SIGNIFICANT CHANGES IN PRACTICE
AND PROCEDURE

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FEDERAL RULES OF CIVIL PROCEDURE

Lawyers are generally blamed for the failure of the modern rules of discovery, which are replaced largely by a system of mandatory predisclosure disclosure. It is said that the adversary process has fostered conduct by lawyers that causes excessive delays and expenses in civil litigation. Unfortunately, the very nature of the lawyer's role as advocate inevitably attracts criticism even though today's lawyer is the best educated and most extensively regulated lawyer in history.

The lawyer in the role of officer of the court, with duties in the administration of justice, often comes into conflict with the lawyer in the role of advocate for a client. Professor L. Ray Patterson describes that conflict:

One of the costs of a culture which reveres the dignity of the individual is the law's complexity in its attempt to insure fulfillment of twin goals: justice for the individual and order for society. These goals represent an inherent conflict and thus create tension in the law. However,phrased to fit the applicable rules, legal arguments are almost invariably a plea of one litigant for order (uphold the sanctity of contracts), and another's plea for justice (unconscionable contracts are not to be tolerated). Because the person sought to be held responsible for his or her wrongful conduct wants relief and the wronged person wants recompense, neither is concerned with order or justice except as the terms are defined in accordance with their own interests.

The lawyer is the fulcrum on which this tension is centered and the conflict resolved.¹

The Judicial Conference conducted public hearings on the proposed amendments to the Federal Rules of Civil Procedure ("Federal Rules") in Los Angeles in November, 1991 and in Atlanta in February, 1992, and published a summary of the comments received.² Notably,

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2. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTER'S SUMMARY, ADVISORY COMMITTEE ON CIVIL RULES, (May 20, 1992).
of the three hundred written submissions on the mandatory disclosure proposals, only one dozen supported the concept of mandatory disclosure. Furthermore, the opponents of the new mandatory disclosure amendments constitute an unusual coalition of individual practitioners, law firms, scholars, bar associations, plaintiffs' trial lawyer associations, defense lawyer associations, insurers, public interest groups, federal district judges, and industry.

After the February, 1992, Atlanta hearing, following near universal opposition, the Advisory Committee decided to delete the mandatory disclosure proposals from the group of amendments then being advanced. However, the Advisory Committee later changed its position, amending the proposed Federal Rule 26 language to require disclosure of potential witnesses and documents with information “relevant to disputed facts alleged with particularity in the pleadings.” Without providing an opportunity for additional public comment, the new version of the proposed amendments was approved by the Standing Committee and the Judicial Conference. The United States Supreme Court approved the amendments and forwarded them to Congress to become effective on December 1, 1993, in the absence of action by Congress, under the Rules Enabling Act. Although a bill

3. Id. at 13-30. Critics of mandatory disclosure proposals included: American Bar Association; a number of state and local bar associations (including those of California, New York City, New York State, Los Angeles County, and the District of Columbia); The American Corporate Counsel Association; The Association of Trial Lawyers of America (“ATLA”); Defense Research Institute; Public Citizen Litigation Group; The Alliance of American Insurers; The National Association for the Advancement of Colored People Legal Defense Fund; Trial Lawyers for Public Justice; The Products Liability Advisory Council; The American Civil Liberties Union; The American Institute of Certified Public Accountants; Lawyers for Civil Justice; Judge Albert V. Bryan, Jr. of the United States District Court for the Eastern District of Virginia; Judge H. Russell Holland of the United States District Court for the District of Alaska; Judge James H. Jarvis, II of the United States District Court for the Eastern District of Tennessee; Judge J. Frederick Motz of the United States District Court for the District of Maryland; Judge Owen M. Panner of the United States District Court for the District of Oregon; Judge Barefoot Sanders of the United States District Court for the Northern District of Texas; and professors, corporations, and private practitioners from various constituencies.


§ 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date
was introduced to delete the mandatory disclosure provisions, Congress failed to act on the bill before its adjournment in 1993.

The recent changes to the Federal Rules and the federal courts' implementation of the Civil Justice Reform Act will substantially change practice in federal courts. They also probably will have an impact on state court practices, as most state rules of civil procedure are based upon the federal rules. Several significant amendments to the Federal Rules of Civil Procedure took effect on December 1, 1993. However, by far the changes that are of most concern are the mandatory disclosure provisions of Federal Rule 26(a).7


The amendments to the Federal Rules regarding depositions primarily limit the number of depositions and allow depositions to be recorded by means other than stenography. Federal Rule 30(a) requires leave of court to take a deposition when: (1) it would result in more than ten depositions per side (i.e., by all defendants or all plaintiffs); (2) the person to be deposed has already given a deposition; or (3) it would be taken before the initial meeting between the parties under Federal Rule 26(f).8 The parties may stipulate, subject to court ap-
approval, to more than ten depositions per side. Federal Rule 30(b)(2)-(3) provides that a deposition may be recorded by stenographic, audio, or visual means, as specified in the notice of deposition. At its own expense, any party may designate additional means of recording.9

**RULE 33: INTERROGATORIES.**

The number of interrogatories is now limited to twenty-five per side, including subparts; however, the parties may stipulate to more or obtain leave of court to allow more. Under Federal Rule 26(f), interrogatories may not be served before the initial meeting of the parties without leave of the court.10 It is intended that mandatory disclosure will reduce the need for interrogatories.


   (b) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties:

      (A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 1 by the plaintiffs, or by the defendants, or by third-party defendants;

      (B) the person to be examined already has been deposed in the case; or

      (C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

Id.

10. Fed. R. Civ. P. 33. The Rule provides in relevant part:

   (a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).

   (b) Answers and Objections.
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RULE 26(f): MANDATORY MEETING OF PARTIES AND DISCOVERY PLAN.

Before the mandatory requirements of Federal Rule 26(a) apply, the parties involved must comply with Federal Rule 26(f), which requires the parties to meet "as soon as practicable," but not later than fourteen days before a scheduling conference is held or a scheduling order is due under Federal Rule 16. In this meeting, the parties are to discuss the nature and basis of claims and defenses, settlement possibilities, and arrangements for mandatory disclosures. They must also prepare a proposed discovery plan to submit to the court under Federal Rule 16 and then must, in good faith, attempt to agree to the contents of the proposed discovery plan.11

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.
(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.
(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.
(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.
(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Id. 11. FED. R. CIV. P. 26(f). The Rule provides in relevant part:

(I) Meeting of Parties; Planning for Discovery. Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis
RULE 26(a)(1): MANDATORY DISCLOSURES.

Within ten days of the meeting required by Federal Rule 26(f), all parties must comply with the mandatory disclosure requirements outlined in their proposed discovery plan, regardless of whether the other litigants have complied. The parties may stipulate to limitations on the scope of disclosure, but in the absence of such stipulations, Federal Rule 26 requires disclosure of the following:

- the names, addresses, and telephone numbers of persons likely to have discoverable information "relevant to disputed facts alleged with particularity;"
- a copy, or a description by category, of documents, data compilations, and tangible things "in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity;"
- damage computations and materials on which computations are based; and
- any relevant insurance agreements.

Any information withheld on the basis of privilege must be noted, and sufficient information must be supplied that allows other parties to evaluate the assertion of privilege. The new rule imposes a broadly expanded continuing duty to supplement with regard to both mandatory disclosure and formal discovery.12

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(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 dis-
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RULE 26(a)(2)(B): DISCOVERY OF EXPERTS.

The amended Federal Rule 26 also requires mandatory disclosure of reports made for each expert retained to testify at least ninety days before trial or whenever the court directs. These reports must contain a complete statement of all opinions to be expressed, as well as the bases for these opinions, data or other information considered in forming the opinions, and any exhibits that summarize or support the opinions. These reports also must contain a statement of the expert's qualifications, a list of publications authored by the expert within the past ten years, the compensation paid to the expert, and a list of other cases in which the expert has testified in the past four years.13

FEDERAL RULE 27(a)(1): DISCOVERY PRECLUSION.


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13. FED. R. CIV. P. 26(a)(2)(B). The Rule provides in relevant part:

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

Id.
for admission may not be served until after initial disclosures have been made by the party seeking discovery. To the extent that the denial of the right to conduct discovery prior to trial can be shown to affect the outcome of the case directly, this sanction might be subject to due process challenges under the Fifth Amendment, as shown by the cases discussed later in this article.

PRACTICAL PROBLEMS.

Opponents of mandatory disclosure typically contend that the language defining the scope of mandatory disclosure will spawn a myriad of ancillary motions regarding what facts are "disputed," whether those facts are alleged with sufficient "particularity," and when the information sought is relevant to those facts. They reason that rather than reduce the delay and expense associated with current discovery practices, the new Federal Rule 26(a) adds an additional layer of discovery to an already burdensome process.

On the other side of the aisle, the American Corporate Counsel Association also criticized automatic disclosure as "unworkable" for corporate defendants. In addition, many corporations submitted individual comments, either directly or through their counsel, opposing automatic disclosure and arguing that it would exacerbate already critical problems in the practice, including the burden and over breadth of discovery and repetitive motion practices.

15. See, e.g., ASSOCIATION OF TRIAL LAWYERS OF AMERICA, COMMENT FROM FEDERAL RULES, JURISDICTION & VENUE COMMITTEE, (Feb. 14, 1992). ATLA, purporting to speak for private individuals engaged in personal injury litigation, objected to the proposed rule because:

[T]he proposed "voluntary disclosure" will not reduce the cost of litigation. The reasonably prudent lawyer who suspects that he or she did not receive all documents "that bear significantly on any claim or defense" will, via a letter sent pursuant to the good faith requirement of Rule 37(a)(1)(B) or a follow-up inquiry pursuant to Rule 34, communicate specific document requests to be sure that he or she has advised the adversary party of what he or she believes is "significant" in the litigation. Therefore, in complex cases, the parties will be required to go through the same drafting exercise that they now go through, plus the proposed "voluntary disclosure" phase of the discovery process. When coupled with the fact that there will be several years, if not decades of motion practice surrounding the meaning of the phrase "likely to bear significantly on any claim or defense," it is difficult to see how this proposal will reduce the cost of litigation.

Id.
17. American Standard, Inc.; Amoco Corporation; ARCO; Bausch & Lomb; Bethlehem Steel Corporation; Bridgestone-Firestone, Inc.; Caterpillar Inc; The Clorox Company; The Coca-Cola Company; Control Data; Cooper Tire Co.; Corning Glass; Deere & Company; Dow Chemical Company; Duquesne Light Company; E.I. Du Pont de Nemours & Company; Eastman Kodak; Emerson Electric Company; E-Systems, Inc. of Dallas; FINA, Inc.; Ford Motor Company; Gates Energy Products, Inc.; Gencorp; Gen-
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ETHICAL PROBLEMS.

A fundamental reality of modern litigation is that the attorney's primary ethical obligation runs to clients. Proponents of automatic disclosure contend that during the investigation, disclosure, and discovery phases of a lawsuit, the attorney's duty should be to the court in aid of a complete search for the truth, rather than to the client. This is what is required by Rule 1.3 of the American Bar Association Model Rules of Professional Conduct, which serve as a model for many state professional conduct rules. Opponents of mandatory disclosure object to the fundamental restructuring of the relationships among attorney, client, and the court that results from new Federal Rules 26(a). Supreme Court Justices Antonin Scalia, Clarence Thomas, and David Souter have stated that the new Rule 26 “does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker.”

By placing upon lawyers the obligation to disclose information damaging to their clients — on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment — the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side.

eral Motors Corporation; Georgia Pacific Corporation; Harley-Davidson, Inc.; Hershey Foods Corporation; Honda North America, Inc.; Hughes Aircraft Company; International Paper Company; LTV Steel Company; McDermott, Inc.; McGraw-Hill, Inc.; Mazda Motor Company of America; Mead Corporation; Michelin Tire Corporation; Mobil Oil Corporation; Morton International; Murphy Oil Company of Eldorado, Arkansas; Nalco Chemical Company; Nissan North America, Inc.; Olin Corporation; Oryx Energy Company; Phelps Dodge Corporation; Piper Aircraft Corporation; Ralston Purina Company; Raytheon Company; Rowan Companies, Inc.; Sears-Roebuck & Company; Shell Oil Company; Snap-On Tools Corporation; Sunstrand Corporation; The Timken Company; TRW, Inc.; Union Carbide Corporation; Uniroyal Goodrich Tire Company; United Technologies; USX; Vulcan Materials Company; and Zurn Industries.

18. See, e.g., ARIZONA RULES OF PROFESSIONAL CONDUCT Preamble (providing “[a]s advocate, an attorney zealously asserts the client’s position under the rules of the adversary system”); ARIZONA RULES OF PROFESSIONAL CONDUCT ER 3, 4 cmt. (providing “[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties”).


20. Id. It is rare that Justices dissent in the transmittal of proposed rules to Congress, but in this instance three Justices also echoed the serious concerns that led the Advisory Committee to withdraw the automatic disclosure proposal following the Atlanta public hearing:

This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it adds a further layer of discovery. It will likely increase the discovery burdens on district judges, as parties litigate about what is “relevant” to “disputed
Griffin B. Bell, former Attorney General of the United States under President Jimmy Carter and former United States Court of Appeals Judge has been another outspoken critic of automatic disclosure, stating that:

Despite its initial attraction, automatic disclosure is a fundamentally flawed concept which will not cure the ills of the discovery system. There is little experience with automatic disclosure in the real world of civil litigation, and it has been vigorously criticized by the practitioners who have had some limited experience with it at the local level. It creates a profound strain on the ethical duties of a lawyer to his or her client, and, because it does not replace the existing discovery process, it will merely add another layer of procedure to an already over-burdened system.  

Furthermore, the United States Department of Justice, speaking through Frank W. Hunger, Assistant Attorney General, Civil Division, expressed to Congress its opposition to automatic disclosure:

We all recognize that reform is necessary. The costs of litigation are rising so quickly that often both litigants lose regardless of the lawsuit's outcome. I believe the litigators in the Civil Division, litigators who go to court every day all across this country, in cases as broad and diverse as the interests of the United States, have valuable experience which can provide guidance in devising reforms to make courts more accessible. At the same time, there are no easy solutions or quick fixes and I caution this Committee to be wary of reform proponents who claim that their proposed solutions will completely solve problems in one area or another.

For these reasons, the Department will endorse all of the other Amendments but is compelled to voice its strong opposition to the Amendment to Rule 26(a)(1). Given the intense controversy surrounding the proposed Amendment to Rule facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rules 37(c) (prohibiting, in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).

I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations.

Id. at 510-12 (emphasis in original).

26(a)(1) and its potential for exacerbating the very problem it was designed to ameliorate, the Committee should oppose it.22

The notes to new Federal Rule 26 cite two law review articles as setting forth the concepts surrounding a duty to disclose information.23 Magistrate Wayne D. Brazil of the Northern District of California authored the first while he was a law professor.24 Judge William D. Schwarzer, then of the Northern District of California and now Director of the Federal Judicial Center, wrote the second.25

Magistrate Brazil states in his article that there is a fundamental antagonism between the goal of true disclosure and the protective and competitive impulses at the center of the traditional adversary system of dispute resolution, and he contends that this antagonism must be removed. He writes that the the modern rules of discovery were designed to gather, organize, and share evidentiary information in an essentially nonadversarial context but that those rules have failed because their academic and judicial proponents failed to appreciate how tenaciously litigators would hold to their adversarial ways. He asserts the failure results essentially from factors, such as traditional professional loyalties, deeply ingrained lawyering instincts, the rules of professional conduct, and competitive economic pressures, which have assured that the process of gathering and organizing evidence does not take place in an essentially nonadversarial context.

Magistrate Brazil's article proposes shifting the trial lawyer's principal obligation during the investigation and discovery stages away from partisan pursuit of client interests and toward the court. He proposes that ethical standards should be refined in order to distinguish between the different requirements of the investigative and discovery stages. Trial lawyers should view themselves primarily as officers of the court in the pretrial stages. Then, in the trial and posttrial stages primary loyalties can return to the client.

Magistrate Brazil concedes that meaningful disclosure probably cannot be accomplished without a significant narrowing of the current reach of both the attorney-client privilege and the work product doctrine. He also agrees that shifting the attorney's primary obligation from the client to the court has some potentially troublesome implica-

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22. Statement of Frank W. Hunger, Assistant Attorney General, Civil Division, Department of Justice, to the United States Senate Judiciary Subcommittee on Courts and Administrative Practice (July 28, 1993).
23. 1993 Proposals, supra note 1, 146 F.R.D. at 628.
tions for the traditional relationship between counsel and client. He acknowledges that clients might feel more pressure not to divulge to their attorney any evidence that the clients fear could damage their cases. Finally, he observes that clients might feel it is unfair for them to compensate an attorney whose loyalties are divided between serving society's interest in justice and serving the client's interest in victory.26

Judge Schwarzer also recognizes in his article that the adversary process is inimical to fact-finding. He contends that there is an inherent paradox in "adversarial discovery." He concurs with Magistrate Brazil that the solution to this dilemma is to shift "the emphasis from discovery — the process — to disclosure — the objective."27

These two authors have had considerable influence on the changes to the Federal Rules. Magistrate Brazil became a member of the Advisory Committee on Civil Rules on February 26, 1988, and participated in the deliberations that led to the automatic disclosure proposal. Judge Schwarzer became Director of the Federal Judicial Center on March 24, 1990. Judge Schwazer's views have been influential with the Advisory Committee because his position involves oversight of and advisement for improvements in the administration of justice in the federal court system.28

In January 1991, the Federal Judicial Center distributed to the district courts a memorandum authored by its Director, Judge Schwarzer, that was to provide initial assistance and guidance in the implementation of the Civil Justice Reform Act of 1990 ("Civil Justice Reform Act"). Consistent with his prior interest in substantially replacing discovery with disclosure, Judge Schwarzer suggested that the district courts incorporate provisions for automatic disclosure in their local plans to reduce expense and delay required by the Civil Justice Reform Act.29

However, many unanswered ethical questions remain. Is the client put in the ethical dilemma of making its own determinations as to the material and relevant facts the attorney ought to know about? Is the attorney who disagrees with his or her clients about whether something is relevant or irrelevant to the case obliged to withdraw from representation if the clients direct the attorney to assume the position that the information is not relevant? Is the attorney who decides to remain in the case going to be subjected to court-imposed

27. Schwarzer, 50 U. PITT. L. REV. at 721.
28. See Bell, 27 GA. L. REV. at 18-19 (noting Judge Schwarzer's persuasiveness).
29. Id.
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sanctions requiring the attorney to pay for failing to disclose when the
attorney is operating under the direction of the client?

There can be no debate about this reality:
The legal community has made it clear that it is a breach of
professional responsibility for a litigator to elevate full disclo-
sure above partisan interests by revealing, unless clearly
compelled to do so, probative evidence that is damaging to the
client. Strong professional sanctions can be imposed against
litigators who follow such a course. Marketplace economics
further reinforce these pressures.30

FEDERAL RULE 37: SANCTIONS FOR FAILURE TO DISCLOSE.

Although attorneys may have great difficulty changing to the new
system of automatic disclosure, exposure to drastic and severe sanc-
tions should provide considerable incentive. The new Federal Rules
equate failure to disclose properly with failure to obey a Federal Rule
37 discovery order, and they authorize all of the sanctions provided
under existing Federal Rule 37(b)(2).31

Rev. 1031, 1312 (1975).
31. See FED. R. CIV. P. 37(b)(2). The Rule provides in relevant part:
   (b) Failure to Comply With Order.
   (1) Sanctions by Court in District Where Deposition is Taken.
   (2) Sanctions by Court in Which Action is Pending. If a party or an officer,
director, or managing agent of a party or a person designated under Rule
30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide
or permit discovery, including an order made under subdivision (a) of this rule
or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the
court in which the action is pending may make such orders in regard to the
failure as are just, and among others the following:
   (A) An order that the matters regarding which the order was made or any
other designated facts shall be taken to be established for the purposes of the
action in accordance with the claim of the party obtaining the order;
   (B) An order refusing to allow the disobedient party to support or oppose
designated claims or defenses, or prohibiting that party from introducing desig-
nated matters in evidence;
   (C) An order striking out pleadings or parts thereof, or staying further
proceedings until the order is obeyed, or dismissing the action or proceeding or
any part thereof, or rendering a judgment by default against the disobedient
party;
   (D) In lieu of any of the foregoing orders or in addition thereto, an order
treating as a contempt of court the failure to obey any orders except an order to
submit to a physical or mental examination;
   (E) Where a party has failed to comply with an order under Rule 35(a)
requiring that party to produce another for examination, such orders as are
listed in paragraphs (A), (B), and (C) of this subdivision, unless the party fail-
ing to comply shows that that party is unable to produce such person for exami-
nation. In lieu of any of the foregoing orders or in addition thereto, the court
shall require the party failing to obey the order or the attorney advising that
party or both to pay the reasonable expenses, including attorney's fees, caused
by the failure, unless the court finds that the failure was substantially justified
or that other circumstances make an award of expenses unjust.
As disclosure is equated with discovery in other proposed Federal Rule changes, why is failure to make disclosure equated with failure to obey a court order rather than failure to make discovery? It certainly appears that failure to make disclosure should be subject to the same Federal Rule 36(a) sanctions as failure to make discovery, rather than subject to the Federal Rule 37(b) sanctions for failure to comply with an order of the court.

Complicated Cases.

In larger, more complicated cases it is probably unrealistic to expect a defendant to have a sufficient grasp of the issues, people, and documents relevant to the case shortly after filing an answer or making an appearance such that the attorney will be able to comply with the disclosure requirements. While the Committee Notes appear to account for this by requiring only that a party make a “reasonable inquiry” prior to disclosure, subsequent discovery will probably lead to additional information and concomitant allegations of “bad faith” non-disclosure, accompanied by motions for sanctions under Federal Rule 37(c) for failure to update disclosure.\(^{32}\)

The reality of notice pleading is that a defendant often does not know until after it has conducted discovery or has been served with the plaintiff’s own discovery demands exactly which documents will be relevant and which witnesses will have pertinent knowledge. Nevertheless, if a party fails to come forward with the right information, it may be subject to the severe sanctions of Federal Rule 37(c). Requests

\(^{32}\) See Fed. R. Civ. P. 37(c). The Rule provides in relevant part:

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney’s fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney’s fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

\(^{Id.}\)
for sanctions may well become a routine part of litigation gamesmanship.

The standard for disclosure of documents — those that are relevant to disputed facts alleged with particularity — is probably sufficiently broad and vague to expose parties to claims of nondisclosure and to motions for sanctions under Federal Rule 37, despite a party's good faith efforts. The courts may well become heavily involved in resolving disputes over whether to impose Federal Rule 37 sanctions as parties attempt to take advantage of the disclosure requirements to obtain sanctions against their opponents. In many cases, overdisclosure may well result in order to avoid sanctions and malpractice concerns related to sanctions.

**Federal Rule 37(C)(1): Exclusion of Evidence.**

Under new Federal Rule 37(c)(1), a party that fails to disclose required information without substantial justification will not be permitted to present any evidence not disclosed as substantive evidence at trial or on a Federal Rule 56 motion unless the failure is harmless. If the evidence is presented by an adverse party, the adverse party will be permitted to disclose at the trial or hearing the fact of failure to disclose.

Precluding a party from introducing evidence that it did not divulge in discovery has previously been authorized by Federal Rule 37(b)(2)(B). It also has been held however that the sanction of exclusion of evidence that is dispositive of a case should not be imposed unless the offending party either demonstrates flagrant bad faith and callous disregard of its responsibilities or unless its disobedience constitutes a willful and direct flaunting of the court's authority.

New Federal Rule 37(c)(1) also authorizes the court to impose other appropriate sanctions on motion after affording an opportunity to be heard, including requiring payment of reasonable expenses, including attorney's fees, caused by the failure to make disclosure.

Similar monetary sanctions have previously been imposed under Federal Rule 37(b) against parties, attorneys, and jointly against

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34. See Ohio v. Arthur Anderson & Co., 570 F.2d 1370, 1375 (10th Cir. 1978) (dis- cussing the "willful bad faith" of the party against whom sanctions were imposed), cert. denied, 439 U.S. 833 (1978).
When a district court apportions liability for expenses between a party and its attorney, this determination is subject to appellate review as would be any other order and thus should be adequately explained by specific findings. It also has been held that in imposing a specific dollar amount of sanctions the trial court must state what behavior is being sanctioned and what Federal Rules are relied on in making the award.

**Federal Rule 37(b)(2) Sanctions.**

New Federal Rule 37(c)(1) also provides that in addition to or in lieu of other sanctions, the court, on motion after affording an opportunity to be heard, may impose sanctions previously authorized by Federal Rules 37(b)(2)(A), (B), and (C) for failure to obey discovery orders entered by the court. Federal Rule 37(b)(2)(A) authorizes entry of an order that states that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

Under this authority, courts have deemed established for purposes of litigation facts that would be unjust and unfair to require a party to prove in the absence of discovery to which the party was entitled, but as to which the party has been precluded from obtaining crucial evidence from the opposite party. Facts also have been deemed established as set forth in certain documents when a party has destroyed the documents in order to avoid producing them. The sanction of taking certain facts to be established also has been combined


36. Weisberg v. Webster, 749 F.2d 864, 873-74 (D.C. Cir. 1984) (remanding to the trial court for more specific findings).


38. See also United States v. ABC Sales & Serv. Inc., 95 F.R.D. 316, 317-18 (D. Ariz. 1982) (sanctioning for failure to produce documents that appeared to have been deliberately destroyed).
with a preclusion of evidence sanction under present Federal Rule 37(b)(2)(B).\textsuperscript{40} The sanction of taking certain facts as established under present Federal Rule 37(b)(2)(A) is not limited in application to nondispositive matters.\textsuperscript{41} However, a court can limit the order to the specific information in question and ensure that the responding party will be afforded its Fifth Amendment rights to due process.\textsuperscript{42}

Federal Rule 37(b)(2)(B) authorizes an order that refuses to allow the disobedient party to support or oppose designated claims or defenses, or prohibits it from introducing designated matters into evidence. In \textit{Update Art Inc. v. Modiin Publishing Ltd.},\textsuperscript{43} the United States Court of Appeals for the Second Circuit held that defendants who repeatedly failed to comply with discovery orders were properly precluded from offering evidence about damages in a copyright action.\textsuperscript{44} In \textit{Ohio v. Arthur Andersen & Co.},\textsuperscript{45} the United States Court of Appeals for the Tenth Circuit prohibited an accounting firm that deliberately and willfully refused discovery for an unreasonable length of time without justification from introducing any evidence opposing the State's claims that the firm sought to prove through the use of the requested documents.\textsuperscript{46} The United States Court of Appeals for the Seventh Circuit held that a party who declined to answer interrogatories on a particular subject was properly precluded from offering proof on the same subject at trial.\textsuperscript{47}

Federal Rule 37(b)(2)(C) authorizes the sanction of striking pleadings or parts of pleadings, including affirmative defenses and counterclaims.\textsuperscript{48} This sanction can amount to judgment against a delinquent party without an opportunity to be heard on the merits; thus courts


\textsuperscript{42} \textit{See} English v. 21st Phoenix Corp., 590 F.2d 723, 728-29 (8th Cir. 1979) (holding sanction to be appropriate), \textit{cert. denied}, 444 U.S. 832 (1979). 10A \textsc{FEDERAL PROCEDURE § 26:532} (1988) (discussing sanctions in regard to dispositive facts). U.S. CONST. amend. X.

\textsuperscript{43} 843 F.2d 67 (2d Cir. 1988).

\textsuperscript{44} \textit{Update Art, Inc. v. Modiin Publishing, Ltd.}, 843 F.2d 67, 71-72 (2d Cir. 1988).

\textsuperscript{45} 570 F.2d 1370 (10th Cir. 1978), \textit{cert. denied}, 439 U.S. 833 (1978).


\textsuperscript{47} Fisher v. Underwriters at Lloyd's London, 115 F.2d 641, 646 (7th Cir. 1941).

have held that it should be applied only when a party's failure to comply with a discovery order is occasioned by fault, willfulness, or bad faith.\textsuperscript{49} Federal Rule 37(b)(2)(C) also authorizes dismissal of an action for failure to comply with a discovery order. This has been held to be a sanction of last resort, applicable only in extreme circumstances.\textsuperscript{50} Appellate courts reviewing imposition of this sanction have been primarily concerned with whether a less drastic but equally effective remedy could have been fashioned.\textsuperscript{51}

In \textit{Batson v. Neal Spealce Associates Inc.},\textsuperscript{52} the United States Court of Appeals for the Fifth Circuit held that a dismissal is proper only when the deterrent value of Federal Rule 37 cannot be substantially achieved by use of a less drastic sanction.\textsuperscript{53} Among the other factors that must be considered are whether: (1) the other party's preparation for trial was substantially prejudiced; (2) the neglect is plainly attributable to an attorney, rather than a blameless client; and (3) the party was simply negligent in failing to comply as the result of confusion or a sincere misunderstanding of the court's order.

The abuse of discretion standard however is applied on review of these cases as in other sanctions cases.\textsuperscript{54}

\textbf{DUE PROCESS REQUIREMENTS.}

The Due Process Clause of the Fifth Amendment must be considered by a court in dismissing an action under the present Federal Rule 37(b)(2)(C).\textsuperscript{55} The punishment of a party for contempt by striking the answer and entering a default judgment was held to be a denial of due process by the United States Supreme Court in \textit{Hovey v. Elliott}.\textsuperscript{56}

\begin{notes}
\textsuperscript{49} General Dynamics Corp., 481 F.2d at 1211; Emerick v. Fenick Indus., Inc., 539 F.2d 1379, 1381 (5th Cir. 1976) (noting that striking of pleading is appropriate when there is bad faith).

\textsuperscript{50} Israel Aircraft Indus. Ltd. v. Standard Precision, 559 F.2d 203, 207-09 (2d Cir. 1977) (holding that dismissal was not justified); Thomas v. United States, 531 F.2d 746, 749 (5th Cir. 1976) (noting that dismissal is sanction of last resort).

\textsuperscript{51} See Litton Sys. Inc. v. American Tel. & Tel. Co., 91 F.R.D. 574, 577 (S.D.N.Y. 1981), aff'd, 700 F.2d 785 (2d Cir. 1982) (stating that dismissal should be invoked only in rare circumstances); Jones v. Louisiana State Bar Ass'n, 692 F.2d 94, 97 (5th Cir. 1979) (noting concern over less drastic measure).

\textsuperscript{52} 765 F.2d 511 (5th Cir. 1985).

\textsuperscript{53} Batson v. Neal Spelce Assoc., Inc., 765 F.2d 511, 516 (5th Cir. 1895).


\textsuperscript{56} 167 U.S. 409, 419 (1897).
\end{notes}
However, the same sanction was upheld by the Court a few years later in *Hammond Packing Corp. v. Arkansas*,\(^5\) in which the Court distinguished *Hovey* on the grounds that in *Hovey*, the sanction was imposed as mere punishment, whereas in *Hammond*, the presumption that the refusal to produce material evidence was an admission of the lack of merit in the asserted defense.\(^6\) The Court also observed that all that the trial court sought was a bona fide effort to comply with the order and that any reasonable showing of inability to comply would satisfy its requirements.

In *Societe Internationale pour Participations Industrielles et Commerciales S.A. v. Rogers*,\(^7\) the Supreme Court reiterated that there are constitutional limitations on the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of its case. The Court held that Federal Rule 37 should not be construed to authorize dismissal of a complaint because of a party’s noncompliance with a pretrial discovery order when it has been established that the failure to comply was caused by inability to comply, rather than willfulness, bad faith, or any fault of the party. Citing *Hammond*, which stated that failure to produce material evidence was presumed to be an admission of lack of merit of the defense, the Court suggested that in a case in which the party had made a good faith effort to comply, the presumption might not apply.\(^8\)

The constitutional limits under the *Hovey-Hammond* test regarding imposition of sanctions that disposes of a case without reference to the merits, either by dismissal or by default judgment, is not precise. It appears however that when the facts taken as established under present Federal Rule 37(b)(2)(A), the evidence is excluded under present Federal Rule 37(b)(2)(B), or the portion of the case dismissed under Federal Rule 37(b)(2)(C) are elements of the dispute that cannot be determined on the merits without disclosure of the evidence, it can be said that the *Hammond* presumption applies. If however the fact taken as established, the evidence excluded, or the issue subject to default or dismissal has no connection with the information the party has neglected to supply, then the sanction might be looked on as mere punishment prohibited under the *Hovey* rule.

The Supreme Court reaffirmed *Rogers* in *National Hockey League v. Metropolitan Hockey Club, Inc.*\(^9\) In *National Hockey League*, the

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United States Court of Appeals for the Third Circuit had reversed a district court Federal Rule 37(b) dismissal on the grounds that the record did not show sufficient evidence of bad faith. The Court acknowledged the general rule that bad faith is a prerequisite for dismissal under Federal Rule 37(b); however the Court reversed the Third Circuit in a per curiam opinion that emphasized the district court’s discretion in imposing sanctions.62

If willfulness on the part of the delinquent party is reflected in the record, then the court need not make a specific finding before imposing the sanction of dismissal.63 However, a court should conduct an evidentiary hearing in order to determine the issue of the offending party’s willfulness if there are material issues of fact. The court should not resolve those factual disputes on affidavits or depositions.64 Furthermore, some statement should be made on the record that articulates the court’s resolution of the factual, legal, and discretionary issues involved in reaching its decision.65

Federal Rule 37(b)(2)(C) also authorizes the rendering of a judgment by default against the disobedient party. This is another drastic remedy that should be resorted to only in extreme situations, such as where it is determined that counsel or a party has acted either willfully or in bad faith in failing to comply with a court order.66 In Wilson v. Volkswagen of America Inc.,67 the United States Court of Appeals for the Fourth Circuit held that this sanction should not be imposed unless it is demonstrated that the failure to make discovery materially affected substantial rights of the adverse party and is prejudicial to the presentation of its case.68

63. DiGregorio v. First Rediscount Corp., 506 F.2d 781, 788 (3d Cir. 1974) (declining to require the trial court to make specific findings of willfullness where willfullness was apparent from the record).
64. Cf. Flaks v. Koegel, 504 F.2d 702, 709, 712 (2d Cir. 1974) (requiring a showing of bad faith before dismissal and requiring an evidentiary hearing on dismissal motion).
65. See Patton v. Aerojet Ordnance Co., 765 F.2d 604, 607-08 (6th Cir. 1985) (holding that the district court erred because reason for its dismissal could not be determined); Quality Prefabrication, Inc. v. Daniel J. Keating Co., 675 F.2d 77, 81 (3d Cir. 1982) (holding that court must articulate on the record reason for dismissal).
66. United States v. DeFrantz, 708 F.2d 310, 311 (7th Cir. 1983) (holding that default judgment is appropriate only where defendant's failure to appear for a deposition was willful); United Artists Corp. v. Freeman, 605 F.2d 854, 857 (6th Cir. 1979) (holding that default judgment was error where defendant's failure to cooperate in deposition may not have been willful); G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1978) (holding that if failure to comply with discovery request was willful, default judgment can be entered).
APPELLATE REVIEW

BROAD DISCRETION.

The present Federal Rule 37(b)(2) grants the trial court broad discretion to make such orders "as are just" based on the facts of the particular case. Courts may use any and all available sanctions considered to be appropriate.

INTERLOCUTORY APPEALS ACT OF 1958.

Although courts possess broad discretion, this is not limitless, and orders imposing sanctions are frequently immediately appealable. Discovery orders fall within the scope of the Interlocutory Appeals Act of 1958 ("Interlocutory Appeals Act"); therefore, the same would presumably apply to orders relating to disclosure.

Accordingly, courts will continue to stringently examine the requirements for establishing that the order presents a controlling question of law or that an immediate appeal will materially advance the termination of the litigation, as required by the Interlocutory Appeals Act, which provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Counsel should request a district court imposing a sanction to state clearly its reasons for its action in the order, so that meaningful review may be had on appeal.

The fact that a party ultimately prevails on the merits after an appeal does not entitle it to be free from sanctions under Federal Rule

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69. See Wright & Miller, supra note 54, § 2289.
70. Guidry v. Continental Oil Co., 640 F.2d 523, 533 (5th Cir. 1981) (noting that the court can apply sanctions as it desires), cert. denied, 454 U.S. 818 (1981); Wilson, 561 F.2d at 504.
Furthermore, the question of whether sanctions may be imposed under Federal Rule 37(b) does not depend on whether a party's failure to comply with a discovery order was willful. It has been held however that if a party's failure to comply with a discovery order is due to inability that is fostered neither by its own conduct nor by circumstances within its control, then the party is exempted from the penal sanctions of Federal Rule 37(b). In Read v. Ulmer, the United States Court of Appeals for Fifth Circuit stated that Federal Rule 37 is not a legal requirement of the impossible. If factors beyond the control of counsel make it impossible for counsel to comply with a procedural deadline, a motion for an extension or other relief should be filed before the crucial date.

**Writ of Mandamus.**

Some cases have permitted the use of a writ of mandamus for appellate review of discovery orders in order to avoid the imposition of sanctions. In In re Burlington Northern, Inc., the Fifth Circuit permitted mandamus review of a district court order directing production of documents for which the attorney-client privilege and work product immunity had been asserted. The court noted that the documents at issue went to the heart of the controversy between the parties and that an erroneous disclosure of these documents could have caused irreparable harm. The district court's order turned on legal questions appropriate for appellate review.

In Bogosin v. Gulf Oil Corp., the United States Court of Appeals for the Third Circuit reached a similar result. Bogosin involved a district court order to produce documents over a party's claim of privilege under the work product doctrine. The Third Circuit exercised its mandamus power to consider the merits of the claimed privilege and deter-

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74. See Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858, 860 (5th Cir. 1970) (holding that Rule 37(b) sanctions should not be imposed if failure to comply was caused by circumstances beyond parties' control).
75. 308 F.2d 915 (5th Cir. 1962).
76. Read v. Ulmer, 308 F.2d 915, 918 (5th Cir. 1962).
77. See Margoles v. Johns, 587 F.2d 885, 888 (7th Cir. 1978) (stating that counsel is well advised to file a motion for extension of time before the deadline). 10A *Federal Procedure* § 26:525 (1988).
78. 822 F.2d 518 (5th Cir. 1987).
79. In re Burlington Northern, 822 F.2d 518, 522-23 (5th Cir. 1987).
80. 738 F.2d 587 (3d Cir. 1984).
manded that an appeal after the final decision would be an inadequate remedy and that the party had been unsuccessful in an attempt to obtain an interlocutory appeal.81

**Final Judgment.**

As with discovery orders, disclosure orders are available for review on appeal from a final judgment in the case; however, they will face the same difficulty of showing that the party has been prejudiced by the order or that the question is not moot. The harmless error doctrine and the broad discretion vested in the trial court will probably continue to require very unusual circumstances for reversal.82

Some of the sanctions that may be imposed under present Federal Rule 37(b), such as dismissal of the action, are final orders and are appealable as such.83 On appeal of a sanction order, the appellate court will consider whether the determination that led to the order was proper.84

**Civil Justice Reform Act**

The Civil Justice Reform Act ("CJRA") required each of the ninety-four federal court districts to appoint advisory groups composed of users of the civil justice system; each advisory group was required to prepare a report.85 Furthermore, each district had to develop a civil litigation expense and delay reduction plan by Decem-

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82. See, e.g., Atlas Truck Leasing, Inc. v. First NH Banks, Inc., 808 F.2d 902, 903 (1st Cir. 1987) (granting trial court broad discretion); ISI Corp. v. United States, 503 F.2d 558, 559 (9th Cir. 1974) (applying harmless error analysis); Marshall v. Ford Motor Co., 446 F.2d 712, 713 (10th Cir. 1971) (finding no abuse of discretion in discovery proceedings); Humble v. Mountain State Const. Co., 441 F.2d 816, 818-19 (6th Cir. 1971) (finding no prejudice in the district court's discovery orders); Montecatini Edison S. P. A. v. E.I. du Pont de Nemours & Co., 434 F.2d 70, 72 (3rd Cir. 1970) (finding district court orders to be within its discretion).
83. Cf. Interstate Cigar Co. v. Consolidated Cigar Co., 317 F.2d 744, 746 (2d Cir. 1963) (regarding appeal following dismissal as discovery violation sanction).
(a) The civil justice expense and delay reduction plan implemented by a district court shall be developed or selected, as the case may be, after consideration of the recommendations of an advisory group appointed in accordance with section 478 of this title.
(b) The advisory group of a United States district court shall submit to the court a report, which shall be made available to the public and which shall include—
(1) an assessment of the matters referred to in subsection (c)(1);
ber 1, 1993. Thirty-four of the districts were designated as Early Implementation District Courts (EIDC), and were thus required to

(2) the basis for its recommendation that the district court develop a plan or select a model plan;
(3) recommended measures, rules and programs; and
(4) an explanation of the manner in which the recommended plan complies with section 473 of this title.

(c)(1) In developing its recommendations, the advisory group of a district court shall promptly complete a thorough assessment of the state of the court's civil and criminal dockets. In performing the assessment for a district court, the advisory group shall—
(A) determine the condition of the civil and criminal dockets;
(B) identify trends in case filings and in the demands being placed on the court's resources;
(C) identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation; and
(D) examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.

(2) In developing its recommendations, the advisory group of a district court shall take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys.

(3) The advisory group of a district court shall ensure that its recommended actions include significant contributions to be made by the court, the litigants, and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts.

(d) The chief judge of the district court shall transmit a copy of the plan implemented in accordance with subsection (a) and the report prepared in accordance with subsection (b) of this section to—
(1) the Director of the Administrative Office of the United States Courts;
(2) the judicial council of the circuit in which the district court is located; and
(3) the chief judge of each of the other United States district courts located in such circuit.


(a) Within ninety days after the date of the enactment of this chapter, the advisory group required in each United States district court in accordance with section 472 of this title shall be appointed by the chief judge of each district court, after consultation with the other judges of such court.

(b) The advisory group of a district court shall be balanced and include attorneys and other persons who are representative of major categories of litigants in such court, as determined by the chief judge of such court.

(c) Subject to subsection (d), in no event shall any member of the advisory group serve longer than four years.

(d) Notwithstanding subsection (c), the United States Attorney for a judicial district, or his or her designee, shall be a permanent member of the advisory group for that district court.

(e) The chief judge of a United States district court may designate a reporter for each advisory group, who may be compensated in accordance with guidelines established by the Judicial Conference of the United States.

(f) The members of an advisory group of a United States district court and any person designated as a reporter for such group shall be considered as independent contractors of such court when in the performance of official duties of the advisory group and may not, solely by reason of service on or for the advisory group, be prohibited from practicing law before such court.


MANDATORY DISCLOSURE

submit their plans by December 1, 1991.86 Fifteen of the thirty-four, or approximately half of the EIDC's adopted plans, required some form of mandatory prediscovery disclosure.87

Both the Civil Justice Reform Act and the 1993 amendments to the Federal Rules of Civil Procedure ("1993 Amendments") seek to reduce the costs and delays of the current federal judicial system; however, they take markedly different approaches in pursuing this objective. The 1993 Amendments seek to effectuate change from the top down, through national rules applicable throughout the federal system. In contrast, the Civil Justice Reform Act contemplates reform from the bottom up, through local rules specifically tailored to the particular problems of each district. Not surprisingly, the CJRA plans adopted by the EIDCs frequently differ from the provisions contained in the 1993 Amendments, particularly with regard to the variety of mandatory disclosure provisions that have been implemented.88

Under the amendments to Federal Rule 83 proposed by the Advisory Committee in August 1991, local rules in the Civil Justice Reform Act plans could conflict with the 1993 Amendments on subjects like mandatory disclosure to provide "a sound basis for potentially useful experimentation," provided they were approved by the Judicial Conference and were limited in duration to a period of five years.89 However, the Standing Committee rejected this proposal in September 1992 and recommitted to the Advisory Committee the proposed changes to Rule 83.90 As a result, all Civil Justice Reform Act plan provisions inconsistent with the 1993 Amendments were abrogated, effective December 1, 1993, when the 1993 Amendments began to govern all civil cases filed thereafter and those cases then pending "insofar as just and practicable."91 However, federal court districts were granted the opportunity to opt out of the mandatory prediscovery disclosure requirements under new Federal Rule 26(a)(1): "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..."92

The Civil Justice Reform Act calls for plans to adopt the following:

89. 1993 Proposals, supra note 1, 146 F.R.D. at 533.
90. Id. at 517.
91. Id. at 404.
Systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case.\footnote{28 U.S.C. § 473(a)(1) (Supp. 1992).}

Differential case management is most frequently implemented by assigning cases to a pre-established category or “track,” typically using a set of standard criteria applied to either certain specific types of cases or general categories of cases.

Furthermore, the Civil Justice Reform Act plans usually establish several procedures designed to facilitate discovery and resolution of the case, including early meetings between the parties, case management conferences with the court, case management orders, case status reports, early neutral evaluation and settlement conferences, pretrial conferences, and pretrial orders.\footnote{See ABA Section of Litigation, Report of the Task Force on the Civil Justice Reform Act (1992).}

CONCLUSION

Between implementation of the dramatic changes contemplated by the Civil Justice Reform Act plans and the 1993 Amendments to the Federal Rules of Civil Procedure on the one hand, and the resolution of the conflicts between the two systems on the other, federal courts and attorneys in federal practice will face substantial challenges in the near future. History teaches that such changes will eventually be adopted by state court systems.