Disclosure under Federal Rule of Civil Procedure 26(a)--Much Ado about Nothing

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by

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* From WILLIAM SHAKESPEARE, MUCH ADO ABOUT NOTHING.

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Introduction

The concept of open discovery embodied in the 1938 Federal Rules of Civil Procedure and the adversarial tradition of the American civil adjudication system have been in a state of ominous tension since the inception of the federal rules. The existence of an irreconcilable conflict that would eventually require fundamental systematic change was both epitomized and foretold by Hickman v. Taylor, in which the Court endorsed liberal, open discovery by recognizing that "[m]utual knowledge of all of the relevant facts gathered by both parties is essential to proper litigation." 1 At the same time, the Court approved the adversarial principles reflected in Justice Jackson's famous concurring statement that "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." 2 Recently, a seemingly modest federal discovery rules reform proposal, which was spawned by concerns about excessive litigation costs and requires mutual early disclosure of basic information by both sides to a case, set off a furor arguably unmatched in the history of the federal civil rules. Examination of the history of discovery and discovery abuse in the context of the adversary system, the recent cacophony calling for litigation system reform, and the likely operation and effect of the federal disclosure proposal reveal that the proposal, while by itself unlikely to significantly affect the costs and abuses associated with current discovery practices, is far more revolutionary than its proponents seem to

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2. Id. at 516 (Jackson, J., concurring). While Justice Jackson's statement, which more poignantly embodies partisanship principles than does the majority opinion, has been cited with far greater frequency than the majority opinion, there is no question that the Court's opinion embraces partisanship. See id. at 511-14 (stating that the files and mental notes of lawyers should not be opened to the free scrutiny of their adversaries).
acknowledge. Indeed, as its opponents consciously or subconsciously sense, the proposal represents the first step on the difficult path away from the laissez faire adversarial tradition in discovery that is perceived by many as achieving too little justice at too great a cost.

The widespread public and professional perception of a "litigation explosion" accompanied by a serious breakdown in the American litigation system during the late 1970s and 1980s has given rise to what might be called a procedural reform explosion in the 1990s. All three branches of the government, as well as much of the organized bar and corporate America, have been involved in a frenzy of activity in recent years that has generated numerous proposals for fundamental changes to the litigation mechanisms by which we resolve civil dis-

3. WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991); see also Dan Quayle, Civil Justice Reform, 41 AM. U. L. Rev. 559, 560 (1992) (increase in litigation). But see Robert C. Clark, Why So Many Lawyers? Are They Good or Bad?, 61 FORDHAM L. Rev. 275, 277-78, 301 (1992) (suggesting that the increase in the number of lawyers and amount of litigation may not be unhealthy); Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4 (1983) (acknowledging widespread claims and perceptions of "litigation explosion" or "hyperlexis," but arguing that data does not support its existence) [hereinafter Galanter, Reading the Landscape]; Lauren K. Robel, The Politics of Crisis in the Federal Courts, 7 OHIO ST. J. ON Disp. Resol. 115, 137 (1991) (arguing crisis and need for reform not substantiated); Jack B. Weinstein, Procedural Reform as a Surrogate for Substantive Law Revision, 59 BROOK. L. Rev. 827, 829-31 (1993) (arguing that claims about litigation explosion have little objective basis and are not supported by federal court case filing statistics).

4. See e.g., Linda S. Mullenix, The Counter-Reformation in Procedural Justice, 77 MINN. L. Rev. 375, 377 (1992) [hereinafter Mullenix, Counter-Reformation]; Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, 77 MINN. L. Rev. 1283, 1284-85 (1993) [hereinafter Mullenix, Separation of Powers]; George L. Priest, Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness, 71 DENV. U. L. Rev. 115, 116-17 (1993); Thomas A. Zlaket, Encouraging Litigators to Be Lawyers: Arizona's New Civil Rules, 25 ARiz. ST. L.J. 1, 1-3 (1993). Professor Richard Marcus suggests that much of the recent "crisis rhetoric" appears to have been employed to spur radical, multidirectional change in the litigation system and concludes that "the feeling that there is some pressing urgency for change, which is fueled by the litigation crisis notion, appears to have been debunked in professional, if not political, circles." Richard L. Marcus, Of Babies and Bathwater: The Prospects for Procedural Progress, 59 BROOK. L. Rev. 761, 761-63 (1993) [hereinafter Marcus, Prospects]. One aspect of the crisis noted by Marcus is the sense that there is a "crisis of purpose"—that there is no general agreement as to what the ultimate aspiration of civil litigation should be. Id. at 766-67. That there is a lack of consensus over purpose is arguably reflected in debates over the relationship between the disclosure rule, Federal Rule of Civil Procedure 26(a), and the adversarial system—the focal point here. See infra text accompanying notes 300-400.
putes in federal court. Few aspects of law, procedural or substantive, relating to litigation in federal courts have escaped attention. Reform efforts, largely spurred by concerns that litigation associated costs have become so excessive that they threaten the very health of the national economy, have included proposals to revise the longstanding


Similar reform programs have been undertaken at the state court level. See, e.g., Zlaket, supra note 4, at 1-9 (describing Arizona's civil litigation reform).

6. Probably the most notorious claims of adverse economic effects of litigation in the United States were those of former Vice President Quayle at the 1991 American Bar Association Convention, where he stated that America had 70% of the world's lawyers and that the increase in litigation was a drain on the economy. Vice President Dan Quayle, Address before the American Bar Association (transcript available in Federal News Service, Aug. 13, 1991). For recent critical discussion of the claim that there is a litigation crisis, accompanied by excessive costs and too many lawyers, see David W. Barnes, The Litigation Crisis: Competitiveness and Other Measures of Quality of Life, 71 DENV. U. L. REV. 71 (1993); Marc Galanter, News from Nowhere: The Debased Debate on Civil Justice, 71 DENV. U. L. REV. 77 (1993) [hereinafter Galanter, News from Nowhere]. Galanter, who has been deeply involved in the litigation crisis debate for many years, ultimately concludes that we lack sufficient information to reach any conclusions about the economic effects of the civil litigation system. "That baseless fictions about the number of lawyers, cursory surmises about the costs of the civil justice system, unfounded notions about product liability litigation and fables about damaged competitiveness continue to be taken seriously testifies both to the paucity of information we do have and to the wide spread disinclination to employ the information that we do have." Galanter, News from Nowhere, supra at 99.

Professor Marcus has offered several possible reasons for the crisis rhetoric and stridency of debate on civil litigation reform, both as to the need for reform and the opposition to reform proposals such as mandatory disclosure in Federal Rule of Civil Procedure 26(a): (1) the innately conservative nature of the legal profession; (2) the politicization of the civil rule-making process resulting in "the sky is falling" approach to gain attention for interest groups' particular concerns; (3) recent experiences with previous reforms such as the amendment of Rule 11 in 1983 and the adoption of the Civil Justice Reform Act (CJRA), accompanied by the perception that there is a hidden agenda to these changes that is intended to make particular groups either "winners or losers." Marcus, Prospects, supra note 4, at 819-21.
method by which costs are allocated in federal lawsuits; to limit damages; to limit expert witnesses; to increase yet again the level of judicial management that is to be exercised by federal judges; to reduce the number of lawyers being produced by law schools; to scale back substantive law in torts, environmental, and other areas; and to launch a massive five-year local delay and cost reduction experimental program in federal courts, commonly referred to as the Civil Justice Reform Act.

Much of the outcry over the abuses and excesses in the litigation system over the past two or three decades has centered on claims of pervasive discovery abuse and misuse. While there are substantial differences in perceptions as to what really constitutes discovery abuse
or misuse and fundamental disagreement on the extent of the problem, there is little question that discovery abuse, however it is defined, has been perceived as a major problem for many years despite repeated corrective tinkering with the federal discovery rules. Not surprisingly, therefore, virtually all quarters in the current procedural revolution have devoted substantial attention to reforms to correct what are seen as the most egregious, and most intractable, problems with discovery. Perhaps the most prominent and controversial of the current discovery reform proposals, which is a part of the Federal Civil Rules Advisory Committee’s seemingly modest recent offerings on discovery reform and has been incorporated in various forms in other reform proposals, is the concept of early mandatory disclosure by both sides of basic information as a prelude to additional traditional discovery.

Similar claims exist regarding discovery abuse in state court civil proceedings. See, e.g., Honorable Robert D. Myers, MAD Track: An Experiment in Terror, 25 ARIZ. ST. L.J. 11 (1993) (report of a state commission examining the direction of the state’s courts indicated that “the most prominent way in which the conduct of lawyers has contributed to inefficiencies, delay, and excessive cost in the resolution of civil disputes is in the conduct of civil discovery” (quoting REPORT OF THE COMMISSION ON THE COURTS § 5.6, at 55)).

12. See infra text accompanying notes 55-130. A survey of the literature on discovery from 1969 until 1978 concluded that there was a growing sense that discovery abuse was becoming a greater problem, particularly in complex litigation, but that the expressed dissatisfaction had come primarily from articles written by law students and academics rather than practicing attorneys. SEGAL, supra note 11, at 66-67.


15. See FED. R. CIV. P. 26(a)(1)(A)-(B). “[T]his subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement,” including information about potential witnesses, documentary evidence, damages, and insurance. Id. & advisory committee’s notes, reprinted in 146 F.R.D. 627, 627-28 (1993). The proposed rule on disclosure, along with other amendments to the Federal Rules of Civil Procedure approved by the Advisory Committee on Civil Rules, the Standing Committee on Practice and Procedure, and the Judicial Conference of the United States, were adopted by the Supreme Court and transmitted to Congress on April 22, 1993.
Federal Rule 26(a) disclosure represents a variation on proposals offered by several proceduralists in the late 1970s. The Advisory Committee has described disclosure as the equivalent of the first wave of standard interrogatories or the “functional equivalent of court-ordered interrogatories”; it is intended “to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information.” Despite these ostensibly modest, benign aspirations, the proposal set off such hairpulling and handwringing in the legal community that one might assume that the entire adversary system itself was being dismantled. Since prelimi-
nary introduction of the disclosure concept in 1989, the pressure to abandon the proposal has been intense. The thesis of this Article is that there is also something far more fundamental causing the breadth and intensity of reaction to the disclosure rule, even by those practitioners who do not have a political, substantive, or parochial agenda. This root cause relates to pervasiveness of a partisan tradition that is not consistent with the formal rules and doctrines of discovery. Although there have been many instances over the past fifty years in which amendments to the federal rules have generated substantial resistance, organized resistance to the disclosure proposal apparently is ununequaled.\(^{20}\) 

\(^{20}\) See infra text accompanying notes 179-400.

\(^{21}\) See, e.g., infra note 308. Reforms outside the area of federal procedural rules have also set off widespread opposition. For example, the profession’s negative reaction to the development of the ABA Model Rules of Professional Conduct by the Kutak Commission between 1977 and 1983 appears to approach that encountered by the disclosure rule and arguably may stem from common underlying dynamics. See Theodore Schneyer, Professionalism as Politics: The Making of a Modern Legal Ethics Code, in Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession 95 (Robert L. Nelson et al. eds., 1992). Among the most controversial provisions of the early drafts of the Model Rules were those that increased lawyers’ obligations to third parties and to the courts in relationship to their clients, particularly with regard to client confidences. These were seen as potentially destroying both the adversary system and traditional norms of confidentiality in lawyer-client relations. Id. at 113-17, 122-23, 127-30.

\(^{22}\) See, e.g., Paul D. Carrington, Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends, 156 F.R.D. 295, 295 (1994); Marcus, Prospects, supra note 4, at 808; Jeffrey J. Mayer, Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of Civil Procedure, 12 Rev. Litig. 77, 81 (1992); Frank W. Hunger, Assistant Attorney General, Civil Division, U.S. Dep’t of Justice, Statement Concerning Proposed Amendments to the Federal Rules of Civil Procedure before the Subcommittee on Courts and Administrative Practice, Committee on the Judiciary, U.S. Senate, July 28, 1993, at 3 (quoting Honorable Sam C. Pointer, Jr., Chief Judge, United States District Court for the Northern District of Alabama and Chairman of the Advisory Committee on Civil Rules, Statement before the Subcommittee on Intellectual Property and Judicial Administration of the Committee of the Judiciary, U.S. House of Representatives, June 16, 1993, at 13) (on file with Hastings Law Journal). Indeed, the organized opposition to the proposal has extended beyond the public comment procedures of the Civil Rules Advisory Committee to include lobbying against proposed Rule 26 to the Standing Committee on Federal Rules, the Judicial Conference, the Supreme Court, and Congress. See Amendments to the Federal Rules of Civil Procedure, supra note 15, at 505 (1993) (statement of Justice White commenting upon letters received); Ann Pelham, Forcing Litigants to Share: Judges Back Radical Discovery Rule, But Lawyers Want a Veto from Hill, Legal Times, May 3, 1993, at 1, 20-23 (summarizing opposition and lobbying efforts led by corporate defense and insurance company lawyers); Samborn, supra note 14, at 33 (discussing lobbying efforts against disclosure rules led by corporate defense lawyers and noting efforts to lobby the Supreme Court as well as Congress); Carl Tobias, Congress
Opposition to the disclosure rule has come from all quarters—the organized bar, individual practitioners, legal scholars, and some judges—and has been motivated by politics, pragmatism, and fundamental theory. Many of the arguments against adoption of the rule were directed at perceived defects in aspects of its structure, such as supposedly unrealistic timing expectations or the fact that the disclosure obligation is tied to a vague standard. Those opposed argue that the language of the standard—"[r]elevant to facts alleged with particularity"—is even more problematic because of the liberal federal notice pleading system and will result in the absence of meaningful disclosure. Others object that the disclosure rule will cost more than it is worth because of increased satellite litigation over compliance with vague and subjective disclosure standards or because the rule imposes additional unnecessary burdens on the litigants. However, perhaps the most significant criticisms center around a perception that the disclosure rule is inconsistent with fundamental principles of the adversary system, particularly those which underlie the tradition of zealous advocacy, the attorney-client privilege, and the work product immunity doctrine. Thus, many opponents see the disclosure rule as fundamentally altering the balance between a lawyer’s duty of zealous, partisan representation of the client and the lawyer’s duty to the legal system as an officer of the court. According to these critics, disclosure will undermine the cornerstone of the civil justice system—adversarial preparation of cases.

Although the controversy surrounding the disclosure rule is only a small part of the larger debate over civil justice system reform that

23. See infra notes 168-205 and accompanying text.
24. See infra notes 201-205 and accompanying text. The disclosure obligation as to persons with relevant knowledge and relevant documents is linked to the pleadings by the Rule’s standard: “relevant to facts alleged with particularity.” Fed. R. Civ. P. 26(a)(1)(A)-(B).
25. See infra notes 201-204.
26. See infra notes 295-297 and accompanying text. See also Zlaket, supra note 4, at 5-7 (noting the prominence of these arguments in the opposition to Arizona’s disclosure rule).
27. See infra notes 295-297 and accompanying text.
28. Recently, in commenting on the opposition to Arizona’s mandatory disclosure rule, one commentator noted that the fallacious “parade of horribles” concerning the “assault on the adversary system” is not unlike the outcry over the initial introduction of the Federal Rules of Civil Procedure. See JoJene Mills, Practical Implications of the Zlaket Rules from a Plaintiffs’ Lawyer’s Prospective, 25 Ariz. St. L.J. 149, 159 (1993). See also infra notes 30-54 and accompanying text.
has consumed the profession in recent years, it provides a unique focal point for consideration of the nature and future direction of the civil litigation system in the United States because it provides a point at which the concerns of economy, justice, and formal and informal theory meet head on. This Article will examine the disclosure rule in the context of the recent debate over discovery abuse and the general outcry for corrective response to what are seen by many as runaway litigation costs. The main focus is an analysis of why an apparently modest rule, intended to reduce discovery costs associated with the exchange of basic information that is supposed to be routinely shared under traditional discovery rules, set off such vehement protest. This analysis requires consideration of the background of discovery in the federal civil litigation system, the process by which the federal disclosure rule was developed and implemented, and the arguments concerning both the practical and ethical problems with the disclosure rule. Part I will briefly review the discovery doctrine and its history in the American litigation system, focusing particularly on the inherent tension between the principles of discovery and those of our adversarial tradition of partisan representation. It will also examine the sources of discovery abuse and the extent to which discovery abuse is a continuing problem, focusing particularly on the available empirical evidence. This examination suggests that discovery abuse may not be as overwhelming a problem in terms of litigation cost and delay as it has incessantly been portrayed. On the other hand, an apparently constant, significant level of discovery abuse does exist in the tactical use of discovery as an impositional weapon and in the evasion of discovery, both of which are contrary to discovery's fundamental purpose of informational exchange geared toward mutual knowledge. Where discovery abuse does exist, it has remained largely unresponsive to previous reform efforts perhaps because much of the abusive discovery practice has become an accepted part of the informal zealous advocacy tradition.

Part II of the Article examines the history, purposes, doctrinal basis, and intended practical operation of the recently amended Federal Rule 26(a) governing disclosure. Part III discusses whether the response to disclosure is justified by serious practical or ethical flaws in this rule or whether something else is responsible for the profession's adverse reaction to disclosure. A detailed analysis of the criticisms of disclosure focuses particular attention on the relationship

29. See infra notes 82-127 and accompanying text.
30. See infra text accompanying notes 33-35.
between disclosure of basic information under Rule 26(a) and adversary-based doctrines, such as the attorney work product protection, the attorney-client privilege, and the traditional ethic of zealous representation, and finds that much of the criticism of disclosure is hyperbolic. Disclosure as envisioned by the Advisory Committee is likely neither to create a panoply of practical problems nor to effect dramatic change in the current adversary-driven discovery system.31

The Article concludes that critics are probably correct that the disclosure rule, by itself, is unlikely to significantly diminish discovery abuse. The foundations for this type of abuse, characterized by unnecessary discovery procedures and evasion of the duty to exchange relevant information, still exist in the incentives and economies of the adversary litigation system and attorneys' informal value systems. Alleviation of such abuse is not likely to occur without fundamental, across-the-board changes in the legal system that address not only formal rules and incentives, but also attitudes of the profession. Nevertheless, what is most significant and encouraging about the disclosure rule—and what is most responsible for the massive resistance it has spawned—is that by making an unambiguous statement about the duty to disclose adverse information without a request from an opponent, the rule takes a basic step toward a fundamental change in litigation culture that gives more emphasis to values other than winning at all costs and strikes a better balance between justice and economy.

31. This is especially true with regard to claims that the minimal disclosure of basic information required by Rule 26(a) will seriously damage the work product and attorney-client doctrines or lawyers' legitimate representational duties to clients. Indeed, claims that disclosure is inconsistent with these duties and doctrines appear to be based on widespread misunderstanding about the scope of the doctrines as they formally exist. The operation of these doctrines will remain largely the same under Rule 26(a) as under traditional discovery with one possible exception. That exception relates to the fact that attorneys, in making a determination of what information is relevant for purposes of disclosure, will be required to make determinations that are similar to evaluations protected as attorney opinion under work product immunity and that under traditional discovery practice may not have resulted in disclosure of information absent precise discovery requests from an opposing party. Lawyers' reactions to this difference, and the widespread perception that the disclosure rule is inconsistent with the adversarial system, suggest the existence of a set of informal lawyer rules regarding ethical discovery practice that are probably most responsible for the massive negative reaction to Rule 26(a)(1). These informal rules, largely grounded in the primacy of the tradition of zealous advocacy, are not only inconsistent with Rule 26(a) disclosure, but are also inconsistent with much of the Federal Civil Rules system and its utilitarian goals. See infra Part III.C.
I. A Brief History of Discovery Abuse

A. The Discovery Rules and the Adversary System

Meaningful discussion of the current discovery reform controversy surrounding Rule 26(a)(1) must begin with a brief examination of the theoretical and historical context of discovery in our adversarial system and the problems that have arisen with discovery practices. Commentary that accompanied the promulgation of the 1938 Federal Rules of Civil Procedure indicates that the discovery provisions were offered as an alternative to the existing antiquated procedural system that was dominated by "the sporting theory of justice"—a system in which lawyers were gladiators largely unrestrained in their efforts to prevail through surprise at trial and the use of highly factual pleading and technical motions practices. At the time, the Federal Rules in general, and the discovery provisions in particular, were viewed as shifting the philosophy from all-out adversarial confrontation and technical gamesmanship at all stages of litigation to economy, efficiency, and justice. Through the cooperative exchange of information,
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discovery was intended to narrow issues that remained in dispute, equalize knowledge among the parties about the evidence, eliminate trickery or surprise at trial, and, as a result, increase the likelihood that justice would be efficiently achieved during both pretrial negotiation and trial.35

Although it has been frequently stated that the philosophy of the rules was “full disclosure,”36 the actual structure of the original rules and the judicial construction of those rules during the first few decades after their promulgation demonstrate that less than “full disclosure” was actually contemplated and that the adversarial “sporting” tendencies of the prior system still dominated a large part of the underlying philosophy of the civil litigation system. Indeed, the discovery system created by the 1938 Federal Rules was specifically engineered to operate within the basic constructs of the adversary system while simultaneously serving as a check on that system.37 However, the stated goals of discovery were at odds with the underlying


Besides converting trials and pretrial negotiations into more orderly searches for the truth, discovery was expected to reduce the number of trials and thus relieve the burden on the courts. If the full truth would soon be revealed, fewer sham suits would be filed. If the adversaries and the court knew the facts before trial, the court could render more summary judgments. If both sides knew the full truth and each other's strengths and weaknesses, they would settle the case and avoid the costs and uncertainties of trial. If both sides knew all the facts, lawyers and clients would be more satisfied with settlement terms and would carry out the agreement willingly.

GLASER, supra note 33, at 11-12. As one influential early commentator summarized, “Each party may in effect be called upon by his adversary or by the judge to lay all his cards upon the table, the important consideration being who has the stronger hand, not who can play the cleverer game.” Sunderland, supra at 739.


37. See GLASER, supra note 33, at 15. Moreover, critics often lose sight of the fact that it is the adversary system itself that increases the need for a system of pretrial discovery because of its reliance on party formulation and presentation of the case. Inquisitorial systems like that in Germany lack extensive pretrial discovery by lawyers. Id. at 26-27; John H. Langbein, The German Advantage in Civil Procedure, 52 U. CHI. L. REV. 823, 823-
psychology and structure of the adversary system, giving rise to a fundamental tension that could cause discovery goals to be compromised.\(^\text{38}\)

The fundamental attributes of the traditional adversary system include: (1) litigants rather than the court carry the primary burden of conducting the activities by which the dispute will be settled (e.g., setting forth issues, uncovering facts, negotiating settlements, marshaling and presenting evidence and arguments, attacking the opponent’s evidence); (2) in performing these functions, attorneys function as advocates who zealously advance the interests of their clients; and (3) the court serves as a neutral umpire who ensures that the result will be socially accepted because it is perceived as just.\(^\text{39}\) These characteristics are supposed to lead to dispute resolutions that are more efficient and just than would be rendered under an alternative system, such as an inquisitorial system, in which the tribunal is far more active in directing the course of proceedings.

The Federal Rules that were promulgated in 1938 to regulate discovery were consistent with the traditional adversary system in three fundamental respects. First, they were to be party-initiated and party-driven. The expectation in the rules’ enactment was that there would be minimal involvement of the court in conducting discovery or resolving discovery disputes.\(^\text{40}\) Also, as with other aspects of the case, parties were financially responsible for putting together their own dis-

\(^{31}\) (1985) (describing the German legal system and its advantages for inquisitorial fact gathering).

\(^{38}\) See, e.g., Glaser, supra note 33, at 15; Winter, supra note 18, at 264 (finding that discovery can be used to impose costs on opponent that allow avoidance of merits); Wolfson, supra note 32, at 18-19 (stating that discovery “gives impetus and opportunity to the baser litigational instincts of delay, deception, and unbridled confrontational advocacy”). One commentator recently noted that “[t]he sense of virtually all discovery reforms . . . is that the adversariness lawyers normally display is ill suited for pretrial exchange of information” and that most reforms have tried to counter the adversarial tendency of litigating attorneys. Mayer, supra note 22, at 80-81.

\(^{39}\) See Glaser, supra note 33, at 15; infra notes 301-307 and accompanying text. What is “just” involves both considerations of substantive justice (i.e., the merits) and procedural justice (i.e., the outcome is consistent with the procedural rules by which the system operates). See Glaser, supra note 33, at 15 n.1.

\(^{40}\) See Paul R. Connolly et al., Judicial Controls and the Civil Litigative Process: Discovery 9-27 (1978) (noting that the new discovery rules left discovery devices mainly in the control of the parties at suit); Frank F. Flegal & Steven M. Umin, Curbing Discovery Abuse in Civil Litigation: We’re Not There Yet, 1981 B.Y.U. L. Rev. 597, 613; Maurice Rosenberg & Warren R. King, Curbing Discovery Abuse in Civil Litigation: Enough Is Enough, 1981 B.Y.U. L. Rev. 579, 581 (discussing the premise that judges are not needed for the practice of discovery). The expected minimal court involvement is evidenced by the absence of significant court controls on discovery abuse in the early rules.
covery cases. Furthermore, although attorneys would be the ones actually conducting discovery activities, the rules did not make attorneys initially accountable for the activities of the clients with regard to discovery. The new rules did not anticipate the extent to which partisan zealotry would hamper the discovery goal of truth seeking.

In several respects, the initial discovery rules seemed to preserve the opportunity for unfair surprise and failed to equalize knowledge of the facts. Perhaps the earliest indication of a limited vision of discovery, as well as the existence of tension between the objectives of the new discovery system and the traditional adversary system's role for the lawyer was found in Hickman v. Taylor. Despite the Court's discussion of the preeminence of truth finding reflected in the Court's statement that "[m]utual knowledge of all of the relevant facts gathered by both parties is essential to proper litigation," the Court held that the materials at issue—written witness statements taken by the attorney for one of the parties—did not have to be disclosed to the

41. There were no attorney certification requirements like those later added to Rule 26(g) under which attorneys were required to certify that papers filed and discovery requests or responses made were legally and factually supportable and not interposed for an improper purpose. See Fed. R. Civ. P. 26(g).

42. This Article, as do most discussions of the civil justice system, assumes that the primary goal of the system, including discovery, is the ascertainment of truth or substantive accuracy. See Robert D. Cooter & Daniel L. Rubinfeld, An Economic Model of Legal Discovery, 23 J. Legal Stud. 435, 435-36, 444-45 (1994); Bruce L. Hay, Civil Discovery: Its Effects and Optimal Scope, 23 J. Legal Stud. 481, 498-99 (1994); Louis Kaplow, The Value of Accuracy in Adjudication: An Economic Analysis, 23 J. Legal Stud. 307, 307 (1994); Daniel Ortiz, Neoactuarialism: Comment on Kaplow (I), 23 J. Legal Stud. 403, 403 (1994). Essentially, discovery contributes to accuracy by increasing the quality and quantity of information available to the parties and the court so that settlement and trial outcomes have a strong relationship with the merits. See Hay, supra at 497-98. For an extended discussion of the extent accuracy is or should be the primary value served by the civil justice system, see the authorities cited above. See also Marcus, Prospects, supra note 4, at 768-69 (finding that procedural justice and accuracy are not synonymous; litigants value other things such as opportunity to be heard and control of the process).

43. For example, narrow construction of the discovery rules resulted in many courts concluding that interrogatories could not be used to inquire into an opponent's contentions concerning the application of law to fact. See Levine, supra note 33, at 87. This in effect allowed parties to shield their theory of a claim or defense until trial. Another example of the short reach of the discovery rules was the fact that, as originally promulgated, Rule 34, on production of documents, did not authorize one to obtain documents absent "good cause." See Glaser, supra note 33, at 33. Yet another was the fact that as originally promulgated the broad scope of discovery (i.e., relevant to the subject matter of the suit) was limited to depositions; even then courts initially construed the rules as not authorizing questions that would produce inadmissible matter. Id. at 32.

44. 329 U.S. 495 (1947).
other party because such disclosure would undermine the adversary system.\(^4\)

These examples suggest the existence of unresolved tension between the tenets underlying the adversarial litigation system and the goals of the discovery rules. The examples also highlight the fact that part of the legal profession may not have shared the philosophy of the framers of the discovery rules in the primary objective of ascertaining truth.\(^4\)

Nevertheless, the decades immediately following the promulgation of the original Rules of Civil Procedure have been described generally as a period relatively free from the claims of abuse that became common in recent years.\(^4\) Whether these “early days” truly represent

\(^{45}\) See id. at 507, 511-12 (open access to work product such as witness statements would result in “[i]nefficient, unfairness, and sharp practices . . . ,” and would poorly serve the client’s interest and the cause of justice); id. at 516 (Jackson, J., concurring) (“[T]rial is and always should be an adversary proceeding . . . . I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him.”). Thus, the holding and the rationale of the Court’s opinion and Justice Jackson’s concurrence undercut the suggestion by some commentators that the Supreme Court “surely recognized that if the process was to work at all discovery had to be a substantially nonadversarial endeavor.” Wolfson, supra note 32, at 50.

\(^{46}\) See, e.g., Glaser, supra note 33, at 12 (noting ongoing criticism of discovery based on fears that “it would diminish the advantages of the adversary system” and have undesirable effects such as those stemming from its use as a tactical weapon); Gardner, Agency Problems, supra note 35, at 164-65 & nn.222-23 (finding bench and bar adherence “to surprise theory of justice” resulted in continually conservative or negative thinking about discovery such that doubts were resolved against discovery in many circumstances); Maurice Rosenberg, Changes Ahead in Federal Pretrial Discovery, 45 F.R.D. 479, 481, 484-86 (1968) (discussing tension, reflected in Hickman, between “the Federal Rules’ stated objective of reaching the merits of the case by putting the cards face-up on the table, on the one hand, and the need to preserve the lawyers’ adversary function, on the other”); Wolfson, supra note 32, at 19-20 (“system that promotes adversarial resolution of disputes through the efforts of dedicated legal representatives cannot be expected to easily accommodate a process that mandates disclosure of vital case-related information”). Indeed, many of the problems that occur in discovery may stem from the fact that a lawyer operating under an adversarial philosophy is simply incapable of objectively responding to discovery requests as long as there is any ambiguity or indeterminacy in the request that will allow multiple interpretations—that a lawyer is virtually compelled to adopt an interpretation, no matter how marginal, that seemingly serves the client’s immediate interest. See Mayer, supra note 22, at 96-99. See also David B. Wilkins, Legal Realism for Lawyers’, 104 HARV. L. REV. 468, 469-502 (1990) (discussing the relationship of indeterminacy and the adversarial ethic); infra notes 360-404 and accompanying text.

the halcyon days of civilized litigation is questionable. While the relative lack of critical outcry about problems with discovery may be interpreted as the result of liberal discovery's wide acceptance, the absence of significant complaints should probably be attributed to other factors.

Because the early discovery rules were not as liberal or as demanding as later rules have become, they presented less potential for conflict with the adversary system's ingrained partisan tendencies. Furthermore, it may be that the first few years after the initial enactment of the rules represented an adjustment period during which litigators were adapting to discovery and realizing that rather than inhibiting their adversarial gamesmanship, the discovery rules actually provided new weapons for the game. Litigators may also have discovered that the rules could be narrowly construed, ignored, or flouted in many instances without fear of sanction by the court.

The relatively low level of dissatisfaction with the early discovery practice also may have been related to conditions in the profession and the field of litigation in the years immediately after the adoption of the discovery rules that were different from conditions that developed later. First, the proclivity to transform the discovery rules into adversarial tools to achieve unintended purposes may have been intensified by a change in the legal profession itself. Some commenta-

Flegal, Discovery Abuse: Causes, Effects and Reform, 3 REV. LITIG. 1, 36 (1983); Wolfson, supra note 32, at 38-39.

48. There were critics who raised complaints concerning discovery problems that were quite similar to those raised later with greater volume and frequency. See, e.g., GLASER, supra note 33, at 35-37 (reviewing complaints about discovery during 1950s, including use of discovery to fish for facts giving rise to a case and use as tactical weapon against weaker, poorer opponent, increased costs on parties and courts from discovery, and use of discovery to avoid doing one's own work); William H. Speck, The Use of Discovery in the United States District Courts, 60 YALE L.J. 1132-33 (1951) (same; citing critical commentary of the late 1940s and early 1950s). Cf. infra notes 55-62 and accompanying text.

49. See Gardner, Agency Problems, supra note 35, at 107, 164 & n.222 (describing the transitory nature of discovery and its movement toward more open discovery as of 1964). See also supra note 43.

50. See, e.g., Winter, supra note 18, at 264 (describing use of discovery as "club" to defeat a meritorious claim); Wolfson, supra note 32, at 42-43 (noting the ability of litigators to use discovery for tactical purposes of delay increasing court costs); infra text accompanying notes 62-68.

51. See GLASER, supra note 33, at 154-55; Gardner, Agency Problems, supra note 35, at 163. For example, a 1962-63 Columbia University study of discovery problems revealed that lawyers were "still motivated to conceal as much as possible, particularly evidence or witnesses that will have a dramatic effect at trial." GLASER, supra note 33, at 234. This suggests that at the time of the Columbia study, many lawyers were still steeped in the "sporting theory" of adversarial justice. LEVINE, supra note 33, at 5.
tors posit that as the legal profession became more competitive, businesslike, and impersonal (evidenced in the development of very large law firms), it became more adversary-driven and suffered a general decline in professional civility. Second, commentators have also suggested that there has been a fundamental increase in the amount and the complexity of federal civil actions commensurate with the creation of new causes of action, particularly for torts and civil rights actions, which require more preparation and investigation into mountains of documents. Increased reliance on discovery, commensurate with this increased complexity, may have placed additional stress on the litigation system and exposed inherent flaws previously less obvious. Third, increased dissatisfaction with discovery practice may be intensified by the changed billing structure of the legal profession, which shifted from fixed fees to hourly fees for services. “When fees are paid on the basis of time charges, discovery practice marries the lawyers’ professional instinct to leave no stone unturned to the financial advantage of doing so,” resulting in overly used and overly expensive discovery.

52. Bone, supra note 47, at 597; Bryant Garth, From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values, 59 BROOK. L. REV. 931, 939-45 (1993); Robert E. Keeton, Times Are a Changing for Trials in Court, 21 FLA. ST. U. L. REV. 1, 13 (1994); Maurice Rosenberg, Federal Rules of Civil Procedure in Action: Assessing Their Impact, 137 U. PA. L. REV. 2197, 2199-2200 (1988) (noting the changes in the legal profession that lead to a more adversarial discovery system). Bryant Garth posits that the increased adversariness, the use of discovery as a strategic weapon, and the willingness to resist discovery in litigation in the 1970s and 1980s occurred primarily because of increased business and legal profession competition. Accordingly, he argues that the “pulling out all stops” or “scorched earth” approach was most prevalent in “high stakes” business litigation, although he acknowledges that aggressive tactics became “more common throughout the profession.” Garth, supra at 939-44. The widespread opposition by lawyers to reforms like mandatory disclosure suggests that while increased adversarial aggressiveness may have been fed or kindled by business and professional competition in the large firm and corporate bar, that segment of the profession established the ethical norm for the profession as a whole. This may have been reinforced by the fact that at least a superficial understanding and acceptance of the notion of partisan client representation was widely accepted as a fundamental tenet of the civil litigation system. See infra text accompanying notes 298, 266-376.

53. See JOSEPH EBERSOLE & BARLOWE BURKE, DISCOVERY PROBLEMS IN CIVIL CASES 77-78 (1980); Bone, supra note 47, at 597; Flegal, supra note 47, at 36-37; Rosenberg, supra note 52, at 2199-2200.

54. Rosenberg, supra note 52, at 2200, 2204-05.
B. The Era of Dissatisfaction

(1) The Perceptions of Discovery Abuse

The apparent satisfaction with early discovery practice gave way to growing dissatisfaction in the 1960s and 1970s as evidenced by the significant increase in the literature on the subject of discovery and the number of special conferences, reports, symposia, meetings, or studies devoted solely or primarily to the issue of discovery problems. Of the approximately thirty different studies on the Fed-

55. Because of the vastness of the literature on discovery problems and reform, comprehensive listing would be virtually impossible. For a sampling of literature on the topic, see Segal, supra note 11, app. B (reviewing in excess of 100 articles on discovery written between 1969 and 1978); Flegal, supra note 47, at 3-8 & nn.14-32 (discussing the discovery abuse literature "explosion" in the late 1970s and early 1980s); authorities cited infra notes 94-130.


eral Rules of Civil Procedure, conducted in the fifty years after the Rules’ enactment, almost half address discovery issues. Finally, dissatisfaction is most obviously reflected in the numerous discovery reform proposals that resulted in significant amendments to the discovery provisions of Federal Rules in 1970, 1980.

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59. The introductory Advisory Committee statement of the 1970 amendments to the discovery rules notes that while relatively few narrowly focused amendments to the discovery rules had been made after their promulgation in 1938, the 1970 amendments reflected “the first comprehensive review of the discovery Rules since 1938” and made substantial changes. FED. R. CIV. P. 26, Advisory Committee’s Explanatory Statement Concerning Amendments to the Discovery Rules, 48 F.R.D. 487, 487-90 (1970). For a brief discussion of the 1970 amendments, see Maurice Rosenberg, Changes Ahead in Federal Pretrial Discovery, 45 F.R.D. 479, 481 (1969). Generally, some of the amendments were intended to address problems with evasive responses to discovery, surprise at trial, and squabbles over privileged or protected information by broadening the scope of discovery to permit interrogatories and requests for admissions on an opposing party’s contentions (i.e., mixed questions of law and fact), requests for production of documents without a showing of good cause, and the obtaining by a witness of a copy of the witness’s own statement. See Levine, supra note 33, at 6-7; Note, Federal Discovery Rules, supra note 57, at 625, 640. Also, the sanctions provisions of Rule 37 were substantially strengthened in the hope of more effectively serving the purposes of the discovery rules. See Notes of Advisory Committee on 1970 Amendment to Rule 37, 48 F.R.D. 538. Overall, the 1970 amendments may be seen as a continuation of the trend to expand the scope of discovery while leaving control of discovery in the hands of attorneys. See Connolly et al., supra note 40, at 9-27.

1983,\textsuperscript{61} and again in 1993.\textsuperscript{62}

The claims of discovery abuse have tended to focus on two types of abuse—runaway discovery and resistance to legitimate discovery.\textsuperscript{63} Complaints about runaway discovery can be divided into claims that (1) discovery has been used as a tactical weapon to impose excessive costs on an opponent and (2) overly broad discovery allows parties to go on "fishing expeditions."\textsuperscript{64} Among the more commonly mentioned activities used to resist legitimate discovery are refusing to provide information, hiding information, raising frivolous privilege claims, disingenuously construing discovery requests narrowly, destroying documents, assisting in perjury, coaching witnesses to avoid disclosing

Federal Rules of Civil Procedure were inadequate to deal with the major problem of discovery abuse.

The "tinkering changes" referred to by Justice Powell included the amendment authorizing early judicial intervention in discovery problems through the use of a discovery conference and plan, either sua sponte or upon motion of a party (Fed. R. Civ. P. 26(f)), clarification that the option to produce business records in Rule 33(c) requires specification of location of business records in sufficient detail to allow the discovering party to locate the documents from which an answer is to be derived, and the requirement that records produced under Rule 34 be produced in a manner that will reasonably allow the discovering party to access the documents and to avoid the abusive tactic of hiding significant documents in with nonsignificant documents. See Amendments to the Federal Civil Rules of Procedure, 85 F.R.D. 521, 521-32 (1980).

\textsuperscript{61} See Preliminary Draft Proposed Amendments to the Federal Rules of Civil Procedure, 90 F.R.D. 451, 478-79 (1981); Arthur R. Miller, The Adversary System: Dinosaur or Phoenix, 69 Minn. L. Rev. 1, 19, 22-24 (1984); Walker, supra note 57, at 762-67 (noting that some rules of procedure have been blamed as a cause of the litigation explosion). For a brief discussion of some of the circumstances surrounding the 1980 and 1983 discovery amendments, see Flegal, supra note 47, at 1-9, 40-47. For a brief discussion of the 1983 amendments to Rules 11, 16 and 26(g), see infra notes 77-80 and accompanying text.


\textsuperscript{63} See, e.g., Glaser, supra note 33, at 35-36; Earl C. Dudley, Jr., Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure, 26 U.S.F. L. Rev. 189, 194 (1992) (explaining the two types of discovery abuse); Flegal, supra note 47, at 14-24; Weyman I. Lundquist & Joseph A. Ball, Conclusions and Recommendations of National Conference on Discovery Reform, 3 Rev. Lit. 209, 210 (1982-83). It is difficult to gauge which type has been predominant over the years. See Flegal, supra note 47, at 14 (finding that over-discovery is predominant); but see Ellington, supra note 57, at 55-57 (finding that empirical studies suggest that evasive practices are most prevalent form of discovery problem in big cases); Brazil, Improving Controls, supra note 57, at 875, 880, 928 (same).

\textsuperscript{64} The term "fishing expedition" is generally used to describe the use of discovery to obtain facts upon which a claim can be based after a marginal or sham claim has already been filed. See generally Glaser, supra note 33, at 62, 122-23.
information, and providing deliberately evasive answers to discovery requests.65

While the classic forms of abuse represent opposite types of problems—one involving too much discovery, the other too little—they share a common foundation. The “sporting theory” or partisan motivation to win underlying the adversarial system seems to be a major factor in most discovery abuse.66 Not surprisingly, this traditional motivation is reflected in or reinforced by education, ethics, and economics.67 Among the specific factors identified as contributing to discovery abuse that relate directly or indirectly to partisanship are financial incentives inherent in the attorney compensation system and the costs of discovery;68 the failure of courts to sanction attorneys and parties for discovery abuse or otherwise effectively manage discovery disputes;69 attorneys’ cooperative complicity in the nonenforcement of the discovery rules based on their fear that strict enforcement of rules will establish precedent that will come back to haunt them later;70 law firm and law school inculcation of law students and new lawyers about discovery practices;71 pressure from clients or in-house counsel to engage in abusive discovery practices;72 client inattention to discovery;73

65. See, e.g., GLASER, supra note 33, at 36; Dudley, supra note 13, at 194-95 (discussing and listing some abusive discovery tactics); Flegal, supra note 47, at 14; Brazil, Improving Controls, supra note 57, at 880. An attorney’s statement to then-Professor Brazil during his 1979 study of discovery problems perhaps relates the essence of evasion: “The purpose of discovery . . . is to give as little as possible so [your opponents] will have to come back and back and maybe will go away or give up.” Brazil, Lawyers’ Views, supra note 57, at 829.

66. See, e.g., GLASER, supra note 33, at 114-16; Brazil, Improving Controls, supra note 57, at 879-80, 928-29; Wayne D. Brazil, Ethical Perspectives on Discovery Reform, 3 REV. LITGG. 51, 62-67 (1982-83) [hereinafter Brazil, Ethical Perspectives]; Flegal, supra note 47, at 24-27; Wolfson, supra note 32, at 45, 48 (noting that the cause of discovery abuse inheres in a litigation approach characterized by the maxim: “never be candid, never be helpful, and make your opponent fight for everything that he seeks”).

67. See, e.g., Brazil, Ethical Perspectives, supra note 66, at 62-87; Brazil, Improving Controls, supra note 57, at 928-29; Wolfson, supra note 32, at 46-51.

68. See, e.g., Brazil, Ethical Perspectives, supra note 66, at 76-78; Brazil, Front Lines, supra note 57, at 235; Flegal, supra note 47, at 29-32; Wolfson, supra note 32, at 46.

69. See, e.g., Brazil, Ethical Perspectives, supra note 66, at 68-69 (describing the lack of sanctions for discovery abuse under Rules 11, 26(c), & 37); Brazil, Front Lines, supra note 57, at 245-51; Flegal, supra note 47, at 15, 17-19, 24-25; Wolfson, supra note 32, at 47-48.

70. Brazil, Ethical Perspectives, supra note 66, at 74-86.

71. See, e.g., Brazil, Ethical Perspectives, supra note 66, at 70-74; Brazil, Lawyers’ Views, supra note 57, at 792-93, 797-99, 833-34; Flegal, supra note 47, at 15, 25-26, 29 (noting that law firms and law schools overemphasize the teaching of discovery practices).

72. See Brazil, Front Lines, supra note 57, at 243-44; Brazil, Lawyers’ Views, supra note 57, at 860-61.

73. See, e.g., Flegal, supra note 47, at 32-33 (asserting that clients often do not take the time to participate in their own litigation, thereby allowing for excessive discovery).
ambiguity in the discovery rules; and the broad scope of discovery.\textsuperscript{74} Also contributing to discovery abuse are factors related to lawyer competence, including inadequate training, improper assessment of the theories of case and discovery needs, overextension of resources, poor management skills, and compulsiveness based on either a fear of malpractice or a basic personality disorder.\textsuperscript{75}

Interestingly, the claims of discovery abuse and the types of abuse claimed seem to have remained relatively constant over time, even though there have been several amendments to the discovery rules designed specifically to cure certain types of abuse.\textsuperscript{76} For example, the Rule 26(f) Discovery Conference was added to the rules in 1980 to assist in resolving discovery disputes and encourage cooperation among counsel. In practice, however, it was seldom used, and when it was used it was used as a method of delaying discovery until the conference was held rather than as a means of improving resolution of issues.\textsuperscript{77} Similarly, the 1983 amendments to Rule 16 on pretrial sched-

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\textsuperscript{74} See, e.g., Brazil, \textit{Ethical Perspectives}, supra note 66, at 67 (noting how ambiguously written rules contributed to the onslaught of discovery abuse); Wolfson, \textit{supra} note 32, at 47 & n.190 (noting continued ABA efforts in 1980-83 to have scope reduced from "relevant to subject matter" to "relevant to the claims and defenses" based on assertion that the standard is responsible for over-discovery); see also A.B.A., \textit{Second Report of the Special Committee for the Study of Discovery Abuse} (1980), reprinted in 92 F.R.D. 137 (1982) (discussing discovery abuse and proposing reforms such as limiting the definition of the scope of discovery). For a discussion of how ambiguity or indeterminacy of the discovery rules allows expansive application of the ethic of partisanship or zealous advocacy, see \textit{infra} notes 365-379 and accompanying text.
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\textsuperscript{75} See, e.g., Brazil, \textit{Front Lines}, supra note 57, at 236-39, 244; Flegal, \textit{supra} note 47, at 25-26, 29; Wolfson, \textit{supra} note 32, 46-47.
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\textsuperscript{76} See, e.g., \textit{EBERSOLE \& BURKE}, supra note 57, at 1 (little difference in arguments between the 1930s and 1970s); Levine, \textit{supra} note 33, at 115-22 (noting continuity of claims of discovery abuse through 1960s and 1970s, despite changes in rules and lack of empirical evidence supporting runaway abuse); Dudley, \textit{supra} note 13, at 199 (discussing the continuity of discovery abuse into 1990s); Mayer, \textit{supra} note 22, at 95 (noting discovery reform history reflects good intentions gone awry); Mullenix, \textit{Hope over Experience}, \textit{supra} note 18, at 821 (noting that despite fact that discovery rules have been amended more than any other civil rules, discovery abuse persists); Wolfson, \textit{supra} note 32, at 45 (discovery abuse not cured despite numerous amendments to the Federal Rules of Civil Procedure and the local rules of the courts addressing discovery problems). \textit{Compare} Flegal, \textit{supra} note 47, at 1-49 (reviewing pre-1983 reform efforts, problems, and solutions) \textit{with} Dudley, \textit{supra} note 13, at 194-95 (revisiting discovery abuse in 1992).
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\textsuperscript{77} See \textit{Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence} (Aug. 1991), reprinted in 137 F.R.D. 53, 105 (1991); Mayer, \textit{supra} note 22, at 95 (noting that the discovery conference was used as a mere tool for causing delays); Bell et al., \textit{supra} note 19, at 38 & n.147 (quoting Draft Advisory Committee Notes Accompanying Proposed Amendments (Feb. 6, 1992) to effect that Rule 26(f) was ineffective to prevent discovery abuses); Mullenix, \textit{Hope over Experience}, \textit{supra} note 18, at 798 & n.8 (referring to Rule 26(f) as a "barnacle" on the civil rules and example of repeated efforts to curb reform abuse). \textit{But see} \textit{Proposed Amendments to
uling and planning conferences reflected a view that increased judicial management was needed to address discovery abuse and the amendments were intended to create a mandatory "process of judicial management that embraces the entire pretrial phase, especially motions and discovery." However, post-1983 experience with the rule suggests that it has done little to stem the claims of discovery abuse, perhaps because federal trial judges burdened by heavy civil and criminal case loads have not had the time to engage in close judicial management of discovery and because those judges may lack the aptitude, training, or interest in such intensive pretrial management. Finally, discovery abuse claims persist despite the strengthening and broadening of sanctions provisions such as Rules 11, 26(g), and 37 over the years. In light of the attention discovery abuse has received for the last thirty years or so and the efforts that have been made to control abuse, the intractability and persistence of the abuse claims suggest either that the partisan incentives to engage in discovery abuse are very strong or that perhaps many abusive discovery practices identified by commentators and judges are not really considered abusive by a large number of lawyers.


78. FED. R. CIV. P. 16(a) advisory committee's note; see also Dudley, supra note 13, at 199-200 (noting that Rule 16 was intended to increase pretrial conferences and scheduling); David L. Shapiro, Federal Rule 16: A Look at the Theory and Practice of Rulemaking, 137 U. PA. L. REV. 1969, 1983-87 (1989).

79. Dudley, supra note 13, at 199-204; see also Shapiro, supra note 78, at 1989-91 (reviewing general post-amendment practice under Rule 16).

80. See FED. R. CIV. P. 11, 26(g), 37 & advisory committee's notes; A.B.A. SEC. LITIG., SANCTIONS: RULE 11 AND OTHER POWERS 12-13 (1986) (stating that "threat of sanctions proven to be a paper tiger"); Judith L. Maute, Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine, 20 CONN. L. REV. 7, 21-28 (1986) (reviewing amendments to Rules 11, 26(g), & 37). Commentators have noted that at least part of the failure of these sanction provisions to effectively stem the tide of discovery abuse may relate to the persistent reluctance of the federal courts to employ the more severe sanction provisions, such as evidence preclusion and dismissal, for discovery abuse. See Dudley, supra note 13, at 217-18 (explaining that severe sanctions are only used in the most extreme cases); see also MASSACHUSETTS CONTINUING LEGAL EDUC., THE U.S. DISTRICT COURT SPEAKS 145-46 (1992) (survey of judges of the District of Massachusetts indicating discovery sanctions rarely imposed except in the most egregious cases).

81. One prominent commentator recently noted that "[d]iscovery practice continues to be the single most troubling element of contemporary procedure." Edward H. Cooper, Discovery Cost Allocation: Comment on Cooter and Rubinfeld, 23 J. LEGAL STUD. 465, 465 (1994). Professor Hazard has also noted:

The prevalence of such underside discovery practice [e.g., narrow disingenuous construction of requests, failing to find damaging documents] cannot be measured for evident reasons. It is believed pervasive enough, however, to sustain wide-
(2) The Evidence of Discovery Abuse

While there has been substantial consistency as to the types of discovery abuse that have been claimed in the literature over the years, little empirical research has been done to objectify and quantify discovery abuse. Similar to crisis rhetoric supporting claims of a “litigation explosion” and calls for fundamental system reforms, claims of discovery abuse have rested largely on nonevidence and may well spread suspicion and cynicism among the trial bar. This effect is itself sufficient cause to question the present discovery Rules.


82. *See Olson, supra note 3; supra notes 4-10 and accompanying text. The use by the legal profession of crisis rhetoric is not novel. Indeed, a study has suggested that based on the rhetoric of the professional literature there have been at least five “crisis” periods, or possibly one long crisis, between 1925 and 1960. Rayman L. Solomon, Five Crises or One: The Concept of Legal Professionalism, 1925-60, in *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* 144, 168-73 (Robert L. Nelson et al. eds., 1992). Some critics argue that crisis rhetoric is used by leaders of the bar to control the actions of members of the bar so as to prevent public esteem for the profession from falling below the point at which the bar is allowed to maintain its privilege and control. Id. at 169-72.*

83. *See Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?,* 140 U. Pa. L. Rev. 1147, 1151-68 (1992). Saks asserts that there generally is an absence of evidence to accurately assess the status and behavior of the litigation system and that most claims are based on mere conclusory assertions unsupported by evidence; anecdotes that are either unreliable, nongeneralizable, distorted, or untrue; factoids (information that sounds like a fact but upon closer examination will be seen to be irrelevant or untrue); and factlets (pieces of real information that are accurate but do not support the conclusions for which they are offered). *Id. See also Trubek et al., supra note 57, at 82-84, 122-23 (empirical study of costs of ordinary litigation indicates that rhetoric of civil litigation reform not supported by reality; emphasizing need for more empirical research before seriously debating reforms); Galanter, News from Nowhere, supra note 6, at 99-103 (litigation explosion rhetoric not based on empirical evidence but naive speculation); Galanter, Reading the Landscape, supra note 3, at 10, 62-63 (same); cf. Ronald D. Rotunda, Lawyers and Professionalism: A Commentary on the American Bar Association Commission on Professionalism, 18 Loy. U. Chi. L.J. 1149, 1151-52 (1987) (noting historical repetition of claims of professional decline in law, and that such serious charges need to be “supported by more than anecdotal analysis”).

One primary example of inconsistency between the crisis rhetoric of an “explosion” of civil case filings and the reality in federal courts is the fact that civil case filings actually dropped slightly in federal courts six of the seven fiscal years between 1986 and 1993. *Statistics Reflect Active Year for the Judiciary, The Third Branch, Feb. 1994, at 4, 5* (newsletter of the federal courts published by the Administrative Office of the United States Courts). This is not to suggest that real problems with the legal system do not exist, but only to point out the tendency of reform proponents to use crisis rhetoric and the opponents to perhaps use statistics that merely debunk or cast doubt on the overstated claims of crisis proponents to suggest that problems do not exist. *See generally Thomas C. Fischer, Are We Facing Legal Gridlock?* 3 (unpublished speech presented at ABA 1992 Meeting, Senior Lawyers Division, “Evaluating Our System of Justice: Is Our Judicial and
be generally exaggerated. Frequently the assertions of the extent of discovery abuse do not rest on evidence, but only cite to another writer making a similar claim or simply make a conclusory statement that derives its strength from the fact that it has been repeated so frequently. Indeed, taking on lives of their own, many of the claims that discovery abuse is the major cause of delay and expense in the federal system are these kinds of conclusory assertions.

A second major type of evidence lacking credibility offered to support claims of discovery abuse is the anecdote or handful of anecdotes drawn from cases—stories about cases in which discovery cost more than the recovery, discovery was used to "fish" for a cause of action, documents were destroyed or hidden, witnesses were deposed repeatedly or abusively, or form interrogatories were used that called for massive amounts of arguably irrelevant information. There are numerous problems with basing any decisions on anecdotes—so many, in fact, that most research fields consider anecdotes (i.e., case

Litigation System Delivering Justice to All of the Public?" (on file with Hastings Law Journal).

84. See, e.g., Garth, supra note 52, at 945 (claiming that there is no documented evidence of routine discovery abuse); Weinstein, supra note 3, at 831 (concluding that discovery abuse was not a problem, at least in the Eastern District of New York, and that claims of abuse are generally exaggerated).

85. See Galanter, Reading the Landscape, supra note 3, at 10, 62-63 (arguing that there is no evidence that American society is inherently litigious and riddled with discovery abuse); see, e.g., Joseph R. Biden, Jr., Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990, 1 CORNELL J.L. & PUB. POL'Y 1 (1992); Quayle: Are There Too Many Lawyers in America?, NEW JERSEY L.J., Aug. 29, 1991, at 15 (quoting then-Vice President Quayle's 1991 ABA speech to effect that discovery was 80% of the problem); Amendment to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 521-23 (1980) (Powell, J., dissenting) (accepting and quoting the ABA Litigation Section's assessment of the existence of "serious and widespread abuse of discovery"); A.B.A. Sec. Litig., Second Report Special Committee for the Study of Discovery Abuse, reprinted in 92 F.R.D. 137, 138, 154 (1982) (explaining committee's conclusion was apparently based on members experience that discovery abuse is major problem).

86. See, e.g., Flegal, supra note 47, at 9-10, 21-24 (listing different types of discovery abuse). For examples of cases frequently cited in discussions of pervasive discovery abuse, see Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 826-27 (2d Cir. 1983) (repeated concealment of documents by counsel in antitrust case by plaintiff); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 305 (2d Cir. 1979) (destruction and concealment of documents by defendant's expert and counsel in antitrust case); Robert W. Gordon & William H. Simon, The Redemption of Professionalism?, in LAWYERS' IDEALS/ LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 230, 252 (Robert L. Nelson et al. eds., 1992) (describing the allegedly extreme adversarial conduct by A.H. Robbins' attorneys in the Dalkon Shield litigation, such as destruction of key documents, cross-examining witnesses during depositions on details of sexual practices, burying important documents in discovery in "mountains of trivial ones," and coaching management witnesses).
studies) almost worthless as a method of understanding larger issues. Apart from the fact that anecdotes can often be distorted or lack a basis in fact, a single anecdote cannot be the basis for extrapolation of general conclusions about causation or the operation of a system. It may be tempting to assume that because most litigators can easily come up with a discovery abuse anecdote, such abuse is pervasive. However, such a conclusion equating the actual frequency of a particular abuse with lawyers' abilities to recall particular instances of abuse would be faulty and should not serve as the basis for reasoned procedural reform.

87. See, e.g., Donald T. Campbell & Julian C. Stanley, Experimental & Quasi-Experimental Designs for Research 6-7 (1963); Saks, supra note 83, at 1159-60 (discussing the extremely limited usefulness of anecdotal evidence). However, lawyers and legal commentators seem to have a tendency to place great confidence in anecdotes. Perhaps this is because, in addition to lawyers' general lack of training in social science research methods, cases have such a central role in legal argument and education. Saks, supra note 83, at 1159.

88. Saks, supra note 83, at 1160.

89. See Galanter, Reading the Landscape, supra note 3, at 61-63 (discovery abuse claims are based on "tiny minority of cases," but there is tendency to identify as general problems by "narrow elite" judges, academics, large firm practitioners that deal with big cases, and big clients). There is also some reliance on what Professor Saks has referred to as "factoids"—"statements that sound like facts, that seem as though they are conveying some information, but on examination turn out to be either false or meaningless." Saks, supra note 83, at 1162. The best example of factoid support for claims of discovery abuse relates to opinion research of the general public or some segment of the legal profession which finds that a majority of those questioned believe that discovery abuse is a significant problem. Id. at 1163. Attitudes can certainly suggest the existence of a problem, but cannot establish either its actual existence or its magnitude.

90. See Saks, supra note 83, at 1161. Professor Saks describes this psychological characteristic as the "availability heuristic." Id. at 1161 n.36. It is therefore not surprising to find that when litigators are asked to give specific information about the frequency of a particular form of discovery abuse instead of responding to a general attitude questionnaire as to whether the form of abuse presents a problem, the responses provide a lower estimate of the magnitude of the problem. See, e.g., Ebersole & Burke, supra note 57, at 4-5 (50% of 246 attorneys surveyed reported discovery problems in cases, but only 4 attorneys reported actual instances of abuse of discovery rules). The questionable value of anecdotes or opinion research is demonstrated by inconsistencies or paradoxes in results when litigators answering an opinion poll indicate that discovery abuse is a massive problem, but the percentage of respondents admittedly engaging in abusive discovery themselves is very small. See, e.g., Ebersole & Burke, supra note 57, at 30-39, 76 (examining the differences of perceptions of opposing counsel and judges regarding discovery in particular cases, including observation that in the area of overdisclosure "one person's abuse is another person's necessity"); Glaser, supra note 33, at 62-63, 121-23 (response to survey showing that attorneys consider use of discovery as fishing or irrelevant harassment only if it is being done by adversary); Brazil, Front Lines, supra note 57, at 235 & n.36 (while Chicago lawyers surveyed in 1979 regarding discovery problems identified as common and widespread use of unnecessary discovery to generate additional fees, known as "meter running," none of the responding attorneys admitted to having engaged in such abuse).
(3) Conclusions from Empirical Studies

While little definitive information can be derived from the empirical studies on discovery abuse to date, the data from studies conducted over the last three decades is germane to the controversy surrounding Rule 26(a) disclosure. Some commentators reviewing data from empirical studies have concluded that "the better view is that discovery normally works well, and that liberal discovery is on balance a functioning system used effectively in more than half the lawsuits filed." This may be a somewhat overly optimistic assessment of discovery practice, particularly in the absence of any agreed upon definition of what "working well" means. Although, superficially, the evidence from studies does not support the popular claims of wholesale widespread discovery abuse, there seem to be recurring findings that suggest troubling systematic problems in discovery practice.

First, relatively constant and significant levels of discovery problems have been reported across studies over time that seem relatively resistant to rules changes. For example, a study completed in 1963 on discovery problems conducted by The Project for Effective Justice of Columbia Law School that concluded discovery problems were not widespread also found that discovery was apparently not

91. One significant limitation on the conclusions that can be drawn from existing empirical data is the fact that most of the major studies on discovery, such as those by Connolly and Brazil, were conducted prior to the 1980 and 1983 Civil Rules amendments that contained discovery reforms. Dudley, supra note 13, at 193.

92. Mayer, supra note 22, at 87; see also Walker, supra note 57, at 781, 783-86, 789 (study of discovery in Iowa state trial courts indicated only 25% of all cases had any formal discovery and of those only a few involved extensive discovery; the majority of judges and attorneys thought discovery was working reasonably well and that discovery abuse has occurred in only a small minority of cases); Randall Samborn, Little Discovery Abuse, Fuels Reform Opposition, NAT'L L.J., May 31, 1993, at 3 (National Center for State Courts' studies showing no discovery in 42% of contracts, property, and tort cases).

93. Mayer seemingly suggests that effectiveness should be equated with successful access to information (without surprise at trial) in half of the cases filed. See Mayer, supra note 22, at 87. However, it is arguable that determining the effectiveness of discovery also requires considering the costs of information exchange to the parties and the justice system, the extent to which discovery practice is consistent with the formal discovery rules and their instrumental purposes, and whether there are ways of reducing the costs and increasing the utility of discovery.

94. See Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 487 (1970); Glaser, supra note 33, at 37, 41-44. In addition to Professor Maurice Rosenberg, William Glaser was an active participant in the study. Note, Federal Discovery Rules, supra note 57, at 625 n.14.

eliminating or reducing surprise at trial, increasing the number of settlements, or resulting in shorter and more efficient proceedings;\textsuperscript{96} complaints about the other side's discovery practice occurred in more than half of the cases.\textsuperscript{97} The frequency of claims about evasive responses to discovery suggested that, at the time of the Columbia Study, many lawyers were still operating under the "sporting theory" of adversarial justice.\textsuperscript{98} Similarly, a late 1970s study by the Federal Judicial Center found that 50\% of the attorneys surveyed reported cases with discovery problems.\textsuperscript{99} In a study of Chicago lawyers sponsored by the American Bar Foundation in the late 1970s, Professor Brazil concluded that, although about two-thirds of all attorneys surveyed indicated that discovery was working at least adequately,\textsuperscript{100} discovery in large-case litigation was in serious trouble. This conclusion was primarily based on data showing that (1) in about 50\% of large cases settled and 33\% of cases fully tried at least one side believed that the other side had failed to uncover significant evidence; (2) more

\textsuperscript{96} See \textit{Glaser}, supra note 33, at 70, 82, 91, 97-98, 100-01, 106-15; Rosenberg, \textit{supra} note 95, 488-90; \textit{see also} \textit{Levine}, \textit{supra} note 33, at 3-5. On the other hand, the study's main author, Professor Rosenberg, concluded that the data did support the finding that discovery increased the quality of settlements and the trial process. \textit{Rosenberg, supra} note 95, at 98, 488-90. \textit{See also} \textit{Levine, supra} note 33, at 5 (explaining that by increasing a party's knowledge of information that both helps and hurts the party's case discovery improves the quality of settlements).

\textsuperscript{97} Rosenberg, \textit{supra} note 95, at 490. Professor Rosenberg theorized that the predominance of discovery problems relating to the scope of discovery and the "relevance" concept arose out of the fact that "the concept of relevance is, in effect, a depository for most of the tensions that develop between adversaries in a lawsuit." \textit{Id.}

\textsuperscript{98} Lawyers were "still motivated to conceal as much as possible, particularly evidence or witnesses that will have a dramatic effect at trial." \textit{Glaser, supra} note 33, at 234; \textit{see Levine, supra} note 33, at 5 (discussing the Columbia study and the "sporting theory" of justice).

\textsuperscript{99} \textit{Ebersole & Burke, supra} note 57, at 4-5. The identification of problem cases was done by surveying 246 attorneys in a particular federal district as to whether they could "identify litigation in which the costs or burdens of discovery seemed disproportionately large considering the legal issues involved, or in which problems with discovery occurred, or in which there seemed to have been abuse or attempted abuse of the discovery process." \textit{Id.} at 4. The attorneys surveyed were selected by court clerks from lists of local bar members on the basis of frequency of civil litigation and apparent knowability and competence. \textit{Id.} Obviously, this methodology introduced several sources of potential bias and lack of true representativeness. The results of the study, while interesting, are too focused on a small group of cases and attorneys, with too many unexamined variables, to add much to the overall assessment of the extent of discovery problems generally. \textit{Id.} at 40 n.9.

\textsuperscript{100} \textit{See} \textit{Brazil, Lawyers' Views, supra} note 57, at 794-96. The validity and generalizability of results from Brazil's study are undermined by the fact that attorneys surveyed were not representative of attorneys in civil cases generally or in Chicago. In particular, while large cases constitute a minority of the cases filed, the number of large case and small case attorneys surveyed was balanced. \textit{See id.} at 791, 897.
than 60% of the large-case attorneys believed that evasion and excessive discovery were problematic and believed that, in 80% of the large cases, opposing counsel had engaged in evasive or incomplete responses to discovery requests; and (3) 85% of large-case lawyers believed that the courts do not adequately control discovery problems.

A second relatively consistent finding in the studies has been that the amount of discovery abuse, whether in the form of excessive or evasive discovery, increases as the incentives for abuse in the cases increase; that is, the more complex or larger the case is, the more likely discovery problems will occur. Thus, the Columbia study on discovery found that discovery costs and the imposition of discovery for purposes of oppression or harassment was a more significant problem in more complex cases. A Federal Judicial Center study in 1979 also found that the occurrence of overdiscovery was related to the size and complexity of cases. Similarly, Professor Brazil’s study of attorney perceptions of discovery generally revealed that discovery problems or abuses were seen by the 180 Chicago attorneys surveyed

101. See Brazil, Lawyers’ Views, supra note 57, at 870-71. But see Ellington, supra note 57, at 1-2 (suggesting that discovery problems exist in only about 15% of civil cases). The Ellington study examined all dockets in closed cases in which there was any indication of discovery activity in the federal district courts of Chicago and Atlanta in the fiscal year ending June 30, 1978, with a particular focus of the frequency on discovery abuse and the frequency with which sanctions were sought and imposed. Based only on review of dockets, the authors found discovery activity in only 38% of the Chicago cases and 45% of the Atlanta cases examined, and discovery problems in only 28% of the those cases in Chicago with discovery and 27% of those in Atlanta. Id. at 3. Discovery activity was apparently defined as the appearance on the docket sheet of an indication that there had been discovery, motions to compel, motions for protective orders, and motions for discovery sanctions. Id. at 13. It is likely, however, that the method of identifying cases with discovery activity and discovery problems may have resulted in significant underidentification of the amount of discovery activity and problems, especially if local rules or court orders provided that filing discovery requests was not necessary. That there was underreporting of discovery problems is also supported by the results from attorney interviews in which attorneys indicated that they sought sanctions for discovery problems only as a matter of last resort for repeated or willful discovery abuse. Id. at 6. The types of discovery problems involved in order of frequency were failure of opponent to respond adequately to discovery requests, disputes over the scope of discovery (e.g., issues of relevance and privilege), and excessive discovery. Id. at 6, 56.

102. See Dudley, supra note 13, at 195-97; Galanter, Reading the Landscape, supra note 3, at 63; Garth, supra note 52, at 945.


104. See Ebersole & Burke, supra note 57, at 73-78.
as substantially more prevalent in large, complex cases as opposed to smaller, simpler, more routine cases.\textsuperscript{105}

More importantly, the studies on discovery abuse have also provided data that may assist in understanding some of the underlying causes and dynamics of discovery problems. In particular, several studies have noted general lawyer misunderstandings or misapplications of fundamental discovery doctrines. For example, a study of the effect of the 1970 revisions to the Federal Rules of Civil Procedure dealing with discovery practices, including a clarification of the work product doctrine in Rule 26(b)(3), found that confusion remained over the meaning and applicability of the work product doctrine.\textsuperscript{106} Lawyer misunderstanding or misapplication of discovery doctrines was confirmed by Professor David S. Shapiro in a more elaborate study in the late 1970s.\textsuperscript{107} Professor Shapiro tested the hypothesis that some of the problems with discovery may be due to "a gap between the theory and practice of discovery" and an absence of clarity in the

\textsuperscript{105} See Brazil, \textit{Front Lines}, supra note 57, at 217, 219, 220 n.1, 222-24. Smaller, simpler case lawyers were defined as those whose median case had an amount in dispute of $25,000 or less and involved liability theories that were "relatively straightforward (e.g., negligence) and which [did] not require analysis of vast quantities of data"; larger case lawyers had a median case with $1,000,000 or more amount in dispute, and a complex case would be typified by an antitrust suit. \textit{Id.} at 222-23 & n.7. Although the data reflected overlap between the discovery characteristics of large and small cases on various criteria, generally it appeared that: (1) discovery accounted for a higher percentage of billable attorney time in large cases than in small cases; (2) discovery is used less in smaller than larger cases for tactical purposes relating to imposition of burdens and expense; (3) evasion, friction, and harassment were less frequent in smaller cases than in larger cases; (4) privilege and work product disputes occurred substantially less often in smaller cases; (5) in large cases clients are more likely to be active in discovery matters and pressure attorneys to evade discovery and use discovery as a tool of harassment; and (6) over-discovery is more prevalent in large cases. \textit{Id.} at 223-30.

Among the reasons offered to explain the differences in results between large and small cases are that large cases, because of their complexity, information demands, and lack of predictability, create greater discovery demands accompanied by potential for error and confusion. They also create strong incentives for discovery abuse because of the high monetary stakes involved. As the opportunities and incentives for discovery abuse increase, the ability of the courts to adequately control discovery abuse is strained and diminished. See Brazil, \textit{Lawyers' Views}, supra note 57, at 873.

The major limitations of the study relate to the size of the sample and the fact that the attorneys were geographically limited to the Chicago area, thereby suggesting potential nonrepresentativeness of the sample. Furthermore, because the study was based on the opinions or perceptions of attorneys, it suffers from the validity problems common to survey research generally. In particular, perceptions suffer from reliability problems and cannot objectively establish facts. See Brazil, \textit{Front Lines}, supra note 57, at 221; Saks, \textit{supra} note 83, at 1162-63.


\textsuperscript{107} See Shapiro, \textit{supra} note 57.
rules, including those set out in *Hickman v. Taylor*,\(^{108}\) rather than the inevitable conflict between the goals of discovery and the adversary system.\(^{109}\) The study revealed a wide variability in the understanding of doctrines, a significant tendency to over apply privileges and work product doctrine, and the pervasiveness of attempts to avoid providing information in response to proper discovery requests.\(^{110}\)

Slightly different, but related, discovery problem dynamics are suggested by Professor Brazil's study. Overall, attorneys reported that evasive or incomplete discovery responses impeded their access to information from opponents in 60% of all cases (80% of large cases and 40% of small cases) and that dilatory discovery responses by opponents occurred in 50% of all cases (large or small).\(^{111}\) However,

\(^{108}\) 329 U.S. 495 (1947).

\(^{109}\) See Shapiro, *supra* note 57, at 1055-57. To test his hypothesis, Shapiro conducted a survey of 400 attorneys in which the attorneys were asked to answer, on the basis of their present knowledge, a series of interrogatories and requests for admissions based upon hypothetical fact patterns. The questionnaire tested attorneys' understandings of obligations to disclose information, work product protection, and attorney-client privilege. *Id.* at 1058-59. Generalizability of the study is undermined because lawyers in the study were not randomly selected, but were instead selected from among those who were thought to have familiarity with litigation, and because only 110 usable responses were received. *Id.* at 1059-60.

\(^{110}\) *Id.* at 1060-61, 1071, 1090, 1093-1100. In particular, a large number of attorneys improperly sought to apply the attorney work product doctrine to interrogatories seeking the substance of information available in an oral or written witness statements, despite the fact that *Hickman v. Taylor* had indicated such "facts" are not protected. *Id.* at 1062-63, 1067, 1072-73 (citing *Hickman*, 329 U.S. at 508-09, 513). Respondents also tended to construe requests narrowly and to avoid divulging information, such as the existence of witnesses who could provide information that may answer an interrogatory the other side would clearly want. *Id.* at 1062, 1073-75, 1092. Finally, there was a tendency to refuse to admit a fact in a Rule 36 request despite the absence of contrary evidence and the absence of a reason to doubt the truth of the fact derived from a witness statement. *Id.* at 1078-79, 1983; *but see id.* at 1084-89 (arguing that no such duty should exist at least when the other side bears the burden of proof and the evidence is probably inadmissible). The significance of these findings in the disclosure controversy is discussed *infra* notes 312-370 and accompanying text. Overall, Professor Shapiro, while unable to determine whether clarifying the discovery rules would cure many of the discovery abuses in light of the incentives in the adversary system structure, nevertheless suggested that several of the rules should be clarified. See Shapiro, *supra* note 57, at 1074-75, 1090-92. In particular, he suggested that Rule 26 should clearly indicate that work product protection does not apply to the factual substance of a witness statement or other factual information known to an attorney as a result of investigation, at least when requested by an interrogatory. *Id.* at 1091. Shapiro also recommended that Rule 33 be amended to clarify that a party responding to an interrogatory as to which the party is unable to give a definitive answer should still provide the information that is reasonably available and relevant to the interrogatory. *Id.* at 1092.

\(^{111}\) Brazil, *Lawyers' Views*, *supra* note 57, at 833, 870-71. When a subset of attorneys who had indicated that they had settled a case believing that the other side still had significant information were asked to explain why they thought this was so, the most common reason given (38%) was failure of the opponent to comply with discovery. *Id.* at 823.
when attorneys were asked to indicate why they may have failed to disclose information to an opponent, the vast majority responded that it was because the other side had failed to undertake discovery competently, e.g., the failure by opposing counsel "to ask the right questions, or for the right documents or depose the right people."\(^{112}\) On the other hand, despite the fact that, overall, attorneys indicated that 60% of the time their opponents' evasive practices impaired access to information, only 20% of the same attorneys indicated that they had themselves undertaken evasive practices such as engaging in actions for the "purpose of distracting another party's attention from or obscuring the existence of information."\(^{113}\) This data lends support to the hypothesis that discovery abuse, at least in the form of evasive practices, is in the eye of the beholder. The data suggests that when an attorney knows information in that attorney's possession is not disclosed it is because the opposing counsel did not ask the right questions, whereas when the attorney offers an explanation for similar behavior by an opponent it is because of evasion.

Moreover, there is an even more fascinating twist suggested by the data. While attorneys overall identified evasive or incomplete discovery responses as problems in 60% of their cases, only 14% of the cases were believed to involve bad faith or dishonesty by their opponents. This data and the attorney comments suggest that attorneys generally did not consider evasive or incomplete responses to be wrong, but instead to be part of the responsibilities of the adversarial advocate to use ambiguities and narrow construction techniques to the client's advantage.\(^{114}\) On the other hand, when this data is considered together with the finding that attorneys overwhelmingly believed that inadequate judicial management of discovery is the biggest discovery problem,\(^{115}\) it suggests one of the most interesting hypotheses regarding discovery problems—attorneys are compelled by the adversarial culture to engage in activities that they recognize are potentially counterproductive and to seek the assistance of the courts to save them from themselves.\(^{116}\)

\(^{112}\) Id. at 822-24.

\(^{113}\) Id. at 854-55.

\(^{114}\) Id. at 838. Indeed, attorneys acknowledged their own difficulty in distinguishing between arguably improper conduct and the responsibility they believed they had to "interpret every discovery request as favorably to their clients as possible and provide damaging information only when the precision of the probe and the absence of privilege left no alternative short of lying." Id. at 855.

\(^{115}\) Id. at 824-25.

\(^{116}\) Id. at 862-69.
Finally, the empirical work indicates that the sanction mechanisms intended to control discovery abuse are far less effective than the drafters of the Rules assumed. Overall, studies tend to show a reluctance by parties to seek sanctions for discovery abuse by their opponents, a reluctance by the courts to impose discovery sanctions, and a relatively small amount of actual sanctioning activity by the courts. Among the reasons offered for judicial reluctance to impose sanctions were: (1) judicial application of an unclean hands notion (i.e., since it is likely that both parties are guilty of abuse, neither will be punished); (2) lack of knowledge by judges that the discovery system was being abused to such a degree; (3) apprehension that the use of discovery sanctions will create or exacerbate acrimony between counsel or parties; (4) concern that sanctions will penalize the client for the attorney's conduct; (5) judges' lack of sufficient knowledge about the issues or participants in a case to feel confident that sanctions are appropriate; (6) empathy, sympathy, or indoctrination in the tradition of zealous partisanship resulting in judicial tolerance of behavior that is close to or crosses over the line between aggressive advocacy and discovery abuse; and (7) the absence of clear, determinate standards in the Federal Civil Rules for judging the propriety or adequacy of discovery requests and responses, which results frequently in reliance on normative standards that are far too lax. Some attorneys indicated that the perceived judicial reluctance to impose sanctions for discovery inhibited further attorney motions to compel and motions for sanctions because the information was not worth the cost required to obtain it and because attorneys did not want to be seen by judges as imposing unnecessary burdens on the courts and their opponents. Other more negative effects of judicial reluctance to impose sanctions or controls on the pretrial environment included the tendency of such reluctance to encourage lawyers to vio-

117. See Ellington, supra note 57, at 151 (explaining findings of 1979 study of Chicago and Atlanta federal court discovery practice); Glasner, supra note 33, at 140-42, 154-56, 161 (explaining findings of 1960's Columbia discovery study).
118. See Ellington, supra note 57, at 4, 8-10 (summarizing 1979 Department of Justice study); Note, Federal Discovery Rules, supra note 57, at 641-43 (discussing the post-1970 amendment follow-up to original Columbia study).
119. See Ellington, supra note 57, at 4 (1979 study of sanctions in Chicago and Atlanta federal courts found that sanctions requests were granted only in about one-fourth of cases in which they were made).
120. Brazil, Improving Controls, supra note 57 at 923-33. These reasons are generally consistent with those set forth in the Department of Justice study on the effectiveness of sanctions. See Ellington, supra note 57, at 8-10.
121. See Ellington, supra note 57, at 103.
late clear duties because of competitive and economic pressures unchecked by probable judicial restraints and the tendency for one side's perceived abusive conduct to set off a retaliatory spiral of discovery abuse.\textsuperscript{122}

The studies indicating lawyer misunderstandings and misapplications of discovery doctrines as well as a relatively constant occurrence of discovery problems that are not responsive to sanction controls, particularly in more complex cases, suggest that lawyers may frequently engage in conduct they would not define as discovery abuse, but that judges or commentators may view as improper. To a great extent the data from the studies are consistent with the notion that discovery abuse seems to be defined by lawyers as "what the other side does," with each side seeking as much information as it can under the broad discoverability standard of the present Rule 26, while attempting to withhold as much information as possible.\textsuperscript{123} The roots of such an irrational and counterproductive dynamic may lie in the adversary tradition of "zealous representation of the client" as the first principle, without careful consideration of whether a particular form of zealotry is authorized by law or even in the client's ultimate best interest.\textsuperscript{124} The view that "intentionally imposing burdens upon an opponent, except in the most egregious circumstances, is a common and ethical aspect of normal litigation practice,"\textsuperscript{125} epitomizes how the broad misunderstanding of adversarial zealotry yields behavior that

\textsuperscript{122} See Brazil, Improving Controls, supra note 57, at 922-23.
\textsuperscript{123} See also Mayer, supra note 22, at 89.
\textsuperscript{124} See Model Code of Professional Responsibility Canon 7 (establishing zealous representation within the bounds of the law); Lawrence M. Frankel, Disclosure in the Federal Courts: A Cure for Discovery Ills?, 25 ARIZ. ST. L.J. 249, 263 (1993) [hereinafter Frankel, Cure for Discovery Ills] (explaining that overemphasis on zealous advocacy and game playing may result in situation in which parties push discovery to inefficient level despite fact that both sides would be better off with less rather than more discovery); Ronald J. Gilson, The Devolution of the Legal Profession: A Demand Side Perspective, 49 Md. L. Rev. 869, 875-76 (1990) (arguing that client who is unsure of litigation position in future would, in abstract, opt for cooperative professional behavior). See also Colin Campbell & John Rea, Civil Litigation and the Ethics of Mandatory Disclosure: Moving Toward Brady v. Maryland, 25 ARIZ. ST. L.J. 237, 240-43 (1993) (discussing ethical obligations and traditional view that zealous advocacy for client is more important than duty to serve truth-finding function of the court). But see Mayer, supra note 22, at 89-90 (arguing that it is erroneous to attribute discovery crisis to misbehaving attorney's overzealousness); infra text accompanying notes 353-378.
\textsuperscript{125} Mayer, supra note 22, at 100 & n.61; see also id. at 101-02 (stating that "filing requests for the sole purpose of burdening an opponent is not necessarily improper or unethical" and arguing that obligation to client includes impositional discovery that attorney knows he or she can get away with because sanctions are unlikely).
clearly crosses the legal and ethical line.\textsuperscript{126} Similarly, the inappropriate frequency and ease with which lawyers assert privileges or work product protections in the name of client interests also demonstrates the influence of a superficial understanding of and adherence to partisan zealotry. Based on the admittedly sparse data, it is probably incorrect to assume that it is "rogue," "misbehaving," or "flagrant misconduct" that is at the heart of discovery abuse identified in most cases in the studies.\textsuperscript{127} In this regard, the studies discussed above suggest that a multitude of factors may underlie or contribute to discovery abuse. Nevertheless, it seems relatively clear that the traditional adversarial culture that instills zealous advocacy as a primary ethic is a common denominator of most forms of abuse. On the basis of these discovery studies, one might have predicted that attorneys so heavily enculturated in partisan discovery practices would have difficulty with any form of discovery reform that required nonpartisan behavior on their part.

\textit{(4) Disclosure as a Response to Discovery Abuse}

Proposed solutions to discovery problems have consistently included increased judicial involvement through pretrial management techniques and increased use of sanctions.\textsuperscript{128} They have also involved proposals for clarifying or strengthening rules of ethics and rules of liability for improper discovery conduct\textsuperscript{129} and for mandating discov-

\begin{itemize}
\item \textsuperscript{126} See, e.g., \textit{FED. R. CIV. P. 26(b)(1)(a)(iii)} (limits on "unduly burdensome discovery" taking into consideration the "needs of the case . . . and importance of issues at stake"); \textit{FED. R. CIV. P. 26(g)} (certification that discovery request is "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in cost"); Winter, \textit{supra} note 18, at 264-65 (discussing Proposed Rule 26(b)(2) limiting discovery in which the "burden or expense of proposed discovery outweighs its likely benefit"). \textit{See infra} notes 356-398.
\item \textsuperscript{127} Thus, it is probably correct that "discovery reforms must seek to address how even good and ethical attorneys" engage in discovery. Mayer, \textit{supra} note 22, at 91. One important step in that direction, however, is to instill in all attorneys the objective limits of adversarial zealotry and the importance of the overall societal interest in cooperative behavior. \textit{See infra} notes 355-377, 396-403 and accompanying text.
\item \textsuperscript{128} See, e.g., \textit{EBERSOLE & BURKE, supra} note 57, at 79; \textit{ELLINGTON, supra} note 57, at 11-12 (supporting greater judicial involvement in pretrial stage generally and greater use of sanctions for discovery abuse, including discovery conference/plan concept embodied in the 1979 proposed rules); Brazil, \textit{Ethical Perspectives, supra} note 66, at 78-81. \textit{See also} Brazil, \textit{Improving Controls, supra} note 57, at 888-89, 937-52 (noting the 1981 proposed civil rules changes involving more pretrial involvement and control by judges, broader sanctioning power, and new certification requirements, and suggesting even more substantial reforms in these areas).
\item \textsuperscript{129} See, e.g., Brazil, \textit{Ethical Perspectives, supra} note 66, at 81-85 (strengthening of Federal Rules of Civil Procedure 11, 26, & 37); Brazil, \textit{Improving Controls, supra} note 57, at
ery planning and dispute resolution conferences prior to judicial involvement in pretrial planning or discovery disputes. Almost twenty years ago several proposals for a very different approach to discovery reform began surfacing that involved removing much of discovery from adversarial practices instead of attempting to restrain those practices through judicial controls, planning by parties, and sanctions.

These discovery reforms involving early, mandatory information disclosure requirements were suggested by several influential commentators, including United States Magistrate Judge Wayne Brazil, a member of the Federal Civil Rules Advisory Committee that proposed Federal Rule 26(a), former United States District Judge Marvin Frankel, and United States District Judge and later Director of the Federal Judicial Center, William Schwarzer. While each of these

889-90, 929-30 (proposing Model Rules on Professional Conduct provisions on knowingly failing to disclose facts, unlawfully obstructing another party’s access to or concealing relevant material, and barring unreasonable discovery requests or failing to make a diligent effort to comply with a proper discovery request).

130. See, e.g., Brazil, Improving Controls, supra note 57, at 893-97. More recently, applying an economic analysis of discovery abuse, some commentators have proposed a form of cost shifting as a solution to discovery abuse. Cooter & Rubinfeld, supra note 42, at 455. These authors define discovery abuse as the knowing misuse of discovery, with misuse of discovery being defined as discovery as to which “compliance costs more than the expected increase in the value of the requesting party’s claim.” Id. at 437. Under this proposal, a party responding to discovery would only bear the cost of reasonably complying with discovery requests up to the “switching point,” after which the party seeking discovery would bear any additional discovery costs. Id. at 455-56. The switching point must be determined for a class of cases, apparently applying an analysis similar to that required under recently amended Federal Rule of Civil Procedure 26(b)(2)(iii), which allows courts to deny discovery if “the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the discovery in resolving the issues.” The purpose of the cost-shifting rule would be a disincentive to abuse and would result in equalization or symmetry of transaction costs, which would lead to an accurate settlement. Cooter and Rubinfeld, supra note 42, at 456.

Obvious shortcomings with this proposed solution are that it does not, by definition, address the common forms of discovery abuse involving evasion or resistance to discovery and unintentional discovery abuse (e.g., based on incompetence). As discussed elsewhere, discovery evasion is particularly resistant to solutions because it often involves a situation in which compliance with a discovery request will result in a loss of the case. For a further practical and theoretical critique of this solution, see Edward H. Cooper, Discovery Cost Allocation: Comment on Cooter and Rubinfeld, 23 J. LEGAL STUD. 465 (1994).

commentators has a slightly different view of the scope of the discovery problem and the required solutions, the fundamental impetus for their support of mandatory "disclosure" of information in the pretrial process was their belief that the continued adherence to full partisanship, at least during the pretrial stage, produces results inconsistent with the goal of the Federal Rules of Civil Procedure—"to secure the just, speedy and inexpensive determination of every action." They generally recognized that the modern rules of procedure relating to discovery were designed to allow lawyer-controlled discovery, driven by the adversarial process, to produce the most efficient path to truth and to avoid judicial involvement in the process to the extent possible, primarily because of its excessive costs. Even after amendments to the Rules, continued problems with the discovery process were viewed as the result of the inherent competitiveness, aggressiveness, and excessive costs. Detailed analysis of the German system has not been undertaken here primarily because of the substantial and fundamental differences between the German and the American civil litigation systems. See Arthur T. von Mehren, Some Comparative Reflections of First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules, 63 Notre Dame L. Rev. 609 (1988).

132. FED. R. CIV. P. 1. See Brazil, Adversary Character, supra note 131, at 1296, 1303; Frankel, More Disclosure, supra note 131, at 51-53; Schwarzar, Discovery Reform, supra note 131, at 704-06; Schwarzar, Slaying the Monsters, supra note 131, at 178. See also Mark Nordenberg, The Supreme Court and Discovery Reform: The Continuing Need for an Umpire, 31 SYRACUSE L. REV. 543, 571-85 (1980) (discussing the Brazil and Frankel proposals). Interestingly, Professor (now U.S. Magistrate Judge) Wayne Brazil and Professor Nordenberg were both members of the Advisory Committee on Federal Rules of Civil Procedure that recommended Rule 26(a).

133. Flegal & Umin, supra note 40, at 613; Rosenberg & King, supra note 40, at 581; Schwarzar, Discovery Reform, supra note 131, at 704-05.

134. See Nordenberg, supra note 132, at 553-60, 566; Rosenberg & King, supra note 40, at 579, 589; Schwarzar, Discovery Reform, supra note 131, at 704-05. See supra notes 76-80 and accompanying text (discussing 1980 and 1983 amendments to the Civil Rules, including the 1980 amendment authorizing judicially controlled discovery conferences (see FED. R. CIV. P. 26(f) and 1983 amendments to increase judicial pretrial management and ability to sanction attorneys for abuse). See FED. R. CIV. P. 11, 16, 26.
and incentives of the adversarial process, which were counterproductive in the pretrial process.¹³⁵

Magistrate Judge Brazil’s original 1978 proposal to address these problems would have included

- shifting counsel’s principal obligation during the investigation and discovery stage away from partisan pursuit of clients’ interests and toward the court;
- imposing a duty on counsel to investigate thoroughly the factual background of disputes;
- imposing a duty on both counsel and client to disclose voluntarily, and at all stages of trial preparation, all potentially relevant evidence and information;
- narrowing the reach of the attorney-client privilege and the work product doctrine;
- making early discovery conferences mandatory;
- substantially expanding the role of the court in monitoring the execution of discovery; and
- requiring thorough judicial review of, or participation in, all settlements that exceed a specific dollar amount.¹³⁶

Judge Schwarzer’s more recent proposal advocated an approach that would “require prompt disclosure of all material documents and information by all parties at the commencement of every action, permitting supplemental traditional discovery for good cause only.”¹³⁷

¹³⁵. Among the problems that were seen to “distort the flow of evidentiary information to the parties and the trier of fact and contribute significantly to the increased cost of litigation,” Brazil, Adversary Character, supra note 131, at 1304-05, and that stem primarily from the incentives and environment created by an adversarially driven pretrial process were: (1) too little regard for the objective of obtaining the truth through discovery; (2) preoccupation with winning (reinforced by rules of professional conduct emphasizing zealous representation of clients); (3) economic incentives not to engage in early discovery planning and to engage in potentially unnecessary discovery and resistance to discovery because it constitutes the most significant and lucrative litigation activity; (4) fears of malpractice if an attorney voluntarily discloses anything potentially harmful to the client or does not fight “tooth and nail” all the time; (5) professional perceptions of skill or competence that may positively view and reward the ability to evade disclosure or use discovery as a tactical weapon to obtain a result that is otherwise not justified by the facts; (6) ineffectiveness of clients’ cost concerns in reining in discovery costs or abuses because of attorney malpractice concerns and the inability of clients to understand case needs realistically or determine what is appropriate or necessary; (7) incentive to use broad wide-open discovery as a fishing tool to find information not directly related to present claims, but instead that might support new claims or induce settlement; and (8) reluctance or inconsistency with which the courts have applied the rules sanctioning discovery abuse, and practical difficulties for courts to be able to determine what is necessary or abusive discovery. See Brazil, Adversary Character, supra note 131, at 1311-48; Brazil, Improving Controls, supra note 57, at 883; Frankel, More Disclosure, supra note 131, at 52-53; Schwarzer, Discovery Reform, supra note 131, at 706-16; Schwarzer, Slaying the Monsters, supra note 131, at 178-79. See also Easterbrook, supra note 131, at 636-43; Nordenberg, supra note 132, at 571-92. Although these problems are phrased slightly differently from those previously identified as being pervasive in discovery, see supra text accompanying notes 5-80, there is substantial similarity and overlap.

¹³⁶. Brazil, Adversary Character, supra note 131, at 1349.

¹³⁷. Schwarzer, Discovery Reform, supra note 131, at 721.
Specifically, this contemplated a discovery rule mandating that a plaintiff serve, along with the summons and complaint: (1) a copy of all material,138 unprivileged139 documents; (2) a list of all persons with material information; and (3) written statements of material information by persons under the control of the plaintiff.140 The responding party would be required to serve similar information at or before the time an answer or a motion on the merits was served. The duty of disclosure would continue throughout the litigation; all discovery by traditional methods would only be available after the disclosure if the parties demonstrated to the court that it was particularly necessary.141

Professor Michael Wolfson offered a slight variation on the foregoing disclosure proposals based on the theory that the solution to discovery abuse is to make pretrial proceedings as nonadversarial as possible while recognizing that discovery is necessary to some extent.142 Wolfson suggested that there are certain core bits of information that are invariably exchanged through the discovery process, such as the names of witnesses to an accident, and that the use of normal discovery for this information presents an opportunity for applying adversarial skills of avoidance, delay, and interpretation at too great a cost to the client, the opposing party, the courts, and the legal system.143 Therefore, he proposed required disclosure, without waiting for a request, of certain basic information that would be (1) routinely discoverable based on experience, (2) directly related to the subject

138. The standard of what must be disclosed was "materiality," by which Judge Schwarzer apparently meant anything that may have a bearing on the outcome of a case (other than mere impeachment evidence). Schwarzer, Slaying the Monsters, supra note 131, at 181. Judge Schwarzer indicated that this standard is more stringent than the Federal Rule 26(b)(1) limits on discovery that are "reasonably calculated to lead to admissible evidence." Id. According to Judge Schwarzer, when a doubt exists about whether something is material, a motion for clarification asking the judge to make a determination would be required. Id.

139. Judge Frankel's original disclosure proposal is essentially similar to Judge Schwarzer's except that Judge Frankel would have required complete disclosure of all material evidence favorable to the other side regardless of claims of attorney-client privilege. Frankel, More Disclosure, supra note 131, at 51-53; see also Schwarzer, Discovery Reform, supra note 131, at 721 n.58.

140. Schwarzer, Slaying the Monsters, supra note 131, at 180. This third element appears to represent a change from Judge Schwarzer's 1989 disclosure proposal, which would not have required such written statements, but would have included a requirement that parties make persons under their control available for depositions. See Schwarzer, Discovery Reform, supra note 131, at 721-22.

141. Schwarzer, Slaying the Monsters, supra note 131, at 180-81; Schwarzer, Discovery Reform, supra note 131, at 721-22.

142. Wolfson, supra note 32, at 52.

143. Id. at 54-55.
matter of the case, (3) easily and broadly definable, and (4) unprivileged. The actual categories of information to be disclosed would be proposed by the parties and designated by the court at a routine discovery planning conference. According to Wolfson, the use of this process would provide a clear understanding of the scope and intent of the disclosure order as well as particularize the disclosure to the circumstances of the case. Compliance with the disclosure order would be ensured because regular discovery by the other party would be available as a check and because the court's discovery order would be subject to the severe sanctions of Rule 37.

Disclosure-based reforms are intended to send a clear message to the bar that discovery gamesmanship is unacceptable and that mutual access to facts and economy in pretrial processes are considered predominant values. Proponents also intend for disclosure to reduce attorneys' personal monetary incentives to engage in unnecessary or abusive discovery practices and encourage more adequate pretrial investigation, thereby increasing the likelihood that complaints and answers filed will comply with Federal Rule of Civil Procedure 11. Shifting the burden of justification for discovery to those seeking the discovery would decrease the amount of discovery activity generally and involve the judiciary in pretrial management of cases through motions for clarification of disclosure obligations and for discovery. Finally, disclosure would accelerate disposition (including settlement) of cases by getting facts out early and facilitate planning when discovery is necessary by focusing the courts and parties on areas where factual gaps exist.

144. Id. at 55-56. An example of items to be disclosed would be the names of medical personnel consulted and medical expenses incurred in a personal injury action. Id. at 55. Because discovery may not even be contemplated in many cases, Wolfson proposed that the parties could avoid a disclosure requirement by a joint declaration that no discovery was necessary. Id. at 59.

145. Id. at 56-57.

146. Id. at 57-58. Because a court order would be involved, in the event of disclosure evasions or noncompliance, severe sanctions would be available, including dismissal of an action, preclusion of evidence on a claim or defense, establishment of facts, or a holding or ruling of contempt. See Fed. R. Civ. P. 37 (b)(2). Wolfson argued that the likelihood of compliance was greater when the game of "adversarial hide and seek" is being played with the court rather than in the "often unscrutinized and freewheeling" normal discovery process. Wolfson, supra note 32, at 58 n.228. But see supra notes 117-122 and accompanying text (Rule 37 sanctions ineffective in stemming discovery abuse).

147. See, e.g., Brazil, Adversary Character, supra note 131, at 1351-61; Schwarzer, Slaying the Monsters, supra note 131, at 180-83; Schwarzer, Discovery Reform, supra note 131, at 722-23; Wolfson, supra note 32, at 51.
These early proposals were greeted with substantial skepticism and criticism. Among the criticisms were that required disclosure of material facts at the time of filing a complaint is inconsistent with notice pleading procedure and (in conjunction with Rule 11) is likely to discourage some meritorious cases from being filed. Critics asserted that rather than improve litigative efficiency, the total disclosure of potentially material evidence may actually undercut efficient trial preparation by allowing parties to bury each other in an avalanche of irrelevant material and may motivate parties to investigate less thoroughly than under adversarial discovery unless the fruits of the investigation are somewhat protected. The materiality standard of disclosure is supposedly overly stringent, inconsistent with current privileges, and too radical a departure from current practice to be acceptable to the bar to the extent that it would require an attorney (through investigation and disclosure obligations) to make an opponent's case. Moreover, the indeterminacy of the materiality standard and potential for abuse will result in many more motions requiring judicial involvement and routine requests for discovery to test the accuracy or completeness of discovery, which will substantially increase the burdens on the courts. Finally, absent changes to other rules, including the sanction provisions (and the court's willingness or ability to enforce those provisions), there is little incentive for attorney compliance with broad disclosure requirements, particularly in light of the likelihood that the same "winning" motivation for nondisclosure would continue to exist and that clients under a disclosure regime would be less willing to be candid with attorneys.\textsuperscript{148}

\textsuperscript{148} See, e.g., Easterbrook, supra note 131, at 640, 642; Nordenberg, supra note 132, at 573-92; Brazil, Adversary Character, supra note 131, at 1351, 1357. In particular, because the disclosure proposals of Judge Schwarzer and Judge Frankel generally apply a standard of "materiality" and prohibit all discovery absent a showing of particular need they would arguably provide a substantial opportunity for parties to engage in self-serving nondisclosure. Cf. Hazard, supra note 81, at 2237, 2240 (discussing incentives to "trim and cheat" through highly developed dialectical skills such as construing document requests to exclude the "smoking gun"); Brazil, Improving Controls, supra note 57, at 883 (arguing that it is unlikely lawyers will exercise self-restraint in engaging in gamesmanship in face of psychological, economical, and professional incentives).

As one commentator noted, despite constant complaints and recognition of the problems inherent in the adversarial process, "the organized bar remains firmly wedded to the adversary ethos," including nondisclosure of evidence favorable to the other side in the context of discovery. Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 600-01 &n.39 (1985). Most of these same criticisms have been leveled at the far less ambitious disclosure amendment to the Federal Civil Rules.
II. Disclosure Under Federal Rule 26(a)

A. The Advisory Committee's Discovery Proposal

It was against this backdrop that Federal Rule 26(a) disclosure came into existence. Based largely on the widely held view that discovery practice was in need of reform, the Advisory Committee began consideration of the precursor to the proposed Rule 26 disclosure provision in 1990.149 According to the draft Reporter's Note and the draft Advisory Committee Note accompanying the first disclosure proposal labeled Rule 25.1, the purpose of the proposed rule was to "materially reduce the cost of discovery before trial" by reducing the reliance on discovery devices to obtain information.150 The fundamental premise of the proposal was "elevated professionalism" under which "parties should disclose their own evidence early and often."151

149. The possibility of consideration by the Civil Rules Advisory Committee of some form of mandatory disclosure was first raised by the Committee Reporter at the Committee's November 1989 meeting. The Committee authorized the Reporter to prepare a draft disclosure rule for consideration at the Committee's June 1990 meeting. The Reporter prepared two drafts, on February 24, 1990 and March 8, 1990, and obtained input from selected sources prior to the June meeting. Mullenix, *Hope over Experience,* supra note 18, at 803-04, 808, 822-23 & nn.320-21. Professor Mullenix asserts that the proposed disclosure rule was based on the assumption that the previous discovery rules were "ineffective and counterproductive" because, rather than promote the free exchange of information, they encourage gamesmanship. Id. at 820.

150. See Mullenix, *Hope over Experience,* supra note 18, at 803, 859, 860-61 (including Mar. 8, 1990 Reporter's Draft Rule 25.1 with Reporter's Note and Advisory Committee Note). The proposal was intended to be accompanied by other modifications to the discovery rules, including limits on the number of interrogatories and depositions. Id. at 803, 858.

Throughout this Article, reference is made to the "Reporter's Notes" or the "Advisory Committee Notes" or the "Committee Notes." These materials are required under 28 U.S.C. § 2073(d) (1988), which provides that "in making a recommendation [for adoption of a proposed rule], the body making the recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's actions, including any minority or separate views." These materials constitute part of the legislative history of a rule, and should be consulted regarding the meaning, purpose, and policies of a particular rule. See generally *Levy,* supra note 14, at 193-94.

151. Id. at 858 (Reporter's Note, Mar. 8, 1990, Proposed Draft Rule 25.1). The draft Advisory Committee Note also stated that the proposed rule was based on "significant court experience with local rules of the court," apparently referring to the local rules of the District of Guam, the Central District of California, and the Southern District of Florida, which included some form of informal exchange of information by parties. See id. at 814, 858, 860. However, these local rule provisions are far more limited than the proposed Rule 25.1 and essentially only require parties to exchange documents the parties intended to use in support of their case and a list of witnesses then known to the parties that the parties contended supported their pleadings. See C.D. CAL. R. 6.1.1 to 6.1.4; S.D. FLA. R. 14; D. GUAM R. 235-5; Mullenix, *Hope over Experience,* supra note 18, at 814-20. At the time, there was virtually no empirical evidence evaluating how these minimal disclosure requirements worked. Id.
The proposal did not contemplate a radical departure from current discovery, as reflected in the draft Advisory Committee Notes. The Notes indicated that the rule really was a call for the exercise of professional responsibility by the bar to substitute less costly informal methods of information exchange for the current formal methods, while retaining "existing . . . discovery devices."152

As initially presented to the Committee at its June 1990 meeting, the draft rule had the following key components: (1) parties would be required to disclose to each other, within 28 days of the filing of an answer to the complaint, the names of "persons known to have personal knowledge of any fact alleged in any pleading," and information on tangible evidence or documents "bearing on any fact alleged in any pleading filed," evidence upon which the computation of damages is based, and information on insurance coverage; (2) the initial disclosure duty would be continuing; (3) additional pretrial disclosure would be required as to names of witnesses, the substance and background information about expert testimony, and exhibits intended to be used; and (4) additional sanctions relating to noncompliance with the disclosure requirements would be created including exclusion of evidence not disclosed and the imposition of costs for expenses incurred by a party as a result of another party's misleading disclosure.153

The version of proposed Rule 26(a)(1) published for public comment in August 1991 contained slightly modified forms of these key components.154 The most significant changes were to the standard de-

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152. Id. at 858 (Advisory Committee Note, Mar. 8, 1990, Draft Rule 25.1). But see Mullenix, Hope over Experience, supra note 18, at 807 (quoting a Feb. 22, 1990 letter by the Advisory Committee's Reporter accompanying the earlier, more ambitious version of the proposal, which characterized the rule as "fairly radical").

153. The full draft of Rule 25.1 is set out in Mullenix, Hope over Experience, supra note 18, at 858 (Mar. 8, 1990, Reporter's Draft Rule 25.1). For a discussion of the Reporter's drafting changes from a February 24, 1990 version, see id. at 802-07 & nn. 27-60.


(a) Required Disclosure: 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 docu-
fining the scope of materials to be disclosed, the timing of disclosure, and the discovery conference authorized under Federal Rule of Civil Procedure 26(f). The August 1991 version reduced the scope of materials required to be disclosed. Individuals with information and the documents or tangible evidence to be listed by a disclosing party were now those "likely to bear significantly on any claim or defense." The published proposal changed the disclosure time to 30 days after the filing of an answer and provided for accelerated disclosure by an opposing party within 30 days of a demand by a party that had disclosed its own materials. Finally, based on the conclusion that the "special 'discovery conference' envisioned by the 1980 amendment [Rule 26(f)] has not proved to be an effective device to prevent discovery abuses," the proposal eliminated Rule 26(f).

The draft Committee Notes described the purpose of the proposed disclosure rule in modest terms. The rule was intended to "accelerate the exchange of basic information and to eliminate the

ments 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 payment made to satisfy the judgment.

155. Proposed Fed. R. Civ. P. 26(a)(1)(A)-(B), reprinted in 137 F.R.D. at 87-88. The draft Advisory Committee Note explained that the limitation on disclosure resulting from the term "likely to bear significantly on any claims and defenses" was intended to address "burdensomeness or potential deception" arising from disclosure of unduly large lists of people with some knowledge about "minor details." The relevant disclosure criteria was whether a person, "if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties." Proposed Fed. R. Civ. P. 26 advisory committee's note, 137 F.R.D. at 100. The disclosure was to be based upon a "reasonable inquiry into the facts" and was to be supplemented as additional information became available during the course of the proceeding. Id. at 101; see Proposed Fed. R. Civ. P. 26(e)(1), (g)(1), id. at 96, 98.

156. 137 F.R.D. at 88. The Advisory Committee Note explained that the provision for accelerated disclosure by demand was to avoid delay in the situation in which an answer had not been filed because of the filing of a Rule 12 motion. Fed. R. Civ. P. 26 advisory committee's note, 137 F.R.D. at 101.

157. Id. at 105. The Committee believed that the court had adequate authority to control discovery through Rule 16 and the proposed revision of Rules 26-37. Id. Rule 26(f), at the time, authorized the court to initiate a discovery conference or provided for a party to obtain a discovery conference upon motion if the party was unable to obtain agreement from an opposing party on a discovery plan. See infra notes 60-77 and accompanying text.

The proposed rule, in addition to the early mandatory disclosures in Rule 26(a)(1) discussed above, also required disclosure of: (1) at least 90 days before trial, a comprehensive written report of expert witness evidence that may be presented at trial by that party and (2) at least 30 days before trial, a list of all witnesses or evidence that will or may be offered at trial. Proposed Fed. R. Civ. P. 26(a)(2)-(3), 137 F.R.D. at 89-90.
paperwork involved in requesting such information.”158 That the rule
did not enlarge beyond traditional discovery the scope of information
to be disclosed was confirmed by the description of the disclosure ob-
ligation as “the functional equivalent of standing interrogatories”
seeking information “customarily secured early in discovery through
formal discovery.”159 Thus, as originally proposed by the Advisory
Committee, the disclosure provisions were substantially based on the
recognition that in the vast majority of cases there is an essential core
of information that is (or should be) invariably exchanged by the par-
ties in reaching a satisfactory resolution of the case. Requiring that
these materials be automatically disclosed would eliminate the costs
relating to preparation of “formal discovery requests with respect to
that information and [would] enable the parties to plan more effec-
tively for the discovery that would be needed.”160

Further modifications to the Advisory Committee’s proposed dis-
closure rules were made after consideration of the public comments
received by the Committee.161 In response to criticisms regarding the
scope of the disclosure requirement, the final version was changed to
require the disclosure of the names of individuals “likely to have dis-
coverable information relevant to the disputed facts alleged with par-
ticularity in the pleadings” and copies or descriptions of documents

(emphasis supplied).
159. Id. at 100.
160. See Addendum B to Letter from the Honorable Sam C. Pointer, Jr., Chairman of
Advisory Committee on Civil Rules, to the Honorable Robert E. Keeton, Chairman of the
Standing Committee on Rules of Practice and Procedure (May 1, 1992), reprinted in 146
161. See Letter from the Honorable Sam C. Pointer, Jr., Chairman of Advisory Com-
mmittee on Civil Rules, to the Honorable Robert E. Keeton, Chairman of the Standing
Committee on Rules of Practice and Procedure (May 1, 1992), reprinted in 146 F.R.D. at
519. In addition to soliciting written comments on the proposed changes to the rules, the
Advisory Committee held public hearings in Los Angeles on November 21, 1991, and in
Atlanta on February 19 and 20, 1992. Id. Probably in response to the overwhelmingly
negative comments on the proposed rule, as much as to the substantive appeal of the argu-
ment that the disclosure rule should be tabled until the results of the CJRA plans contain-
ing disclosure provisions were in, the Advisory Committee briefly abandoned proposed
Rule 26(a) at its February 1992 meeting in New Orleans. See Stephen B. Burbank, Igno-
rance and Procedural Law Reform: A Call for a Moratorium, 59 BROOK. L. REV. 841, 845
(1993); Marcus, Prospects, supra note 4, at 809; Winter, supra note 18, at 268-69. The sub-
sequent revival of the rule was based at least in part on the view that the Committee “had a
duty to provide leadership.” that the CJRA experimentation would be unlikely to provide
useful empirical data, and that a national Rule 26(a) on disclosure was important to estab-
lish “the cultural change the Committee sought.” Marcus, Prospects, supra note 4, at 809
(citing Advisory Committee on Civil Rules, Minutes of Committee Meeting 7 (Apr. 13-15,
1992)). See also Winter, supra note 18, at 268-71.
within the parties’ possession, custody, or control. “relevant to disputed facts alleged with particularity in the pleadings.”

The other major change in the proposed rule related to the timing and logistics of the disclosures and discovery. To clarify issues in the case, facilitate disclosures, and encourage development of joint discovery plans early in the case, the final proposal reinstated the Rule 26(f) discovery conference in a modified form, made such a conference mandatory, and tied the timing of the initial required disclosures and discovery to that conference. Under the final rule, unless otherwise agreed by the parties or ordered by the court, disclosures are to occur at the Rule 26(f) meeting or within 10 days after that meeting and discovery cannot occur until after the Rule 26(f) discovery meeting. The meeting must be held as soon as practicable, but at least 14 days before the time for a scheduling conference or order under Rule 16(b).

The disclosure provision represented only one of several measures considered to address discovery problems. Other measures included: (1) clarification of Rule 26(b)(1)(a)(iii) to authorize district courts to limit discovery when the benefit from discovery is outweighed by its likely cost or burden and (2) presumptive limits on the

162. FED. R. CIV. P. 26(a)(1)-(B), reprinted in 146 F.R.D. at 606-07. See Winter, supra note 18, at 268-69; Addendum B to Letter from Pointer, supra note 160, at 527. The change of language was intended to clarify and narrow the scope of the disclosure obligation by (1) using the familiar discovery terms of “relevancy” and “discoverable information” and eliminating the suggestion that attorneys would be required to make decisions as to what information was most significant to an adversary; (2) clarifying that only information relating to facts in dispute was to be disclosed; (3) tying the breadth of the disclosure requirement to the level of specificity or vagueness of the pleadings so that attorneys would not have to conduct unreasonably broad searches for all information conceivably related to a vague allegation in a notice pleading; and (4) requiring disclosure to occur after a meeting of the attorneys at which they would be expected to clarify the disputed issues and adjust disclosure and discovery in light of common sense. See FED. R. CIV. P. 26 advisory committee’s note, reprinted in 146 F.R.D. at 630-31; Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure, reprinted in 146 F.R.D. 515, 517 n.3 (1992); Winter, supra note 18, at 269.

163. See Addendum B to Letter from Pointer, supra note 160, at 527-28. Rule 26(f) was changed from a procedure for court involvement in resolving disagreements when a party had proposed a discovery plan to a mandatory meeting for the parties to “discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by (a)(1), and develop a proposed discovery plan.” Proposed Amendments to the Federal Rules of Civil Procedure and Forms of May 1, 1992, reprinted in 146 F.R.D. 535, 622 (1993).

164. See FED. R. CIV. P. 26(a)(1), 26(d), 26(f). The scheduling order referred to must be issued within “90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant.” FED. R. CIV. P. 16.
number of interrogatories or depositions. Together with the disclosure proposal, these proposed amendments to the discovery rules were seen as an integrated approach to addressing the problems of excessive use of or resistance to discovery at great cost without corresponding benefit or effect on the outcome and the use of discovery as an impositional "club" against an adversary. However, the most important purpose and effect of the amendments was to send the message that there was going to be a change in the litigation "culture."

B. Reaction to the Supreme Court's Approval of the Proposed Disclosure Rule

The attack on the disclosure rule intensified into a major lobbying campaign once the proposed rules were transmitted to Congress. Congress was bombarded with complaints about the rules from numerous interest groups, including the products liability bar, the ABA, the Justice Department (which had literally reversed its position on the rules), public interest lawyers, and civil rights lawyers. Com-


166. Winter, supra note 18, at 263-64. See also William W Schwarzer, In Defense of "Automatic Disclosure in Discovery," 27 GA. L. REV. 655, 658 (1993) [hereinafter Schwarzer, In Defense] (noting that one of the purposes of disclosure was to facilitate early narrowing of issues and inexpensive information exchange without adversarialness and to discourage the "discovery game" in which parties use discovery to exhaust opponents (quoting Bell et al., supra note 19, at 12)).

167. See supra note 161 (discussing revival of rule at April 1992 Advisory Committee meeting); Bell et al., supra note 19, at 40 & n.157 (1992) (quoting Minutes of the Advisory Committee on Civil Rules 2 (Dec. 1, 1990) and statements of Committee members).

168. The goal of the lobbying effort was to get Congress to act pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, prior to December 1, 1993, when the proposed rules would automatically take effect if Congress did not take contrary legislative action. See 28 U.S.C. § 2074 (1994) (rules prescribed under section 2072 and transmitted to Congress by May 1 of a particular year shall go into effect "no earlier than December 1 of that year unless otherwise provided by law").


mittee Hearings were held on the proposed rules. Legislation that would have deleted the mandatory disclosure requirement of Proposed Rule 26(a)(1), H.R. 2814, was introduced by Representative Hughes on July 30, 1993 and began to wind its way through the legislative process.\textsuperscript{171} By late October the well-informed view by those following the lobbying onslaught was that disclosure was dead. The accuracy of this view seemed confirmed by the House when it passed H.R. 2814 on a voice vote November 3, 1993 and forwarded the bill to the Senate.\textsuperscript{172} There was little reason to doubt that the legislation killing disclosure would pass the Senate as well, and the antidisclosure lobbying forces began to celebrate.\textsuperscript{173}

As it turned out, the celebration was at least momentarily premature. Because of a curious and somewhat ironic set of circumstances, the details of which are not altogether clear, the disclosure deleting legislation never came to the Senate floor for a vote in time to prevent the rules from going into effect on December 1, 1993. According to one account, the legislation deleting disclosure became hostage to a certain Senator's interest in eliminating other proposed amendments to the discovery rules limiting the quantity of depositions and interrogatories.\textsuperscript{174} Although a last minute compromise was supposedly

\textsuperscript{supra}. While one could expect the corporate defense bar to object to disclosure, given its potential for requiring substantial burdens and release of information, the fact that plaintiffs' lawyers and public interest law groups also objected, often in hyperbolic terms, was somewhat unexpected. \textit{See} Marcus, \textit{Prospects, supra} note 4, at 808 (quoting Nan Aron of the Alliance for Justice to the effect that "the proposal 'would end public interest litigation as we know it'" (quoting Ann Pelham, \textit{Judges Make Quite a Discovery; Litigators Erupt, Kill Plan to Reform Federal Civil Rules}, \textit{LEGAL TIMES}, Mar. 16, 1992, at 1)). The significance of the widely varied sources of opposition should not be overlooked. While widespread opposition might be based on perceptions of serious practical flaws in the disclosure proposal, or at least as Professor Marcus posits, flaws that cause various groups to perceive themselves as particularly harmed by the rule compared to their opponents, it may indicate the real problem with disclosure is that it is overtly inconsistent with widely accepted notions of civil litigation adversarial culture. Marcus, \textit{Prospects, supra} note 4, at 808, 815-16. \textit{See} Pelham & Rodriguez, \textit{supra}; infra notes 298-301 and accompanying text.

\textsuperscript{171.} \textit{See generally} Honorable William J. Hughes, \textit{Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure}, \textit{18 SERAL HALL LEGAL J.} 1, 2-3 (1993). For an interesting discussion of why special interest lobbying of Congress, as well as increased congressional involvement in civil litigation rule making should be viewed with concern, see Marcus, \textit{Prospects, supra} note 4, at 816-18.

\textsuperscript{172.} Hughes, \textit{supra} note 171, at 4.

\textsuperscript{173.} \textit{See}, e.g., Alfred W. Cortese & Kathleen L. Blaner, \textit{Should Congress Decide the Civil Rules}, \textit{NAT'L L.J.}, Nov. 22, 1993, at 15 (touting politicization of rule-making process and effect of partisan lobbying that appeared to have saved the profession from the burdens of impractical disclosure).

\textsuperscript{174.} \textit{FED. R. CIV. P.} 26(b)(2)(iii), 30(a), 33(a); \textit{see} \textit{supra} note 165 and accompanying text.
worked out, which would have only delayed the effective date of the disclosure rules for six months and increased slightly the numerical limits on interrogatories, the compromise apparently fell through when it was rejected by another Senator who favored retaining the discovery numerical limits and the Senate ran out of time before it adjourned for the first session of the 103rd Congress.\textsuperscript{175} Thus, the reason that the disclosure provisions became effective December 1, 1993 apparently had little to do with congressional acceptance of the principles of disclosure, but rather with the fact that an effort to eliminate even more of the Advisory Committee’s proposed discovery reforms backfired in the context of legislators’ interest in adjourning.

Nevertheless, faced with their unexpected failure, antidisclosure lobbyists immediately set about to obtain the repeal of the newly effective disclosure rules.\textsuperscript{176} They also adopted another, perhaps more effective strategy, which was to get individual districts to opt out of the disclosure rules by local rule and court order.\textsuperscript{177} According to the Federal Judicial Center, as of February 23, 1994, twenty-three districts had decided to opt out of the Rule 26(a) disclosure and another eight districts did not adopt the rule but gave individual judges the authority to require disclosure. Thirty-two districts had adopted the Federal Rule on disclosure and another thirty-one districts had some form of mandatory disclosure as part of their civil justice reform plans.\textsuperscript{178}

\textsuperscript{175} See Tobias, supra note 170, at 24. See also Hughes, supra note 171, at 10-11 (failure of attempts to reach compromise before adjournment for Thanksgiving); Stempel, supra note 5, at 681-82 (describing the role of Senator Howard Metzenbaum in preventing the bill from being considered by unanimous consent prior to the holiday recess).


\textsuperscript{177} Rule 26(a)(1) provides that automatic disclosure applies “except to the extent otherwise . . . directed by court order or local rule.” Several districts have been pressured to opt out of disclosure, and many of those districts have done so. See, e.g., Hughes, supra note 171, at 12 (legislation to repeal disclosure should not be introduced, but courts can use opt-out method); Denis F. McLaughlin, Your Guide to Amended Rules of Civil Procedure, N.J. L.R., Jan. 10, 1994, at 1 (describing pressures for district to opt out or modify rule); Samborn, supra note 176, at 1 (reporting opt-out of Delaware, Eastern District of Michigan, and Southern District of New York); Janet Seiberg, Rule Wrangling, CONN. L. TRIB., Jan. 24, 1994, at 3 (describing pressure by lawyers for district to opt out or modify the disclosure rule); Daniel Wise, 3 Bar Groups Seek Delay in Federal Discovery Changes, N.Y. L.J., June 9, 1994, at 1 (defense bar organizations attempt to get Southern District of New York to delay implementation of Rule 26(a)); Panel Urges Federal Judges to Opt Out of Mandatory Disclosure, CONN. L. TRIB., Mar. 14, 1994, at 12 (report of advisory panel recommending opting out).

\textsuperscript{178} Mark Hansen, Early Discovery Hits Snag, ABA J., May 1994, at 35. Ironically, but not surprisingly, some disclosure opponents, who originally argued that federal Rule 26(a) should not be enacted but that the many different local rules on disclosure should be
III. Analysis of the Disclosure Controversy

A. Criticisms and Defenses of Mandatory Disclosure

Perhaps one should not be surprised that a profession steeped in adversarial culture and gamesmanship would unleash a flood of criticism on the disclosure proposal. It is also not surprising that the criticisms of the rule originated from very different perspectives and sought to serve very different, and often inconsistent, purposes. As Jeffrey Stempel has aptly noted regarding civil litigation reform generally, the "wide variety of potentially interested parties pursuing preferred agendas virtually guarantees that many elements of the litigation reform community will be on different pages from one another regarding the reform agenda." Thus, one should expect to see a wide variety of criticisms asserting that the disclosure rule serves or harms the interests of one particular group or another. Furthermore the negative response of the organized bar was somewhat pre-
dictable. The organized bar generally can be expected to support, as
guiding principles or ideals, increased access to justice, adequate judi-
cial system funding, and improved judicial case
management.\textsuperscript{182} The bar will also support moderate reforms intended to achieve these
goals, or at least give the appearance that these goals are being served
by the litigation system. However, the organized bar will not support
efforts beyond "tinkering" reforms if the reforms threaten to alter the
fundamental structure of the system,\textsuperscript{183} including a system in which a
zealous bar marshals and presents proof.\textsuperscript{184} Arguably, because it was
perceived as fundamentally altering the existing structure, the disclo-
sure proposal was strongly resisted by the organized bar.\textsuperscript{185} Given
the history of discovery and other civil procedural reforms, many mem-
bers of the litigation community may believe that, as a practical mat-
require plaintiffs to engage in more investigation to obtain disclosure and because of limits
on pro plaintiff rules of discovery).

\textsuperscript{182} See ABA Working Group on Civil Justice System Proposals Report,
Blueprint for Improving the Civil Justice System iv-vii (1992) [hereinafter(Blueprint); Garth, supra note 52, at 933-38.

\textsuperscript{183} See Garth, supra note 52, at 935-38; Deborah L. Rhode, Ethical Perspectives on
Legal Practice, 37 Stan. L. Rev. 589, 600-01 (1985) (discussing organized bar resistance to
fundamental change in adversarial norms including Model Rules change to authorize dis-
closure of favorable evidence to other side); Winter, supra note 18, at 277 (asserting that the
organized bar has little incentive to support discovery reforms that cut back on unnec-
essary legal services).

\textsuperscript{184} See Blueprint, supra note 182, at iv-vii. One possible explanation for this ten-
dency of the organized bar to resist fundamental change is that the purpose of the organ-
ized bar is primarily to serve the self-interest of the bar, ultimately protecting income and
power of attorneys. See Garth, supra note 52, at 933; Charles W. Sorenson, Jr., The Inte-
grated Bar and the Freedom of Nonassociation—Continuing Siege, 63 Neb. L. Rev. 30, 34-
40 (1984). Even activities purportedly undertaken to serve the public interest can actually
be seen as ultimately serving the self-interest of the bar. \textit{Id.} at 36-39; Garth, supra note 52,
at 933-36. Reforms will be rejected if they are viewed by the organized bar as being incon-
sistent with the immediate self-interest of lawyers being served by the current structure.

Another related contributing factor to the organized bar's resistance to fundamental
change stems from the fact that organized bar associations, such as the American Bar
Association (ABA), are made up of many lawyers with varied and inconsistent interests. See
generally Stempel, supra note 5, at 739. Because these often inconsistent interests cancel
each other out on specific reform issues, a bar organization can be expected to take posi-
tions consistent with the status quo. See also Robert L. Nelson & David M. Trubek, Arenas
of Professionalism: The Professional Ideologies of Lawyers in Context, in Lawyers' Ide-
als/Lawyers' Practice: Transformations in the American Legal Profession
188-94 (Robert L. Nelson et al. eds., 1992) (official bar rhetoric stays general and vague
because it is speaking for an internally varied and divided bar).

\textsuperscript{185} See, e.g., Blueprint, supra note 182, at 69-70 (supporting the "concept" of disclo-
sure of core information and limitations on discovery, but opposing actual proposals be-
cause of perceived needs for "refinement" and view that adaptation of current judicial
management of discovery would be better); Rhonda McMillion, ABA Seeks Delay in
Amending Federal Discovery Rule, ABA J., Sept. 1993, at 119 (discussing ABA opposition
to disclosure); Henry Reske, Early Disclosure Adopted, ABA J., Feb. 1994, at 16 (same).
ter, the disclosure rule would cause more problems than it would cure by introducing new terminology and new opportunities for disputes, gamesmanship, or abuse.\(^{186}\)

What is most remarkable about the criticism of the new disclosure rule\(^ {187}\) is the ferocity and breadth of the opposition to disclosure generally by the corporate defense bar, the plaintiff's bar, or academia, given the relatively modest practical goals of the rule. The common argument by these groups, expressed by a variety of commentators, is essentially that the rule is inconsistent with our "American judicial system, which relies on adversarial litigation."\(^ {188}\)

The arguments in opposition to Rule 26(a) disclosure can be broadly divided into two categories: (1) arguments that challenge the rule on pragmatic grounds and (2) arguments that the rule is inconsistent with the fundamental tenets of our civil litigation system. A pragmatic evaluation of the disclosure rule requires consideration of whether it will yield a benefit in terms of ameliorating problems related to discovery abuse or misuse, cost and delay in litigation, and the just resolution of disputes. The importance of this last criteria should not be overlooked; after all, the primary directive of the Federal Rules of Civil Procedure is that they should be "construed and administered to secure just, speedy, and inexpensive determination of every action."\(^ {189}\)

However, the central focus of this Article is not to predict precisely how effectively the Rule will work, but to examine the strength of the strident practical critique of disclosure. The focus of the analy-

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186. See, e.g., Janet Cooper Alexander, Judges' Self-Interest and Procedural Rules: Comment on Macey, 23 J. LEGAL STUD. 647, 659 (1994) (changes to rules can be expected to cause significant increase in satellite litigation over meaning and compliance similar to that experienced with 1983 Rule 11 amendment, which is fresh in minds of many); Mullenix, Hope over Experience, supra note 18, at 820 (repeated failures of amendments to correct discovery abuse as "lawyers create new ways to circumvent the rules"); Judith Resnik, Tiers, 57 S. CAL. L. REV. 837, 1030 (1984) ("The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms.").

187. The analysis here focuses on the most controversial provisions of the disclosure rule, which are the requirements in Rule 26(a)(1)(A) relating to disclosure of the names of persons likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings and in Rule 26(a)(1)(B) calling for disclosure of a description of documents relevant to disputed facts alleged with particularity in the pleadings.


sis is to determine whether the rule is so obviously badly conceived, as opponents claim, that it cannot possibly have a positive impact, or instead, if the opposition is more fundamentally based on the perceived inconsistency of Rule 26(a)(1) with our adversarial justice system or partisan interests. The Article then examines the nature of Rule 26(a)'s relationship to the adversarial system to determine if the rule is actually as inconsistent as opponents perceive it to be. The assessment of how the disclosure rule fits doctrinally into an adversarial litigation system must be guided by explication of the purposes, specific elements, and doctrines of the adversary system as it exists in the federal court system, both formally and informally. The crucial question should be the extent to which the disclosure rule is consistent with and serves the overarching values and purposes of the civil litigation system.

B. Pragmatic Criticisms and Responses

Before discussing the practical operation of Rule 26(a)(1), an important point should be made regarding the nature of the criticisms of

190. At this point, because of the novelty and lack of substantial experience with disclosure, particularly as envisioned under Rule 26(a)(1), practical evaluation of the disclosure obligation is necessarily largely conjectural. What seems to be relatively clear based on the experience of those districts or states that have some version of a disclosure obligation is that the "parade of horribles" predicted by disclosure opponents has yet to materialize. Edward D. Cavanaugh, Bumps on the Road to Speedier Justice, LEGAL TIMES, Jan. 3, 1994, at 22. See, e.g., Frankel, Cure for Discovery Ills, supra note 124, at 275-77 (disclosure provisions in South Carolina, Central District of California, Guam, and Southern District of Florida similar to federal rule "apparently have not caused major controversy, have been fairly well received, and may provide a limited reduction in cost and delay"); Myers, supra note 11, at 20-28 (disclosure accompanied by sanctions working in Arizona disclosure rules); Pelham, supra note 178, at 1 (judges and lawyers appear satisfied with Northern District of California rule requiring disclosure of documents that "tend to support positions that the disclosing party has taken or is reasonably likely to take in a case"); Samborn, supra note 176, at 1 (analyzing Eastern District of New York CJRA disclosure rule that "bears significantly" on claims and defenses, and revealing substantial majority of 350 lawyers surveyed indicated no negative effects and half said positive change; half said no change from discovery); Schwarzer, In Defense, supra note 166, at 661 (early experience of 24 CJRA districts with variants of disclosure does not support claims about excessive motions practice engendered by the rule); Carl Tobias, Automatic Disclosure: Let It Be, LEGAL TIMES, Jan. 31, 1994, at 25 (anecdotal evidence from the early implementation districts that have some form of disclosure indicates that disclosure works well once judges, litigants, and attorneys become familiar with it); Carl Tobias, A Progress Report on Automatic Disclosure in the Federal Districts, 155 F.R.D. 229, 231 (1994) (same). While more widespread experience with disclosure may yet reveal serious fundamental practical problems with the rule and may well provide valuable information to be used in ultimately assessing the costs and benefits of the rule and making improvements, the absence of evidence of serious problems to date suggests that at least some of the dire predictions by opponents should be viewed skeptically.
disclosure. One suspect form of attack on the Rule 26(a)(1) disclosure requirement is to point out all of the ways that lawyers can avoid compliance with the rule or can use the rule to impose abuse. Critics argue that disclosure will not work because it is based on an unrealistic assessment of the incentive structure of an adversary system; attorneys will concentrate exclusively on the goal of winning for the clients who pay them and who pressure them to win.\textsuperscript{191} Disclosure can be avoided, critics argue, by an unreasonably narrow construction of the rule's purportedly ambiguous phrase “relevant to disputed facts alleged with particularity” so that relevant damaging documents will remain hidden. Furthermore, by burying relevant documents in a mountain of irrelevant ones, the rule can be used as a weapon to impose additional costs on an opponent.\textsuperscript{192} While the extent to which the disclosure rule is subject to avoidance or misuse is debatable, the argument, in and of itself, seems largely beside the point. As the Article's discussion of the history of discovery abuse suggests, it seems unquestionable that some lawyers will find a way to circumvent any rule that may work against their partisan interests, and some lawyers may even turn a measure intended to reform litigation practices into a weapon to serve partisan interests.\textsuperscript{193} However, this cynical view of professional behavior is not a reason to avoid the adoption of rules intended to reduce litigation abuse.\textsuperscript{194} Rules set the standard for behavior. They must be consistent with the aspirational principles established based upon the assumption that law abiding lawyers and clients will obey those rules. The focus in assessing the practical operation of the rule is whether disclosure is consistent with fundamental aspirational principles of the civil litigation system, discussed in Part III.C below, and whether the disclosure rule will result in long-term net degradation of the system, that is, more abuse, cost, and delay, and less justice than exists under the current regime.\textsuperscript{195}

\textsuperscript{191} See, e.g., Frankel, \textit{Cure for Discovery Ills}, supra note 124, at 266-67, 273; Mayer, \textit{supra} note 22, at 113-22; Underwood, \textit{supra} note 189, at 277.


\textsuperscript{193} See \textit{supra} notes 49-51 and accompanying text; Mullenix, \textit{Hope over Experience}, \textit{supra} note 18, at 820, 827 (repeated failures of amendments to correct discovery abuse as “lawyers create new ways to circumvent the rules”).

\textsuperscript{194} Cf. Mullenix, \textit{Hope over Experience}, \textit{supra} note 18, at 827 (“proposed rule under attack because . . . dismal view of professionalism precludes honest dealing”).

\textsuperscript{195} This is essentially a speculative cost-benefit analysis. The reason that no net long-term increase in cost should be used as the criteria is that even if the disclosure system is no
Preliminarily it should be noted that the arguments of the attackers and defenders of disclosure probably show that as a profession, lawyers have learned their partisan advocate lessons well. Opponents of disclosure tend to be hyperbolic; their descriptions of the reach and effect of the disclosure obligation predict a worst-case scenario. For example, some critics have characterized the disclosure rule as requiring parties to supply their opponents with "virtually all information needed to prepare for trial" and to do so "in all types of litigation, from simple collection cases to patent, securities and antitrust transactions." As a result, the potential sweep, impact, and burden of the

more efficient than the current system, some value must be given to having rules facially consistent with aspirational principles. Here the disclosure rule arguably serves the basic principle that underlies discovery in the first place—that civil litigants and judges are entitled to information relevant to resolving a dispute efficiently, justly, and accurately. See supra note 35 and accompanying text. Another common objection to the disclosure rule that should at least be briefly mentioned was that empirical study of disclosure in the Civil Justice Reform Act "experimental plans" should have been undertaken first before adopting a national rule. See, e.g., McMillion, supra note 185, at 119; Carl Tobias, In Defense of Experimentation with Automatic Disclosure, 27 GA. L. REV. 665 (1993); Laurens Walker, Avoiding Surprise from Federal Civil Rulemaking: The Role of Economic Analysis, 23 J. LEGAL STUD. 569, 581 (1994). In light of the delaying effect that such study would have on implementation of disclosure, the motives of these calls for study are suspect. Cf. Mullenix, Hope over Experience, supra note 18, at 829 (empirical study also results in postponing solution to the problem). Moreover, given empiricism's practical limitations in the area of civil procedure, its immense cost, its questionable value, and the perceived need to address discovery problems throughout the federal system now, little would likely be gained from waiting. See Robert G. Bone, The Empirical Turn in Procedural Rulemaking: Comment on Walker (1), 23 J. LEGAL STUD. 595, 597, 609-11 (1994); Thomas D. Rowe, Jr., Repealing the Law on Unintended Consequences? Comment on Walker (2), 23 J. LEGAL STUD. 615, 616-17 (1994). See also Deborah R. Hensler, Researching Civil Justice: Problems and Pitfalls, 51 LAW & CONTEMP. PROBS. 55 (1988) (generally discussing problems faced in undertaking research on civil justice system); Linda S. Mullenix, Hope over Experience, supra note 18, at 828 ("empirical research is labor-intensive, slow, and prone to methodological problems that encourage disputes"); Stempel, supra note 5, at 731 n.259 (noting practical problems with relying on CJRA experimental Expense and Delay Reductions Plans, including "erratic implementation . . . [and] insufficient monitoring . . . ."); Ernest E. Svenson, Mandatory Discovery Reform, LITIG. NEWS, Oct. 1993, at 3, 11 (noting need for discovery reform now and quoting Judge Schwarzer's response to CJRA experimentation argument, including low likelihood that the highly varied CJRA plans will supply "any clear empirical answers" beyond what is currently available). Finally, "experimentation" is also beside the point given the minimal actual effect that disclosure is likely to have in most cases—an effect that is more symbolic than anything, signaling that a "change in the culture of adversariness" in discovery is necessary. See Bell et al., supra note 19, at 40 (quoting Minutes of Dec. 1, 1990 Meeting of the Advisory Committee on Civil Rules (Committee Members James Powers, Mariana R. Pfelzer, Dennis G. Linder, and Wayne Brazil)); Schwarzer, In Defense, supra note 166, at 658-59.

196. Underwood, supra note 189, at 278; Bell et al., supra note 19, at 39; Mayer, supra note 22, at 113-22 (critique of disclosure presented in context of complex, contentious case rather than average case). Mayer also broadly states that "[j]ust because the parties know
rule, as well as any potential ambiguity in its operative term "disputed facts pleaded with particularity," are seen as enormous.

On the other hand, the new rule's proponents seemingly cast the rule in a perhaps unreasonably positive light. They tend to minimize the extent of the disclosure obligations, focusing on routine cases in which material to be disclosed is obvious. Proponents also downplay the potential ambiguities of the rule and may overestimate the cooperative capacity of the bar to work through those ambiguities. They may also overestimate the likely actual cost-saving benefits of the rule.

While many of the assertions of increased burdens or problems caused by disclosure should be viewed skeptically, some of the criticisms of the rule require more thorough consideration. Justice Scalia captured the main practical problems that many critics see with disclosure in asserting that disclosure actually "adds a further layer of discovery" that will "likely increase the discovery burdens on district judges" as the parties litigate about the meaning of the rule's terms, standards, and obligations and whether the parties have complied with those obligations. According to this perspective, disclosure will ac-

What facts are in dispute does not mean that they would know what documents and information are relevant to those facts." Id. at 115. This point seems to be an exaggeration at best. Arguably, the development of the analytical ability to make determinations of basic relevance is expected from lawyers litigating in federal courts. See generally William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1122, 1132 (1988) [hereinafter Simon, Ethical Discretion] (asserting that lawyers expected to be able to make complex judgments rather than merely engage in mechanical rule following). For another strained claim, see Jonathan R. Macey, Judicial Preference, Public Choice, and the Rules of Procedure, 23 J. LEGAL STUD. 627, 639 (1994) (disclosure rule will result in more document production and cost because it will require production even in small cases in which no discovery would have been undertaken before). But see Alexander, supra note 186, at 656-58 (disclosure amendments would not increase the amount of discovery in cases in which it is not currently undertaken because (1) of ability of parties under Rule 29 to stipulate out of disclosure or discovery, and fact that court can exempt cases from disclosure by class or individual case; (2) small cases probably do involve basic discovery anyway; (3) the restriction of disclosure to disputed facts pleaded with particularity should limit the amount of disclosure; and (4) wide flexibility in parties' ability to negotiate over form and amount of disclosure of documents or description of documents).

197. See, e.g., Schwarzer, In Defense, supra note 166, at 657; Winter, supra note 18, at 275-76; Wolfson, supra note 32, at 62.

198. See, e.g., Schwarzer, In Defense, supra note 166, at 661-62; Winter, supra note 18, at 275-76.

199. See, e.g., Schwarzer, In Defense, supra note 166, at 663-64 ("disclosure will obviate wasteful and unnecessary discovery").

tually cause more problems than it cures because of increased costs or burden on the courts stemming from the additional litigation arising out of ambiguities, uncertainties, and duplication of activity caused by the disclosure rule. Critics further argue that such an increased burden is not justified because, as the Advisory Committee itself noted, the information being obtained through disclosure could have been routinely obtained through traditional discovery. Thus, for purposes of pragmatic analysis, the principal issues are the extent of ambiguity of the rule's operative terminology, the likelihood of litigation over the rule's meaning, and the extent to which the disclosure rule requires additional costs resulting from that purported ambiguity.

(1) Meaning of Key Terms and Likelihood of Disputes

The terms of Rule 26(a)(1) most frequently identified as problematic are "alleged with particularity," "discoverable information," and "relevant." Critics argue that these terms are unfamiliar, at least in the context of disclosure, and that motions and disputes over these terms are likely to be common as parties seek to clarify their obligations under the rule or seek sanctions under Rule 37 for alleged failures of other parties to disclose. Critics also argue that ambiguity will result in the overproduction of "marginally relevant documents." Proponents of disclosure have generally responded that

201. See, e.g., Amendments to the Rules of Civil Procedure, 146 F.R.D. at 510 (Scalia, J., dissenting); Bell et al., supra note 19, at 41-46; Macey, supra note 196, at 639; Underwood, supra note 189, at 278-82. A typical statement of this argument is that because of the vagueness of the disclosure standard, "practitioners will be at risk of having to guess how the standard would be defined by both the court and the opponent in a given case and the parties would have neither a specific request from the opponent nor a specific standard in the Federal Rules to guide them in deciding what to disclose." Because sanctions are available for noncompliance, "motions to dismiss under Rule 12, motions for protective order under Rule 26(c), and motions for sanctions under Rule 37 will doubtless increase." Bell et al., supra note 19, at 41-43.


203. See, e.g., Bell et al., supra note 19, at 41-44; Hughes, supra note 171, at 6-7; Koski, supra note 192, at 87; Gerald G. MacDonald, Hesiod, Agesilaus, and Rule 26: A Proposal for a More Effective Mandatory Initial Disclosure Procedure, 28 WAKE FOREST L. REV. 819, 835-44 (1993); Mayer, supra note 22, at 112; Underwood, supra note 189, at 281.

204. Bell et al., supra note 19, at 44; see Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. at 511 (1993) (Scalia, J., dissenting) (irrelevant documents will be produced because of the early inception of disclosure duty); Koski, supra note 192, at 87 (parties may produce "reams of marginally relevant documents, so that time must be spent litigating the relevance of the few important ones . . . traditional discovery . . . [is] more cost effective" because litigants will not be "inundated with endless boxes of documents of negligible significance"). This argument regarding overproduction of documents seems particularly weak. "The rule requires disclosure not production." Schwarzer, In Defense,
the terms are not excessively vague and are drawn from other familiar areas of procedure from which guidance can be obtained; to the extent there is ambiguity, mechanisms under the rule are available to resolve the ambiguity without further litigation; there is always some ambiguity in new rules or laws that is ironed out as courts interpret and apply the rules; and any slightly increased cost that arises in a few cases during the initial period after adoption of the disclosure rule will be outweighed by the long-term benefits achieved in the majority of cases. A close examination of the arguments suggests that, while neither side of the argument is entirely convincing, disclosure opponents have generally failed to demonstrate that the disclosure rule is unworkable.

The terms used in Rule 26(a) were specifically adopted by the Advisory Committee in response to comments that the disclosure term initially proposed, “bears significantly on any claim or defense,” was unreasonably vague and likely to cause disputes, particularly in determining the significance of information required to trigger a disclosure obligation. The terminology in the final version of the rule was selected specifically because of its use in the discovery or pleadings rules and the additional certainty the term afforded. “Relevant” and “discoverable” information, for example, are pervasive concepts already found in procedural and evidentiary law. They specifically appear in Federal Rule 26(b)(1) defining the scope of discovery, and lawyers’ general abstract understanding of these potentially vague terms can be expected to have developed largely through exposure to the interpretive case law over the years. What is relevant or

supra note 166, at 663. It would seem that the lawyer and client’s primary instinct is to be conservative in their approach to disclosure and choose the method that reveals the least, such as listing by general category and location documents relevant to disputed facts pleaded with particularity or tending to be underinclusive in producing actual documents. Id. See Mayer, supra note 22, at n.113 (fear of overdisclosure not realistic in light of sanctions structure). It is also doubtful that disclosure will result in production of more irrelevant documents than occurs in traditional discovery. By requiring parties in response to a request for production to produce documents “as they are kept in the ordinary course of business,” Rule 34 necessarily results in the production of potentially large amounts of irrelevant documents under traditional discovery practice. Fed. R. Civ. P. 34(b).

205. See Schwarzer, In Defense, supra note 166, at 661-64; Winter, supra note 18, at 267-69, 275-77; see also Alexander, supra note 187, at 656-59 (refuting arguments Rule 26 will impose high costs on litigation); Frankel, Cure for Discovery Ills, supra note 124, at 274-77 (discussing the possibility disclosure will reduce opportunities for game playing).

206. See, e.g., MacDonald, supra note 204, at 836-37; Underwood, supra note 189, at 279 n.82; Winter, supra note 18, at 267-69; supra notes 161-167 and accompanying text.

207. See Underwood, supra note 189, at 281. For many years, Federal Rule of Civil Procedure 26(b)(1) has provided in pertinent part: “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pend-
discoverable in a particular case obviously depends on the specific circumstances of that case, but there are some general principles that would seem applicable to both discovery and disclosure. Within the scope of the concepts of relevance and discoverability generally is "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in a case."208 Information that itself would not be admissible into evidence at a trial would be discoverable and relevant if the information is "reasonably calculated to lead to the discovery of admissible evidence."209 Because Rule 26(a)(1)(A) and (B) tie the term relevant to "facts specifically alleged" rather than the "subject matter or issues in a case," the scope of the term "relevant" in the disclosure rule is obviously more limited than when it is applied in discovery. However, it does not appear that the use of these terms in the disclosure rule introduces any new source of ambiguity, and it seems doubtful that the terms by

ing action . . ., including the . . . identity and location of persons having knowledge of any discoverable matter." Fed. R. Civ. P. 26(b)(1) (emphasis added). Indeed, lawyers' general familiarity with these terms is evidenced by basic interrogatories that commonly call for the identity by name, address, and telephone number of all persons believed to have knowledge of relevant facts, or the name and address of each person who has knowledge of any discoverable matter. Underwood, supra note 189, at 280; Kenneth R. Berman, Q: Is This Any Way to Write an Interrogatory? A: You Bet It Is, Littig., Summer 1993, at 42, 45. Of course, as you might expect in our partisan discovery system, such interrogatories may draw objections on the ground of overbreadth, but these objections can be cured by narrowing the subject matter of the particular interrogatory. Id. at 46. Thus, with its "particularity" limitation, it would appear that the disclosure requirement operates similarly to regular exploratory interrogatories. See Schwarzer, In Defense, supra note 166, at 661 (finding that traditional discovery also frequently has "vague, catch all discovery requests" that result in discovery motions; no reason to expect that more discovery motions will occur under disclosure).


209. Fed. R. Civ. P. 26(b)(1). One commentator has noted that the terms "relevant" and "discoverable" cannot be considered to have the same meaning in the disclosure rule since Rule 26(a)(1)(A) requires disclosure of names of persons "likely to have discoverable information relevant to disputed facts" and Rule 26(a)(1)(B) only requires a description of documents or copies of documents "relevant to disputed facts," leaving out the term "discoverable." Mayer, supra note 22, at 112 n.97. While the drafting inconsistency is somewhat perplexing, it may be that the Advisory Committee wanted to make clear that in complying with the document disclosure requirement, it was not permissible to fail to disclose or describe an otherwise relevant document because the party believed that it was privileged. Using the term "discoverable" in the context of document request might suggest otherwise. See Fed. R. Civ. P. 26(b)(5) & advisory committee's note, reprinted in 146 F.R.D. at 617, 639 (1993). The Advisory Committee explained that "[a] party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection." Id. at 639.
themselves will significantly contribute to increased disputes in the context of disclosure.

Similarly, the use of the phrase "with particularity" is not novel in the Civil Rules. An exception to the notice pleading system of the federal rules is that "all averments of fraud or mistake . . . shall be stated with particularity." The concept of "particularity" also occurs in Rule 34(b), which states that a request to produce must describe items to be produced, either by category or individual item, with "reasonable particularity." Like the terms "relevant" and "discoverable," the concept of "particularity" is abstract and depends on the context of the specific case and case law interpretations to provide guidance. Unlike the case law on the other terms, however, the case law that provides general guidance as to "particularity" under Rule 9(b) and Rule 34 may not be very helpful in the context of disclosure. The particularity requirement of pleading in Rule 9(b) is intended to serve different purposes than those served by Rule 26(a)(1) disclosure. Factual particularity for claims of fraud and mistake reflects an exception to general notice pleading based on a policy disfavoring those claims and on a need to provide better notice for defendants to defend adequately against fraud claims and protect themselves from claims suggesting moral turpitude that are easily alleged. In that context courts have generally held that detailed evidentiary pleading is neither required nor appropriate. Instead, the threshold standard of sufficiency is assumed to be that satisfied by Form 13 of the Federal Rules—enough detail to give the adverse party fair notice of the nature of the claim and to enable that party to prepare a response. If the particularity of the pleading is insufficient under Rule 9(b), greater particularity may be sought by an opponent under Federal Rule of Civil Procedure 12(e), resulting in an amendment to the

210. FED. R. CIV. P. 9(b) (emphasis added).
211. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296 (1990 & 1994 Supp.); see, e.g., Ross v. A.H. Robins Co., 607 F.2d 545, 557 (2d Cir. 1979), cert. denied, 446 U.S. 946 (1980) (holding that particularity of fraud in pleadings intended to provide fair notice, protection of reputation or goodwill of defendants, and discouragement of frivolous litigation for its in terrorem effect).
212. See Ross, 607 F.2d at 557 n.20 (quoting 2A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 9.03); 5 WRIGHT & MILLER, supra note 211, § 1298, at 648. Form 13, which addresses pleading fraud under Rule 9(b), is expressly made sufficient under Federal Rule of Civil Procedure 84. The model allegation of fraud given in a suit to recover on a promissory note is as follows: "Defendant . . . on or about ____ conveyed all his property, real and personal [or specify and describe] to [another] defendant . . . for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness [to plaintiff] . . . ." FED. R. CIV. P. form 13.
pleading under Federal Rule 15, or insufficient particularity may result in a motion to strike or dismiss the pleading, potentially resulting in dismissal of the count.\textsuperscript{213}

Rather than gauging the sufficiency of pleadings, "particularity" in the context of Rule 26(a)(1) disclosure is both a limiting and expanding concept with a variable standard that creates a potential continuum of disclosure obligations. By tying the disclosure obligation to the level of factual specificity in the pleadings, the particularity term protects a party from overly burdensome and difficult disclosure decisions in cases in which the pleadings contain little in the way of specific information about the nature of the claims. At the same time, when a party pleads facts with greater detail, the rule enables that party to obtain more information through disclosure without the necessity of a discovery request.\textsuperscript{214} The extent to which something is pleaded with sufficient clarity to trigger a disclosure obligation and the extent of the disclosure obligation is governed by common sense applied to a specific case, rather than by technical rules or a fixed standard.\textsuperscript{215} The kind of judgment called for is precisely that which is expected of legal practitioners.\textsuperscript{216}

Some critics of disclosure have asserted that Rule 26(a) creates a standard that is even more restrictive than Rule 9(b) because it expressly calls for "fact" pleading rather than pleading the "circumstances" with particularity as in Rule 9(b). These critics apparently interpret the rule as creating a high fixed threshold of detail that must be pleaded before any disclosure is triggered. Therefore, they argue, the rule will not result in disclosures in most cases because parties in the majority of cases will still follow notice pleading under Federal Rule 8 and never reach the level of factual detail that would trigger

\textsuperscript{213} WRIGHT \& MILLER, supra note 211, § 1300.

\textsuperscript{214} See FED. R. CIV. P. 26(a) advisory committee's note, reprinted in 146 F.R.D. 627, 631 (1993). "The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence." Id.

\textsuperscript{215} Id. Delineation and clarification of factual disputes calling for disclosure were also expected to be facilitated through party discussions at the Rule 26(f) discovery meeting. See FED. R. CIV. P. 26 advisory committee's note, reprinted in 146 F.R.D. at 641-44; infra text accompanying notes 241-263.

\textsuperscript{216} See Simon, Ethical Discretion, supra note 196, at 1122 (thinking required of practitioners is "complex, informal judgment," not "mechanical rule-following"; "essence of the professional judgment of the lawyer is [the] educated ability to relate the general body and philosophy of law to a specific legal problem") (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1980)).
This argument ignores the substantial incentive of parties to plead detail to the maximum extent they can to obtain information quickly and cheaply. Moreover, it is directly contrary to the Advisory Committee's directive that the particularity standard must be seen as a variable standard that can create some disclosure obligation even in cases with little factual detail and greater disclosure with more pleading detail.

Similarly, the Rule 34 "reasonable particularity" requirement, used to limit the party's burden in having to search for documents, is not especially helpful when applied to Rule 26(a). The nature of the description involved and the duty of the party responding to a Rule 34 request are quite different from those present in disclosure, and the case law interpreting Rule 34 is of little use in interpreting the disclosure rule. In fact, Rule 34 has been construed by some courts to preclude requests that call for the kind of broad, subjective judgment about relevance that the disclosure rule expressly contemplates.

Rather than a delineation of facts from which a party and lawyer are to identify and list relevant documents, Rule 34 contemplates a description by the requester of a document or thing that is sufficient for an ordinary party to understand what is being requested.

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217. See Macdonald, supra note 203, at 836-38 & n. 95. Rule 8(a)(2) requires only a "short plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

218. See supra note 214. The Committee noted that "[b]road, vague, and conclusory allegations sometimes tolerated in notice pleading—for example, the assertion that a product with many component parts is defective in some unspecified manner—should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product." Fed. R. Civ. P. 26(a) advisory committee's note, reprinted in 146 F.R.D. at 631. On the other hand, Judge Ralph Winter, a former member of the Civil Rules Advisory Committee, has noted that the level of detail required to trigger disclosure is not that great. For example, if a plaintiff pleads only that he was injured by a defective train wheel, there would be no disclosure obligation created with regard to defective train wheels, but if a plaintiff pleads injury by defective wheel on Amtrak train 77, the defendant would have to disclose information relating to defective wheels on train 77. Jaret Seiberg, All or Nothing, CON. L. Tnm., May 2, 1994, at 12 (quoting former Advisory Committee member and Second Circuit Judge Ralph Winter); see Winter, supra note 18, at 269.


220. See Roger S. Haydock & David F. Herr, Discovery: Theory, Practice, and Problems § 4.8 (1983); 8A Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure § 2211 (1994). Under traditional discovery methods, one can get a party to undertake an analysis of the relevance of documents to specific facts similar to that required under Rule 26(a) by posing an interrogatory that requests a party to list documents relating to certain facts. Haydock & Herr, supra,
Because the particularity requirement may increase the amount of evidence or facts pleaded, some critics have argued that disclosure is a return to "fact" pleading or that it is inconsistent with notice pleading. While it is true that the effect of Rule 26(a) may be to increase the evidentiary detail contained in initial pleadings, it is by no means clear that encouraging increased evidentiary pleading is necessarily a bad thing. Moreover, it is not accurate to state that this is a regression from "notice" to pre-federal rule "fact" pleading. As one of the Advisory Committee members has commented, the "Committee had no desire to abandon notice pleading, but given that pleadings often do allege facts, it undertook to draft a proposal limiting automatic disclosure to facts that are actually pled." The purpose of the particularity term in the disclosure rule is facilitation of the exchange of basic information early in the case, not the elimination of insufficient claims through hypertechnical pleading requirements and issue definition that characterized common law and code forms of fact pleading and that were downplayed as pleading functions in the Federal Rule's pleading scheme under Rule 8. The consequence of failing to plead facts with particularity under Rule 26(a) disclosure is not a loss of a claim or defense, or a requirement to replead, as would be the case under the problematic fact pleading systems. Instead, it is simply an alteration of obligations and opportunities to obtain information through the disclosure mechanism that is intended to accelerate progress toward resolution on the merits.

While some of the general discovery concepts, such as relevance and discoverable information, along with court interpretations of

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§ 4.8, at 239. The Advisory Committee indicated that the disclosure obligation to provide a description of the documents in the party's possession was to serve this same preliminary purpose. See Fed. R. Civ. P. 6(a)(1)(B) advisory committee's note, reprinted in 146 F.R.D. at 630 (disclosure of description of documents will assist in framing document requests in a manner likely to avoid squabbles).

221. See, e.g., MacDonald, supra note 203, at 836-38 & n.95; Mayer, supra note 22, at 114.

222. Winter, supra note 18, at 268.


224. See Seiberg, supra note 218, at 12 (citing Advisory Committee Member and Federal Judge Ralph Winter). Professor Marcus has observed that "pleading practice is little better than an expensive waste of time" unless it facilitates a decision on the merits. Marcus, Revival, supra note 223, at 492-93. While the particularity requirement in Rule 26(a) is ultimately geared toward that objective, a collateral consequence may be increased disputes over pleading especially in the context of motions to impose sanctions for noncompliance.
those concepts, may be transferable to disclosure, the flexible concept of pleading facts with particularity as the operative standard of disclosure is somewhat novel. These concepts can be expected to generate significant uncertainties as litigants grapple with the rule's meaning initially. However, any ambiguity that exists is not substantially different from the ambiguity that accompanies any rule with a flexible standard. Just as the courts have developed guidance in other contexts as to the meaning of particularity, relevance, and discoverability, courts will soon articulate threshold disclosure standards for Rule 26(a). However, the likelihood that the initial uncertainties will result in widespread litigation disputes requiring expenditures of significant party and court resources is far from clear and much of the outcry in this regard must be viewed as highly speculative "premature alarmism."

Developing a better sense of how likely or extensive disputes over disclosure obligation might be and the extent of the additional burden on the courts and parties that is likely to arise requires closer examination of several factors: (1) the types of cases to which disclosure most likely would be applied under Rule 26(a)(1) and the extent of disclosure obligations; (2) the extent to which disclosure procedures in Rule 26 will ameliorate disputes; and (3) the incentive structure under the disclosure rule.

(2) Likely Use of Disclosure and Extent of Obligations

Critics of Rule 26(a) disclosure have consistently made their arguments about the likely inundation of the courts with disclosure disputes and motions in the context of complex cases involving numerous issues and tons of documents. Disclosure supporters first point out

225. See Winter, supra note 18, at 267-71.

226. Mullenix, Hope over Experience, supra note 18, at 827. Professor Mullenix notes that it is difficult to conceive of a dispute arising from the disclosure rule that could not be handled by a judge or magistrate judge during pretrial proceedings.

227. See Schwarzer, In Defense, supra note 166, at 656-57; Winter, supra note 18, at 275-76 ("[L]itigators who attacked . . . disclosure were largely products-liability-defense attorneys; they gave examples that were almost universally of complex litigation in which the plaintiffs' allegations were largely conclusory and potentially involved thousands of documents at various places on the planet."). See, e.g., Bell et al., supra note 19, at 1, 39, 48-49 (focusing on product liability, toxic torts, patents, and securities cases in article supported by the Product Liability Advisory Council Foundation). These authors magnify the ambiguity and resultant necessity for motions to resolve disputes by using as an example a case in which the pleadings only state that plaintiff was injured by a vehicle defectively manufactured by defendant. Id. at 42. Obviously, such a pleading would create virtually no disclosure obligation under any reasonable interpretation of the rule. See supra notes 214-218 and accompanying text.
that "complex" cases constitute a relatively small portion of the cases in the federal courts. However, the rule is intended to operate primarily in the context of typical cases and whether disclosure is appropriate is to be determined flexibly based on the lawyer's experience and knowledge of the circumstances of a particular case. This is reflected in the fact that Rule 26(a) allows exclusion of entire categories of cases or individual cases by agreement of the parties, by local rule, or by order of the court. Indeed, the Advisory Committee Note accompanying the disclosure rule specifically states: "The disclosure obligations . . . will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant."

Moreover, the rule on its face contains a number of limitations that clearly indicate neither an intent for the disclosure rule to supply all information needed at trial nor that the rule is to be blindly applied to all cases. Thus, the rule's limits required disclosure to the names of individuals "likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings" and the subject of that information, but does not require disclosure of the information itself. Similarly, the rule requires "a description [of documents] . . . in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings," but not disclosure of the actual documents or contents of those documents. Furthermore, the initial disclosures need only be based upon "the in-

228. See Schwarzer, In Defense, supra note 166, at 657 & n.7 (finding that products liability cases constituted only 5% of all civil filings in statistical year ending Sept. 30, 1992); Winter, supra note 18, at 275-76 (arguing that critics focused on small number of cases with complex issues, such as products liability).

229. FED. R. CIV. P. 26(a)(1); Alexander, supra note 186, at 657 (ability of parties under Federal Rule of Civil Procedure 29 to stipulate out of discovery procedures, and fact that court can exempt cases from disclosure by class or individual case will reduce inappropriate application of disclosure); Schwarzer, In Defense, supra note 166, at 656-57 (disclosure intended to "have principal effect in routine cases"); Winter, supra note 18, at 275-76 (same).


231. FED. R. CIV. P. 26(a)(1)(A)-(B). The Advisory Committee Note accompanying the disclosure rule makes clear that disclosures are primarily for purposes of obtaining basic information needed in most cases to "help focus the discovery that is needed, and facilitate preparation for trial or settlement." FED. R. CIV. P. 26(a)(1) advisory committee's note, reprinted in 146 F.R.D. at 629-30 (emphasis added). They also indicate that the rule contemplates only a brief general description of the subject of an individual's knowledge and a general categorization and description of the nature of documents so as to provide the other side with a basis to decide what depositions may be needed and what documents may need to be examined and to provide information "to frame their document
formation then reasonably available to” a party. These limitations on disclosure obligations are significant because it can be assumed that, in deciding whether to engage in a dispute over disclosure or file a disclosure-related motion, litigants and their lawyers will weigh the extent of the burden created by the disclosure obligation against the costs of litigating disputes and their consequences. The more burdensome the disclosure duty, the more likely a party will seek protection from disclosure or be inclined to construe the “particularity” standard narrowly so as to reduce the burden of disclosure.

Nevertheless, when a party believes that it would be clearly problematic to apply the rule broadly, agreement can be sought from the opponent for an alternative disclosure plan or for no disclosure at all. That failing, a party can seek relief from the court in a case not already exempted from disclosure categorically. As discussed in the next subpart, the issue is whether recourse to these alternatives to Rule 26(a) disclosure will be effective or will entail significant costs and burdens beyond those that would be incurred under traditional discovery.

Disclosure opponents have also claimed that the disclosure obligation and potential burden have been significantly increased by the provision that requires supplementation of initial disclosures with in-

requests in a manner likely to avoid squabbles . . . .” Id. at 630. Ultimately, the rules are to be applied “with common sense in light of the principles of Rule 1 . . . .” Id. at 631.

232. Fed. R. Civ. P. 26(a)(1). The Advisory Committee Notes explain that the rule calls for only a “reasonable inquiry into the facts of the case” under the circumstances, but does not “demand an exhaustive investigation at this stage of the case.” Fed. R. Civ. P. 26(a)(1) advisory committee’s note, reprinted in 146 F.R.D. at 632-33. The reasonableness of the investigation is to be determined considering factors such as “the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation . . . .” Id.

233. See generally infra notes 275-282, 279, 402-404 and accompanying text (discussing cost-benefit analysis).

234. In light of the limitations on the disclosure obligations, it is also probably a mistake to accept at face value the claims of critics that the rule cannot be applied to complex cases. Even in these cases, there must be a core of readily identifiable persons with relevant knowledge and information on the general categories and locations of documents that can be disclosed without unreasonable burden. The rule, after all, does not contemplate exhaustive disclosure of all information initially. It requires only disclosure of information within the party’s knowledge after a reasonable inquiry, followed by discovery and by supplemental disclosure of new information when it comes to light. See Fed. R. Civ. P. 26(a)(1) (disclosures shall be based on information “then reasonably available to [a party]” regardless of whether a party has completed the investigation); Fed. R. Civ. P. 26(e) (duty to supplement initial disclosure at “appropriate intervals” if information disclosed is materially incomplete or incorrect); Underwood, supra note 189, at 286-87.
formation acquired after the initial response. Rule 26(e) requires supplemental disclosures if "the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Critics assert that parties will now continuously have to monitor new information and review prior disclosures for correctness and disclose additional information even when the opponent has not expressly sought information in discovery. While this new duty to supplement significantly increases a litigant's and lawyer's disclosure duties, it is not as broad or as troublesome as critics suggest. First, the reference point for the duty of supplementation is still the original disclosure standard of 26(a)(1)—"disputed facts alleged with particularity in the pleadings," not some general standard of relevance to the subject matter of the suit. Only information (e.g., names of witnesses, descriptions of documents) about which other parties have not been made aware in writing or during discovery need be supplemented, and supplementation need not occur continuously but only at "appropriate intervals." Finally, the supplementation requirement creates a duty to disclose information, but should not create any new duty of inquiry or investigation that would not already be demanded by ethical obligations to the client, other Civil Rules, or malpractice avoidance.

235. FED. R. CIV. P. 26(e)(1).

236. See Mayer, supra note 22, at 120; Underwood, supra note 189, at 286-87. One commentator suggests that this supplementation duty will require the party to "consider theories of relevancy rejected or overlooked by his opponent." Mayer, supra note 22, at 120. As discussed in the text, this construction is simply not supported by the face of the rule or the Committee Notes.

237. The duty to supplement, which is imposed on a party, applies both to information acquired by the party and that party's counsel. FED. R. CIV. P. 26(e) advisory committee's note, reprinted in 146 F.R.D. 627, 641 (1993).

238. Id. The duty to supplement is not unique to disclosure, but applies to discovery responses to interrogatories, requests for production, and requests for admissions. Id.

239. Id.

240. See Alexander, supra note 186, at 659 (no added costs from finding information because a lawyer would do so anyway in preparation of her own case and failure to do so would "probably constitute malpractice"); Wolfson, supra note 32, at 60, 62 ("ethical requirement of thorough and appropriate case preparation, backed up by fear of malpractice suit" promotes pretrial preparation and Rule 26(g) requires reasonable inquiry in responding to discovery). See also FED R. CIV. P. 11 (reasonable inquiry as to factual and legal support for positions taken in court); FED. R. CIV. P. 26(g) (same as to discovery requests and responses); infra notes 340-348 and accompanying text.
(3) Procedural Devices to Facilitate Disclosure

Recognizing the novelty of disclosure and the potential ambiguity of the "particularity" standard, the Advisory Committee provided lawyers not only with the explanatory guidance in the Committee Notes discussed above, but also with procedural mechanisms for working out the details of disclosure and for reducing the likelihood of disputes arising in the process. Unless the parties agree otherwise or unless the court by local rule or order authorizes, discovery cannot be undertaken through traditional methods until after the parties have met and conferred as required by Rule 26(f).241 Rule 26(f) requires that the lawyers for parties meet early in the litigation242 "to discuss the nature and basis of their claims" and the possibilities for "settlement or resolution . . . , to make or arrange for the disclosures . . . , and to develop a proposed discovery plan" including parties' views on specifically enumerated topics.243 Within ten days after the Rule 26(f) meeting, the parties must make their initial disclosures unless they have reached an agreement with their opponents for different disclosure requirements or have been relieved of that obligation by a court order or local rule.244 The Advisory Committee Notes and disclosure advocates emphasize that one of the primary purposes of this Rule 26(f) meeting is to discuss and clarify claims, defenses, and dis-


242. Rule 26(f) provides that the meeting should occur "as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)." Fed. R. Civ. P. 26(f). Some mathematics are involved to determine the last possible point at which the Rule 26(f) conference may be held since the Rule 16(b) conference order is due after the court receives the Rule 26(f) meeting report and "within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant." Fed. R. Civ. P. 16(b)(f). Some commentators have cited the timing requirement as a possible source of confusion and ineffectiveness of the disclosure rule. See, e.g., Bell et al., supra note 19, at 43 n.163; Underwood, supra note 189, at 283-84. Nevertheless, the principal point is that the timing rule is quite practical and flexible: the meeting should be as early in the case as possible and certainly before the trial court is required to become involved and issue a scheduling order addressing potential discovery problems and other case management issues. See Fed. R. Civ. P. 26(f) advisory committee's note, reprinted in 146 F.R.D. at 642.

243. Fed. R. Civ. P. 26(f). Among the topics for consideration in the plan are changes in Rule 26(a) disclosure requirements; discovery subjects, timing, and limitations; and any other pretrial management orders that may be appropriate. Id.

closures prior to the time disclosures are due.\textsuperscript{245} The rule expressly assigns the parties primary responsibility for working out issues and making a good faith effort to resolve issues before seeking judicial intervention. Before seeking court-ordered relief from some aspect of disclosure, a party must have "in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."\textsuperscript{246} Similarly, before seeking a court order compelling disclosure or imposing sanctions against the other side for failing to meet disclosure obligations, a party must certify that good faith efforts to resolve the disclosure dispute have been made.\textsuperscript{247}

The overall thrust of these provisions is essentially to say to lawyers: "There are several types of information that invariably must be exchanged in any civil action and that should not be the subject of wasteful squabbling. The rules will allow you, as competent professionals, to work out the exact details of how and when that information will be exchanged but will preclude you from engaging in traditional discovery or discovery motions until you have at least met to discuss the details of the case, settlement, disclosure of information, and a proposed plan for discovery that is tailored to the needs of the case." Perhaps what is so daunting to some lawyers is the extent to which the new rules place responsibility on lawyers to take charge of their cases and to behave reasonably in resolving matters with the other side. Given the fact that lawyers often see discovery abuse as what their opponents do and the fact that lawyers have consistently sought court intervention to save them from themselves in the context of discovery disputes\textsuperscript{248} resistance to the responsibilities created by the disclosure rules is perhaps understandable, but certainly not laudable.

In light of the focus of the amendments on lawyer good faith, reasonableness, and communication, it is not surprising that opponents of disclosure have directed little of their attack toward the Rule 26(f) meeting requirement and have instead directed their criticism toward the standard for disclosure in the abstract. By doing so, they have avoided acknowledging their responsibility to discuss and clarify disclosure obligations with the opposing parties and counsel. Indeed, some of the most ardent opponents of disclosure have suggested that

\textsuperscript{245} See FED. R. CIV. P. 26(a)(1), (f) advisory committee's note, reprinted in 146 F.R.D. at 631, 643; Schwarzer, \textit{In Defense, supra} note 166, at 661-62.
\textsuperscript{246} FED. R. CIV. P. 26(c).
\textsuperscript{247} FED. R. CIV. P. 37(a)(2)(A).
\textsuperscript{248} See \textit{supra} notes 113-117 and accompanying text.
the concept of a mandatory discovery meeting itself is a good idea, as long as it does not involve mandatory disclosure.249 One of the most common criticisms of the Rule 26(f) meeting procedures seems to be a reiteration of the "other side won't play by the rules" claim frequently heard in the context of discovery abuse.250 As discussed previously, the argument that a small number of lawyers will not follow the rules is not an acceptable reason to decline to adopt rules aimed at reducing costs and improving justice unless there is reason to expect that the rule will actually exacerbate problems.251 Here disclosure opponents have failed to make a case that the Rule 26(f) conference requirement will not be helpful in clarifying obligations and reducing disputes, much less that the meeting itself will make things worse overall.

Some critics also attack the disclosure meeting procedure on the ground that the prior version of the discovery conference, added to the rules in 1980 to encourage cooperation among lawyers, failed to reduce discovery abuse.252 However, the earlier version of the conference was quite unlike that envisioned under amended Rule 26(f). First, the prior Rule 26(f) discovery conference was not mandatory. A court could order a conference, or a conference could be sought by a

249. See, e.g., Bell et al., supra note 19, at 49-50. Other disclosure critics who have focused heavily on the purported vagueness of the disclosure standard as one of the fundamental defects of the disclosure rule do not even address the effect of Rule 26(f). See, e.g., Mayer, supra note 22, at 113-22; Underwood, supra note 189, at 279-81; see also Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 507, 511 (1993) (Scalia, J., dissenting) (discussing the imprudence of adopting a mandatory disclosure rule).

250. See, e.g., Bell et al., supra note 19, at 49, 52; Mayer, supra note 22, at 116-17. The former authors state: "Although the Advisory Committee assumed that litigants would work cooperatively to define the boundaries of disclosure, eliminating much of the wasted time and cost of the current discovery process, a more reasonable assumption is that zealous advocates will inevitably seek to use the inherent ambiguity of the automatic disclosure standard to advance their clients' interests." Bell et al., supra note 19, at 49. See also Hank Grezlak, Concerns Over Discovery: Federal Rule Amendments Bring Mixed Reactions, LEGAL INTELLIGENCER, July 19, 1993, at 1, 6 (Philadelphia Bar Association opposition to Rule 26(a) based on argument that agreements under the rule will not be reached easily "because of the nastiness or zealousness of some attorneys" and fact that "opposite sides in cases have different motives and agendas"). Although obstructionist tactics are often equated with zealous advocacy, it is not clear that the client's best interests ultimately would be served by the actions suggested by these authors. It is equally as arguable that the client's interests would be served better by counsel cooperatively attempting to agree on the scope and timing of the disclosure requirement, as well as other aspects of the discovery process, so that client litigation costs would be minimized. See generally infra notes 403-404 and accompanying text.

251. See supra notes 192-195 and accompanying text.

252. Mayer, supra note 22, at 95. As noted previously, because the discovery conference had been viewed as ineffective and seldom used, the Advisory Committee originally proposed the repeal of Rule 26(f) in its original form. See Proposed Amendments to the Federal Rules of Civil Procedure Advisory Committee's Note, 137 F.R.D. 99, 105 (1991).
party who had prepared a discovery plan and had sought unsuccessfully the good faith cooperation of the opposing party in framing that plan or resolving disputes as to the contents of the plan. Not surprisingly, without being mandatory and without a specified outcome for the meeting, "[l]awyers did not choose to utilize the conference in the cooperative manner envisioned by reformers."\(^{253}\) In contrast, the amended Rule 26(f) conference is mandatory, regardless of whether the parties decide to stipulate out of disclosure. Moreover, because disclosure of information based on disputed facts in prior pleadings is mandatory, unless parties reach a contrary agreement, and because a mandatory discovery report must be submitted to the court after the meeting,\(^{254}\) substantial incentives are provided for the parties to attempt to reach agreement on the scope of disclosure through the conference.

A more troubling concern about discovery reform generally raised in the context of disclosure procedures by some critics is that, for ethical and strategic reasons, lawyers are really incapable of communicating with each other with clarity.\(^{255}\) According to this perspective, much of the problem with discovery arises from the fact that the language of many discovery requests is inherently indeterminative, inevitably creating communication and interpretation difficulties. "A lawyer engaged in discovery practice will have a difficult time objectively reading discovery requests while promoting his client's interests."\(^{256}\) In construing a written discovery request, the reader is not committed to an objective understanding of the writer's intent, but may actually be committed to construing the request in a manner that does the least damage to the client, either as a matter of zealous representation or client pressure.\(^{257}\) The "relevant to facts alleged with particularity" standard in disclosure is seen as exacerbating the indeterminacy and the communication problems lawyers face, because it is even broader than specific discovery requests.\(^{258}\)

This communicative incapacity argument, arising out of the context of written discovery requests and the broadly written discovery

\(^{253}\) Mayer, supra note 22, at 95.

\(^{254}\) The Advisory Committee contemplated that the "report will assist the court in seeing that the timing and scope of disclosures . . . and the limitations on the extent of discovery . . . are tailored to the circumstances of the particular case." Fed. R. Civ. P. 26(f) advisory committee's note, reprinted in 146 F.R.D. 627, 642 (1993).

\(^{255}\) See Mayer, supra note 22, at 95-116.

\(^{256}\) Id. at 96.

\(^{257}\) See id. at 97-98, 103.

\(^{258}\) Id. at 113-15.
rule language, is not persuasive in the context of disclosure because parties are required to meet early in the litigation and confer on the disclosures to be made under the “particularity” standard. Both inadvertent and intentional lack of interpretive objectivity in the discovery context are possible, in part, because discovery operates through a lengthy formalized exchange of paper communications that facilitates stalling and less than full disclosure. For example, parties must wait thirty days for the written responses to their interrogatories, which may include broad objections and vague responses, or may involve a motion seeking a protective order from the court. At that point the original requesting party must evaluate the written response and determine whether it is adequate or whether a motion to compel, requiring intervention of the court, is required. More delay occurs before any discovery motion will be heard by the court. During this process, parties frequently may not be aware of an opposing party’s narrow interpretation of an interrogatory and that it has resulted in some relevant information not being provided. It is not until a dispute actually erupts and percolates into court that the parties may have to directly communicate with each other and explain more completely the precise information they are seeking and have withheld. At that point their nonobjective positions are often severely tested by direct confrontation with the other side and possible inquiry from the court.

On the other hand, because the disclosure process requires the parties to meet to discuss the specifics of disclosure, including the nature and basis of the factual claims or defenses being made in the pleadings, this direct confrontation or dialogue must occur earlier in the case than would occur under traditional discovery. Arguably, during this interchange the lawyers cannot avoid obtaining a more objective understanding of the information that is required to be disclosed than would occur based only on written discovery exchanges. This is especially true if counsel competently serve their clients’ interests by

259. See Fed. R. Civ. P. 33(b), 26(c).
260. This is similar to the “silent” assertion of privilege that the amendment to Rule 26(b)(5) was intended to address. See Fed. R. Civ. P. 26(b)(5) & advisory committee’s note, reprinted in 146 F.R.D. 627, 639-40 (1993).
attempting to clarify disputed facts at issue and thus ensure an appropriate breadth of the required disclosures. In light of the discussions at the Rule 26(f) meeting, lawyers may also not be in a position to justify nondisclosure as easily by asserting that they did not understand what was intended by a factual allegation in a complaint. It is only if all parties to a case made a strategic decision to opt out of disclosure that indeterminacy would seem to be as problematic as that which has been attributed to traditional discovery, and one is hard pressed to conceive of a motive for all sides in a case to make this strategic choice except in the most complex cases. Thus, the potential for reducing the level of indeterminacy of traditional discovery is at least one factor that may refute the claims by some commentators that "existing discovery procedures are at least as efficient as disclosure." 

(4) Incentives for Compliance with Disclosure

Accompanying the disclosure requirements are additions to Rules 26(g) and 37 intended to induce compliance with the new disclosure obligation. Rule 26(g)(1) adds a requirement that attorneys certify "to the best of [their] knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made," and Rule 26(g)(3) directs the court to impose an appropriate sanction, including attorneys' fees and expenses, upon the attorney or the party or both for a violation that is not substantially justified. Rule 37(a) now authorizes a motion to

262. Cf. Wolfson, supra note 32, at 57 ("By participating in the definitional process, the parties have an opportunity to explore the needs of their particular case, raise arguments about the categories themselves and the information to be included therein, [and] understand the meaning, scope and intent of each category . . . "). See also Schwarzer, In Defense, supra note 166, at 661-62 (concluding Rule 26(f) conference and discovery plan for mandated Rule 16 conference will result in more clarity and fewer motions since court and lawyers will have more information about their own and their opponent's case to plan rationally). In this regard, the Rule 26(f) conference may have much in common with the deposition discovery device that is quite useful for exploring facts within a deponent's knowledge because of the ability to probe deeply and to expand appropriately the areas of inquiry in response to the content of the deponent's testimony. See generally Haydock & Herr, supra note 220, § 2.1.1 (discussing advantages of depositions).

263. But see Mayer, supra note 22, at 117 ("It would be a poor lawyer indeed who could not provide a good faith reason for underdisclosure or explain why a subsequently corrected underdisclosure was harmless."). In making this comment, Mayer does not account for the effect of the Rule 26(f) conference as a possible limiting factor on the ability of lawyers to justify underdisclosure.


compel disclosure for a failure to disclose as required by Rule 26(a) and authorizes appropriate sanctions if the movant has first in "good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." Rule 37(c) is revised to add self-executing sanctions considered particularly appropriate for failures to disclose, false disclosures, and misleading disclosures. If a party fails to disclose information required by Rule 26(a) (initial disclosure) and 26(e) (supplemental disclosure), the party shall not "be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed" unless the nondisclosure is substantially justified and harmless. Instead of, or in addition to, this sanction, the court can impose other appropriate sanctions after giving the party an opportunity to be heard. These sanctions may include reasonable expenses and attorneys' fees caused by the failure to disclose, sanctions authorized under Rule 37(b)(2)(A); (B), and (C), and "informing the jury of the failure to make disclosure." Rule 37(g) also now authorizes the imposition of costs and attorneys' fees against a party or lawyer who fails to cooperate in good faith in the "development and submission of a proposed discovery plan."

Opponents of disclosure have attacked the sanctions provisions from seemingly opposite directions. Some assert that the availability of severe sanctions will cause a proliferation of motions practice and increase the costs of litigation. They argue that parties will attempt to use the sanctions provisions, not only to recover costs and attorneys' fees in obtaining compliance with disclosure obligations, but also to obtain the more strategic sanctions such as barring the use of evidence at trial or obtaining an instruction to the jury about the failure to disclose specific evidence. The motivation identified for such a proliferation of sanctions litigation is apparently "the increasingly ad-

266. FED. R. CIV. P. 37(a)(2)(A).
268. FED. R. CIV. P. 37(c). The other sanctions referred to in section 37(b)(2) include taking certain facts as being established, refusing to allow a party to introduce evidence on a matter, striking pleadings, dismissal, or default judgment. FED. R. CIV. P. 37(b)(2)(A), (B), (C).
269. FED. R. CIV. P. 37(g).
270. See, e.g., Bell et al., supra note 19, at 42-43, 45. In particular, concern has been expressed that sanctions would be sought when documents surfaced during discovery that a party believed should have been disclosed by an opponent initially during disclosure. Id. at 43.
versarial and uncivil nature of modern litigation." Other critics with a very different perspective claim that the sanctions provisions are inadequate to ensure compliance with disclosure obligations because they are not designed to be enforced strictly in the typical case. In particular, sanctions are not available when nondisclosure was “substantially justified,” and the more severe forms of preclusionary sanctions are not available when the nondisclosure was “harmless.” Because of the seemingly ready availability of excuses for nondisclosure, lawyers will conclude that the risk of incurring more serious sanctions is not sufficiently great to warrant disclosing damaging information.

It is likely that neither of these arguments accurately depicts the overall dynamics of sanctions practice under the disclosure rule. Neither argument convincingly demonstrates that disclosure would result in sanctions-related litigation beyond that encountered in traditional discovery, except perhaps for the initial increase in litigation that can be expected as the courts flesh out the meaning of “substantial justification” and “harmless” failure to disclose in Rules 26(g) and 37(c). Indeed, to some extent the disclosure opponents’ arguments work against each other. For example, the first argument predicting burgeoning litigation over sanctions seems to be premised only on a notion of blind adversariness and ignores the possibility recognized in the second argument that in many instances the standards of Rules 26(g) and 37(c) make it unlikely that sanctions motions or arguments will be successful. An unstated but logical extension of the second argument regarding laxity of the sanctions standards is that if one assumes lawyers consciously make a cost-benefit analysis regarding the extent of disclosure they will make, one would also assume lawyers would make a similar analysis with regard to the cost and likely chances of success in seeking sanctions from opponents for their purported failure to comply with disclosure obligations. In other words, accepting the argument that sanctions are unlikely, one would also assume that sanctions motions would not be likely except when litigants have ascertained they will likely succeed.

271. Id. at 43, 44-45.
272. FED. R. CIV. P. 26(g)(3).
273. FED. R. CIV. P. 37(c); see Mayer, supra note 22, at 117 (“It would be a poor lawyer indeed who could not provide a good faith reason for underdisclosure or explain why a subsequently corrected underdisclosure was harmless.”).
274. Mayer, supra note 22, at 118-19; see also Frankel, Cure for Discovery Ills, supra note 124, at 266-67 (arguing that shift favoring disclosure over discovery not likely to be successful because incentives underlying overzealous behavior remain unaltered and favor
On the other hand, the second argument probably overstates the laxity of sanction standards and perhaps understates the likelihood of court enforcement of sanctions for abuse in the disclosure process. It is also based on the assumption that the majority of litigants obey rules only because of the risk of sanctions. With regard to the likelihood of sanctions, the recent trend has been toward a greater willingness by courts to impose at least monetary sanctions (e.g., costs and attorneys’ fees) under Rule 37 for discovery abuse, but courts have shown continued reluctance to impose more serious sanctions under Rule 37(b) such as striking pleadings, entry of default, or dismissals except in the most egregious cases. While the imposition of sanctions and the amount of sanctions litigation under disclosure generally can be expected to change little from that under traditional discovery, there are aspects of modified Rule 37 that may more effectively provide an incentive to comply with disclosure as to the most centrally relevant information. Unlike Rule 37(b) sanctions for failure to comply with discovery requirements, which are generally within the court’s discretion, amended Rule 37(c) creates a presumptive sanction of preclusion of use of nondisclosed evidence that must be applied unless the court finds that the nondisclosure was harmless and substantially justified. Depending on the construction of these terms, the Advisory Committee could reasonably believe that the “automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence . . . .” That the terms “harmless” and “substantial justification” were not intended to have the liberal scope attributed to them by some commentators is demonstrated by the Advisory Committee’s examples of the limited situations in which the “harsh penalties” would not be appropriate: inadvertent omission of the “name of a potential witness known to all

advocacy over professionalism). Among the incentives posited as weighing against compliance with disclosure under the Federal Rule are (1) the most successful firms are the ones that win for clients and they will most likely be the ones that do not adhere scrupulously to disclosure requirements; (2) profit drive, client pressures, and the benefits perceived by lawyers from engaging in “hardball” tactics; and (3) low likelihood that judges will more strictly enforce disclosure requirements than they currently enforce discovery requirements. Id. at 266 & n.78.

276. Fed. R. Civ. P. 37(c)(1) advisory committee’s note, reprinted in 146 F.R.D. 689, 691 (1993). See also Dudley, supra note 13, at 221-22 (touting effectiveness of presumptive application of more severe preclusionary sanctions for failure to obey discovery requirements in complex cases). The incentive would seem particularly strong to disclose what would be viewed from the disclosing party’s perspective as favorable evidence, as opposed to unfavorable evidence, given that one effect of the disclosure may be to influence a favorable settlement outcome.
parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant” about the disclosure requirements unless those requirements had been called to the pro se litigant’s attention by another party or the court.277 The more relevant a particular piece of information is to the facts of the case, the more important it is to the parties and the more difficult it will be for the party to argue successfully that nondisclosure was inadvertent or substantially justified.

The relationship between the importance of the information to the parties, the viability of excuses for nondisclosure, and the apparently narrow construction to be given to “substantial justification” are also important factors in considering the potential sanctions for the failure to disclose information that is potentially harmful to one’s case. The Advisory Committee recognized that presumptive preclusion of evidence not disclosed is ineffective to compel disclosure of unfavorable information, but believed that effective compliance could be achieved through a wide variety of other severe sanctions, including “declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure . . . .”278 Although the imposition of meaningful sanctions for nondisclosure of unfavorable evidence requires a motion by an opposing party and the rule appears to leave the court with substantial discretion, courts can be expected to view claims of inadvertence, harmlessness, or substantial justification skeptically when the undisclosed information is obviously relevant to the facts alleged and clearly unfavorable to a nondisclosing party. In other words, sanctions in addition to costs and fees are most likely to be sought and imposed in cases in which the violations are the most egregious, and conversely, the deterrent effect of the sanctions provision should work best in cases in which the pressure to avoid disclosure is the greatest. At least superficially, the incentives of the sanction provisions seem to work in the right direction and to be minimally adequate, if not ideal, in design.


278. Id. at 691-92. The Committee did not explain the difference in treatment of favorable and unfavorable evidence, but it is probably based on the Committee’s practical concern that only sanctions for failure to disclose favorable evidence can be self-executing. However, given the history of reluctance of the courts to impose severe sanctions for discovery abuse generally, the incentive for disclosure of unfavorable information should have arguably been strengthened by a presumption of sanctions for nondisclosure absent substantial justification. See Dudley, supra note 13, at 221-23.
Moreover, in analyzing the likelihood of compliance with disclosure requirements, one must avoid applying an oversimplified version of cost-benefit analysis to a monolithic and cynical view of lawyers and litigants. In particular, substantial skepticism is based on the assumption that the majority of lawyers would choose to cheat outright rather than to disclose information that will be profoundly damaging to their client's case.\textsuperscript{279} If this were true, one would expect to see far more evidence of blatant discovery evasion than actually appears to exist.\textsuperscript{280} As a general proposition, in complex cases in which the stakes are high for both the client and the lawyers, the pressures to engage in various forms of discovery abuse (and presumably disclosure abuse) may be overwhelming, absent strict enforcement of sanctions that outweigh the benefits of abuse.\textsuperscript{281} However, one must be careful about concluding that this proposition holds true in more typical cases. Not only may the risk of less stringent sanctions on the lawyers or clients be sufficient to guarantee compliance, but other incentives may generally tend to ensure that parties and their lawyers conscientiously attempt to comply with the disclosure rules.

Professionalism is another important incentive, but one that disclosure critics have substantially discounted.\textsuperscript{282} The basic professional assumption is that most lawyers attempt to comply with the rules of procedure and ethical responsibilities as they understand them. Prior to the disclosure amendment lawyers could interpret the rules of discovery in light of longstanding conceptions of the adversarial role and interpretive case law\textsuperscript{283} as allowing adversarial discovery practices or game playing. Discovery practices in which no information is given unless in response to a "proper" request were viewed as allowed and

\textsuperscript{279} See, e.g., Frankel, \textit{Cure for Discovery Ills}, supra note 124, at 273-74 ("It is preposterous to think lawyers on the honor system are going to come forth with the smoking gun . . . .").

\textsuperscript{280} See generally supra notes 82-113 and accompanying text.

\textsuperscript{281} See, e.g., Brazil, \textit{Improving Controls}, supra note 57, at 952; Dudley, \textit{supra} note 13, at 220. For example, in cases in which ultimate liabilities may exceed millions of dollars, monetary sanctions of a few thousand dollars may be simply the "cost of doing business," Dudley, \textit{supra} note 13, at 221. See, e.g., Barbara J. Gorham, Fisons: \textit{Will It Tame the Beast of Discovery Abuse?}, 69 \textit{Wash. L. Rev.} 765, 787 (1994) (arguing that sanctions in high stakes products liability case not high enough to deter type of nondisclosure of "smoking gun"). Indeed, there may be some cases in which even the most severe sanctions, including attorney discipline, will not be viewed as sufficiently weighty to overcome the incentive to engage in abusive litigation tactics.

\textsuperscript{282} See, e.g., Bell et al., \textit{supra} note 19, at 40; Frankel, \textit{Cure for Discovery Ills}, \textit{supra} note 124, at 266.

\textsuperscript{283} Hickman v. Taylor, 329 U.S. 495 (1947); \textit{see supra} note 44-45 and accompanying text.
the guiding principle of discovery was how to interpret a particular discovery request to avoid giving opponents the information that they were after.\textsuperscript{284} The professionalism assumption underlying disclosure is that once it is made manifestly clear that lawyers and parties have an obligation to stop this adversarial game playing and disclose certain basic information, most will comply.\textsuperscript{288} The critics' reply to the professionalism argument is essentially that lawyers indoctrinated for years in adversarial discovery practices geared toward winning any way possible under the law cannot be expected to change overnight in response to a mere rules change, especially when incentives to engage in overzealous advocacy remain largely intact.\textsuperscript{286} While it is too soon to tell which view of the profession will ultimately prove correct, early experience with disclosure suggests that many attorneys in fact do respond as would be expected under the professionalism model.\textsuperscript{287} Moreover, there is reason to believe that if judges openly endorse and reinforce the professionalism message and expectation of disclosure, strictly enforcing the obligations created under the rules, a more significant positive impact can be expected.\textsuperscript{288}

(5) \textit{Bottom Line on Pragmatic Concerns and Costs}

The critics of disclosure have identified the key aspects of Rule 26(a) that are likely to be problematic, but their critique falls short of

\textsuperscript{284} See Edward H. Cooper, supra note 81, at 477-78; Frankel, \textit{Cure for Discovery Ills}, supra note 124, at 266; Schwarzer, \textit{In Defense}, supra note 166, at 659. See also Mayer, supra note 22, at 100-01 (argument that use of discovery for "improper advantage," such as intentionally imposing burdens on an opponent is arguably ethical and normal part of litigation practice). But see infra notes 352-375 and accompanying text.

\textsuperscript{285} See Frankel, \textit{Cure for Discovery Ills}, supra note 124, at 266; Schwarzer, \textit{In Defense}, supra note 166, at 659. This message was made express in the Advisory Committee Notes to Rule 26(a) where it is stated: "The disclosure requirements should . . . be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations." \textsc{Fed. R. Civ. P.} 26(a) advisory committee's note, reprinted in 146 \textsc{F.R.D.} 627, 631 (1993) (emphasis added).

\textsuperscript{286} See, e.g., Frankel, \textit{Cure for Discovery Ills}, supra note 124, at 266-67.

\textsuperscript{287} See supra note 190; Frankel, \textit{Cure for Discovery Ills}, supra note 124, at 276-77 (game playing and satellite litigation may be less of problem under disclosure rules similar to the federal rules than under discovery).

\textsuperscript{288} See \textsc{Connolly et al.}, supra note 40, at 18; Dudley, supra note 13, at 221-22; Frankel, \textit{Cure for Discovery Ills}, supra note 124, at 267, 276-77. A related factor that may influence compliance with the disclosure rule is the "local legal culture," which includes the subtle attitudes and unwritten practices of lawyers and judges in a particular locale. See Dudley, supra note 13, at 211. The greater the extent that the local legal culture rejects lax disclosure practice and gamesmanship, the more likely lawyers may feel compelled to behave consistently with the disclosure rules.
establishing a compelling case that disclosure will actually exacerbate litigation problems and costs to an extent that would justify their vociferous opposition. Indeed, it would seem that Rule 26(a) was designed with sufficient limitations, adaptability, and incentives so that most problems with vagueness, noncompliance, and misuse have been anticipated and can be ameliorated. It is undoubtedly true that there will be initial start-up costs to parties and the courts as lawyers and litigants get used to the disclosure concept and as the uncertainties in the rule are worked out. However, it is far from clear that the costs of disclosure will ultimately be higher than those under the pre-Rule 26(a)(1) discovery practice. On the one hand, disclosure may reduce costs by eliminating the time for preparation of some discovery paper work; increasing the efficiency of subsequent discovery; increasing the likelihood of the resolution of litigation more quickly by narrowing issues, settlement, or dispositive motions earlier; and reducing the opportunities for evasion and manipulation if courts clearly delineate and enforce the standards that control disclosure obligations.

On the other hand, litigation costs may well increase under Rule 26(a) because, first, litigants will test the parameters and meaning of the disclosure rule through motions for protective orders from disclosure, motions to compel disclosure, and motions seeking sanctions for inadequate disclosure and, second, many litigants will continue to use the discovery process to the same extent previously because of distrust of their opponents' compliance with disclosure.

The significance of the practical concerns about any potential increased cost from disclosure is related to the fact that, as proponents and opponents both note, disclosure really is not intended to provide any information that is not already available through existing discovery mechanisms. Instead, it is intended only to reduce modestly the cost of obtaining basic information under current discovery by accelerating the exchange of information and eliminating some of the paper work needed to obtain that information for parties to better assess

289. See Alexander, supra note 186, at 658-59; Frankel, Cure for Discovery Ills, supra note 124, at 274-77.

290. Alexander, supra note 186, at 658; Frankel, Cure for Discovery Ills, supra note 124, at 274-75; Schwarzer, In Defense, supra note 166, at 663-64; Winter, supra note 18, at 271, 276-77.

291. See, e.g., Alexander, supra note 186, at 659; Bell et al., supra note 19, at 44-46; Hughes, supra note 171, at 6-7; MacDonald, supra note 203, at 842; Mayer, supra note 22, at 121; Underwood, supra note 189, at 280-82.

292. See, e.g., Alexander, supra note 186, at 658; Underwood, supra note 189, at 280; Winter, supra note 18, at 271.
the need for further discovery or the advisability of settlement and to prepare for trial. Nevertheless, even assuming that the disclosure rule does result in some increased costs, as the next subpart makes clear, they can be justified if they more effectively serve the values or goals of the civil litigation system. Unfortunately, what also seems clear from the analysis of the pragmatic arguments about the disclosure rule is that there may not be a universal understanding of just what the values or goals of the system are, and this lack of shared understanding may account more for the widespread outcry over disclosure than the rule's purported inadequacies.

C. Consistency of Disclosure with the Adversarial Civil Litigation System

The claim that disclosure is generally inconsistent with the fundamental tenets of our litigation system has been repeated frequently, but seldom with explanatory detail or analysis. Generally, critics have simply stated that the rule is inconsistent with the adversary system, work product doctrine, and ethical obligations to clients. They base this on their view that, in the process of making a determination of what information must be disclosed, a party will have to decide what an opponent needs to make his or her case and will “be required to assist in making [that] case . . . .” Critics have also asserted that disclosure undermines the attorney-client privilege because it requires

293. See generally supra notes 159-168 and accompanying text; Alexander, supra note 186, at 657; Winter, supra note 18, at 271. Increased costs associated with disclosure may also raise questions about the justification for the rule if one considers the empirical evidence suggesting that discovery generally is not as riddled with abuse as popularly perceived. See supra notes 91-92 and accompanying text; see also Samborn, supra note 92, at 3 (finding by National Center for State Courts that “no formal discovery is filed in 42 percent of the . . . cases that it examined . . . strikes at the heart of a judiciary proposal to amend Rule 26 . . . .”).

294. Bell et al., supra note 19, at 46-47. See, e.g., Alexander, supra note 186, at 656 (guessing by lawyer at what should be disclosed breaches ethical obligations to clients); Alfred W. Cortese, Jr., & Kathleen L. Blaner, Civil Justice Reform in America: A Question of Parity with Our International Rivals, 13 U. Pa. J. Int'l Bus. L. 1, 45-46 (1992) (disclosure inconsistent with our "fiercely adversarial" system and forces lawyer to do opponent's work); Hughes, supra note 171, at 6 ("mandatory disclosure is anathema to the adversarial process"). See also Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 507, 511 (1993) (Scalia, J., dissenting) (obligation to disclose damaging information in context requiring application of considerable judgment "would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is 'relevant to disputed facts' plainly requires him to use his professional skills in the service of the adversary."); Richard C. Ferris II, Note, Friend or Foe—The Proposed Amendments to Rule 26 of the Federal Rules of Civil Procedure, 2 Regent U. L. Rev. 39, 58 (1992) (citing comments on proposed Rule 26(a) by the Lawyers for Civil Justice). A further rationale for perceived inconsistency with the work product privilege is that disclosure might reveal "a 'legal theory or line of
an attorney "to disclose to the client's adversary what counsel has learned during his investigation, good or bad, about the client's case" and violates the duties of loyalty and zealous representation by requiring an attorney to interpret what facts are relevant by disclosing adverse information for the benefit of the opponent. A consequence of such disclosure, they argue, is the damage to the attorney-client privilege because once attorneys explain they must "root zealously through their clients' files in search of damaging information simply to turn it over to their opponent," clients will become "evasive and less forthcoming."

These arguments, although vociferously and frequently made, represent a visceral response based on some general, vague notion of the way the system is supposed to work, rather than a carefully reasoned or substantiated analysis based on actual doctrines. Closer examination of the arguments shows that the disclosure rule is inconsistent with few, if any, specific doctrines underpinning the rules governing litigation in the federal courts. To the extent that disclosure is viewed by lawyers as inconsistent with their previously embraced notions about attorney-client relationships and ethical conduct, these notions themselves may be inconsistent with the formal rules or may be notions that are simply no longer acceptable in the current litigation climate. The controversy over disclosure has highlighted the fact that lawyers have not had a consistent, universal professional vision of the proper pretrial conduct in the civil litigation system for quite some

factual inquiry' that [an] opponent never considered" or might disclose a lawyer's mental impressions. Id. at 57; Cortese & Blaner, supra at 46.

295. Hughes, supra note 171, at 6 & n.22 (citation omitted); see, e.g., Laura A. Kaster & Kenneth A. Wittenburg, Rulemakers Should Be Litigators, NAT'L L.J., Aug. 17, 1992, at 15.

296. Ferris, supra note 294, at 56-57 (citing comments of the Lawyers for Civil Justice). See also Carol Campbell Cure, Practical Issues Concerning Arizona's New Rules of Civil Procedure: A Defense Perspective, 25 ARIZ. ST. L.J. 55, 81-83 (1993) (disclosure violates the duty of confidentiality under Rule 1.6 of the Model Rules of Professional Conduct). But see, e.g., Mills, supra note 28, at 160-61 & n. 47 (disclosure obligation, like discovery obligations, are imposed upon clients not lawyers; lawyers are limited by ethical rules like Model Rule 3.3 and 3.4 from assisting client in providing false or misleading answers in discovery); Campbell & Rea, supra note 124, at 242 (ethical duty under Model Rule 3.4 to disclose information in discovery upon request). See generally infra notes 355-363 and accompanying text.

297. An example of this visceral response is the comment by one attorney about the proposed disclosure rule: "I have a problem that I am supposed to give up what I am supposed to disclose to my adversary, and that just really seems to be contrary to everything that I have done in my practice." Bell et al., supra note 19, at 47 n.177 (quoting Nov. 21, 1991 statement of James S. Bianchi at Public Hearing of the Advisory Committee).
time, and many of the formal and informal rules or doctrines that compose the system have been in uneasy tension with each other.

(1) The "Adversary System"

It is difficult to respond to the claims that the disclosure rule is inconsistent with our adversary system because there appears to be no proffered definition of just what the adversary system, as envisioned by the disclosure rule, entails. Instead, this claim appears to reflect lawyers' informal or workplace understanding of the adversary system, ungrounded in the formal rules, and likely to be synonymous with largely unbridled, zealous advocacy on behalf of clients. As one commentator recently expressed it:

Lawyers, from their first day of law school, are socialized into a way of thinking about the lawyer-client relationship that is rooted in an adversary model. Lawyer culture cherishes the "you and me against the world" ethic. This ethic holds that the lawyer owes virtually complete and undivided loyalty to the client without regard to any other values.

While a complete discussion of the adversary system and the role of lawyers in that system is beyond the scope of this Article, a brief examination of the definition, purpose, and components of the civil adversary system is necessary to properly evaluate the claims that dis-

298. Indeed, there may be little agreement within the legal profession as to what the American adversary system is. See Stephen A. Salzburg, Lawyers, Clients, and the Adversary System, 37 MERCER L. REV. 647, 649 (1986).

299. Elizabeth G. Thornburg, Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege, 69 NOTRE DAME L. REV. 157, 187 (1993) [hereinafter Thornburg, Sanctifying Secrecy]. See also Simon, Ethical Discretion, supra note 196, at 1134 (discussing tendency to conflate adversary system with partisan advocacy). This phenomenon was apparent in much of the negative response to the disclosure rule, which frequently quoted well-worn, simplistic notions of partisan advocacy and homilies. See, e.g., Ferris, supra note 294, at 56 ("[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 ... is his first and only duty" (quoting TRIAL OF QUEEN CAROLINE 8 (J. Nightengale ed., 1821))); Cure, supra note 296, at 58 n.9 (disclosure will allow opponent to litigate "on wits borrowed from the adversary" (quoting Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring))); Cortese & Blaner, supra note 294, at 46 (disclosure inconsistent with our "fiercely adversarial" system and forces lawyer to do opponent's work).

As many law school teachers of professional responsibility or civil procedure can attest, students take readily to the notion of adversarial zealotry and balk at limits imposed on zeal, such as Rule 11 of the Federal Rules of Civil Procedure.

closure is anathema to it. Such an examination reveals that disclosure is not inconsistent with the formal justifications and structure of the modern adversary system; the possible exception is that the disclosure required by Rule 26(a) adjusts parties’ responsibilities for marshalling evidence beyond that initiated by the 1938 Discovery Rules. In sharp contrast, there is no doubt that even the minimal disclosure called for in Rule 26(a)(1) is inconsistent with the informal adversary system to which lawyers are seemingly so fervently attached.

Two important preliminary points must be made. Many criticisms of the disclosure rule seem to assume or imply that the adversarial system, in and of itself, is intrinsically good. However, the adversarial model or scheme is not an end in itself, but is a method of adjudicating disputes that has been accepted based on its effectiveness in accomplishing certain goals. In other words, the adversarial system is a utilitarian or instrumental means and to evaluate its operation and the relationship of the disclosure rule to the adversarial system, one must start by identifying the system’s purposes or goals. The principal justification and ultimate purpose given for the adversary system in civil litigation is that it is the best method for arriving at the truth. As one of the adversary system’s champions describes it, the “system proceeds on the assumption that the best way to ascertain the truth is to present an impartial judge or jury with a confrontation between the

301. See Thornburg, Sanctifying Secrecy, supra note 299, at 188-89. On the other hand, the readiness with which lawyers invoke the adversarial system and appear emotionally attached to that system in the face of changes like Rule 26(a) disclosure suggests that adversariness may have acquired an intrinsic, nonutilitarian value. See Luban, supra note 300, at 81 (reviewing arguments that adversariness is intrinsically good because the traditional lawyer-client relationship is a moral good and valued tradition). Cf. 24 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure, § 5472, at 77 (1986) (“non-instrumental justification for the privilege rests upon the belief or intuition (or emotion, if you will) that it is wrong for courts to compel revelation of attorney-client confidences”). The intrinsic value of adversariness may be related to laissez faire notions such as “survival of the fittest.”

302. See, e.g., Freedman, supra note 300, at 3 (adversary system determines truth fairly and efficiently); Robert J. Kutak, The Adversary System and the Practice of Law, in The Good Lawyer 172, 174 (David Luban ed., 1983) (competitive marshalling and argument of facts is best for accuracy); David Luban, Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics, 40 Md. L. Rev. 451, 468 (1981) (adversary system justified as best method for achieving truth). This is not to suggest that the system as it actually is employed may not have other purposes. See, e.g., Luban, supra note 300, at 74-81 (protects individual legal rights and ethically divides labor); Tommy Prud’homme, The Need for Responsibility Within the Adversary System, 26 Gonz. L. Rev. 443, 446-47 (1991) (primary effect and purpose is generation of income for lawyers); Simon, Ideology of Advocacy, supra note 300, at 119-20 (promotes stability and the status quo). See also supra note 42 and accompanying text (discussing purpose of discovery in facilitating arrival at truth).
proponents of conflicting views, assigning each the task of marshalling and presenting the evidence for its side in as thorough and persuasive a way as possible.”303 Accordingly, discussion of arguments regarding the propriety of disclosure must keep this ultimate goal of accuracy or truth in mind.

The second preliminary, but crucial, point is that there is no such thing as the adversary system with an inherently fixed structure that has been handed down from the jurisprudential heavens. Instead, what exists is our civil adversary system that must be seen as an evolving, complex, interrelated, and often contradictory amalgam of broad structures, legal rules or doctrines, ethical rules, and informal rules that come into play in the civil dispute resolution process. The important issue for analysis here, then, is how Rule 26(a) disclosure interrelates with these components of our adversary system. This analysis will focus on the major areas touted by critics as being adversely affected by disclosure: the formal procedural doctrines such as the attorney-client privilege and work product protection that preserve some aspects of the adversarial character of the discovery process,304 and lawyers’ ethical responsibilities. In considering the formal doctrines of practice, the informal practice rules or subculture will also be discussed.

The fundamental elements of the adversary civil adjudicatory system in the narrow sense are generally: (1) a neutral decision maker; (2) individual parties responsible for marshalling and presenting the evidence and attacking their opponent’s case; and (3) formal rules, including substantive, ethical, and procedural laws.305 The second element is most often equated with partisan or zealous advocacy and is often treated as being synonymous with the term adversary system, particularly by lawyers. On the other hand, the third element, the formal rules that constrain the “clash of one-sided representations,” are often virtually ignored in general descriptions of the system, except

303. Monroe H. Freedman, Judge Frankel’s Search for Truth, 123 U. PA. L. REV. 1060, 1065 (1975); but see Luban, supra note 300, at 70-74 (critiquing ability of system based on “clash of opposing points of view” to get at truth); Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 596-99 (1985) (questioning assumption that truth will “emerge from two advocates arguing as unfairly as possible on opposite sides”).

304. See Thornburg, Sanctifying Secrecy, supra note 299, at 188 n.132 (“privilege persists because lawyers at heart never gave up their fondness for the element of secrecy and opportunity for surprise inherent in the prediscovery adversary system”); Cooper, supra note 81, at 476-77 (work product seeks to reconcile “cooperative character of discovery with the adversary character of trial”).

305. See Luban, supra note 300, at 56-57; Freedman, supra note 303, at 1065; Maute, supra note 80, at 13.
perhaps by judges.306 The second element of parties marshalling their evidence is obviously directly affected by disclosure. The extent to which Rule 26(a) disclosure represents a radical alteration of the methods of evidence development under our formal adversary system requires consideration of the way that formal procedural rules, including ethical rules, have actually defined the parties' duties in practice.

At least since adoption of the 1938 Federal Rules of Civil Procedure, we have not had a pure adversary system in which the parties are strictly responsible for independent marshalling of evidence at trial or are allowed to engage in unrestrained partisan advocacy. Instead, there have been a series of adjustments in the formal rules of litigation largely made as it became clear that the adversary system, particularly the tendencies of zealous advocacy, did not always meet our goals regarding just outcomes and reasonable costs in dispute resolution.307 Moreover, there has been constant tension between these formal procedural rules and the dynamics of partisan advocacy as it

306. Luban, supra note 300, at 57. See id. at 51, 57-58; Maute, supra note 80, at 16 ("Folklore of lawyers' 'blind devotion' emphasizes zeal, with minimal focus on the legal boundaries that circumscribe permissible conduct."); Simon, Ethical Discretion, supra note 196, at 1084-88 (finding lawyers' discussions of ethics tend to be categorical with lawyer libertarian (Code) model emphasizing zealous client advocacy versus judges' regulatory approach to resolve substantive issues). See, e.g., Freedman, supra note 300, at 3-4; Craig Enoch, Incivility in the Legal System? Maybe It's the Rules, 47 SMU L. REV. 199, 225-26 (1994). A similar phenomenon can be observed when lawyers invoke the principle of zealous advocacy under the Model Code of Professional Responsibility without mention of the limitation "within the bounds of the law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"). See infra note 354-377 and accompanying text.

307. See generally Cooper, supra note 81, at 476-78 (discussing discovery and adversary system); Maute, supra note 80, at 14-16, 19-28 (focusing on reforms in response to perceptions of shortcomings, delays, inaccuracies arising from zealotry in 1983 amendments to Federal Rules of Civil Procedure and Model Rules of Professional Conduct). See supra text accompanying notes 32-54. See also Robert L. Nelson, Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm, 37 STAN. L. REV. 503, 550-51 (1985) ("American legal institutions rarely function in a fashion even remotely approaching full adversary procedures."); Simon, Ethical Discretion, supra note 196, at 1134-35 (libertarian partisan advocacy approach not widely accepted before the late 19th century). The limits of partisanship were noted well before the adoption of the Model Code of Professional Responsibility:

[An] advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case [and] plays his role badly and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy he distorts and obscures its true nature.

has been embraced informally by lawyers.\textsuperscript{308} With these points as background, the relationship of Rule 26(a) disclosure to the specific components or doctrines of our modern civil adversarial system becomes the focus of the analysis.

(2) Attorney-Client Privilege

Even a cursory review of the amended Rules of Civil Procedure provides a quick response to any claim that Rule 26(a)(1) disclosure of names of persons with knowledge and documents is inconsistent with the basic principles of the attorney-client privilege. Although there are significant jurisdictional variations in formulation, the attorney-client privilege is generally recognized as an absolute protection from testimonial disclosure of confidential communications between a lawyer and a client relating to legal advice that do not have the purpose of furthering a crime or fraud and that the client otherwise does not impliedly or expressly waive.\textsuperscript{309} On its face, amended Federal Rule 26(a) does not impinge upon the privilege even for initial disclosures. The operative provision of the federal discovery rules limiting the scope of discovery to matters “not privileged” remains intact,\textsuperscript{310} and the Advisory Committee Notes accompanying the December 1993 amendments expressly acknowledge that a party may object to the production of documents during Rule 26(a) disclosure on the basis of “privilege or work product protection.”\textsuperscript{311} Thus, documents that memorialize attorney-client communications relating to particular dis-

\textsuperscript{308} See, e.g., GLASER, supra note 33, at 12 (arguing that discovery undermines adversary system); LUBAN, supra note 300, at 54, 180-85 (describing denunciation of discovery, when introduced, as ending the advocate’s role; describing controversy over confidentiality provisions of Model Rules of Professional Conduct, during development, which were viewed as infringing on advocacy); Maute, supra note 80, at 54 (describing controversy over 1983 Rule 11 amendment because it sought drastic change in the over-adversarial culture); see generally supra notes 32-125. Similar tensions are also reflected in the traditional model of a lawyer’s ethical roles as a partisan advocate and as an “officer of the court” with separate duties to the administration of justice. See generally Gilson, supra note 124 at 874; Simon, Ethical Discretion, supra note 196, at 1084-89, 1133-35; David B. Wilkins, Legal Realism for Lawyers, 104 HARV. L. REV. 468, 471, 479 (1990). Indeed, much of traditional legal literature has focused on dissatisfaction with adversarial zeal.

\textsuperscript{309} See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §§ 6.3.1, 6.4.10 (1986); 24 WRIGHT & GRAHAM, supra note 301, § 5473.

\textsuperscript{310} FED. R. CIV. P. 26(b)(1).

\textsuperscript{311} FED. R. CIV. P. 26(b)(1) advisory committee’s note, reprinted in 146 F.R.D. 612, 631 (1993). The Advisory Committee’s Note accompanying Federal Rule of Civil Procedure 26(a)(1)(C) regarding disclosure of documents supporting damage claims also expressly provides that the disclosure obligation only exists as to documents “not privileged.” Id. at 631. See also Schwarzer, In Defense, supra note 166, at 659; Thornburg, Sanctifying Secrecy, supra note 299, at 195 n.154; Winter, supra note 18, at 270.
puted facts would still be privileged if the conditions of the privilege are met.

More importantly, however, the privilege would not be implicated by disclosure because the attorney-client privilege applies to communications but not to the underlying facts that were communicated. The vast bulk of information covered by Rule 26(a)(1), such as lists of persons with discoverable information relevant to disputed facts pleaded with particularity and lists of documents relevant to disputed facts pleaded with particularity, are likely to be factual and thus outside the privilege.

Other rather significant aspects of the underlying dynamics of disclosure and the attorney-client privilege should not be overlooked. Modern attorney-client privilege is primarily based not on the theory that the privilege itself is intrinsically good, but that the privilege must be available to allow the client to speak candidly and fully to the attorney. A slightly more complete statement of this utilitarian or instrumental argument is that: (1) Clients require the services of lawyers to navigate through the legal system by assisting them in determining the legality of their conduct and in resolving disputes; (2) to effectively serve clients in this regard, lawyers must have all relevant facts, both favorable and unfavorable, from the client; (3) clients will not supply their lawyers with complete information or will not use lawyers at all unless the client-lawyer relationship is confidential; (4) and to satisfy the utilitarian or instrumental argument, the benefits of

312. Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981); 24 Wright & Graham, supra note 301, § 5484, at 320; Thornburg, Sanctifying Secrecy, supra note 299, at 171-72. The fact-communication distinction has proven to be one of the most difficult for law students, lawyers, and even courts. In essence, clients may be asked to reveal what they know about a particular matter, but may not be asked to reveal what they said to their lawyers about the matter. There is a tendency for lawyers to overapply the privilege even to facts communicated by a client to a lawyer or, particularly in the context of corporate attorneys, facts a client employee learns from counsel. See, e.g., 24 Wright & Graham, supra note 301, § 5484, at 320-21. See generally Shapiro, supra note 57; supra notes 107-110 and accompanying text. Moreover, in some instances, the existence of the privilege has meant that facts may end up not being disclosed, particularly when the opponent is unable to ask the right question or is unaware of a particular witness, because the document or communication that would reveal the facts will remain privileged. Thornburg, Sanctifying Secrecy, supra note 299, at 172 n.69, 192-93; 24 Wright & Graham, supra note 301, § 5472, at 85.

313. Wolfram, supra note 309, § 6.3.2; 24 Wright & Graham, supra note 301, § 5472, at 78-86; Thornburg, Sanctifying Secrecy, supra note 299, at 160-61. But see Vincent C. Alexander, The Corporate Attorney-Client Privilege: A Study of the Participants, 63 St. John’s L. Rev. 191, 217-18 (1989) (discussing noninstrumental rationales raised in support of privilege include client’s right of privacy and autonomy and notions of attorney honor).
increased client candor must outweigh its costs to society. Disclosure critics have seemingly relied on a similar utilitarian argument to support their attack. That is, client candor will be undermined by the disclosure rule if adverse relevant facts must be revealed without a proper request from the other side. Presumably this is what is meant when some disclosure critics refer to interference or undermining of the attorney-client relationship.

There are two major problems with the argument that disclosure will reduce client candor. First, critics of the attorney-client privilege have forcefully asserted that the utilitarian argument does not hold up particularly well under scrutiny and that, in fact, the costs to society do not justify the benefits posited. In particular, the factual assumption that client candor depends on the existence of the privilege lacks empirical support. After reviewing available studies on the issue, one critic recently concluded that the available studies cast doubt on the assumptions: "(1) that clients know about the privilege and can, therefore, be influenced by it; (2) that clients are influenced by the privilege in making disclosures; and (3) that clients, even with the privilege, are honest with their lawyers."
The second major problem is that, as noted above, even as formulated under the utilitarian argument, the privilege does not apply to facts known by the client, regardless of whether those facts have been embedded in a communication between the lawyer and the client. The cost-benefit analysis that justifies confidentiality of communications would not justify the social cost that would be accompanied by a loss of access to facts generally. Thus, any general claim for encouraging client candor as to facts is quite weak overall.

It might be argued that there was more of an inducement for client candor under the attorney-client privilege before the disclosure amendment because of the difference in the likelihood that adverse facts would be disclosed under discovery in comparison to the required disclosure under Rule 26(a)(1). Hypothetically, a lawyer communicating with a client about future litigation before the disclosure amendment would have told the client: "The privilege protects our communications, and I need to know all of the facts in order to best represent you. Those facts, including the harmful facts, will not be disclosed unless you authorize it or if the opponent asks for them through discovery, such as in an interrogatory or during deposition questioning. It is also possible that the opponent will never ask for a particular fact or that we will be able to finesse a request by objecting to a particular discovery request." Now under disclosure the message is the same as to the need for candor, but the lawyer must also tell the client that certain information, such as names of witnesses you know who are likely to have relevant facts and the existence of relevant documents, must be disclosed without a request from an opponent. Of course, the lawyer will also probably tell the client: "I will be making the determination of what is relevant." Under disclosure a client might be less likely to be candid as to what are perceived

lack of awareness of privilege scope, disclosure decisions based on need for legal assistance rather than the existence of a privilege, majority of lawyers believed that they would get about the same information from clients regardless of whether clients were told about confidentiality and about 85% believed it would be enough for adequate representation, and surveyed clients never told of confidentiality were about as likely to withhold information as those told—only about 11% of both groups admitted not disclosing information to attorneys. Zacharias, supra note 314, at 383-86. See also Empirical Research Project, Corporate Legal Ethics—An Empirical Study: The Model Rules, The Code of Professional Responsibility, and Counsel's Continuing Struggle Between Theory and Practice, 8 J. CORP. L. 601, 622-23 (1983) (attorneys raised confidentiality issues more than twice as often in interviewing corporate employees (69.3%) than did the employees being interviewed (28.8%)).

318. See, e.g., 24 WRIGHT & GRAHAM, supra note 301, § 5472, at 85.
319. See, e.g., Thornburg, Sanctifying Secrecy, supra note 299, at 172.
320. This arguably is the equivalent of the function performed by the lawyer in determining whether a particular fact is encompassed within a discovery request.
as unfavorable facts because of the increased likelihood of their disclosure. As the empirical evidence shows, however, it seems unlikely that clients, who generally seem less concerned with confidentiality than the critics assume, will make this further, finer distinction in communicating with their lawyers. Moreover, an argument of decreased candor ignores the primary motivation for individuals and corporations to go to lawyers—that they need reliable legal advice and recognize that advice based on false assumptions may not be reliable.321

Furthermore, it is slightly perverse to argue that a rule should be rejected because it requires honest behavior from parties—merely the disclosure of relevant facts, whether favorable or unfavorable.322 The disclosure obligation under Rule 26(a) is imposed on the client and is intended to serve important public interests related to efficiently resolving civil disputes accurately. Even employing the instrumental or utilitarian justifications used to support the attorney-client privilege, it is unpersuasive to argue that a rational cost-benefit analysis that includes all of the costs, not only to the client but to the opposing party and to the legal system itself, would support nondisclosure simply to obtain a very slight increase in client candor.323

321. See Thornburg, Sanctifying Secrecy, supra note 299, at 175; Simon, Ethical Discretion, supra note 196, at 1142-43 (arguing sufficient incentives exist to disclose adverse information to lawyers without confidentiality); see also Zacharias, supra note 314, at 391-96. In a survey of client/lay person responses to disclosure in hypotheticals in which disclosure might work against client interests, clients overwhelmingly thought the lawyer should disclose confidential information in certain circumstances and the vast majority indicated that disclosure would not make them less willing to consult an attorney. Interestingly, among the hypotheticals were some that involved information that would be required to be disclosed under Rule 26(a), but which would be confidential under traditional ethical rules, including the somewhat notorious example from Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962), in which defendant's doctor discovered during an examination of the plaintiff in a civil suit arising out of an accident that the plaintiff had a previously undiagnosed aneurism that was probably caused by the accident and would probably be fatal unless disclosed. More than 91% of the clients surveyed indicated that the information should be disclosed by the lawyer. See Zacharias supra note 314, at 395, 409.

322. Cf. 24 Wright & Graham, supra note 301, § 5472, at 83 ("the honest client has nothing to fear from a disclosure of the facts, that only the client bent on chicanery would withhold facts that might unmask his plot"). The typical utilitarian response to this point has been that the inducement of disclosure, at least to the lawyer, is necessary so that the lawyer can influence the client to ultimately not be dishonest. See id.; Thornburg, Sanctifying Secrecy, supra note 299, at 175-77. One problem with this response is that there is little support for the argument that the lawyer is effective in influencing improper client conduct because of the lawyer's dependence on satisfying the client and the client's economic incentives. Id.; see also Zacharias, supra note 314, at 369-70, 389 (preventing client misconduct rationale rarely comes into play).

323. Cf. 24 Wright & Graham, supra note 301, § 5472, at 84-86 (arguing that cost-benefit analysis must include consideration of "the loss of public respect for and confidence in the administration of justice" that "may well cost more than any trivial accounting
Lawyers are in no position to argue that because of the existence of the disclosure obligations, they will stop advising clients to be candid with them. Although the disclosure obligation is directly imposed upon the party under Federal Rule of Civil Procedure 26(a), the lawyer becomes involved in disclosures in at least two ways: the determination of relevance to disputed facts pleaded with particularity clearly calls for the kind of legal analysis for which the client employs the lawyer; and under Federal Rule of Civil Procedure 26(g), the lawyer must certify that to the best of the lawyer's "knowledge, information, and belief, formed after a reasonable inquiry," the disclosure being made by the client "is complete and correct as of the time it is made." 324 The lawyer tempted to tell the client to keep the lawyer in the dark may violate several legal and ethical duties. Such action places the lawyer in direct violation of Rule 26(g)'s reasonable inquiry requirement, thus potentially subjecting the lawyer and client to a range of sanctions. 325 Moreover, such action by the lawyer would violate the lawyer's duties of competence and diligence in representation of the client generally, which must be viewed as entailing an obligation of rendering accurate, candid legal advice based on as complete an investigation as is reasonably possible. 326 Lawyers cannot close their eyes and ears to unfavorable facts that might be obtained from clients, because these unfavorable facts are necessary for lawyers to provide accurate and intelligent legal advice on a panoply of issues, including the likelihood of success on the merits, settlement advisability, and litigation strategy. "Unless the client has sole access to the bad facts, there is always a danger that the opponent will, on her own, discover those bad facts and use them at trial. These bad facts can be

of evidence lost and gained as a consequence of the privilege"); Thornburg, Sanctifying Secrecy, supra note 299, at 191-205 (citing adverse cost effects of privilege, including inappropriate risk shifting, "truthgarbling," and other societal costs such as increased litigation costs and inaccurate outcomes).


325. Sanctions include the payment of an opponent's costs and attorneys fees and new sanctions directly tailored to nondisclosure, such as preclusion of the use of evidence, preclusion from being able to offer any evidence on an issue for which nondisclosure occurred, and having the jury told about the nondisclosure. See Fed. R. Civ. P. 26(g)(3), 37(a)(2), 37(c).

326. See generally Model Rules of Professional Conduct Rule 1.1 (1983) (Competence—"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation"); Rule 2.1 cmt. ("A client is entitled to straightforward advice expressing the lawyer's honest assessment," even if it involves "unpleasant facts and alternatives."). Cf. Thornburg, Sanctifying Secrecy, supra note 299, at 178-81.
minimized or manipulated effectively only to the extent that the [lawyer] is aware of them.”

Thus, the assertion that the disclosure rule is inconsistent with the attorney-client privilege or will damage the attorney-client relationship is not well grounded. The attorney-client privilege is formally preserved in the new rules. Moreover, the rules seem to cause little, if any, change in important aspects of the attorney-client relationship. This is particularly true with regard to candor of communications and the obligations of the attorney to the client relating to the new duty of clients to reveal relevant facts without awaiting a discovery request. For the ethical attorney and the honest client, there should be no adverse effect.

(3) Work Product Protection

Much of the analysis of the disclosure rule and the work product doctrine parallels the foregoing discussion of the attorney-client privilege. The work product doctrine arguably was created to preserve the essential adversarial nature of civil litigation in the face of the otherwise cooperative, open nature of the discovery process. In addition to maintaining the potential for spontaneity or surprise at trial, the work product doctrine appears to rest on the premise that there is something inherently and fundamentally valuable in preserving an adversarial information gathering process. Nevertheless, it must be

327. Thornburg, Sanctifying Secrecy, supra note 299, at 181. As noted previously, the sanctions provisions of the new disclosure rules increase the potential downside of failing to disclose relevant facts. Judge Ralph Winter poignantly noted, in response to the assertion that disclosure will disrupt the attorney-client relationship, that such an argument “reflects the notion that the attorney-client relationship is enhanced by charging substantial sums to a client for the fruitless defense of a request for discovery resulting in a direct order that specified matters be disclosed. Indeed, the very argument—that formal and costly but useless proceedings are necessary—is itself an admission that wasteful discovery routinely occurs.” Winter, supra note 18, at 271.

328. See Cooper, supra note 81, at 476-77; Elizabeth Thornburg, Rethinking Work Product, 77 VA. L. REV. 1515, 1516 (1991) [hereinafter Thornburg, Rethinking Work Product]. The discovery process itself, to the extent that it requires a specifically framed request or question subject to the opponent’s objections and interpretations, is procedurally adversary in nature rather than a cooperative sharing system in which each side shares all. The disclosure provision in Federal Rule 26(a) is only a limited exception to this general adversary process. See Cooper, supra note 81, at 477-78. Yet, it may be the fact that disclosure is largely not an adversarial process that most contributes to the resistance it has encountered, rather than the fact that in some way the rule requires disclosure of information that is not otherwise required to be disclosed on request.

329. See Cooper, supra note 81, at 476-77; Thornburg, Rethinking Work Product, supra note 328, at 1525; Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring). It has been argued that the maintenance of work product in the adversary system rests on the
remembered that the work product doctrine is relatively narrow in scope. While the attorney-client privilege absolutely protects from disclosure communications falling within its boundaries, work product protection under the Federal Rules is a qualified protection from an opponent’s discovery for the lawyer’s processes of preparation for litigation and the actual materials prepared by the lawyer and the lawyer’s agents. The primary utilitarian justification for work product protection broadly stated is that “lawyers will better serve their clients and the ends of justice when they can operate in a ‘zone of privacy,’” and more specifically, that work product protection is needed to encourage proper lawyer preparation of the client’s case.

As with the attorney-client privilege, Rule 26(a) on its face does not directly affect the work product protection because the rule specifically preserves the protections available for trial preparation materials that were already available under traditional discovery. Moreover, contrary to the suggestion of disclosure critics, the fact

erroneous assumption that secrecy and surprise served by the doctrine are essential to the sound functioning of the adversary system and on an overemphasis on competition and winning. D. Christopher Wells, The Attorney Work Product Doctrine and Carryover Immunity: An Assessment of Their Justifications, 47 U. Pitt. L. Rev. 675, 685, 701-02 (1986). See, e.g., Fed. R. Civ. P. 26(b)(3); Hickman, 329 U.S. 495; Alexander, supra note 313, at 214-15; Thornburg, Rethinking Work Product, supra note 328, at 1522. Among the types of information covered by “ordinary” work product are witness statements, inoffice memoranda, investigative reports, data collections, surveys, and other tangible things and documents prepared in anticipation of litigation. Such information may be obtained by an opposing party only on a showing of “substantial need” and “undue hardship” in obtaining the “substantial equivalent of the materials by other means.” A second category of work product materials, referred to as “opinion” work product, is entitled to a higher, but as yet precisely undefined level of protection and includes a lawyer’s “mental impressions, conclusions, opinions or legal theories.” FED. R. Civ. P. 26(b)(3); Alexander, supra note 313, at 214-15 & n.66; Thornburg, Rethinking Work Product, supra note 328, at 1522-23.

Wells, supra note 329, at 681-885. See, e.g., Hickman, 329 U.S. at 511 (“Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and the preparation of cases for trial” if an opponent had ready access to trial preparation materials); Alexander, supra note 313, at 214-15; Thornburg, Rethinking Work Product, supra note 328, at 1524-30. For a critical evaluation of the various justifications for the work product doctrine, including claims that its abrogation would deter attorneys from writing down litigation materials, encourage sharp practices (e.g., evasion, dirty tricks, delay), require an attorney to become a witness, invade proprietary attorney interests, and harm lawyer morale, see, e.g., Edward H. Cooper, Work Product of the Rulemakers, 53 Minn. L. Rev. 1269, 1274-82 (1969); Thornburg, Rethinking Work Product, supra note 328, at 1524-83; Wells, supra note 329, at 681-703.

See, e.g., Fed. R. Civ. P. 26(b)(3); Schwarzer, In Defense, supra note 166, at 659; Winter, supra note 18, at 270.

See, e.g., Hughes, supra note 171, at 6 n.22 (asserting mandatory disclosure may violate the work product doctrine because requirements call upon attorney to interpret his
that a lawyer in the process of making mandatory disclosures must merely evaluate or interpret the opponent's claim neither violates the work product doctrine nor creates a change in discovery practice. Lawyers invariably must engage in substantial evaluation of opposing parties' claims or defenses in the course of representation and must engage in a probing factual investigation into the basis for those claims. It is axiomatic that the work product doctrine, similar to the attorney-client privilege, does not shield from disclosure the facts, such as the names of persons with relevant information about the case or the identification of relevant documents, that are gathered by the lawyer or the client in the course of that preparation.\(^3\) The disclosure rule merely alters the necessity of generating traditional discovery requests to elicit those very basic facts. While this may ultimately be a profound change, it is not one that directly implicates the work product protection.

Some critics maintain that the disclosure rule violates the work product doctrine because, by requiring the party to identify relevant documents or persons with relevant knowledge, it indirectly results in revelation of an attorneys' mental impressions, opinions or legal theories.\(^3\) This argument seems to be based on an overly expansive view of what is protected by the federal work product protection. Again, the disclosure duty falls on the client in the first instance based on the matters within the client's knowledge that are relevant to disputed facts pleaded with particularity. While a client must also generally disclose information that would be available to the client through the attorney, thus potentially implicating matters involving an attorney's work product, the primary source of the factual information is the client, and that information is of a very limited factual nature—knowledge of persons and documents relevant to facts pleaded with particularity. Moreover, it is difficult to see how the extent of disclo-

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or her adversary's claim to comply with the mandatory disclosure requirements); supra notes 294-286 and accompanying text.

334. See, e.g., Cooper, supra note 331, at 1272, 1298, 1301 (discovery contemplates mutual knowledge of relevant facts gathered by both parties; "party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney"); Mills, supra note 28, at 160-63; Schwarzer, In Defense, supra note 166, at 659-60; see also Hickman, 329 U.S. at 504, 507. As Professor Cooper explains, "Free fact discovery has been allowed because the extent of the losses resulting from unlimited discovery ... remain a matter of conjecture, while the discovery system itself represents a considered judgment, based on long experience, that closing off such inquiry results in unilateral ignorance—often mutual unilateral ignorance of different areas of fact—and inadequate trial preparation." Cooper, supra note 331, at 1282.

335. See, e.g., Cure, supra note 296, at 75-76; Ferris, supra note 294, at 57.
sure of the attorney's mental impressions or theories in this context will be any greater than the indirect revelation that occurs under traditional litigation practices in response to discovery requests. For example, such revelation occurs in discovery when an attorney provides factual information that was gathered during that attorney's investigations, or when the attorney makes an objection based on the scope of discovery, or when an attorney submits arguments in support of a motion for a protective order or responds to contention interrogatories. On the other hand, the type of opinion work product that is clearly intended to be within the scope of the protection is that which would specifically reveal an attorney's mental impressions, such as an intraoffice memorandum discussing a case or summarizing and evaluating recollections from oral witness interviews.

Critics of the disclosure rule also have raised the concern that disclosure will be inconsistent with the primary purpose of the work product doctrine, encouraging thorough attorney preparation of cases, and therefore negatively affecting the attorney-client relationship. Essentially, the assumption is that "[o]perating in the zone of privacy, the lawyer will exercise greater efforts and freedom in pursuing the client's interest without the danger of the adversary benefitting from those efforts." The analysis here is reminiscent of the objections to

336. See generally Cooper, supra note 331, at 1284-86, 1305-06 (finding that while courts will not allow a single interrogatory request for all information one side has that bears on a case, courts will allow a request for facts bearing on identified specific issues).

337. See Fed. R. Civ. P. 26(b)(3). Rule 26(b)(3) makes clear that the mental impressions that are entitled to protection are those that are contained in documents and tangible things, such as witness statements that are prepared in anticipation of litigation, and presumably not the mere fact that a party or party's attorney may have knowledge of a potential witness or document relevant to some disputed fact in a pleading. See also Thornburg, Rethinking Work Product, supra note 328, at 1521-23 (clarifying opinion work product to include lawyer notes or memoranda reflecting witness statements, opinions on settlement value of case, trial strategy, lists of trial witnesses to be called and expected testimony, lists of trial exhibits to be offered at trial); but see Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986) (applying work product to preclude plaintiff from asking defendant's in-house counsel to reveal documents that had been reviewed in responding to request for documents relevant to the litigation).

338. See, e.g., Hughes, supra note 171, at 7 (arguing disclosure "would reward the delinquent advocate rather than the well prepared").

339. Wells, supra note 329, at 683. A more complete statement of the assumptions underlying this rationale are that (1) if lawyers have access to their opponents' case preparation they will not have to incur the costs of case preparation and may also gain access to information that they would not have otherwise been able to obtain on their own either because of lack of resources or competence and (2) the lawyer preparing a case will recognize this and have an incentive to undertake a less thorough case preparation and to not develop information that may be used adversely by an opponent. The result is poorly prepared counsel who have a badly served client and an adversarial system that cannot
disclosure based on the attorney-client privilege, except that the focus here is on predictions of the professional behavior of attorneys in gathering information rather than on client candor. Probably even more than in the area of attorney-client privilege, the justifications for the work product protection have come under fire. Convincing arguments have been offered on why the work product protection is unlikely to contribute significantly to attorney preparation, and why it simply cannot be justified, considering the cost to the judicial system of lost information and the increased cost of resolving disputes. First, the very contours of the work product doctrine, as traditionally applied, are not consistent with the thorough preparation rationale. A substantial part of the incentive for more thorough preparation is the notion of privacy of preparations, yet, as noted above, a large part of the information obtained through an attorneys' investigations—both favorable and unfavorable factual information—are outside the protection altogether. Thus, while the protection traditionally might have precluded asking an opposing party to produce notes of its meetings with potential witnesses, if the opposing party asks a party in the course of a deposition or in interrogatories to name individuals who have knowledge regarding specific facts or to identify documents in the party's possession relating to those facts, the information would have to be provided.

Moreover, adequate incentives, if not compelling demands, for thorough preparation of cases come from numerous other sources, pressures, and doctrines. As one commentator has stated: "[W]ork product immunity cannot provide an incentive for the litigant to go perform its functions because of unretrieved facts." Id. at 684-85; Cooper, supra note 331, at 1279-82; Thornburg, Rethinking Work Product, supra note 328, at 1527.


341. See, e.g., Cooper, supra note 331, at 1282, 1301-02; Thornburg, Work Product Rejected, supra note 340, at 959; Thornburg, Rethinking Work Product, supra note 328, at 1528. In addition, there are other uncertainties at the time of pretrial investigations and preparations that make it hard to predict in advance whether the protection will apply at a later time, including the specific factual circumstances of the case, whether the tangible product of a particular investigation was done "in anticipation of litigation," whether the protection has been waived, and whether the opponent will demonstrate "substantial need and undue hardship" so as to justify obtaining work product material. Thornburg, Rethinking Work Product, supra note 328, at 1528-29; Thornburg, Work Product Rejected, supra note 340, at 958-59.
forward with a totally thorough investigation into both helpful and harmful facts any more than the adversary system itself can encourage such investigation.¹³⁴² Informal, but nevertheless powerful pressures, for thorough preparation arise from the lawyer's inherent motives to win, or at least maximize the results of, civil litigation for the client; these motives are fueled by a lawyer's financial considerations, concepts of self-esteem, and reputation with peers or future clients. It can be assumed that over the long term, lawyers who conduct their own thorough preparation will be more successful than lawyers who rely on their opponent's preparation or avoid preparation because of fear that opponents will gain access to unfavorable facts through their preparation.¹³⁴³ Thorough preparation is reinforced by the different measures of success in a case: winning at trial; recognizing early on in the case, before excessive litigation costs are incurred, that settlement is appropriate; or being better prepared than one's opponent.¹³⁴⁴ Pressures for thorough preparation can also be expected to come from clients directly, particularly sophisticated or institutional clients, and from the financial structures of law firms that may, as a result of hourly billing practices, encourage pretrial discovery activities and investigation.¹³⁴⁵

Thorough preparation is not only encouraged by the informal incentives surrounding civil litigation, but is virtually demanded by the formal rules structures. For example, provisions of the Model Code of Professional Responsibility and the Model Rules of Professional Conduct directly address the ethical obligation of attorneys to adequately prepare cases.¹³⁴⁶ Adequate inquiry and investigation, including investigation of unfavorable facts, are required independently by the Federal Rules of Civil Procedure. Rule 26(g) requires that all discovery requests and responses to discovery requests be based on a "reason-

¹³⁴² Thornburg, Rethinking Work Product, supra note 328, at 1528.
¹³⁴³ Cooper, supra note 331, at 1280; Thornburg, Rethinking Work Product, supra note 328, at 1527-28; Thornburg, Work Product Rejected, supra note 340, at 958-61; Wells, supra note 329, at 686-89.
¹³⁴⁴ See Cooper, supra note 331, at 1280-81; Wells, supra note 329, at 686-87 & n.47.
¹³⁴⁵ Thornburg, Rethinking Work Product, supra note 328, at 1529-30; Wells, supra note 329, at 688.
able inquiry” into the facts and circumstances of the case. Rule 11 of the Federal Rules requires an even broader duty of attorney inquiry and encourages thorough preparation. Rule 11 essentially provides that before an attorney presents or advocates a position to the court, the attorney must have undertaken a reasonable inquiry into the facts and evidence of the case.

Given that work product does not protect basic factual information in the possession of the party or the party's attorney and that overwhelming incentives or pressures generally exist for thorough attorney preparation, there is no reason to expect that work product practice and attorney preparation will change significantly under the disclosure obligation merely to disclose the names of persons with relevant information and to identify relevant documents. The only question would seem to be whether less adequate preparation can be expected to occur under the disclosure rule because the disclosure obligation is automatic, whereas in traditional discovery practice the duty to reveal factual information depends on an opposing party asking the right question. The automatic nature of disclosure should make little difference. It seems highly doubtful that lawyers are in a position at the time they must begin case preparation to cut back on the preparation in which they will engage based on the fact that a disclosure obligation exists. As one commentator recently noted in connection with her argument that the work product privilege should be eliminated altogether, demand for trial preparation is relatively inelastic because the bulk of it is like the basic bread that people must have to survive, regardless of the cost increases (i.e., adverse impacts) that might occur. While the automatic nature of the duty to dis-

347. FED. R. CIV. P. 26(g).
348. See FED. R. CIV. P. 11. While the amended rule no longer applies to discovery, it now applies to any other presentations to the court, including by signing, filing, submitting, or later advocating, a “pleading, written motion, or other paper,” and requires that an attorney have specifically engaged in an “inquiry reasonable under the circumstances” into whether the “factual contentions have evidentiary support” and the “denial of factual contentions are warranted on the evidence.” Id.
349. See, e.g., Schwarzer, In Defense, supra note 166, at 659; Wolfson, supra note 32, at 61-62; see also Janet Napolitano, Showing Your Cards: Litigating in a Mandatory Disclosure Jurisdiction, LITIG., Winter 1994, at 26, 28-29 (discussing Arizona disclosure rule, under which attorneys must still attempt to get as much information as possible from clients in order to best represent them).
350. The argument would be that a lawyer who knows that the direct result of preparation will be disclosure of facts will be less thorough than a lawyer who knows that another party must first propose a proper discovery request that may be resisted.
351. See Thornburg, Work Product Rejected, supra note 340, at 961. The cost to which Thornburg was referring was that resulting from loss of work product immunity and the
close does increase the likelihood that adverse facts obtained through pretrial investigation will be disclosed to an opponent, the pressures on a lawyer to investigate the case thoroughly from the beginning remain extremely powerful. The addition of new certification and investigation requirements and sanctions against both the client and the attorney also may make any difference in the incentive to prepare under disclosure, as compared to under the prior discovery system, insignificant.

In summary, Rule 26(a)(1) is neither inconsistent with the formal operation of the work product doctrine, nor inimical to its primary purpose of encouraging attorney preparation. The protection is available to the same extent as it has been under traditional discovery. The incentives that are responsible for lawyer preparation remain fully operative even under disclosure. A substantial part of pretrial investigation would normally be expected to occur early in the case and prior to the filing of pleading or other motions, and well before disclosures would be required under Rule 26(a) and (f). Thorough investigation would appear critical for the parties and counsel to meet their reasonable inquiry duties, to avoid making frivolous claims and defenses, and for lawyers to best represent their clients' interests by providing sound advice, particularly with regard to early settlement discussions.

(4) Inconsistency with Ethical Rules

Conspicuously absent from most of the claims that Rule 26(a) disclosure is inconsistent with lawyers' ethical duties is specific discussion of exactly what those ethical duties entail and from what source they are derived. Instead, critics simply broadly assert that having to disclose information to an opponent, without a specific discovery request and based on determinations of relevance by the disclosing party's attorney, violates duties of client loyalty and zealous representation. The disclosure opponents' ethical arguments inadvertently resulting access by an opponent to information, but the analogy seems appropriately applied to trial preparation and disclosure.

352. See Fed. R. Civ. P. 26(g), 37(c); supra notes 268-281 and accompanying text. The fact that disclosure does not displace traditional discovery and that there is a supplemental disclosure duty under Rule 26(e) would also seem to provide additional pressures to continue with thorough attorney preparation.

353. See Fed. R. Civ. P. 11 (requiring reasonable inquiry before any presentations to court including pleading and motions).

354. See supra notes 294-297 and accompanying text. But see Campbell & Rea, supra note 124, at 242-45; Cure, supra note 296, at 81-86.
draw attention to some of the fundamental problems already plaguing the legal profession. Substantial ambiguity or internal conflict in the formal ethical rules has arguably fed not only lawyer misunderstanding of obligations, but also the development of an informal set of ethical norms that may be inconsistent with the formal rules.\textsuperscript{355}

The disciplinary codes and ethical rules that govern lawyer practice, as formulated in the ABA Model Rules of Professional Conduct and the earlier ABA Model Code of Professional Responsibility,\textsuperscript{356} attempt to regulate, or at least provide guidance in, two major areas of lawyer duty and potential conflict: (1) the lawyer's duty to the client as an advocate, which includes the duties of loyalty and confidentiality, and (2) the lawyer's duty as an officer of the court, which requires commitment to the fair and efficient administration of justice and includes the duties of candor, honesty, and obedience of law in dealing with the court and with third parties.\textsuperscript{357} Relatively few of the provisions of the ethical rules directly address, much less resolve, the litigation conduct issues implicated by the disclosure rule. Indeed, the relevant ethical rules either expressly or impliedly defer to the law outside the rules of ethics themselves—the rules of substantive law and civil and criminal procedure—for definition of lawyers' legal duties in litigation.\textsuperscript{358} For example, under the Model Code, zealous representation of the client must remain "[w]ithin the [b]ounds of the [l]aw,"\textsuperscript{359} a lawyer must not "intentionally [f]ail to seek the lawful

\textsuperscript{355} See Schneyer, supra note 21, at 102 (finding even within the disciplinary codes are "fragmentary and often incompatible conceptions of the lawyers' role vying for dominance" such as the lawyer as partisan, as officer of the court, as counselor, as servant of the public interest); Wilkins, supra note 308, at 480-81, 499-503 (arguing indeterminacy and ambiguity in the ethical rules allow exploitation by lawyers committed to partisanship).

\textsuperscript{356} See Model Rules of Professional Conduct (1983); Model Code of Professional Responsibility (1980). For pragmatic reasons, the discussion focuses here on the Model Rules and the Model Code provisions promulgated by the ABA House of Delegates, even though the ethical rules of individual states may vary substantially from those rules. As of late 1993, about 38 states and the District of Columbia had adopted at least significant portions of the Model Rules, and the remaining states (with the exception of California) have ethical rules based largely on the Model Code. See Stephen Gillers & Roy D. Simon, Jr., Regulation of Lawyers: Statutes and Standards x-xi (1994). For a fascinating and informative review of the process by which disciplinary canons and codes, including the ABA Model Rules of Professional Conduct, were developed, see Schneyer, supra note 21, at 95.

\textsuperscript{357} See generally Enoch, supra note 306, at 210-13 (discussing the Rules of Professional Conduct and lawyers' roles as advocates and officers of the court); Wilkins, supra note 308, at 470-71; Model Rules of Professional Conduct Preamble (1983).

\textsuperscript{358} See Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 Yale L.J. 1239, 1263 (1991); Wilkins, supra note 308, at 471-74.

\textsuperscript{359} Model Code of Professional Responsibility Canon 7 & DR 7-102 (1980).
objectives of his client through reasonably available means permitted by law," claims and defenses advanced must be warranted by existing law, and a lawyer cannot "[c]onceal or knowingly fail to disclose that which he is required by law to reveal." Similarly, under the Model Rules, claims and defenses must have a basis that is "not frivolous" under the law, and lawyers must not "unlawfully obstruct another party's access to evidence," "knowingly disobey an obligation under the rules of a tribunal," or "in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

Rule 26(a) on disclosure is part of the law establishing the legal boundary for attorney litigation conduct, just as other prior limiting rules of procedure, such as Rule 11 and the discovery rules, generally create obligations that restrain zealous representation. Thus, the short answer to the arguments by the critics of disclosure regarding the purported violation of ethical duties to the client is simply that attorneys' zealotry has always been ethically subject to legal limitations and obligations, including obligations to reveal to an opposing party adverse information. While true, this does not explain why so many lawyers believe that disclosure of facts under a procedural law violates an ethical duty or is somehow fundamentally different from prior legal duties to disclose information during discovery. The answer to these questions relates substantially to the tradition of zealous advocacy and the critical role that the language of ethical rules has played in lawyers' interpretations or perceptions of their roles and the legal boundaries that constrain lawyers' advocacy.

361. Model Code of Professional Responsibility DR 7-102(A)(2)-(3) (1980). See also id. DR 7-109(A) ("lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal").
364. See, e.g., Alexander, supra note 186, at 656 & n.37 (arguing disclosure of information under Rule 26(a) violates ethical duties to clients no more than do obligations under discovery rules generally); Campbell & Rea, supra note 124, at 246 (discussing Arizona civil procedure disclosure rule incorporated as legal duty under Arizona version of Model Rule 3.4(d)); Enoch, supra note 306, at 212-13 (finding rule limitations on zealotry such as Rule 11 require "that a lawyer's duty to clients cannot override his or her obligation to the justice system"); Schwarzer, In Defense, supra note 166, at 659 & n.17 (arguing claims of violation of ethical duties are baseless and reflect a "blind eye to a lawyer's obligations to the court"); Wolfson, supra note 32, at 61 (stating that ethical prohibition against damaging a client's interests extends only as far as the rules of court and the availability of evidentiary privileges permit).
Because the legal boundaries and duties are at times unclear, the ethical rules (particularly provisions of the Model Code) have attempted to provide guidance to lawyers in resolving potential conflicts of duties involving the courts and clients. For example, the Model Code specifically advises a lawyer that when "serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law." Commentators contend that the tradition of zealous advocacy in conjunction with this and other language of the Code that restricts lawyers only to "good faith" or "nonfrivolous" positions, has produced a model of lawyer conduct in which any "arguably legal" position may be maintained by a lawyer with the lawyers interpreting what is arguably legal from the perspective that maximally serves the client’s interests. The disciplinary codes, formulated largely by the trial bar, "give primacy to the advocate’s role and reducing dissonance between the law and the immediate interests of the client by encouraging acquiescence to the client."

Some commentators saw the promulgation of the Model Rules as a conceptual advance, moving from the Code’s model of the lawyer as a partisan advocate to a model with a clearer recognition of the lawyer’s duties to the legal system in general and considering the propriety of a lawyer’s own values in representation decisions. Nevertheless, commentators recognized that

365. Model Code of Professional Responsibility EC 7-3 (1980). See also id. EC 7-4 ("advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion on the likelihood that the construction will ultimately prevail"); id. EC 7-9 (in exercising judgment on behalf of client, lawyer should "always act in a manner consistent with the best interests of his client").

366. See, e.g., Maute, supra note 80, at 16-19; Simon, Ethical Discretion, supra note 196, at 1085, 1087-88; Wilkins, supra note 308, at 471-73. Professor Simon characterizes this as the "arguably legal maxim" or "libertarian approach"—under which loyalty to client is the distinctive lawyer role with "no direct responsibility to third parties or the public other than those the system imposes on citizens generally." Simon, Ethical Discretion, supra note 196, at 1085, 1087.

367. Robert W. Gordon & William H. Simon, The Redemption of Professionalism?, in Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession 230, 251 (Robert L. Nelson et al. eds., 1992); see Maute, supra note 80, at 16-20 (emphasis on zeal rather than legal boundaries); Wilkins, supra note 308, at 473 (resolving doubts in client’s favor places partisanship at center of lawyer role). Critics of the ethical rules also maintain that rules are written with sufficient ambiguity and generality and underenforced to such an extent that only the most egregious violations will be reached; tendencies toward self-interest and pursuit of client’s desires regardless of ultimate cost to society are tolerated, if not encouraged outright. See Nelson & Trubek, supra note 184, at 183-85; Maute, supra note 80, at 18, 20-21.

368. See Maute, supra note 80, at 19-21; Schneyer, supra note 21, at 137-38; Wilkins, supra note 309, at 480-81. But see Hazard, supra note 358, at 1262-63 (arguing the Model Rules impose no independent professional restraint on litigation; the 1936 ABA Canons of Professional Ethics evidenced more hostility toward litigation and more clearly empha-
change would not occur "so long as the ethic of zealous advocacy is the ... accepted professional norm." Post-1983 commentary on the ethical rules and the negative response to Rule 26(a) disclosure seem to indicate, however, that traditional zealous advocacy has retained its primacy in the model of lawyer conduct accepted by lawyers even under the Model Rules regime.

The fundamental point that many lawyers may have lost sight of is that the formal ethical rules require compliance with the law. Although the ethics rules' recognition of zealous advocacy on behalf of the client might result in some deference to the client's interest as the attorney interprets and argues the law, the legal boundaries are ultimately going to be determined by the courts applying a very different standard. Indeed, while lawyers have continued to tout the tra-

sized the profession's duty of deference to the courts). Professor Maute saw a shift away from the primacy of zealous advocacy, particularly because of the elimination from the operative portion of the Model Rules, the encouragement of zealous representation, and substitution of more objective standards to govern litigation conduct, such as the Model Rule 3.1 requirement of nonfrivolous basis for claims or defenses and the Rule 3.4(d) requirement that lawyers make a reasonably diligent effort to comply with legally proper discovery requests. Maute, supra note 80, at 19-20. The concept of zealous advocacy has not been completely purged from the rules, but seems to have been diluted. The Preamble to the Model Rules states that a "lawyer zealously asserts the client's position under the rules of the adversary system" and states that "a lawyer can be a zealous advocate" when the other side is well represented, but also states that "[a] lawyer's conduct should conform to the requirements of the law." MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983) (emphasis added). The concept of zeal also appears in the comments to Rule 1.3 on lawyer diligence, but is far more tempered than that in the Model Code. The Rule states: "A lawyer should act . . . with zeal in advocacy" but is "not bound to press for every advantage that might be realized for the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983). Noticeably absent from either the rules or the commentary is the equivalent of the Model Code's EC 7-3 principle of resolving doubts as to legality in favor of the client. Id.


370. See Wilkins, supra note 308, at 471-73, 499-500; Simon, Ideology of Advocacy, supra note 300, at 85, 88. See also Campbell & Rea, supra note 124, at 241-43 (discussing discovery duties under Model Rules and rules of procedure before disclosure rule adopted in Arizona—zealous representation outweighed any countervailing duty to the court to present the truth); Cure, supra note 296, at 81 & n.102 (discussing traditional emphasis on every tactical advantage for client over duties to court); Mayer, supra note 22, at 99-101 (arguing imposing discovery burdens ethical); Zlaket, supra note 4, at 6 (suggesting attorney responses to new disclosure rules evidence misunderstanding of the "legitimate boundaries of advocacy" and that zealous advocacy leads to unjustified discovery delay, evasion, obfuscation, or other such conduct in name of client representation).

371. See generally Gorham, supra note 281, at 771-72 (discussing different standard applied by Washington Supreme Court to lawyers' claims that they were merely doing their
dition of zealous advocacy, the judiciary has perceived an increase in incivility in the practice of law in recent years spurred by an increase in the confrontational “win at all costs” mentality. The courts have looked disdainfully on attorneys’ almost talismanic invocation of the principle that “the duty to represent a client zealously is paramount when it conflicts with any obligation to the administration of justice,” and courts have rejected this notion as “indefensible as a matter of law.”

The point is quite simply that in the courts, zealous advocacy

adversarial duty in the discovery process); Wilkins, supra note 308, at 476-77 (discussing the differences in the manner judges and lawyers apply law). See, e.g., Washington Physicians Ins. Exch. & Ass’n v. Fisons Corp., 858 P.2d 1054, 1079 (Wash. 1993) (discovery conduct “is to be measured against the spirit and purpose of the rules, not against the standard of practice of the local bar”).

372. See, e.g., Marvin E. Aspen, The Search for Renewed Civility in Litigation, 28 VAL. U. L. REV. 513, 515-19 (1994); Brent E. Dickson & Julia Bunton Jackson, Renewing Lawyer Civility, 28 VAL. U. L. REV. 531 (1994); Keeton, supra note 52, at 13; Zlaket, supra note 4, at 6 & n.25. For example, because of a perception of increased unprofessional attorney conduct, the United States Court of Appeals for the Seventh Circuit undertook a study of civility and professionalism in the bar and eventually published a set of aspirational “Standards for Professional Conduct.” FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, reprinted in 143 F.R.D. 441 (1992). Many of the aspirational standards that address common forms of discovery abuse merely reflect the duties legally imposed on counsel by the Federal Rules. Compare “Lawyers Duties to Other Counsel,” numbers 19 through 27 (prohibiting discovery for purposes of harassment, undue burden or increase in expenses; requiring good faith construction of discovery requests to include relevant nonprivileged information; and requiring objections to discovery to be based on good faith belief in merits and not for delay or nondisclosure of relevant information) (Aspen, supra at 526-27) with FED. R. CIV. P. 26(b)(2) (scope and limits on discovery) and 26(g) (discovery certification that all discovery requests, responses, and objections be consistent with the Federal Rules on discovery, not be imposed for an improper purpose such as “to harass or to cause unnecessary delay or needless increase in the cost of litigation,” and not be “unreasonable or unduly burdensome or expensive”).

One question that arises is why this apparent redundancy exists with matters already covered under the Federal Rules of Civil Procedure and other controlling disciplinary rules. One disturbing possibility is that the civility code, purportedly an aspirational non-binding set of rules intended to set standards above those of existing rules, is actually an effort to water down the existing rules by suggesting that certain behaviors are not covered by formal rules. Cf. Amy R. Mashburn, Professionalism and Class Ideology: Civility Codes and Bar Hierarchy, 28 VAL. U. L. REV. 657, 684 (1994) (“lawyer regulation may be evolving backwards”). On the other hand, the possibility that the reiteration of discovery duties may only be for emphasis is supported by the Preamble to the Seventh Circuit’s Standards, which states that “[n]othing in these standards supersedes or detracts from existing disciplinary codes or alters existing standards of conduct . . . .” Aspen, supra at 524 (emphasis added).

373. Aspen, supra note 372, at 519; see Winter supra note 18, at 271; Zlaket, supra note 4, at 6; see, e.g., Malautea v. Suzuki Motor Co. 987 F.2d 1536, 1546 (11th Cir. 1993), cert. denied, 114 S. Ct. 181 (1993). Malautea is particularly relevant to the discussion of the adversarial zealotry criticism of the disclosure rules. In that case, which involved a products liability suit against the manufacturer of a sport vehicle that rolled over and severely injured the plaintiff, the court entered severe sanctions against the defendant and the attor-
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and its derivative doctrines of the attorney-client privilege and work product protection are not given the broad scope or primacy that they have been given by much of the profession.

The profession's natural gravitation toward an expansive definition of zealous client representation and application of the "arguably legal" standard is particularly predictable and significant in the context of discovery, which itself is intended as a limitation on partisanship.374 Because it occurs largely outside the immediate controlling influence of the court and because discovery requests typically involve substantial indeterminacy, the scope of discovery is particularly subject to lawyer manipulation if partisanship is embraced as the primary operating principle.375 This is epitomized by the traditionally accepted approach to discovery in which facts and documents need only be made available to an opposing party in response to a "proper" re-

neys for discovery abuse. The sanctions included a default judgment against the defendant for failure to comply with court discovery orders to turn over documents; costs and attorneys fees against the counsel for bad faith involvement in covering up discoverable materials; and imposition of additional fines against the attorneys for other forms of discovery abuse and resistance. Unfortunately, many of the particular examples of discovery abuse involved were far from uncommon, such as disingenuously objecting to interrogatories as ambiguous, construing interrogatory requests in an overly narrow manner, delaying production of information and deposition transcripts to hinder plaintiff's counsel's preparation, and hiding damaging relevant information. Malautea, 987 F.2d at 1540.

In commenting on the frequency of discovery abuse in the courts today and the twisting of discovery rules into powerful adversarial weapons for the benefit only of clients, the Malautea court stated:

All attorneys, as "officers of the court," owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself. . . .

Unfortunately, the American Bar Association's current Model Rules of Professional Conduct underscore the duty to advocate zealously while neglecting the corresponding duty to advocate within the bounds of the law. As a result . . . too many attorneys, like defense counsel in this case, have allowed the objectives of the client to override their ancient duties as officers of the court. In short they have sold out to the client. Id. at 1546-47. See also Fisons, 858 P.2d at 1084 (rejecting lawyer's claim that good lawyering required that lawyers for defendant not disclose documents and stating that "lawyer's duty" to place his client's interest ahead of all others presupposes the lawyer will live with the rules that govern the system); Williams v. General Motors Corp., 158 F.R.D. 510, 511-12 (M.D. Ga. 1993) (imposing sanctions on attorneys for seeking sanctions against an opposing counsel who had to cancel a deposition because of his father's terminal illness and commenting on the excess in zeal displayed); Keeton, supra note 52, at 13 (finding advocacy has become excessively zealous compared to traditional model under the original Canons of Ethics).

374. See Wolfson, supra note 32, at 50; supra notes 33-42 and accompanying text.

375. See Frankel, Cure for Discovery Ills, supra note 124, at 261-63; Schwarzer, In Defense, supra note 166, at 658-59; Wilkins, supra note 308, at 477, 481, 505.
quest—one that is unobjectionable, unambiguous, and inescapable. Attorneys play this game, in the name of best serving the client interest, by avoiding disclosure through finding an ambiguity or a basis for objection. The common first instinct has been "[h]ow can I interpret this interrogatory, or document request, to avoid giving up what I know my opponent is after?" As discussed above, however, courts have had a very different view of these same practices, often characterizing them not as legitimate discovery advocacy but instead as "obstruction, obfuscation, evasion, [or] destruction . . . under the guise of sound legal maneuvering or client representation."

Traditional lawyer discovery practice based on the primacy of zealous advocacy is integrally related to a basic assumption about litigant conduct that litigants and their attorneys will rationally act in their own immediate self-interest. In the context of discovery, this means that, as long as the cost or risk to the litigants from failing to disclose information is less than the cost of disclosing the information, the litigant will rationally "conceal, and lie about, unfavorable infor-

376. Schwarzer, In Defense, supra note 166, at 659; see, e.g., Campbell & Rea, supra note 124, at 242-43; Enoch, supra note 306, at 225. Indeed, one of the great benefits of the discovery game that depends so substantially on the ability of the opponent to ask the right question is the possibility that either through ignorance or incompetence, the opponent will fail to ask the right question. See Margaret A. Berger, Civil Litigation in the Twenty-First Century: A Panel Discussion, 59 BROOK. L. REV. 1199, 1209 (1993) (quoting remarks of Ralph K. Winter, former member of the Advisory Committee on Civil Rules, regarding the hysteria over disclosure); see also Cortese & Blaner, supra note 294, at 45; Napolitano, supra note 349, at 26, 29. The pervasiveness of lawyers' acceptance of such practices was recently demonstrated in Fisons, in which the court sanctioned the lawyers and defendant for failing to disclose “smoking gun” documents in a products liability case despite the fact that the documents were clearly encompassed by the plaintiff's discovery request. The lawyers offered as part of their defense testimony by “expert” witness lawyers and academics to support the contention that “[d]iscovery is an adversarial process and good lawyering required the responses made in this case.” 858 P.2d at 1083. Moreover, one of the experts asserted that “[t]endentious, narrow and literal positions with regard to discovery are . . . both typical and expected in the civil discovery process.” Gorham, supra note 281, at 771 n.42 (quoting Declaration of Professor Boerner). See also Bryan P. Harnetiaux et al., Harnessing Adversariness in Discovery Responses: A Proposal for Measuring the Duty to Disclose After Physicians Insurance Exchange & Ass’n v. Fisons Corporation, 29 GONZ. L. REV. 499 (1994) (discussing Fisons case and civil discovery abuse).

377. Zlaket, supra note 4, at 6; see also supra note 373. The divergence between the courts' views of lawyer tactics and that of lawyers, in addition to evidencing divergent ethical visions for the profession, may also indicate lawyer cognitive dissonance—the tendency for preconceived notions or beliefs to alter or obscure perceptions of contrary data. See Simon, Ethical Discretion, supra note 196, at 1139-40. Simon suggests that “a strong presumption in favor of the client may blind the advocate to opposing considerations that will be important to the judge . . . .” Id. at 1140.
The great benefit of expansive lawyer interpretation and application of the principle of zealous representation, as well as the work product and attorney-client doctrines, are that to a certain degree they legitimize concealment and reduce the number of instances in which actual lying is required. By doing so, they reduce the level of internal conflict that lawyers must face in their professional lives as they undertake conduct for the benefit of a client that should be unacceptable on a personal level.

The perceived dissonance of the disclosure rule and the accepted traditional practice is greatly magnified, in the eyes of lawyers who embrace the partisan ethic, by the fact that under Rule 26(a) disclosure, lawyers supposedly must apply their analytical skills for the benefit of the opposing party as they evaluate the relevance of documents and information for purposes of disclosure. While disclosure opponents probably exaggerate the extent to which this differs from the lawyer's duties to other parties and the courts under the predisclosure federal civil litigation system, proponents of disclosure must do

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378. Hay, supra note 42, at 483. Costs or risks can include, but are not limited to, losing a civil case or incurring sanctions from the court for specific conduct. Other less immediate factors that may influence litigants' cost-benefit analysis could include more long-term costs, such as the precedential effect of a case and the effect of litigant behavior on reputation in the legal community and future employment. See also Frankel, Cure for Discovery Ills, supra note 124, at 261-63 (examining general incentives and pressures for discovery abuse); Maute, supra note 80, at 49 (finding “opportunities and incentives to cheat [in discovery] are enormous”); Wilkins, supra note 308, at 494 (arguing that lawyer economics and the extent that lawyers will exploit indeterminacy are “inextricably intertwined”).

379. Cf. Simon, Ideology of Advocacy, supra note 300, at 126-28 (describing “procedural fetishism,” which is exemplified by focusing on procedure rather than substantive values at stake and engaging in conduct that would not be acceptable based on one's own values or those of the society).

380. For example, under Rule 11 lawyers have been required to undertake a reasonable inquiry into the factual and legal support for their papers and pleadings and can be sanctioned for making unwarranted arguments, claims, and defenses. FED. R. CIV. P. 11. The analytical duties imposed by this rule to reign in zealous advocates and deter frivolous litigation serve primarily the interests of courts and opposing litigants. See Fed. R. Civ. P. 11 advisory committee’s note, 97 F.R.D. 165, 198 (1983); Maute, supra note 80, at 28. In the case of Rule 11, the standard that must be met is one of nonfrivolity, which leaves much room for lawyers to maneuver on behalf of their clients. See Fed. R. Civ. P. 11 advisory committee's note, reprinted in 146 F.R.D. 583, 586-87 (1993); Luban, supra note 300, at 51; Wilkins, supra note 308, at 505. Even so, much of the recent controversy over Rule 11 may arise out of the clash between the rule's demands and the culture of adversary zeal.
more to demonstrate that the change is not significant than simply stating that the "disclosure obligation is directly proportional to the specificity of the allegations" in the pleading.\textsuperscript{381} This relates only to the amount of information that is potentially subject to disclosure. However, it must be acknowledged that the rule represents a fundamental shift in who has primary responsibility for determining what information is relevant and the basis upon which the determination is made. In the discovery system, it is the requesting party who initially must, through a discovery request, identify what facts and information it believes are relevant. This occurs somewhat blindly at a level of generality at first, and then with greater specificity, as more and more information is obtained during the discovery process.\textsuperscript{382} Under Rule 26(a), it is the party in possession of the evidence that makes the initial determination of what is relevant and what will be disclosed. The analysis of relevance will be based on the theories and facts alleged in the opposing party's pleading and the discussions with the opposition during the mandatory Rule 26(f) conference.\textsuperscript{383}

Because the disclosure obligation is tied to an opposing party's allegations of fact in the pleadings, the initial stage of traditional discovery based on specific requests and the new rule 26(a)(1) appear to be similar in the sense that the party seeking information can influence the extent of the disclosure in both cases by the specificity of language they use. In most cases, the disclosure obligation and discovery obligations would seem to result in roughly the same investigatory and analytical effort by parties to exchange the same information.\textsuperscript{384}

Similarly, under the traditional discovery regime, analytical work undertaken by lawyers to prepare their cases, including work interpreting the allegations of the pleading and search for relevant materials, could inure to the benefit of their opponents through discovery. However, in that context, there was the intermediate, necessarily "proper discovery request" and ensuing game that would have to be played before the opponent would be able to benefit.

\textsuperscript{381} Schwarzer, \textit{In Defense}, supra note 166, at 660.

\textsuperscript{382} See Frankel, \textit{Cure for Discovery Ills}, supra note 124, at 252-53. Frankel notes that the traditional discovery process is one in which initial discovery takes the form of basic interrogatories asking an opposing party to identify potential witnesses and documents that exist and that are relevant to specific matters identified in the discovery request. Based on the information obtained, document requests, depositions, and more interrogatories are undertaken that yield additional relevant information that may expand the scope of the requests made for additional information through more interrogatories, depositions, and requests for production. \textit{Id.} at 253 n.17.

\textsuperscript{383} See Frankel, \textit{Cure for Discovery Ills}, supra note 124, at 253, 265; \textit{supra} note 241-246 and accompanying text.

\textsuperscript{384} However, substantial differences, could be expected in the amount of discovery proceedings, disputes, and delays that occurred before the exchange of the information. \textit{See} Napolitano, \textit{supra} note 349, at 29 (arguing that the same information comes out under
The difference rests primarily in the level of specificity of language that will trigger a disclosure of information and, more important, in the fact that under Rule 26(a) the party disclosing information is in a far better position to identify relevant information because of its superior knowledge and access to information that is potentially relevant. The result should generally be the disclosure of more relevant information than under traditional discovery, and it is this prospect that seems to be at the heart of the concern by lawyers committed to the tradition of zealous advocacy.

Thus, while Rule 26(a)(1) disclosure reaches a relatively modest amount of the information involved in traditional discovery, it wreaks havoc with the partisan conception of standard ethical operating procedure. By eliminating the requirement that there be a “proper” discovery request and sending the overt message that there is a legal obligation of disclosure period, Rule 26(a) clearly signals the reversal of two of the central systematic tenets of traditional zealous advocacy in the context of discovery. When potential conflicts arise between a lawyer’s ethical duty as an officer of the court to disclose facts and a lawyer’s ethical duty to represent the client’s interest, the duty to the court and the administration of justice rather than client interest take disclosure 98% of the time that would eventually come out under discovery anyway, after more unnecessary delays and costs); Schwarzer, In Defense, supra note 166, at 660.

385. See Frankel, Cure for Discovery IIs, supra note 124, at 265. A simple illustration of this would be as follows: A plaintiff brings a products liability case alleging that a manufacturing defect caused the plaintiff’s injuries. The defendant manufacturer is aware that the product was intentionally manufactured employing a design that was likely to cause the type of injury suffered by the plaintiff but which was more cost effective. During traditional discovery, a plaintiff might seek the “identification of all persons with knowledge of the manufacturing process applicable to this product.” Applying the narrow reading, such an interrogatory would be given under the zealous advocacy “arguably legal” ethics approach, and (after objecting that this interrogatory is unreasonably vague, broad, and burdensome, thereby delaying disclosure and potentially triggering additional discovery proceedings) the defendant would disclose names of persons with knowledge of how the product was actually manufactured, but not the names of person with knowledge about the design defect. In the same circumstances under Rule 26(a) disclosure, the plaintiff might allege in the complaint that plaintiff “was injured while using defendant’s product and that the injury was caused by that product.” In this circumstance, a defendant with knowledge of the design defect arguably has a duty to disclose the names of persons with knowledge of the existence of the defect, although, predictably, some defendants would argue that the facts are not alleged with particularity. Cf. Campbell & Rea, supra note 124, at 245.

386. As discussed in the section on practical criticisms of the disclosure rule, there is a potential for at least some traditional application of the “arguably legal” partisan approach focused now on the “pleaded with particularity” standard in Rule 26(a). See supra notes 192, 200-201, 232-234 and accompanying text. Even if this admittedly indeterminate standard becomes the new field for discovery games, the field for lawyer maneuvering should be somewhat narrower.
primacy. Furthermore, instead of an adversarial presumption that the lawyer's first duty is one of nondisclosure, there is now a presumption of disclosure of relevant information.387

Because the disclosure rule is explicit about the duty to disclose certain basic relevant information and takes the disclosure of that information outside the traditional discovery dynamic, the rule also restricts the opportunity for partisanship by reducing the legal parameters within which indeterminacy of rules and language can be interpreted by lawyers applying the "arguably legal" or "benefit of the doubt to client interest" perspectives.388 Finally, the rule also moves further toward delineation of lawyers' duties based on "purposivism" instead of maximizing client interests.389 The rule expressly instructs lawyers that there is a unilateral duty to disclose both adverse and favorable information and emphasizes the function of discovery in efficiently and fairly ensuring that all parties to a civil dispute have access to relevant information to be used toward the just resolution of the dispute. By ensuring access to relevant information, the rule further erodes the traditional model of the lawyers' duty based on "zealous advocacy within the bounds of the law" and accentuates the vision that federal rules and federal courts have been expressing with greater volume and frequency in recent years: lawyers' primary duty in federal court civil litigation is "to assist in carrying out [the] "essential purposes" or "social functions" [of the law], or at the very least refrain from acting so as to subvert and nullify the purposes of the rules."390

At least one explanation, then, for the claims of inconsistency of Rule 26(a) with the adversarial system's ethical rules, work product protection, and attorney-client privilege is that the formal legal and ethical rules, at least as envisioned by the courts, are inconsistent with

387. See Campbell & Rea, supra note 124, at 242-47; Enoch, supra note 306, at 224; Schwarzer, In Defense, supra note 166, at 659-60.

388. This is due in no small part to the fact that, despite the retention of standards such as tying disclosure to the particularity of facts alleged, as soon as the lawyer analyzes the facts of a case to determine if disclosure of something is in the client's immediate interest and concludes that it is not, the lawyer may well have also made the determination that it is relevant and therefore must be disclosed. See, e.g., the fact pattern discussed supra note 385.

389. "Purposivism" as used here is the notion that "lawyers should demonstrate greater allegiance to the public purposes of legal rules." Wilkins, supra note 308, at 505; see also Simon, Ideology of Advocacy, supra note 300, at 62.

390. Wilkins, supra note 308, at 506; see also Schwarzer, In Defense, supra note 166, at 660 n.21. Judge Schwarzer captured the essence of this point in his response to Justice Scalia's contention that disclosure does not "fit comfortably" within our adversarial system, when he stated that the "safeguards and incentives of the adversary process do not work well in the discovery process." Id.
the actual lawyer culture or the generally accepted operating rules of lawyers in the civil litigation system. Under this view, it is a mistake to assume that the official canons of the profession taught in the law schools and reflected in the official rules governing lawyer conduct actually reflect the ideology of the profession. Instead, the relationship between actual practice and formal rules is far more complex. Ideology reflected in official formal rules can influence lawyers to resist economic and client pressures and behave consistently with the rules. On the other hand, pressures, incentives, and influences generated in legal practice can directly influence the content or lawyers' interpretation of ethics and procedural rules so that the understanding and application of the rules reflects a quite different perspective on ethics, one largely determined by individual self-interest. At times the formal rule system and actual lawyer workplace rules may simply be inconsistent with each other.

This dynamic can be seen in the controversy over the disclosure rule, which seems to have fallen very close to the fulcrum of the traditional tension between the lawyers' duty as client advocate and the lawyers' duty as officer of the court. While the disclosure rule is not inconsistent with the formal doctrines governing lawyer conduct, it is inconsistent with the informal workplace practices and ideologies accepted by a large number of lawyers. The result is that, in the course of reacting to the proposed rule on disclosure and in attempting to influence the formal rules, lawyers and the organized bar have revealed not only inconsistencies between the traditional adversarial ideology and the disclosure rule, but also have revealed the inconsistencies of that ideology with other existing formal rules governing civil litigation practice. It will be interesting to watch the dynamic unfold further as Rule 26(a) is applied. Perhaps the rule will positively influ-

391. See generally Nelson & Trubek, supra note 185, at 181-214 (discussing lawyers' professional ideologies taken in context); see also Hazard, supra note 358, at 1250-51; Wilkins, supra note 308, at 488. This does not mean, necessarily, that there is a single, unified, consistent ideology or agreement about appropriate lawyer behavior among individual lawyers; varied and conflicting views abound and the profession must be viewed as ethnically pluralistic. Id.; Hazard, supra note 358, at 1251; Nelson & Trubek, supra note 184, at 187; Schneyer, supra note 21, at 97. Indeed, even within the disciplinary codes are "fragmentary and often incompatible conceptions of the lawyers' role vying for dominance," such as the lawyer as partisan, as officer of the court, as counselor, as servant of the public interest. Id. at 102; see also Simon, Ethical Discretion, supra note 196, at 1133 (stating "there has never been a consensus about where to draw the line between" a lawyer's duties to the court and as an advocate).

392. See Nelson & Trubek, supra note 184, at 188, 199, 206; supra text accompanying notes 106-114.
ence the ethical behavior of attorneys. On the other hand, the informal adversarial ethic may ultimately prevail over the ethical model presented by the formal disclosure rule, through the use of the political process to obtain a rule change,393 or the use of an eviscerating and narrowing interpretation of Rule 26(a), or perhaps simply through noncompliance, leaving the workplace discovery practices of lawyers unchanged.394

Conclusion

The seemingly intractable nature of discovery problems in the federal courts is striking. The literature on federal court practice is filled, particularly over the last three decades, with recurring concerns about evasion of discovery and the use of discovery as a tactical weapon despite the repeated efforts at procedural reform. The limited empirical evidence suggests that while discovery abuse is not as pervasive as one would assume based on the volume of claims in the literature, there is a constant, significant level of problem discovery

393. See supra notes 169-177 and accompanying text, discussing the intensive lobbying efforts for repeal of the rule or for districts to opt out of Rule 26(a). See also Daniel Wise, 3 Bar Groups Seek Delay in Federal Discovery Changes, N.Y. L.J., June 9, 1994, at 1, 2 (defense bar organizations attempt to get Southern District of New York to delay implementation of Rule 26(a) in order to allow empirical data on efficacy of disclosure to be gathered); Elaine Song, District's Judge Opposes Mandatory Disclosure Rule, CONN. L. TRIB., Feb. 6, 1995, at 6 (discussing Connecticut district court's considering opting out of disclosure rule and opposition by attorneys to rule).

394. At least one early example supporting a pessimistic view appeared recently in Litigation (The Journal of the Section of Litigation of the American Bar Association), in which an article on document production under the new Rule 26(a) sarcastically and pejoratively referred to the "preenlightenment days" (i.e., before the 1993 rule amendments) and proceeded to list ways the bar can continue to "nonproduce" documents, including "arguing that the document was not relevant to "disputed fact[s] 'alleged with particularity in the pleadings.'" R. Bruce Beckner, Advance Sheet, Litig., Spring 1994, at 49. Other ways of avoiding production included asserting (silently to yourself and later to the court if caught) that the document was not within the scope of a document request, was not in the file you reasonably searched, or was not "within your custody and control." Id. While the writer does throw in the caveat that such behavior is "not necessarily" what an attorney "should" do, the force of this caveat is diluted by the final conclusion that under the new Rule 26 "it is more important that [sic] ever that [lawyers] work to keep document production no worse than a zero-sum game for themselves and their clients." Id. at 51. In the context of the article, apparently what this means is that an attorney should engage in a cost-benefit analysis before deciding whether to "nonproduce" and should only consider producing the "smoking gun" document when the risk or cost from nonproduction outweighs the likely cost of production. Noticeably absent is any exhortation of professionalism or compliance with the intent of the Civil Rules; instead, the reaction of at least one representative indicator of the organized bar seems to be much of the same self-interest that has fueled discovery abuse problems in the past.
practices. More importantly, a closer look at the evidence suggests that a large portion of discovery abuse can be attributed to the dynamics and pressures of the adversarial litigation tradition that have been in constant tension with the utilitarian discovery goal of providing inexpensive mutual access to information for the purpose of just resolution of civil disputes. The discovery rules have been unsuccessful in checking partisan tendencies largely because the ambiguous or indeterminate rules have lent themselves to, or been co-opted by, partisan use and practices and because the courts historically have not corrected adversarial excesses by strict enforcement of the rules.

The inconsistency between the adversarial tradition and the formal goals of discovery is at the heart of the costly, counterproductive practices labeled as discovery abuse and is both epitomized and confirmed by the controversy over the federal Rule 26(a) disclosure amendment. Disclosure opposition has focused on the purportedly impractical nature and operation of the disclosure rule, and critics have tried to cast the disclosure rule as antithetical to well established rules and doctrines of the civil litigation system. Upon thorough inquiry, however, the arguments that disclosure is so practically flawed that it should be rejected out of hand are far from compellingly supported. In fact, the pragmatic attack on disclosure is really secondary to the widely shared perception that disclosure is inconsistent with adversarial traditions and discovery practices that have been embraced without question by much of the profession for too many years. When the disclosure rule is scrutinized in the context of the formal doctrines that compose our federal civil litigation system, few, if any, significant inconsistencies can be found with the formal rules. Instead, disclosure of the basic information called for by Rule 26(a)(1) is consistent with the procedural and ethical doctrines and rules that have been developed to achieve the goals of discovery and just civil dispute resolution. In addition, the disclosure rule more clearly and unequivocally communicates those goals to the profession.

Reduced to its essence, what arguably so inflames the critics of disclosure is that the rule says it is not permissible for lawyers and clients who are aware of relevant evidence that is unfavorable to the

395. One explanation for the difference between the amount of discovery abuse identified empirically and that identified in the literature relates to who is defining or identifying the abuse. Most empirical studies measure the perspectives of lawyers acculturated to adversarial discovery practices that may be at odds with the language and intent of formal discovery rules. The general literature, on the other hand, primarily created by academics, uses consistency with language and intent of the formal discovery rules as the gauge of abuse.
client to rely on traditional adversarial gamesmanship to avoid the disclosure of that information. The lawyer in possession of evidence tending to show that the claim should not have been brought or a defense should not be made, can no longer rely on well-worn strategies like waiting for the "proper request," delaying tactics, or hoping that the other side fails to request the information. Instead, the underlying premise of disclosure is that the outcome of civil litigation should relate more closely to the substantive merits than to the willingness and ability of counsel to stretch partisan zealotry to its limits at a potentially significant, unwarranted cost to the civil justice system. It attempts to serve this end by reducing only slightly the field of adversarial contest, but in this reduction it is revolutionary.

Because lawyers have had the adversarial tradition "drummed into them" throughout their careers, some commentators are justifiably skeptical about the prospects for success of any discovery or other litigation reforms that are inconsistent with lawyers' perception of the adversarial system—regardless of whether it will benefit society or the lawyers in the long run. Admittedly the legal profession's reaction to the disclosure rule provides much support for this skepticism. However, the mere inconsistency of traditional practice and informal ideology with the disclosure rule is not a reason for rejection of the rule, both as a matter of principle and because the existence of the rule can influence positively systematic client and lawyer behavior.

For many years commentators decrying the abuse of pretrial discovery have asserted that improvement is unlikely absent a significant change in the litigation culture and conceptions of professionalism. As Judge Keeton, former Chair of the Standing Committee on the

396. The reaction to disclosure arguably exemplifies how completely the legal profession's ideology of advocacy has embraced what William Simon has labeled "[p]rocedural fetishism," which is exemplified by focusing on procedure rather than substantive values at stake: "The present system encourages the prosecution of claims which would not be pursued by people who were forced to seriously confront their own and society's values." Simon, *Ideology of Advocacy*, supra note 300, at 126-28.

397. See Berger, * supra* note 376, at 1208 (quoting remarks of attorney Kenneth R. Feinberg). See also id. at 1209 ("[M]aybe we need to lobotomize lawyers away from their adversarialism. But I think that with out strong judicial enforcement, a lot of these proposals are going to be doomed to failure." (quoting remarks of Professor Jeffrey W. Stempel)).

398. See, e.g., Keeton, * supra* note 52, at 13 (enforcement of precise rules alone is not enough; also need professional culture); Mullenix, * supra* note 18, at 820, 827-28 (more than rules changes are necessary; must treat cause and must develop aspirational professionalism); John W. Reed, *Light-Hearted Thoughts About Discovery Reform*, 3 Rev. Litig. 215, 221 (1983) (analogy to killing dinosaur of discovery abuse: nobody killed the dinosaurs—the climate changed and the climate must change as to discovery); Walker, * supra* note 57, at 811, 820 ("rules of procedure and principles of professionalism often mirror one an-
Federal Rules of Practice, recently noted, this requires unitary cooperation and efforts from all parts of the profession, including the courts, legal practitioners, the government, and the academy, with the Rule 1 mandate for "just, speedy and inexpensive determination of every action" serving as the guidepost. It includes "developing a professional culture that encourages skilled advocacy and discourages Rambo tactics" and "a widely shared expectation about what is and what is not permissible," training lawyers and judges in the effective practice techniques and how to appropriately address deviations from effective practice, and adopting new and improved rules for the twenty-first century. A critical aspect of a change in pretrial litigation culture is to overcome the traditional approach that focuses on immediate or short-term clients' interests and assumes that zealous representation of those interests is invariably at odds with society's overall interest in discouraging strategic (i.e., frivolous) litigation and partisan discovery practices. Given the current widespread public dissatisfaction with lawyers and the legal system, it is time for a fresh look at what practices are in the client's best interest. While it is probably true that the public would agree in the abstract with notions of "zealous representation," in the long term, clients' interests are most rationally served by rules that serve the maximum social benefit rather than individual immediate interests. For this change to occur, however, lawyers must overcome not only their clients' tendencies toward counterproductive immediate self-interest, but their own shortsighted competitive self-interests.

other," and even though "rules of procedure can express principles of professionalism," the rules cannot embody them and "there are limits to what they can accomplish").


400. Keeton, supra note 52, at 16.

401. See generally Karen O'Connor, Civil Justice Reform and Prospects for Change, 59 Brook. L. Rev. 917 (1993) (examining the public's poor perception of the legal profession and arguing for the necessity of an overhaul of the legal system). In particular, opinion polls show that the public believes that the system is too slow, costly, and incomprehensible and that lawyers are greedy and untrustworthy. Id. at 922-25. It would be interesting to know what the public would think of lawyers' arguments regarding disclosure—particularly why it is ever proper to hide relevant evidence. As noted previously, in one study of lay opinions, regarding the obligations to disclose information, clients adopted a much broader view of a disclosure obligation than have attorneys or the rules. See supra note 321.

402. See Gilson, supra note 124, at 874-75 (advocating Rawlesian approach to client interest). See also Gordon & Simon, supra note 368, at 251-52 (finding corporations can be unexpectedly responsive to regulatory reforms that may be socially responsible, even applying an "amoral" economic analysis).

403. See Garth, supra note 52, at 932-35 (discussing effect of client demands and citing Posner for pessimistic view that only value is what sells); Gilson, supra note 124, at 894-86;
As a mere rules change, the disclosure rule is unlikely to solve pretrial discovery abuse.\textsuperscript{404} Indeed, the criticism is well taken that it may result in short-term increased burdens on the courts as the novel concept is applied to a profession steeped in a resilient partisan tradition.\textsuperscript{405} Nevertheless, the disclosure rule, by unequivocally stating a fundamental obligation of automatic mutual access to basic information, could well represent a significant, albeit faltering, step toward meaningful litigation culture change. Given the obdurateness of discovery abuse and the profession's unquestioning acceptance of the partisan tradition, those interested in genuine reform must be willing to fight extraordinarily hard for even such incremental improvement.\textsuperscript{406}

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\begin{itemize}
  \item Brazil, \textit{Front Lines, supra} note 57, at 243-44; Brazil, \textit{Lawyers' Views, supra} note 57, at 860-61. However, in Brazil's study, lawyers indicated that even in large cases client pressure to evade discovery requests was not common and was considered the source of fewest problems. \textit{Id.} 861-62.
  \item \textsuperscript{404} See, \textit{e.g.}, Brazil, \textit{Improving Controls, supra} note 57, at 946 (changes in rules will result in only gradual changes in attorney behavior).
  \item \textsuperscript{405} In light of modest gains likely to result from disclosure, the unintended side effects, such as additional dispute costs and satellite litigation costs, make the rule particularly subject to further attack and potential retrenchment similar to that recently occurring with regard to Federal Rule of Civil Procedure 11. See Frankel, \textit{Cure for Discovery Ills, supra} note 124, at 273.
  \item \textsuperscript{406} See Marcus, \textit{Prospects, supra} note 4, at 813 (“For the pragmatist, the question is not so much whether changes achieve an ideal but whether they work an improvement.”); Marcus, \textit{Revival, supra} note 223, at 494 (In “an adversarial system in which litigants and lawyers try to use the procedures that exist to the advantage of their clients. . . ., as tinkerers, we will have to repeat the cycle of revision and relapse again and again.”).
\end{itemize}