Rules Concept of Notice Pleading

Notice pleading was initially believed to be a "boon to the civil justice system."[78] Recently, however, it has been identified as a "factor contributing to discovery abuse."[79] More than one litigator commented on the apparent conflict that would result

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74. Comments from LCJ, *supra* note 19, at 8.

75. Letter from Chadbourne & Parke, New York, N.Y. to The Committee on Rules of Practice and Procedure at 4 (November 5, 1991) (providing comments on the COMMITTEE PROPOSAL) (on file at the Rules Committee Office) [hereinafter Comments from C & P].

76. Comments from LCJ, *supra* note 17, at 7.

77. The author found the stated criticism articulated in nearly all the 35 letters, commentaries and articles he reviewed as sources for this Note. The remarks ranged from cursory to highly detailed. In addition to those sources, gathered from the Rules Committee Office, already cited, *see* Letter from Carpenter, Bennett & Morrissey, Newark, N.J. to The Committee on Rules of Practice and Procedure at 3 (May 21, 1991); Letter from Milberg, Weiss, Bershad, Specthrie & Lerach, San Diego, California to The Committee on Rules of Practice and Procedure at 2 (May 20, 1991); Letter from Bar Association of San Francisco, San Francisco, California to The Committee on Rules of Practice and Procedure at 7 (May 15, 1991); Letter from Joy Technologies Inc., Pittsburgh, Pennsylvania to The Committee on Rules of Practice and Procedure at 1 (July 12, 1991); Letter from Johnson, Oldham & Angell, Denver, Colorado to The Committee on Rules of Practice and Procedure at 3 (October 30, 1991) (all on file at the Rules Committee Office).

78. Comments from LCJ, *supra* note 19, at 8 (citing Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U.L. REV. 635, 644 (1989), and Aurther R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 8-9 (1984) [hereinafter *The Adversary System*]).

79. Comments from LCJ, *supra* note 19, at 8 (citing Easterbrook, *Discovery As Abuse, supra* note 78, at 644.

from coupling notice pleading with disclosure requirements.[80] In fact, one coalition of attorneys believes that "[a]ny detrimental effect that notice pleading has had to date will pale in comparison to the problems likely to occur when the proposed disclosure process is superimposed on the notice pleading system."[81] Another litigator stated that requiring "a defendant to respond to 'notice pleading' by producing all documents which 'may bear significantly' upon the case puts the cart before the horse."[82] Much comment was received by the Advisory Committee indicating that the proposed Rule 26 was incongruent with the practice of notice pleading. Byproducts of that mismatch were perceived to be (1) increased motion practice, (2) further judicial intervention in the discovery process, and (3) waste of both the defendant's resources and the court's time.

1. Increased Motion Practice and Further Judicial Intervention in the Discovery Process

Under Rule 8(a), which authorizes the current practice of notice pleading, complaints are often extremely cursory.[83] Indeed,

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80. This was unofficially the second most frequently stated criticism of the proposed Rule 26. *See, e.g.*, Comments from LCJ, *supra* note 19, at 8; Letter from Martin, Bischoff, Templeton, Langslit & Hoffman, Portland, Oregon to The Committee on Rules of Practice and Procedure at 3 (November 6, 1991) [hereinafter Comments from MBLT & H]; Letter from Harris Corporation, Melbourne, Florida to The Committee on Rules of Practice and Procedure at 1 (July 8, 1991); Letter from Keefer, Wood, Allen & Rahal, Harrisburg, Pennsylvania to The Committee on Rules of Practice and Procedure at 1 (October 21, 1991) (all on file at the Rules Committee Office).

81. Comments from LCJ, *supra* note 19, at 8.

82. Comments from MBLT & H, *supra* note 80, at 3.

83. The following example illustrates an actual complaint in a products liability action. The text is complete and verbatim.

> 1. The Plaintiff, ____, is an individual residing in Norton, Bristol County, Massachusetts.
>
> 2. The Defendant, ____, is a corporation engaged in the manufacture, distribution and sale of motor vehicles to the general public in the Commonwealth of Massachusetts.
>
> 3. On or about July 19, 1987, in Norton, Massachusetts, by reason of the carelessness, negligence and failure of the Defendant, its' agents, servants or employees, in the manufacture and assembly of a motor vehicle and the equipment and apparatus connected therewith, the Plaintiff was severely injured.
>
> 4. In consequence thereof, the Plaintiff suffered great pain of body and mind, incurred medical expenses, has been deprived of his earning capacity, and has been permanently disabled.
>
> Wherefore, the Plaintiff, ____, prays for judgment to issue in his favor together with costs, interest, and attorneys fees deemed to be fair and adequate by this court.

Comments from LCJ, *supra* note 17, at 8-9.

the concept behind notice pleading is to require little more than to give notice to the opposing party that a claim against him exists. "Nevertheless, proposed Rule 26 would require defendants to disclose information based on cursory complaints without the benefit of any discovery and then risk sanctions if that disclosure, based on a vague standard, is later found deficient based on twenty-twenty hindsight."[84] Essentially, proposed Rule 26 will require a party to make his "best guess" at what his adversary's claim is, and then "compound the speculation" by further guessing at what information he has that is "likely" to "bear significantly" on that claim.[85]

All this speculation will create a "difficult dilemma"[86] for attorneys. Their problem will be twofold. First, in an effort to protect their clients' interests, attorneys will use the best available weapon in their arsenal. A motion under Fed. R. C. P. 12(e) for a more definite statement is a likely candidate. Second, they will want to protect their client and themselves from potential sanctions; a 12(e) motion would serve that purpose also.

"As presently drafted, the proposed Rule 26 will virtually guarantee that a defendant will file a ... motion for a 'more definite statement' in almost every case."[87] Defendants will employ 12(e) motions to "ferret out the factual basis"[88] of a plaintiff's claim and in the process slow the litigation process. Since the filing of a 12(e) motion delays the filing of an answer, disclosure itself will be delayed because it is the answer that triggers disclosure. "No disclosure or discovery" can take place until the court rules on such motions.[89]

On the other hand, some litigants will elect to unnecessarily overdisclose information, thereby publicly revealing information that otherwise would have remained confidential. The dilemma is not an enviable one. Making a choice between compliance with a "vague" rule and protecting confidential information is "an onerous, unfair burden that litigants may be forced to assume under the proposed rule."[90] As one litigation firm points out:

> No matter the response chosen, it is likely that the opposing party will not be satisfied. Motions to compel and for sanctions

84. Comments from DPK & K, *supra* note 16, at 7.
85. Comments from LCJ, *supra* note 19, at 8.
86. Comments from DPK & K, *supra* note 16, at 7.
87. Comments from C & P, *supra* note 75, at 3.
88. Comments from DPK & K, *supra* note 16, at 7.
89. *Id.*
90. Comments from LCJ, *supra* note 19, at 10.

> will flood in from plaintiffs while defendants[91] will be forced to counter with motions for more definite statements and early requests for protective orders. A paper blizzard will result, with the court relegated to sorting out an endless morass of collateral discovery matters that will only serve to delay the discovery of needed information, all of which is presently obtainable under existing discovery rules. This is a far sight from the Committee's stated purpose of accelerating the exchange on information and eliminating paperwork.[92]

It seems clear that until the procedural kinks of the proposed system are worked out, motion practice will necessarily be high as lawyers endeavor to protect themselves and their clients' interests.

2. Waste of Defendants' Resources and Court's Time

Notice pleading allows a plaintiff in a products liability action to base a claim simply on the allegation of "defective design."[93] The effect of such a pleading under proposed Rule 26 is that the defendants would be forced to "identify each and every expert, for each and every product manufactured, in manufacturing, design, warning, or any other aspect of the product, prior to being allowed to depose the plaintiff to determine which product caused the alleged injury."[94] This places an immense and unnecessary burden upon the defendant to identify "every potential witness for every product."[95] Such a burden is clearly not within the spirit or letter of the rules and is a waste of the defendants' resources.[96] Parties will inevitably attempt to meet the disclosure requirement with minimal effort. Consequently, "[j]udges will be called on with increasing frequency to enter the fray, but because the disclosure standard is so amorphous, they will find it difficult

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91. *See also* Comments from HKW & M, supra note 27, at 5 ("Inflexible or unworkable rules will only lead to more motions and more congested dockets.").

92. Comments from DPK & K, *supra* note 16, at 7-8.

93. Letter from Benoit, Alexander, Sinclair, Doerr, Harwood & High, Twin Falls, Idaho to The Committee on Rules of Practice and Procedure at 1 (November 5, 1991) (providing comments on the COMMITTEE PROPOSAL) (on file at the Rules Committee Office).

94. *Id.*

95. *Id.*

96. *Id.; see also* Thomas M Mengler, *Abusive Discovery, supra* note 10, at 7 ("Designed to reduce costs and delay, the initial disclosure provision could be employed to increase those costs.").

to rule on the adequacy of a disclosure without substantial additional input from the litigants themselves."[97] In the end, it will be both the litigants and the courts who relinquish their resources to a system that is no better than the present.

G. Proposed Rule 26 Conflicts with the Adversarial System

Concern was voiced over the potential for the proposed Rule 26 to conflict with both the Attorney-Client privilege and the Work Product Doctrine.

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty ....[98]

The American Judicial System rests upon the foundation that the adversarial system is the best method for adjudication of disputes.[99] To operate at maximum efficiency, the adversarial system demands that litigants build their case against their opponent as best they can. To "inject[] a decidedly non-adversarial process into the middle of a process that is fiercely adversarial in all other respects will create significant tension and conflict with numerous aspects of the law."[100]

1. Attorney-Client conflicts

One litigation firm captured the tone and message of several letters in stating that the proposed Rule 26

> is antithetical to the adversarial system and at least somewhat at odds with the longstanding practice and ethical duty to provide zealous representation of one's clients .... Moreover, a requirement that counsel disclose weaknesses in a case is in tension with the attorney-client relationship and likely to create conflicts of interest between attorney and client.[101]

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97. Comments from LCJ, *supra* note 19, at 10.

98. Trial of Queen Caroline 8 (J. Nightengale ed. 1821), *quoted in* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975).

99. Letter from Kirkland & Ellis, Washington, D.C. to The Committee on Rules of Practice and Procedure at 1 (October 25, 1991) (providing comments on the COMMITTEE PROPOSAL) (on file at the Rules Committee Office) [hereinafter Comments from K & E].

100. Comments from LCJ, *supra* note 19, at 12 (citing Schwarzer, *supra* note 50 (Framers of federal rules of civil procedure intended rules to function effectively in adversary process).

101. Comments from K & E, *supra* note 99, at 1.

Attorneys will be hard pressed to make their clients understand that they are under a legal duty to root zealously through their clients' files in search of damaging information simply to turn it over to their opponent, all in the name of justice.[102] Accordingly, clients will learn to be evasive and less forthcoming with their attorneys as their instincts emerge to prevent their self-destruction. Inevitably, the very privilege that was designed to protect the attorney-client relationship will be undermined.[103] Quite possibly, "attorneys may find themselves in the awkward position of being unable to respond properly to the directives of the rules because they are being sandbagged by their clients with regard to especially confidential or negative information."[104] At this point, the attorney is working for a client who will not confide in him and is slave to a system that will sanction him for noncompliance. A comprehensive proposal should address these issues, perhaps through modification of the attorney-client privilege. But here again, as with complex litigation, that will open a whole new can of worms.

2. Work Product Conflicts

Proposed Rule 26 and the Work Product doctrine have the potential to clash frequently. Through disclosure a party may reveal a "legal theory or line of factual inquiry"[105] that his opponent never considered. Mental impressions may also be inadvertently divulged through disclosure of witnesses and documents.[106] In *Hickman v. Taylor*, Justice Jackson stated, "[d]iscovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary."[107]

Another potential problem related both to the attorney-client privilege and the work product doctrine can be understood by way of example. Must the defendant's counsel disclose test data that was gathered in preparation for prior cases?[108] Likewise, must expert opinions formed in response to defense counsel's questions be revealed if the plaintiff has not raised these issues but they are conceivably related to those issues plaintiff has

102. Comments from LCJ, *supra* note 19, at 12.
103. *Id.*
104. *Id.* at 13.
105. *Id.*
106. *Id.*
107. 329 U.S. 495, 516 (1947) (Jackson, J., concurring)
108. Comments from HKW & M, *supra* note 27, at 4.

identified?[109] Again we find ourselves returning to the key language of proposed Rule 26: What is "likely" to "bear significantly?"

Given the non-adversarial nature of the proposal, its implementation could potentially undermine both the attorney-client privilege and the work product doctrine. Moreover, it may have "far reaching and largely unforeseen implications"[110] on "other fundamental cornerstones of the civil justice process ...."[111]

H. Better Avenues for Meaningful Reform

This author believes that the Committee's proposal may not address the discovery issues that truly demand reformation.[112] There are, however, problems with the current discovery system. Precisely what those problems are and what their scope and severity may be is the subject of substantial disagreement. As one commentator averred, "[t]he panacea for the current discovery malaise"[113] is not another round of rulemaking. Ironically, members of the Advisory Committee have acknowledged that discovery abuse will not be curtailed until the regulations defining an attorney's ethical obligations are reviewed and amended.[114] Such change is not within the Advisory Committee's purview and certainly cannot be properly addressed by amendments to the Federal Rules. There are, however, other avenues of reform that should appropriately be addressed by the Committee.

> [O]ne [such avenue of reform] clearly within the Committee's reach, is that the current scope of discovery is invasive beyond all reasonable boundaries. Although earlier Rules Committee efforts, since abandoned, were directed at limiting

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109. *Id.*

110. Comments from LCJ, *supra* note 19, at 13.

111. *Id.* at 14.

112. *See also* Thomas M. Mengler, *Abusive Discovery, supra* note 10, at 2 ("[I]t is worth questioning whether the cause of our discovery ills is ineffective rulemaking and whether the cure—if there is any—is more, or different, rules. This author, for one, casts a dissenting vote").

113. *Id.* at 16.

114. Wayne D. Brazil, *Civil Discovery, supra* note 49, at 1345; Aurther R. Miller, *The Adversary System, supra* note 78, at 17-19 (citing Jack H. Friendenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 817 (1981)).

> the scope of discovery,[115] the pending amendments are silent on what is perhaps the best possibility for achieving meaningful reform.[116]

The current version of Rule 26, which allows discovery of all information that "appears reasonably calculated to lead to the discovery of admissible evidence," invites litigants to pillage recklessly through their opponents' files.

I. Complex Litigation

Essentially, all the aforementioned criticisms apply equally in complex litigation, but the inflexibility of proposed Rule 26 seems to be further aggravated by the unique demands of such litigation. The discovery process in complex litigation is "of necessity an evolving one."[117] Plaintiffs frequently refuse to identify a specific theory of liability pending the outcome of in-depth discovery.[118] Consequently, "[d]efendant[s] may not know which documents or witnesses are relevant to the claim or defense until even later."[119]

1. Notice pleading

Notice pleading is especially problematic in complex litigation. For example, in product liability cases

> the manufacturer is faced with a complaint which sets forth the bare facts of an accident and the broad allegation that a particular product is unreasonably dangerous. Few details are set forth. It is virtually impossible for the manufacturer to determine within 30 days of the receipt of the complaint which of its thousands of employees and millions of documents are 'reasonably likely' to 'bear significantly' on a claim or defense in the case. To place this burden upon the manufacturer with potential sanctions for failure to comply is unreal-

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115. Comments from LCJ, *supra* note 19, at 4 (citing Reporter's Note, March 8, 1990 Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Rule 26, pp. 257-58 (March 15, 1990)) (describing proposal from New York State Bar Association recommending the narrowing of the scope of discovery); Miller, *supra* note 78, at 22-24 (citing PRELIMINARY DRAFT OF PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE, 77 F.R.D. 613, 623 (1978)); Brazil, *supra* note 49, at 1333-35 (1978).

116. Comments from LCJ, *supra* note 19, at 4.

117. Comments from MBLT & H, *supra* note 80, at 2.

118. *Id.*

119. *Id.*

> istic and unfair. Even the most conscientious manufacturers will not be able to comply with this rule.[120]

The problem is compounded in the case of a foreign corporation. Even the most sophisticated of them find it extraordinarily difficult to understand and comply with American discovery procedures within 90 days, assuming the document requests are highly specific.[121] Merely amassing and reviewing a large volume of documents in 30 days may be unduly burdensome.[122] "Imagine the nightmare of sorting documents for privilege under such time constraints."[123]

2. Settlement

One commentator expressed the opinion that the "unnecessary expenditure of time and resources" in trying to comply with the 30-day requirement would "be a disincentive to settlement"[124] because settling would mean discarding, for naught, resources already invested. Such a time constraint would confront a defense attorney with "the unenviable option of over-producing documents or risk significant sanctions for failure to produce the evidence."[125]

3. The Civil Justice Reform Act (The "Act")

The Act will provide an ideal medium for gathering requirements unique to complex litigation. The Act addresses the inescapable fact that "[c]omplex cases require extraordinary treatment"[126] by authorizing special procedures for cases regarded as complex.[127] It is through these special procedures that the unique requirements of litigating complex cases will be flushed out, documented, and reported on in 1995. The Committee proposal, however, makes no accommodations for complex cases. In fact, it attempts to treat all variations of litigation the same.

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120. Comments from T & M, *supra* note 54, at 1.

121. Comments from MBLT & H, *supra* note 80, at 2.

122. Comments from HKW & M, *supra* note 27, at 2.

123. *Id.*

124. *Id.* at 1; *see also id.* at 5 ("[U]nrealistically limited discovery will not promote settlement, will exacerbate the number of trials and again increase the expenditure of time and money.").

125. *Id.* at 2.

126. Comments from DPK & K, *supra* note 16, at 16.

127. *Id.*

"This is at odds with the mandate of Congress and the realities of litigation."[128] One possible solution would be altering Rule 26 to handle cases identified as "complex" in one of two ways. Either an exemption could be granted for such cases to delay disclosure until the issues were "clearly framed through some discovery,"[129] or judicial management could be imposed throughout the entire discovery process.[130] Then, of course, we are faced with the problem of defining "complex" litigation to determine who would qualify for the special provisions or exemptions.

Complex litigation demands special treatment. A failure to recognize this may cause a bottleneck in the litigation process which nullifies the positive effects, if any, the proposed system would create.

J. The Current System Performs Adequately

Some believe the current system works well enough to be left alone. One commentator stated that the proposed rules "[w]hile well intentioned ... would prove disastrous in practice."[131] He also posited that, rather then streamlining discovery practices, the amended Rule 26 would, overall, have the opposite effect.[132] Furthermore, the discovery process is almost always "initiated after the filing of the complaint and answer."[133]

> In the minority of cases in which discovery is not initiated promptly, there is usually a good reason. Early settlement discussions or dispositive motions for dismissal or summary judgment often serve to resolve cases before any (or much) discovery takes place.... [A] plaintiff attorney's failure to spend the small amount of time and money necessary to initiate discovery is often a sign of the relative lack of confidence he or she has in his or her case. Such marginal cases frequently end up be nonsuited, dismissed or settled for a nominal amount .... Thus, the current system's requirement that a litigant affirmatively initiate and conduct discovery helps to weed out marginal, riffraff litigation.[134]

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128. *Id.*
129. *Id.*
130. *Id.*
131. Comments from K & E, *supra* note 99, at 1.
132. *Id.* at 2; *see also* Comments from T & M, supra note 54, at 1 ("[T]he proposal likely will serve to increase and delay litigation rather than streamlining the process.").
133. Comments from K & E, *supra* note 99, at 1.
134. *Id.* at 1-2.

There were more than a few letters to the Advisory Committee that related such satisfaction with the current form of discovery practice.

CONCLUSION

Response to the Advisory Committee's invitation for comment on the proposed amendments to the Federal Rules of Civil Procedure was huge. Some commentators responded with a one-page letter simply identifying their likes and dislikes in a cursory fashion, while other responses resembled full-blown proposals. Whatever their volume and detail, they were all marked by a spectrum of comment that ranged from blanket approval to harsh criticism. There were, as could be expected, many positions in between. As earlier stated, many letters addressed proposed Rule 26 exclusively or as a focal point.

In all, the responses were not positive. That, however, is also to be expected because it is only the dissenters that speak up when threatened with a change in the status quo. Realistically, those who approved proposed Rule 26 had little or no motivation to respond to the invitation for comment because they have the momentum of change on their side. Please remember, it is easy to be critical in a unsubstantiated fashion - which many letters were. "Nor should we be too critical of constructive efforts, during a period of limited resources, to get control of excessive discovery through procedural reform."[135]

Many commentators apparently invested large amounts of time, thought, and energy in their efforts to constructively critique the proposed Rule 26. This note reflects the comments of these constructive critics and not the biased, conclusory, intransigent to change statements that some commentators proffered. A taste of some of the more zealous dissenters provides some worthwhile insight into the vigor and stir that proposed Rule 26 has caused. One such critic stated that "[t]he citizens of the United States would be well served by the immediate, and retroactive, abolition of the standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States."[136] He further stated:

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135. Thomas M. Mengler, *Abusive Discovery*, *supra* note 10, at 2.

136. Letter from Luskins & Annis, Coeur d'Alene, Idaho to The Committee on Rules of Practice and Procedure at 1 (October 21, 1991) (providing comments on the COMMITTEE PROPOSAL) (on file at the Rules Committee Office).

> The proposed changes to Rules 26 ... reflect[s] a heavy influence of bureaucrats and silk stocking attorneys. The court system is supposed to serve the citizens of the country. The ever increasing bureaucratization of the legal process has the citizens serving the judicial system's administrative needs, which means the tail is wagging the dog.[137]

The State Bar of California, Committee on Federal Courts stated that the majority of its committee members believed that the proposed amendments to Rule 26 would be "welcomed by litigants interested in reducing the costs and delays of litigation."[138] They also indicated that some of their committee members had some discomfort "with the philosophical shift"[139] that proposed Rule 26 appeared to be based on:

> These members question[ed] the proposed changes as an attempt to convert civil discovery — at least during the early phases of litigation — from an adversarial process (with counsel advancing client interests) into a voluntary disclosure-oriented process in which counsel (as officers of the court) owe their duty of loyalty to the court .... These members, while acknowledging that perhaps a voluntary disclosure-oriented discovery scheme is an idea whose time has come, believe that such a scheme would constitute such a radical departure from the ingrained mores and culture of the legal profession that its success is problematic.[140]

Lastly, one commentator analogized to other efforts at reform through Rule amendments by stating the "[t]he explosion of litigation under Rule 11 is an example of how rule amendments, despite the best intentions, can engulf courts and litigants in disputes that only further detract from a resolution of the underlying merits."[141]

The author believes that the common thread running through the letters and comments he reviewed is one of caution. That the discovery process is abused by lawyers and in some cases, the clients themselves, echoes the remarks of many commenta-

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137. *Id.*

138. Letter from The State Bar of California, The Committee on Federal Courts, San Francisco, California to The Committee on Rules of Practice and Procedure at 4 (June 4, 1991) (providing comments on the COMMITTEE PROPOSAL) (on file at the Rules Committee Office).

139. *Id.*

140. *Id.* at 4-5.

141. Comments from K & E, *supra* note 99 at 2.

tors.[142] There is a consensus that change is needed. What change is most appropriate is a sticky, multi-faceted, ball of confusion. Perhaps the time has come to address seriously the hope that alternate dispute resolution procedures will quickly become an integral part of the American jurisprudence system.[143] At this point, nothing more appropriate can be said then the old cliché - only time will tell.

RICHARD C. FERRIS II

142. Letter from Davis, Arneil, Dorsey, Kight & Parlette, Wenatchee, Washington to The Committee on Rules of Practice and Procedure at 1 (October 23, 1991) (providing comments on the COMMITTEE PROPOSAL) (on file at the Rules Committee Office).

143. *Id.*

APPENDIX

Proposed Rule 26 would read as follows:

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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

(1) Initial Disclosures. Except in actions exempted by local rule or when otherwise ordered, each party shall, without awaiting a discovery request, provide to every other party:

(A) the name and, if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense, 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 likely to bear significantly on any claim or defense;

(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 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 the court otherwise directs or the parties otherwise stipulate with the court's approval, these disclosures shall be made (i) by the plaintiff within 30 days after service of an answer to its complaint; (ii) by a defendant within 30 days after serving its answer to the complaint; and, in any event, (iii) by any party that has appeared in the case within 30 days after receiving from another party a written demand for accelerated disclosure accompanied by the demanding party's disclosure. A party is not

excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosure, or, except with respect to the obligations under clause (iii), because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required in paragraph (1), each party shall disclose to every other party any evidence that the party may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness which includes a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied upon in forming such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years.

(B) Unless the court designates a different time, the disclosure shall be made at least 90 days before the date the case has been directed to be ready for trial, or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(A), within 30 days after the disclosure made by such other party. These disclosures are subject to the duty of supplementation under subdivision (e)(1).

(C) By local rule or by order in the case, the court may alter the type or form of disclosures to be made with respect to particular experts or categories of experts, such as treating physicians.

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, each party shall provide to every other party the following information regarding the evidence that the disclosing party may present at trial other than solely for impeachment purposes;

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

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

(C) an appropriate identification of each document to other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, other parties shall serve and file (i) any objections that deposition testimony designated under subparagraph (B) cannot be used under Rule 32(a) and (ii) any objection to the admissibility of the materials identified under subparagraph (C). Objections not so made, other than under Rules 402-403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures; Filing. The disclosures required by the preceding paragraphs shall be made in writing and signed by the party or counsel in compliance with subdivision (g)(1). The disclosures shall be served as provided by Rule 5 and, unless otherwise ordered, promptly filed with the court.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examinations or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)C), for inspection and other purposes; physical and mental examinations; and requests for admission.

* * * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery

or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. Limitations in these rules on the number and length of depositions and the number of interrogatories may be altered by local rule for particular types or classifications of cases. The frequency or extent of use of the discovery methods permitted under these rules and any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery to the resolution of the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion sunder subdivision (c).

* * * *

(4) Trial Preparation: Experts.

(A) A party may depose, after any report required under subdivision (a)(2) has been provided, any person who has been identified as an expert whose opinions may be presented at trial.

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

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonable incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

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

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

(d) Timing and Sequence of Discovery. Except with leave of court or upon agreement of the parties, a party may not seek discovery from any source before making the disclosures under subdivision (a)(1) and may not seek discovery from another party before the date such disclosures have been made by, or are due from, such other party. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquire as follows:

(1) A party is under a duty seasonably to supplement its disclosures under subdivision (a) if the party learns that the information disclosed is not complete and correct. With respect to expert testimony that the party expects to offer at trial, the duty extends both to information contained in reports under Rule 26(a)(2)(A) and to information provided through a deposition of the expert, and any additions or other changes to such information shall be disclosed by the time the party's disclosure under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is not complete and correct.

(f) [Abrogated]

(g) Signing of Disclosures, Discovery Requests, Responses and Objections.

(1) Every disclosure made pursuant to subdivision (a) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or

party constitutes a certification that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry the disclosure is complete and correct as of the time it is made.

(2) Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief formed after a reasonable inquiry it is: (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.