STATE OF MINNESOTA

IN SUPREME COURT

C6-84-2134

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF CIVIL PROCEDURE

ORDER

IT IS HEREBY ORDERED that a hearing be had before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on October 9, 1996 at 9:00 a.m. to consider the recommendations of the Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure to amend the Rules of Civil Procedure. A copy of the report containing the proposed amendments is annexed to this order and may also be found at the Court's World Wide Web site: (www.courts.state.mn.us).

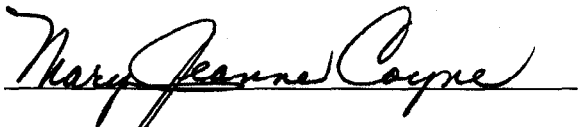
IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before September 25, 1996, and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before September 25, 1996.

Dated: August 5, 1996

BY THE COURT:



Mary Jeanne Coyne
Associate Justice

OFFICE OF
APPELLATE COURTS

AUG 5 1996

FILED

MACKENZIE & HALLBERG

PROFESSIONAL ASSOCIATION

Trial Lawyers

Reed K. Mackenzie*
Mark A. Hallberg*
Michael W. Unger†
John M. Dornik

Legal Assistants
Teresa Erickson
Barbara Retzlaff
Mona Winston, R.N.

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Suite 2500
Minneapolis, MN 55402

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September 25, 1996

OFFICE OF
APPELLATE COURTS

SEP 25 1996

FILED

HAND DELIVERED

Frederick K. Grittner
Supreme Court Administrator
MINNESOTA SUPREME COURT
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Dear Mr. Grittner:

Enclosed are 12 copies of Request for Oral Presentation & Written Submission, together with Minnesota State Bar Association Committee on Court Rules and Administration's *Report of Special Subcommittee on Proposed Amendments to Minnesota Rules of Civil Procedure.*

Very truly yours,

Michael W. Unger

MWU:dme
Enclosures

*Civil trial specialists, certified by the Minnesota State Bar Association and the National Board of Trial Advocacy.

†Civil trial specialist, certified by the Minnesota State Bar Association.

OFFICE OF
APPELLATE COURTS

SEP 25 1996

FILED

STATE OF MINNESOTA

IN SUPREME COURT

No: C6-84-2134

In re: Hearing to Consider Proposed Amendments to the Minnesota Rules of Civil Procedure.

REQUEST FOR ORAL PRESENTATION & WRITTEN SUBMISSION

TO: The Supreme Court of the State of Minnesota:

Michael W. Unger states as follows:

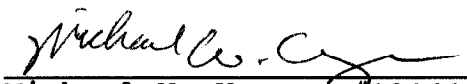
1. That I am an attorney licensed to practice law in the State of Minnesota and Chairman of the Minnesota State Bar Association Committee on Court Rules and Administration.

2. That I request to participate in oral presentations scheduled by the Court for October 9, 1996 to address proposed changes in the Minnesota Rules of Civil Procedure, which are of interest or concern to the members of the Minnesota State Bar Association.

3. That I respectfully submit the attached written report of a Subcommittee on a Committee on Court Rules and Administration. The Subcommittee report is scheduled for consideration by the full Committee on Court Rules and Administration on October 2, 1996. I request permission to present the final actions taken by the Committee on Court Rules and Administration on October 9, 1996.

Dated: September 25, 1996.

Respectfully Submitted,



Michael W. Unger, #131416
MACKENZIE & HALLBERG, P.A.
150 South Fifth Street, Ste 2500
Minneapolis, MN 55402
612-335-3500
Attorneys for Committee on Court Rules and Administration, Minnesota State Bar Association

MINNESOTA STATE BAR ASSOCIATION
COMMITTEE ON COURT RULES AND ADMINISTRATION

REPORT OF SPECIAL SUBCOMMITTEE ON PROPOSED AMENDMENTS TO MINNESOTA RULES OF CIVIL PROCEDURE

INTRODUCTION

On July 22, 1996, an advisory committee to the Minnesota Supreme Court issued recommendations for rules changes in the Minnesota Rules of Civil Procedure. This report was first published for the general public by an order dated August 5, 1996. The recommendations were posted on the Court's Internet site on or about that time. They were also published in Finance & Commerce on August 16, 1996. The Minnesota State Bar Association was unable to obtain copies of the rules from the Internet and requested a hard copy that was received in mid-September of 1996. The Court has solicited written and oral comments with a deadline for a written submission on or before September 25, 1996. The Court's hearing is set for October 9, 1996.

GENERAL OBSERVATIONS

The primary thrust of the proposed rules changes are to conform the Minnesota Rules of Civil Procedure to various changes adopted in the Federal Rules of Civil Procedure since 1991. In most instances, the Advisory Committee has recommended amendments to conform the Minnesota rules to the federal rules. There are a number of exceptions, however, and one is particularly significant.

Arguably, the recommended changes dealing with discovery practices are likely to increase the cost of litigation without a corresponding benefit. For example, the additional cost associated with a recommendation to permit routine expert depositions could be so substantial as to create a chilling effect for many litigants.

The impact of such a change may fall disproportionately on those with the least financial resources. The need for such a role change, and the likely benefit is uncertain.

As a general matter the Subcommittee feels that the proposed changes have been developed without adequate input from the Bar and without adequate time for thoughtful consideration and debate. The Subcommittee is concerned that changes of such magnitude warrant wider debate and input from the Minnesota Bar than time allows. Ideally, the changes proposed should be the subject of deliberation by the House of Delegates or, preferably, the General Assembly. Regrettably, this does not appear possible.

Another concern arises from the communication with the Bar Association about these proposed changes. The State Bar's leadership and the leadership of this Committee were unaware that the Advisory Committee was reviewing and acting upon these rule changes until after action was taken.

The Subcommittee questions the need for the short time line for response, comment and enactment. This is particularly true since Minnesota's own version of the federal rules is still under deliberation by the Federal District Court. It strikes us that the recommendations before the Supreme Court are both premature and hasty.

FEDERAL CHANGES NOT RECOMMENDED FOR MINNESOTA

Of the changes in the federal rules which are not being recommended for adoption in Minnesota, the Subcommittee feels that only two items receive special comment: Changes to Rule 11; Rule 26(a)(1) requiring initial disclosures.

Rule 11: The Subcommittee is in complete agreement that the changes to Rule 11 are unnecessary in Minnesota. The Supreme Court's decision in *Uselman v. Uselman*, provides clear standards for the lower courts to utilize in resolving Rule 11 sanction issues.

Rule 26(a)(1) - Initial Disclosure: This provision of the federal rules requires each party to initially disclose information such as names of individuals likely to have relevant evidence, descriptions of documents that will be available for inspection and copying, calculation of damages and relevant insurance agreements. Under the new federal provision, this information is to be disclosed without the necessity of any interrogatory or other discovery request.

The Supreme Court Advisory Committee suggests that this provision not be incorporated in state court practice because it would, "merely add an additional and costly layer of discovery." The Subcommittee is of divided opinion about the wisdom of this conclusion. Half of the Subcommittee believes that the initial disclosure requirements under the federal rules are designed to simplify the discovery process by eliminating the need to conduct discovery of what should be non-controversial matters. The Advisory Committee noted that disclosure of initial facts and identity of witnesses has not traditionally been a problem in Minnesota. Those favoring initial disclosure agree and find that requiring disclosure will not be a problem in most cases, but will provide early information at minimal expense.

A contrary view is held by the other half of the Subcommittee. According to this view, standard interrogatory requests already

seek this type of information. By separating out certain matters for treatment under the initial disclosure rule while leaving others to interrogatories, we increase the likelihood that any sort of discovery problems will end up being presented in a fragmented fashion. Under existing practice, all issues may be dealt with at one time in the context of responses to interrogatories.

All members of the Subcommittee agree that should initial disclosure be adopted in Minnesota, it should be modified to accommodate Minnesota's "hip pocket filing" practice. Any requirement for initial disclosure should only arise after an action is filed with the court.

RULES CHANGES RECOMMENDED FOR ADOPTION

The Committee has reviewed the remaining recommended rules changes and finds most of them to be worthwhile. The proposed changes to Rules 26 and 30 are objectionable, however. Additionally, special comment is warranted on the proposed change to Rule 5.

Rule 5: The Subcommittee enthusiastically endorses the proposed changes to Rule 5 and, in particular, the proposed provision prohibiting court administrators from rejecting papers for filing. It is the unanimous view of the subcommittee that it is not the appropriate role for a court administrator to determine when to accept papers for filing. If there is a dispute about the appropriateness of the filing, this is more properly presented for consideration to the court.

Rule 26 - Discovery:

A. Mandatory Expert Witness Disclosure: The Subcommittee unanimously agrees that the mandatory expert witness disclosure

should not be adopted unless it provides a specific exception for treating physicians. In the case of treating physicians, the Subcommittee believes that the current practice of limiting discovery to expert interrogatories is most appropriate. In our experience, the vast majority of the medical profession finds the need to provide medical/legal information to be an unwelcome part of their professional practice. The requirements of mandatory disclosure (such as revealing the list of all cases in which the expert has testified, furnishing a list of publications, and the like) provide an additional burden that would be most unwelcome. It would be unfair to the litigants to impose a rule for which they have little or no control and ability to compel compliance.

Under the ethical rules which govern the medical profession, treating physicians are not to assume the role of advocate, and are required to be objective and impartial providers of expert medical opinion. A patient's attorney is in no position to secure the type of cooperation necessary to comply with the mandatory expert disclosures.

The Subcommittee also finds this requirement to be repugnant on public policy grounds. The medical profession should not be forced to have to attend to the business of litigation requirements any more than is absolutely necessary to secure the advancement of justice. There is little or no problem in Minnesota with regard to disclosure of treating physician opinions. Accordingly, this Rule should not be adopted unless there is an express provision exempting treating physicians.

As to specially retained experts whose primary purpose is to render medical/legal opinions, rather than treat the patient, the

majority of the Subcommittee thinks the proposed amendment is desirable because it expands the scope of expert discovery without being unduly burdensome. It should be noted, however, that this recommendation is somewhat inconsistent with the recommendation that there not be initial discovery disclosures. Clearly the requirement of expert witness disclosures does provide an "additional layer of discovery" and raises the specter of new grounds for contention and dispute in practice.

One member of the Subcommittee opposes the proposed change because the existing rules usually work well without adding expense to the discovery process.

B. Discoverability of Witness Statements: The Advisory Committee appears to recommend a dramatic change restricting the discoverability of witness statements. Since no rationale is offered for this change, it is assumed by this Subcommittee that the proposed change may be an oversight. Minnesota State Court Practice Rule 26.02(c) has long allowed discovery of witness statement without making a showing out of the work/product doctrine. This has been a conscious departure from the federal practice over the years. See e.g., *Leer v. Chicago, Milwaukee, St. Paul & Pacific Railway Company*, 308 N.W.2d 305, 307 n.4 (Minn, 1981). The Advisory Committee recommendation would eliminate this longstanding and successful distinction of Minnesota state court practice. The Subcommittee strongly opposes this recommendation. The discoverability of witness statements has long been proven to advance the "search for truth" in litigation.

C. Expert Witness Depositions: The Subcommittee opposes the recommendation for adoption of the rule change at 26.02(d) expert

depositions without seeking prior court approval. For many years, Minnesota practice has intentionally deviated from federal practice in this regard. (Prior to the federal rule change, expert depositions were routinely permitted in the District of Minnesota.) The routine taking of expert depositions adds a tremendous cost to litigation that is generally unnecessary. These depositions can easily cost a few thousand dollars. There are occasionally cases where expert depositions may be needed, but such exceptions are best determined by the judge or by agreement by the parties. It is a rare case where expert depositions are essential to a resolution of a case.

Additionally, the same points must be made with regard to the impact of such a rule on treating physicians. Routine discovery depositions of treating physicians will not only add expense of several thousand dollars per deposition, but will double the demand for the time of treating physicians, time which would be better spent treating patients.

D. Privilege Log: The proposed amendments to Rule 26.02(e) would merely codify the standard interrogatory requests of many current practitioners. The best "form interrogatories" currently call for a description of the basis of privilege whenever a privilege objection is raised. The Subcommittee believes, however, that a comment should be added cautioning that the requirement of a privilege log is not meant to require itemization of each and every document, nor to provide a detail of information that may run contrary to the point of the privilege itself. In many cases, a description in very general terms of the nature of documents being withheld may often be adequate.

E. Supplementation of Discovery Responses: The proposed rule to Rule 26.05(a) contains a drafting error. The proposed amendment would use the redundant language of both "seasonably" and "at appropriate intervals." One of these phrases should be dropped. These redundant phrases are not incorporated in the current Federal Rules.

F. Rule 26 Comments: The Subcommittee believes that the Advisory Committee's comments on the provisions of Rule 26 should not be adopted in their entirety. The comments seem more extensive than seems appropriate.

Rule 30.04: The Subcommittee wishes to note its enthusiastic approval of the proposed changes to Rule 30.04. There are a significant number of lawyers who engage in appropriate objections during depositions. The proposed rule changes clarify the appropriate standard and approach for making objections at depositions.

Form 24: The proposed form for use in mandatory expert witness disclosures should be revised to make clear they do not apply to treating physicians. This would be best accomplished by deleting the following language from lines 1172 and 1173:

> "about each of the persons it may call to offer opinion testimony at the trial of this action. These disclosures are made..."

CONCLUSION

We recommend adoption of this report for presentation to the Minnesota Supreme Court.

Respectfully Submitted,

Brian Melendez, Minneapolis
Eric Larson, Rochester
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MACKENZIE & HALLBERG

PROFESSIONAL ASSOCIATION

Trial Lawyers

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September 30, 1996

OFFICE OF
APPELLATE COURTS

OCT 1 1996

FILED

Frederick K. Grittner
Supreme Court Administrator
MINNESOTA SUPREME COURT
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Dear Mr. Grittner:

It has come to my attention that we filed a draft of the Subcommittee Report that contains minor errors. Please find enclosed 12 copies of the final draft which omits these errors. I would appreciate it if you would take steps to see that the copies previously filed are replaced with the enclosed final draft.

The full court Rules Committee is scheduled to take up this subject during a meeting on Wednesday, October 2. Should final action be taken at that time, I will supply further written notice so that the Court may be aware of the status of the Committee's work prior to the hearing.

Thank you.

Very truly yours,

Michael W. Unger

MWU:dme
Enclosures

*Civil trial specialists, certified by the Minnesota State Bar Association and the National Board of Trial Advocacy.

†Civil trial specialist, certified by the Minnesota State Bar Association.

OFFICE OF
APPELLATE COURTS

OCT 1 1996

FILED

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Respectfully Submitted,

Brian Melendez, Minneapolis
Eric Larson, Rochester
Michael Unger, Minneapolis
Willard Wentzel, Minneapolis

ROBINS, KAPLAN, MILLER & CIRESI
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October 1, 1996

OFFICE OF
APPELLATE COURTS
OCT -3 1996
FILED

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Proposed Amendments to the Minnesota Rules of Civil Procedure
Case No. C6-84-2134

Dear Sir:

We respectfully request the opportunity to appeal before the Court on October 9, 1996 to make an oral presentation regarding the proposed amendments to the Minnesota Rules of Civil Procedure.

Please distribute the attached written summary of our presentation respectfully submitted by me and by John Degnan with the Bassford firm.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI

John F. Eisberg

BASSFORD, LOCKHART, TRUESDELL & BRIGGS

John M. Degnan

JFE/ml
Enclosure

1075210-1

WRITTEN STATEMENT

The undersigned lawyers have been practicing primarily within the field of medical negligence litigation for approximately 20 years. John Eisberg has represented plaintiffs in this field of practice and has served as a member of the Board of Governors of the American Trial Lawyers Association and the Minnesota Trial Lawyers Association. John Degnan has represented defendants and insurers in this speciality and is a former President of the MDLA. Both of us strongly oppose the Advisory Committee's proposed change in Rule 26.01(b) requiring that expert witnesses provide signed reports in support of their opinions; and likewise oppose proposed Rule 26.02(d)(1), expanding the right to take depositions of experts and their opinions.

The preparation and trial of medical malpractice cases has generally been handled by several individuals and firms, particularly among the defense bar. The current practice among those of us who engage in this speciality has been to provide detailed answers to interrogatories to opposing counsel that sets forth the substance of the opinions of each of our experts. Minnesota law, enacted a few years ago, requires each expert to sign his or her answer. That requirement was enacted by the Legislature after a consensus was reached by representatives from groups including the MTLA, MDLA, the Minnesota Medical Association, the Minnesota Hospital Association, and all of the principal insurers of physicians in Minnesota (including The St. Paul Cos. and Midwest Medical Insurance Co.) These persons concluded that no further change was required in our discovery rules in so far as they pertained to the providing of expert witness testimony. As a result of our practice, counsel seldom request or require reports or depositions of experts. When more information is required of an expert, counsel either permit an informal conference with that individual or agree to a deposition if a reciprocal courtesy is extended to the other side. Therefore, we respectfully submit, the Rule as it presently exists works as it was intended to; it isn't broken; it doesn't require fixing. Furthermore, as the Rule presently stands, it promotes fairness to all parties. Hence, we believe that any change in the Rule would result in an enormous alteration of our practice and would be, in our opinion, opposed by almost every practitioner and insurance carrier involved in this type of litigation in Minnesota.

Whether one is representing plaintiffs or defendants, it is extremely difficult to find physicians who will agree to review cases, let alone getting them to agree to testify in one. In significant medical malpractice cases (which includes probably 90% of all cases tried) experts are often retained from out-of-state by both plaintiffs and defendants and it is not all that unusual for each side to have a minimum of three experts who will testify on issues of liability, causation and damages. The proposed Rule contemplates that each of these experts will prepare or approve a report that sets forth basically every conceivable piece of testimony that may be elicited during a direct examination of that witness, as well as inclusion of all exhibits the witness will use during his or her direct examination. While the Rule indicates that the disclosure of this report will be "made at least 90 days before the trial date or the date the case is to be ready for trial" there can be no doubt that preparation of such testimony will need to be completed well in advance of trial, and in all probability many months in advance of trial.

In our opinion, such a Rule would have an extremely chilling effect on the ability of both plaintiffs and defendants to find qualified and reputable experts as witnesses rather than "hired guns". Physicians will simply not make the time commitment that is required under this Rule to either prepare or review a report that contemplates this type of disclosure requirement -- in addition to spending all of the time that is needed to prepare for his or her testimony just before trial. For those who will act as experts, the expense to each side will increase geometrically. This additional burden and expense will not result in any corresponding benefit to either party.

In addition, from the plaintiffs' standpoint, it is difficult if not inconceivable to prepare a script setting forth the substance of a direct examination, coupled with exhibits, prior to knowing the identity and opinions of the defendants' experts and the substance for those opinions. Often times exhibits and other data that assist the expert in explaining opinions to a jury are not and cannot be prepared until sometime shortly before trial. This is true whether the lawyer is representing a defendant or a plaintiff.

The proposed Rule also specifically provides that the individuals who have prepared reports shall be deposed. Those who support this change appear to believe that since depositions are permitted of experts that such depositions will be shorter because the opposing party has a report to review in advance of the deposition. We believe this will simply not be the case. First of all, as stated, under present practice, depositions of medical experts are generally not taken. This Rule will significantly change that practice. Secondly, the deposition will not be any shorter. It will undoubtedly lengthen the deposition since counsel will be probing into all areas suggested by the report without the same type of concerns that he or she might have if that cross-examination was conducted in front of a jury.

And, obviously, explaining to the expert that he or she will be required to write or assist in the preparation of such a report, testify at trial, and testify at a deposition will only either add to the expense of the case for all parties or diminish the likelihood of retaining an expert whose opinions really matter.

As previously stated, under current practice the opinion of the experts set forth in answers to interrogatories must be approved by the expert before it is disclosed to opposing counsel. In our offices, that involves preparing a summary of the opinion based on conversations that have occurred with the expert. The expert is then sent this proposed answer for his or her review and approval. The expert then makes whatever modifications are required and then signs off on the answer. Even this relatively limited process can often times take months to accomplish. We can only speculate as to the amount of time that would be required to get an expert to sign an actual report.

In conclusion, we respectfully request that this Court reject any change to the Rules requiring the preparation and disclosure of expert reports and the requirement of taking depositions of expert witnesses. More than most, we need to be able to continue to work cooperatively with medical expert witnesses. These proposed changes make our work virtually impossible. Finally, to mimic the Federal Rules, which so far to date are untested and unproven, would be a serious mistake for the District Courts in Minnesota. It also would unfairly add immeasurably to the costs of litigation to all sides without in any measurable degree adding to the administration of justice or the improvement of our present discovery Rules.

Respectfully submitted

ROBINS, KAPLAN, MILLER & CIRESI

John F. Eisberg

BASSFORD, LOCKHART, TRUESDELL & BRIGGS

John M. Degnan

JFE/ml

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SEP 26 1996

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September 25, 1996

Mr. Frederick Grittner
Clerk of the Appellate Courts
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HAND DELIVERED

Re: Proposed Amendments to the Minnesota Rules of Civil Procedure
Case No. C6-84-2134

Dear Sir:

I respectfully request the opportunity to appear before the Court on October 9, 1996, to make an oral presentation regarding the proposed amendments to the Minnesota Rules of Civil Procedure.

Please distribute the attached summary of my presentation.

Respectfully submitted,

STEPHEN S. ECKMAN

SSE/slh
Enclosures

STATE OF MINNESOTA
IN SUPREME COURT
C6-84-2134

Summary of the presentation of Stephen S. Eckman, ESQ., an attorney licensed to practice in the State of Minnesota, presented to the Supreme Court Justices in conjunction with the hearing of October 9, 1996.

INTRODUCTION

The undersigned respectfully requests the Court to consider the following observations and comments regarding the proposed amendments to the Rules of Civil Procedure for the State of Minnesota. The observations and thoughts that follow are those of the undersigned after consultation with numerous practitioners of civil litigation in the State of Minnesota.

I am a civil litigation attorney, having practiced primarily plaintiff civil tort litigation for the past 24 years. I am certified as a specialist in civil trial advocacy by the National Board of Trial Advocacy, and as a civil trial specialist by the Minnesota State Bar Association. I have served in various offices as well as President of the Minnesota Trial Lawyers Association and served for several years on the Board of Governors of the Association of Trial Lawyers of America. For several years, I have served on the Ethics Committee of ATLA and have chaired that committee.

I previously served, by appointment of former Chief Justice Douglas Amdahl, on the Supreme Court Advisory Committee on the Rules of Civil Procedure, and participated in many meetings and discussions regarding previous amendments to the Rules considered and eventually adopted by this Court.

PRACTICE BACKGROUND

The undersigned is lead trial lawyer in a firm of eight civil litigation attorneys located in Minneapolis. I have been active in the trial of civil litigation cases in the states of Minnesota, Illinois, Wisconsin, Iowa, North Dakota, South Dakota, Florida, West Virginia, Indiana, Missouri, Nebraska, Montana, Colorado and New Jersey. I have tried to jury verdict, civil cases in both State and Federal Courts in the aforementioned jurisdictions. I have conducted discovery in a wide variety of litigation throughout the United States.

DISCUSSION

It is my sole purpose in the presentation of this paper to urge you to reject the Advisory Committee's proposed change in Rule 26.02(d)(1) which proposes that you expand the scope of civil discovery to permit unbridled depositions of expert witnesses.

It is my considered professional opinion that such an expansion of discovery would be a serious mistake on your part and would do a great injustice to the civil justice system in the State of Minnesota.

ARGUMENT

The Advisory Committee, as presently constituted, has apparently come to the conclusion that the depositions of experts should be allowed *as a matter of right.* Without reference to empirical study on the point, the remarkable suggestion is made that "numerous problems" would be somehow avoided if depositions of experts were permitted without leave of Court.

Such a practice, which is in some states, would result in a significant increase in the cost of litigation with no identifiable reduction in trials. If, as represented, the committee

is interested in streamlining litigation, cutting costs to the parties and shortening the time to disposition, the last thing this Court should do is adopt this proposed change.

I can state without equivocation that expert witness depositions are, more often that not, fishing expeditions entered into for the purpose of preparing elaborate records with which to "trip up" an expert at trial. Experts report the discovery depositions to be harassing, argumentative, time-consuming and confusing. Often, it is sad to say, attorneys ask questions in the depositions that would never be permitted trial. These actions have the unavoidable effect of discouraging academics, business people, teaching physicians and other potential expert witnesses from participating in the litigation process.

At its worse, such a rule (as is the practice in the Illinois State Courts) permits discovery depositions not only of all experts but of all treating physicians. This outrageous waste of physician time has led countless physicians to advise attorneys that they "want nothing more to do with this case" and request repeatedly to be excluded from further proceedings. The problem the undersigned has run into is that physicians refuse to see patients because of the likelihood of lengthy and time-consuming expert depositions which unduly harass the treating physician and discourage him/her from ever giving medical opinions in a case.

We do not want this situation in Minnesota. We have enjoyed a good working relationship with doctors and other experts in our state. They are called upon routinely to write comprehensive reports and furnish 26(b)(4) interrogatory answers which have served the legal profession very well. There is absolutely no excuse for the harassing of experts when full and complete interrogatory answers serve the purpose.

If it ain't broke, don't fix it. All that is required is for a vigorous trial managing judge to insist that for any conclusion to be introduced in Court it must have been disclosed in advance by report or interrogatory answer. This suffices our litigation needs.

CONCLUSION

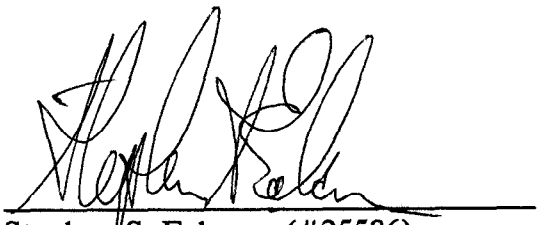
I cannot emphasize enough the regressiveness of the committee's recommendation here. It is unimaginable that this recommendation has flowed from an honest cross section of the trial bar. In a time in which the public is increasingly disgusted with the cost and time involved in civil litigation, it is inconceivable that this Court could justify the expansion of discovery into this area. To the extent that the Federal Rules have done this, I can state that it has been a mistake. The new Federal Rules have resulted in an expansion of discovery rather than a reduction. Cases are taking longer to prepare, not less time.

Finally, and importantly, the provision of expert depositions as a matter right also establishes another disturbing trend which has not been addressed by the Advisory Committee. That is, expert depositions as a matter of right establish "standard practice" in the legal malpractice community. Practitioners have admitted to me that they would terrified to find themselves facing an excess verdict when they have not taken the depositions of the experts. The malpractice implications of failure to take expert depositions make the Committee's suggestion that the Rules will "make discovery depositions of many experts unnecessary" is naive at best and misleading at worst. The allowing of expert depositions as a matter of right in the states which permit it have made the depositions of experts routine resulting in countless hours of more work with no improvement in settlement prospects or of the avoidance of trial.

This recommendation should be rejected.

Dated: 9/25/96

RESPECTFULLY SUBMITTED



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†ALSO ADMITTED IN WISCONSIN

Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Dear Mr. Grittner:

Enclosed are the original and twelve copies of this letter, which represents my written statement concerning the proposed amendments to the Minnesota Rules of Civil Procedure. This statement is filed pursuant to the Court's August 9, 1996, order.

The only rule I would like to comment on is 26.01(b)(2). The pertinent portion of the proposed rule reads as follows:

> Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness.

My concern is twofold: (1) that the disclosure rule should apply only to experts who will be called as witnesses at trial and (2) that the expert not be required to prepare a report. Each of these concerns is explained below.

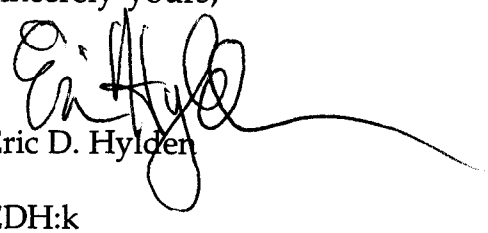
First, proposed Rule 26.01(b)(2) refers to an expert witness "who is retained or specially employed to provide expert testimony in the case." It is not clear whether this is intended to apply only to experts expected to testify at the time of trial. That certainly might be implied by the fact that proposed Rule 26.02(d)(2) maintains the distinction between experts intended to be called and those who are not intended to be called as witnesses. I believe this is a valuable distinction and allows parties to contact those experts who will put forth their best case. Conversely, if all experts are required to be disclosed, regardless of whether the parties intend them to be called as trial witnesses, there will be a chilling effect on expert selection. Since that would be undesirable, I suggest adding language indicating that the disclosure requirements

apply only to those experts whom the parties expect will be called as witnesses at the time of trial.

Second, the proposed rule requires the disclosure to include a "written report prepared and signed by the witness." My objection to this portion of the rule is that the written report should not have to be prepared by the expert as long as the disclosure is signed by the expert, verifying that it represents his or her opinion. It has been my experience in working on medical malpractice cases (where only the expert's signature is required on a disclosure) that this system works well and results in informative, substantive disclosures which experts can be held to at the time of their trial testimony. On the other hand, it is my experience from federal court practice that when experts are required to prepare the report themselves they rarely understand the need for strict compliance with the disclosure requirements. Even when it is explained to them in some detail, I see many of those requirements glossed over or left out entirely. I believe this is due to the fact that the experts do not understand the purposes behind the requirements and therefore treat them as legal boilerplate, which would only interfere with the expression of their opinions. Going back and getting supplemental reports to cover material which has been omitted is expensive, time-consuming, and frustrating for all involved. For all of these reasons, I believe it is enough if the disclosure report is simply signed by the expert, verifying that it is a true and accurate statement of his or her opinions.

I thank the Court for the opportunity to address these matters.

Sincerely yours,



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AUG 29 1996

FILED

August 26, 1996

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C6-84-2134

MINNESOTA SUPREME COURT
RE: PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF CIVIL PROCEDURE

Dear Justices of the Supreme Court:

I am writing concerning the proposed amendments to the Rules of Civil Procedure. Specifically, I would ask that the disclosures of prior testimony for healthcare professionals testifying as to damages, under Rule 26.01(b)(2) be prospective only. I believe it would be an impossible burden on most treating physicians to have to recreate a list of testimony over the past four years. Certainly, with notice, we can have them begin accumulating such information, but it will be difficult and quite expensive for the first attorney requesting a list to pay the cost of having the doctor or his staff accumulate this information.

Further, although the Rule requests a report, I am assuming that the report can reference the medical records and notes without having to incorporate all of them for purposes of the disclosure.

With respect to the amendments to Rule 26.01(d), the Rule appears to dictate that depositions may only take place after a report is provided. I don't know that such language is necessary as a party may choose to take the deposition without having possession of the report, or may decide to waive the requirement of the report and rely on the deposition. It appears from the earlier portions of Rule 26.01 that a report is going to be mandated from all experts absent a court order to the contrary, which makes the second sentence "If a report from the expert . . ." superfluous.

Yours truly,

Charles T. Hvass, Jr.

CTH:pw

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August 23, 1996

OFFICE OF
APPELLATE COURTS

AUG 26 1996

FILED

Mr. Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Supreme Court Order

Dear Mr. Grittner:

Pursuant to the Supreme Court's Order of August 5, 1996, pertaining to the proposed amendments of the Minnesota Rules of Civil Procedure, I wish to offer this letter as my statement in opposition in certain of the modifications and changes which have been proposed to the Court.

My concerns principally arise from the proposed amendments to Rule 26 pertaining to discovery. My concerns and comments are as follows:

- With respect to trial preparation, the new Rules propose to require a report of all specially retained experts. Rule 26.01(b)(2) as proposed, would require that counsel for any party with a specially retained or employed expert transmit a report "prepared and signed by the witness". Interestingly, the advisory committee comment suggests that this Rule specifically allow preparation of the report by an attorney; the body of the Rule, however, requires that the written report be "prepared and signed by the witness". The comment and Rule are in direct conflict in this regard.

- More significantly, however, I am concerned that the substantial additional expense to plaintiffs whom I represent will be put out by reason of this Rule. This concern is heightened by the provisions of the proposed amended Rule

26.01(b)(2), which allows any party to depose "any person who has been identified as an expert whose opinions may be presented at trial".

- The contents of the mandatory expert report under Rule 26.01(b)(2) includes "a listing of any other cases in which the witnesses testified as an expert at trial or by deposition within the proceeding 4 years." My experience in the Federal practice is that this requirement is rarely met, since this information is almost never available. I am unaware of any expert witness who maintains data in a format which would allow response to this portion of the required report. Nonetheless, I fully anticipate that attorneys will demand this information. If obtainable, it would be obtained only at a substantial expense, and would appear that gathering this information would be the expense of the party retaining the expert. I suggest that if the mandatory report requirement is retained, that the opposing party be given the opportunity to request the report and, if requested, the opposing party bare the cost of compensating the expert for the time spent in preparing the report. This would assure that expert reports are requested only when truly necessary.

- Rule 26.01(b)(2) also is limited in requiring reports from the employee of the party to those circumstances where the employees duties "regularly involve giving expert testimony". I see no reason for limited employee/expert reports to those circumstances where the employee regularly gives such testimony. If the employee will be testifying in a case, the report should be provided in every instance. This should avoid the attempt to conceal employee/expert testimony from opposing counsel.

As the Court is aware, the present procedure expert depositions take place only upon leave of Court. I strongly believe this Rule should be retained in its present form, an automatic deposition of experts should not be allowed.

In my practice, the experts upon whom we most frequently call are treating medical doctors. If Defendant's are allowed to freely depose any expert, many treating doctors will no longer agree to provide treatment to persons in litigation's because they will be subject to repeated discovery depositions which will take them from their busy medical practice.

At present, it is difficult enough to secure the cooperation of treating doctors for trial depositions; to allow defense counsel free rein for depositions of <u>all</u> treating

medical doctors would impose substantial costs upon plaintiff's counsel, and a great burden upon treating doctors. The Rule should be retained to require a leave of Court before depositions of experts may be taken.

I very much appreciate the Courts time in considering my observations and comments regarding these amendments.

Very truly yours,

Peter W. Riley
Direct Dial No: 344-0425

PWR/par

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October 3, 1996

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OCT - 7 1996

FILED

Frederick K. Grittner
Supreme Court Administrator
MINNESOTA SUPREME COURT
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Dear Mr. Grittner:

Please find enclosed 12 copies of the Final Report and comments of the Minnesota State Bar Association Committee on Court Rules and Administration concerning the proposed amendments to the Minnesota Rules of Civil Procedure. We would ask that these copies be shared with the Court in lieu of the prior Subcommittee Report. The final Committee's action varies from the Subcommittee report in one major respect. The Committee has taken the position that the proposed changes calling for mandatory expert disclosure be rejected in their entirety.

On behalf of the Committee, I respectfully request the opportunity to present these comments to the Court at its hearing on October 9. Thank you.

Very truly yours,

Michael W. Unger

MWU:dme
Enclosures
cc: Mary Jo Ruff, MSBA
Brian Melendez
Eric Larson
Willard Wentzel, Minneapolis

*Civil trial specialists, certified by the Minnesota State Bar Association and the National Board of Trial Advocacy.

†Civil trial specialist, certified by the Minnesota State Bar Association.

MINNESOTA STATE BAR ASSOCIATION
COMMITTEE ON COURT RULES AND ADMINISTRATION

ON PROPOSED AMENDMENTS TO MINNESOTA RULES OF CIVIL PROCEDURE

Adopted by a Vote of 12-0 on October 2, 1996

INTRODUCTION

On July 22, 1996, an advisory committee to the Minnesota Supreme Court issued recommendations for rules changes in the Minnesota Rules of Civil Procedure. This report was first published for the general public by an order dated August 5, 1996. The recommendations were posted on the Court's Internet site on or about that time. They were also published in Finance & Commerce on August 16, 1996. The Minnesota State Bar Association was unable to obtain copies of the rules from the Internet and requested a hard copy that was received in mid-September of 1996. The Court has solicited written and oral comments with a deadline for a written submission on or before September 25, 1996. The Court's hearing is set for October 9, 1996.

GENERAL OBSERVATIONS

The primary thrust of the proposed rules changes are to conform the Minnesota Rules of Civil Procedure to various changes adopted in the Federal Rules of Civil Procedure since 1991. In most instances, the Advisory Committee has recommended amendments to conform the Minnesota rules to the federal rules. There are a number of exceptions, however, and one is particularly significant.

Many of the recommended changes dealing with discovery practices are likely to increase the cost of litigation without a corresponding benefit. For example, the additional cost associated

with a recommendation to permit routine expert depositions could be so substantial as to create a chilling effect for many litigants. The impact of such a change may fall disproportionately on those with the least financial resources. The need for such a rule change, and the likely benefit, is uncertain. Similarly, the call for additional expert disclosure is, in the view of most of the Committee, unnecessary and likely to raise the overall cost of litigation.

As a general matter, the Committee on Court Rules and Administration uniformly believes the proposed changes have been developed without adequate input from the Bar and without adequate time for thoughtful consideration and debate. Changes of such magnitude warrant wider debate and input from the Minnesota Bar than time allows. Ideally, the changes proposed should be the subject of deliberation by the House of Delegates or, preferably, the General Assembly. Regrettably, this does not appear possible.

Another concern arises from the communication with the Bar Association about these proposed changes. The State Bar's leadership and the leadership of this Committee were unaware that the Advisory Committee was reviewing and acting upon these rule changes until after action was taken.

The Committee questions the need for the short time line for response, comment and enactment. This is particularly true since Minnesota's own version of the federal rules is still under deliberation by the Federal District Court. It strikes us that the

recommendations before the Supreme Court are both premature and hasty.

FEDERAL CHANGES NOT RECOMMENDED FOR MINNESOTA

Of the changes in the federal rules which are not being recommended for adoption in Minnesota, the Committee feels that only two items receive special comment: Changes to Rule 11; Rule 26(a)(1) requiring initial disclosures.

Rule 11: The Committee is in general agreement that the changes to Rule 11 are unnecessary in Minnesota. The Supreme Court's decision in *Uselman v. Uselman*, provides clear standards for the lower courts to utilize in resolving Rule 11 sanction issues. Some Committee members like the opportunity for attorneys to correct their behavior as afforded under the new Federal Rule 11 and note that *Uselman* does not address this notion.

Rule 26(a)(1) - Initial Disclosure: This provision of the federal rules requires each party to initially disclose information such as names of individuals likely to have relevant evidence, descriptions of documents that will be available for inspection and copying, calculation of damages and relevant insurance agreements. Under the new federal provision, this information is to be disclosed without the necessity of any interrogatory or other discovery request.

The Supreme Court Advisory Committee suggests that this provision not be incorporated in state court practice because it would, "merely add an additional and costly layer of discovery." The Committee is of divided opinion about the wisdom of this con-

clusion. Half of the Committee believes that the initial disclosure requirements under the federal rules are designed to simplify the discovery process by eliminating the need to conduct discovery of what should be non-controversial matters. The Advisory Committee noted that disclosure of initial facts and identity of witnesses has not traditionally been a problem in Minnesota. Those favoring initial disclosure agree and find that requiring disclosure will not be a problem in most cases, but will provide early information at minimal expense and may afford an opportunity for earlier settlement. Another observation favoring initial disclosure is that the requirement benefits litigants whose attorneys fail to undertake thorough discovery. This is thought to advance the interests of justice.

A contrary view is held by the other half of the Committee. According to this view, standard interrogatory requests already seek this type of information. By separating out certain matters for treatment under the initial disclosure rule while leaving others to interrogatories, we increase the likelihood that any sort of discovery problems will end up being presented in a fragmented fashion. Under existing practice, all issues may be dealt with at one time in the context of responses to interrogatories.

All members of the Committee agree that should initial disclosure be adopted in Minnesota, it should be modified to accommodate Minnesota's "hip pocket filing" practice. Any requirement for initial disclosure should only arise after an action is filed with the court. Those who have had favorable experience with the "ini-

tial disclosures" requirement in federal court have observed that this has worked because of early case management by a magistrate judge who directs the parties to explore settlement in a brief "window" of time between initial disclosure and the start of discovery.

RULES CHANGES RECOMMENDED FOR ADOPTION

The Committee has reviewed the remaining recommended rules changes and finds most of them to be worthwhile. The proposed changes to Rules 26 and 30 are objectionable, however. Additionally, special comment is warranted on the proposed change to Rule 5.

Rule 5: The Committee enthusiastically endorses the proposed changes to Rule 5 and, in particular, the proposed provision prohibiting court administrators from rejecting papers for filing. It is the unanimous view of the Committee that it is not the appropriate role for a court administrator to determine when to accept papers for filing. If there is a dispute about the appropriateness of the filing, this is more properly presented for consideration to the court.

Rule 26 - Discovery:

A. Mandatory Expert Witness Disclosure: The Committee is nearly unanimous in its view that the mandatory expert witness disclosure provision in proposed Rule 26.01(b) should not be adopted. Nearly all Committee members believe that the current Minnesota practice of utilizing expert interrogatories and following up, when necessary, with court approved depositions, is

largely effective and much preferable. In our view, the added requirement of signed witness reports will add expense to the litigation and may well discourage many experts from agreeing to become involved. Ironically, such requirements will lead to more frequent use of "professional" expert witnesses because the requirements of the litigation process will become too daunting for experts who do not make their living as expert witnesses. The quality of justice will ultimately suffer from such a development.

In the event the Supreme Court actually adopts such an expert disclosure rule, then there should be an exemption for physician experts. In the case of physicians, the Committee believes that the current practice of limiting discovery to expert interrogatories is most appropriate. (In medical negligence cases, there are already additional disclosures mandated by statute. Yet another requirement would be totally unjustified.) In our experience, the vast majority of the medical profession finds the need to provide medical/legal information to be an unwelcome part of their professional practice. The requirements of mandatory disclosure (such as revealing the list of all cases in which the expert has testified, furnishing a list of publications, and the like) provide an additional burden that would be most unwelcome. In the case of treating physicians who did not volunteer to be witnesses, it would be unfair to the litigants to impose a rule for which they have little or no control and ability to compel compliance. Under the ethical rules which govern the medical profession, treating physicians are not to assume the role of advocate, and are

required to be objective and impartial providers of expert medical opinion. A patient's attorney is in no position to secure the type of cooperation necessary to comply with the mandatory expert disclosures.

The Committee also finds an additional disclosure requirement, as it would apply to physicians, to be repugnant on public policy grounds. The medical profession should not be forced to have to attend to the business of litigation requirements any more than is absolutely necessary to secure the advancement of justice. There is little or no problem in Minnesota with regard to disclosure of physician opinions. Medical records are often available beyond interrogatory responses. Accordingly, this Rule change should not be adopted, but if some change is made, then there should be an express provision exempting physicians.

One or two Committee members support additional expert disclosure for non-physician experts because it expands the scope of expert discovery without being unduly burdensome.

B. Discoverability of Witness Statements: The Advisory Committee appears to recommend a dramatic change restricting the discoverability of witness statements. Since no rationale is offered for this change, it is assumed that the proposed change may be an oversight. Minnesota's Civil Procedure Rule 26.02(c) has long allowed discovery of witness statement without making a showing under the work/product doctrine. This has been a conscious departure from the federal practice over the years. See e.g., *Leer v. Chicago, Milwaukee, St. Paul & Pacific Railway Company*, 308 N.W.2d

305, 307 n.4 (Minn, 1981). The Advisory Committee recommendation would eliminate this longstanding and successful distinction of Minnesota state court practice. The Committee strongly opposes this recommendation. The discoverability of witness statements has long been proven to advance the "search for truth" in litigation.

C. Expert Witness Depositions: By a substantial majority, the Committee opposes the recommendation for adoption of the rule change at 26.02(d) to permit expert depositions without seeking prior court approval. For many years, Minnesota practice has intentionally deviated from federal practice in this regard. (Prior to the federal rule change, expert depositions were routinely permitted in the District of Minnesota.) The routine taking of expert depositions adds a tremendous cost to litigation that is generally unnecessary. These depositions can easily cost a few thousand dollars. There are occasionally cases where expert depositions may be needed, but such exceptions are best determined by the judge or by agreement by the parties. It is a rare case where expert depositions are essential to a resolution of a case.

Additionally, the same points must be made with regard to the impact of such a rule on treating physicians. Routine discovery depositions of treating physicians will not only add expense of several thousand dollars per deposition, but will double the demand for the time of treating physicians, time which would be better spent treating patients.

D. Privilege Log: The proposed amendments to Rule 26.02(e) would merely codify the standard interrogatory requests of many

current practitioners. The best "form interrogatories" currently call for a description of the basis of privilege whenever a privilege objection is raised. The Committee believes, however, that a comment should be added cautioning that the requirement of a privilege log is not meant to require itemization of each and every document, nor to provide a detail of information that may run contrary to the point of the privilege itself. In many cases, a description in very general terms of the nature of documents being withheld may often be adequate.

E. Supplementation of Discovery Responses: The proposed change to Rule 26.05(a) contains a drafting error. The proposed amendment would use the redundant language of both "seasonably" and "at appropriate intervals." One of these phrases should be dropped. These redundant phrases are not incorporated in the current Federal Rules.

F. Rule 26 Comments: The Committee believes that the Advisory Committee's comments on the provisions of Rule 26 should not be adopted in their entirety. The comments seem more extensive than seems appropriate.

Rule 30.04: The Committee wishes to note its enthusiastic approval of the proposed changes to Rule 30.04. There are a significant number of lawyers who make inappropriate objections during depositions. The proposed rule changes clarify the appropriate standard and approach for making objections at depositions.

Form 24: The proposed form for use in mandatory expert witness disclosures should not be used since we recommend against such

a rule change. If disclosure is adopted, then the form should be revised to make clear it does not apply to treating physicians. This would be best accomplished by deleting the following language from lines 1172 and 1173:

> "about each of the persons it may call to offer opinion testimony at the trial of this action. These disclosures are made..."

CONCLUSION

We urge the Minnesota Supreme Court to act consistent with these recommendations.

Respectfully Submitted,

M.S.B.A. COMMITTEE ON COURT RULES AND ADMINISTRATION

By: Michael W. Unger, Chair

C6-84-2134

OFFICE OF
APPELLATE COURTS
MAY 22 1996
FILED

MASLON
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BORMAN
&BRAND
a Professional Limited Liability Partnership

MEMORANDUM

TO: Members of the Supreme Court Advisory Committee on Rules of Civil Procedure

FROM: David F. Herr

RE: Rule 5 - Service of Process Alternate Provisions

DATE: May 22, 1996

This report summarizes alternative available to amend Minn. R. Civ. P. 5.02 relating to service after initial service. (Initial service is governed by Rule 4.)

The discussion at the last meeting of the Advisory Committee appeared to focus on two problems. Although the discussion at times confused the two issues, it is probably best to consider the issues separately. One issue relates to whether service should be allowed by facsimile transmission, the other relates to whether service should be permitted late in the day, particularly after business hours.

I recommend that whatever we do, it should be the same for facsimile transmission if we allow it as well as conventional delivery. It appears to me that service under the closed office door at 5:45 p.m. should be no different than faxing to the office at 5:45.

Existing Rule 5.02 provides:

> **RULE 5.02 SERVICE; HOW MADE**
>
> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Written admission of service by the party or the party's attorney shall be sufficient proof of service. Service upon the attorney or party shall be made by delivering or by mailing a copy to the attorney or party at either's last known address or, if no address is known, by leaving it with the court administrator. Delivery of a copy within this rule means: Handing it to the attorney or party; or leaving it at either's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office,

> leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

Federal Rule 5(b) provides:

> **(b) Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

I have not conducted a comprehensive evaluation of how other states handle the issues of service deadlines and service by fax. I did locate a few examples that should suffice for our purposes.

Wisconsin follows the Minnesota and Federal rule standard, with two slight changes:

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Written admission of service by the party or the party's attorney shall be sufficient proof of service. Service upon the attorney or party shall be made by delivering or by mailing a copy to the attorney or party at either's last known address or, if no address is known, by leaving it with the court administrator. Delivery of a copy within this rule means: Handing it to the attorney or party; **transmitting a copy of the paper by facsimile machine to his or her office**; or leaving it at either's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to

> be served has no office, leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Service by facsimile is complete upon transmission. . . .

Wisc. Stat. § 801.14(2). The Wisconsin code also includes a change in calculation of time that may be of interest to us:

> (b) If the notice or paper is served by facsimile transmission and such transmission is complete between 5 p.m. and midnight, 1 day shall be added to the prescribed period.

Wisc. Stat. § 801.15(5)(b).

Florida employs a similar approach, adding a provision for service by fax as one of five methods for service:

> . . . or (5) by transmitting it my facsimile to the attorney's or party's office with a cover sheet containing the sender's name, firm, address, telephone number, and facsimile number, and the number of pages transmitted. When service is made by facsimile, a copy shall also be served by any other method permitted by this rule. Facsimile service occurs when transmission is complete. Service by delivery after 5:00 p.m. shall be deemed to have been made on the next day that is not a Saturday, Sunday, or legal holiday. *[Note. This last sentence applies to all means of service. DFH]*

Fla. R. Civ. P. 1.080(b)(5).

Illinois permits four methods of service, including service by fax:

> . . . (4) by transmitting them via facsimile machine to the office of the attorney or party, who has consented to receiving service by facsimile transmission. Briefs filed in reviewing courts shall not be served by facsimile transmission.
>
> (I) A party or attorney electing to serve pleadings by facsimile must include on the certificate of service transmitted the telephone number of the sender's facsimile transmitting device. Use of service by facsimile shall be deemed consent by that party or attorney to receive service by facsimile transmission. Any party may rescind consent of service by facsimile transmission in a case by filing with the court and

> serving a notice on all parties who have filed appearances that facsimile service will not be accepted. A party or attorney who has rescinded consent to service by facsimile transmission in a case may not serve another party or attorney by facsimile transmission in that case.
>
> (ii) Each page of notices and documents transmitted by facsimile pursuant to this rule should bear the circuit court number, the title of the document, the title of the document, and the page number.

Ill. S. Ct. R. 11(b)(4).

South Dakota employs a rule similar to Wisconsin's:

> . . . Service upon a party represented by an attorney may also be made by facsimile transmission as provided in § 15-6-5(f). . . . Service by facsimile transmission is complete upon receipt by the attorney receiving service. . . . In the case of service by facsimile transmission, proof of service shall state the date and time of service and the facsimile telephone number or identifying symbol of the receiving attorney.

S. Dak. R. 15-6-5(b). Rule 15-6-5(f) provides:

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, such service may be made by facsimile transmission pursuant to the following conditions:
>
> (1) The attorney upon whom service is made has the necessary equipment to receive such transmission;
>
> (2) The attorney has agreed to accept service by facsimile transmission or has served the serving party in the same case by facsimile transmission; and
>
> (3) The time and manner of transmission comply with the requirements of § 15-6-6(a), unless otherwise established by the Court.
>
> The signature on the facsimile shall constitute a signature under § 15-6-11(a).

The South Dakota rule on computation of time provides, similar to Florida's:

> **15-6-6(a). Computation of time.**
>
> . . .
>
> Service by facsimile transmission must be completed by 5:00 o'clock p.m., receiver's time, on a weekday, which is not a legal holiday, or service shall be deemed to be made on the following weekday, which is not a legal holiday.

California provides for service by fax, and includes a somewhat more extensive set of rules. I attach a copy of Cal. R. Civ. P. 2008 in its entirety. Rule 2009 specifies a form of transmittal sheet for service by fax.

I believe these examples should provide sufficient grist for the mill. We need to decide:

1. Do we have a problem that needs to be addressed?
2. How should we implement service by fax by rule?
3. Do we want to establish a deadline for service? Notwithstanding my opinion, should it be applicable to all service or only service by facsimile?

I look forward to seeing you at tomorrow's meeting.

D.F.H.

Attachments

RULE 2008. SERVICE OF PAPERS BY FACSIMILE TRANSMISSION

(a) [Transmission of papers by court] A court may serve any notice by fax in the same manner that litigants may serve papers by fax.

(b) [Service by fax] Service by facsimile transfer shall be permitted only if the parties agree and a written confirmation of that agreement is made. The notice or other paper must be transmitted to a facsimile machine maintained by the person on whom it is served at the facsimile machine telephone number as last given by that person on any document which he or she has filed in the cause and served on the party making service. The service is complete at the time of transmission, but any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after the service of such document served by facsimile transmission shall be extended by two court days, but such extension shall not apply to extend the time for filing notice of intention to move for new trial.

(c) [Availability of fax] A party or attorney agreeing to accept service by fax shall make his or her fax machine generally available for receipt of documents between the hours of 9 a.m. and 5 p.m. on days that are not court holidays under Code of Civil Procedure section 136. This provision does not prevent the attorney from sending documents by means of the fax machine or providing for normal repair and maintenance of the fax machine during these hours.

(d) [When service complete] Service by fax is complete upon receipt of the entire document by the receiving party's facsimile machine. Service that occurs after 5 p.m. shall be deemed to have occurred on the next court day. Time shall be extended as provided by this rule.

(e) [Proof of service by fax] Proof of service by fax may be made by any of the methods provided in Code of Civil Procedure section 1013a, except that:

(1) The time, date, and sending facsimile machine telephone number shall be used in lieu of the date and place of deposit in the mail;

(2) The name and facsimile machine telephone number of the person served shall be used in lieu of the name and address of the person served as shown on the envelope;

(3) A statement that the document was transmitted by facsimile transmission and that the transmission was reported as complete and without error shall be used in lieu of the statement that the envelope was sealed and deposited in the mail with the postage thereon fully prepaid; and

(4) A copy of the transmission report shall be attached to the proof of service and the proof of service shall declare that the transmission report was properly issued by the transmitting facsimile machine.

Adopted, eff. March 1, 1992.

RULE 2009. FACSIMILE TRANSMISSION COVER SHEET *

The Facsimile Transmission Cover Sheet shall be in the following form:

ATTORNEY OR PARTY WITHOUT ATTORNEY (name and address): TELEPHONE NO. ATTORNEY FOR (name): FAX NO.	FOR COURT USE ONLY
COURT NAME:	
PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT:	
FACSIMILE TRANSMISSION COVER SHEET	CASE NUMBER:

TO THE COURT:

1. Please file the following transmitted documents in the order listed below:

Document name	No. of pages

2. ☐ Processing instructions consisting of: _____ pages are also transmitted.

3. ☐ Fee required ☐ Filing fee ☐ Fax fee (rule 2007(c))
   a. ☐ Credit card payment (Nevada County Municipal, Oakland-Piedmont Municipal, San Bernardino Superior, Santa Clara Superior, South Bay Municipal, and Ventura Superior Courts – rule 2007(b)). I authorize the above fees and any amount imposed by the card issuer or draft purchaser to be charged to the following account:
   ☐ VISA ☐ MASTERCARD Account No.: Expiration date:

   .....
   (TYPE OR PRINT NAME OF CARDHOLDER) ▶ _____
   (SIGNATURE OF CARDHOLDER)

   b. ☐ Attorney account (Madec Superior and Visalia Municipal Courts – rule 2007(c)).
   Please charge my account No.:

   c. ☐ Fee to be mailed (Crest Forest Justice, Monterey County Municipal, and Ventura Superior Courts – rule 2007(d)).

4. ☐ If the filing is in the Crest Forest Justice, Madec Superior, or Monterey County Municipal Court, the filing party must insert in the box below the name and address to which the copy of this cover sheet shall be mailed.

Form Adopted by Rule 2011
Judicial Council of California
(Eff. From July 1, 1990)

FACSIMILE TRANSMISSION COVER SHEET
(Fax Filing)

Code of Civil Procedure, § 1012.5
Cal. Rules of Court, rule 2008(d)
(new)

Adopted, eff. March 1, 1992.

* [Pub. Note: This form was originally adopted by former Rule 2011, which was adopted effective July 1, 1990 and repealed effective March 1, 1992. Rule 2011 was essentially readopted as new Rule 2009 effective March 1, 1992.]

(H)

Law Offices of

WENTZEL
FLUEGEL

A LEGAL PARTNERSHIP

701 Fourth Avenue So. / Suite 1200 / Minneapolis, MN 55415-1815
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OFFICE OF
APPELLATE COURTS

SEP 24 1996

FILED

September 20, 1996

Clerk of Supreme Court
245 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155-6102

Re: Hearing to Consider Proposed Amendments to the Minnesota Rules of Civil Procedure
Court File No: C6-84-2134

Dear Clerk:

Enclosed please find 12 copies of the Request for Oral Presentation and Written Submission regarding the Proposed Amendments to the Minnesota Rules of Civil Procedure. I understand that the hearing in this matter is set for October 9, 1996.

Thank you for your attention to this matter. If you have any questions, please feel free to contact our office.

Very truly yours,

Wilbur W. Fluegel

WWF/nar
enclosures
cc: MTLA

Wilbur W. Fluegel
Certified Civil Trial Specialist by Minnesota State Bar Association & National Board of Trial Advocacy / Also Admitted in Wisconsin

Willard L. Wentzel, Jr.
Certified Civil Trial Specialist by Minnesota State Bar Association & National Board of Trial Advocacy

OFFICE OF
APPELLATE COURTS

SEP 2 4 1996

FILED

STATE OF MINNESOTA

IN SUPREME COURT

No.: C6-84-2134

In re: Hearing to Consider Proposed Amendments to the Minnesota Rules of Civil Procedure.

REQUEST FOR ORAL PRESENTATION & WRITTEN SUBMISSION

TO: The Supreme Court of the State of Minnesota:

Wilbur W. Fluegel, states as follows:

1. That, he is an attorney licensed to practice law in the State of Minnesota and co-chair of the Minnesota Trial Lawyers Association *Amicus Curiae* Committee.

2. That, he requests to participate in oral presentations scheduled by the Court for October 9, 1996 to address proposed changes in the Minnesota Rules of Civil Procedure, which are of interest or concern to the membership of the Minnesota Trial Lawyers Association.

3. That, he respectfully submits the attached written statement outlining the issues upon which he would like to address the Court.

Dated: Sept 20 1996

Respectfully Submitted,

Wilbur W. Fluegel, #30429
WENTZEL & FLUEGEL
Suite 1200, 701 Fourth Avenue South
Minneapolis, MN 55415-1815
(612) 337-9500
Attorneys for Amicus, Minnesota Trial Lawyers Association

rules.pet

WRITTEN STATEMENT

I. Introduction

The Board of Governors of the Minnesota Trial Lawyers Association met on August 29, 1996 in special session to consider the proposed changes to the Minnesota Rules of Civil Procedure, which are the subject of this hearing. The MTLA is a voluntary organization of over 1200 Minnesota trial attorneys who represent predominantly claimants in civil litigation and the accused in criminal complaints.

The subject changes proposed to the Minnesota Rules of Civil Procedure, which are of concern to the organization relate primarily to alteration of the rules of pre-trial discovery. Specifically proposed new rules 26.01(b) and 26.02(d)(1) are of concern.

II. Current rules are adequate to achieve the Advisory Committee's goals.

A. Discovery "abuse and overuse" is decreasing, and readily addressed under existing rules.

The Advisory Committee proposing the current rule changes has expressed its continued belief that problems of "discovery abuse and overuse" are issues that are "*less* pervasive" than in the past.[1] The Committee has also stated its recommendation that any ongoing "problems should *primarily* be addressed by heightened adherence to and enforcement of existing rules *rather than further rule changes.*"[2]

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[1] ADVISORY COMMITTEE COMMENT--1996 AMENDMENTS, MINN.R.CIV.P. 26 (emphasis added).

[2] *Id.* (emphasis added).

B. Proposed new discovery rules represent "significant" changes.

The Advisory Committee nonetheless has recommended amendments to Rule 26 which it acknowledges are "the most significant of the changes recommended at this time."[3] If indeed discovery abuse is on the wane and well addressed by the existing rule framework, any significant revision to current rules must be carefully examined.

Any negative implications posed by significant rule changes should be viewed as posing a great burden to their adoption as the deliberative process of this Court's decision-making unfolds, given the admittedly adequate function of current civil procedures.

C. Goals of new rules are cost and time reductions from conformity to new federal practice.

In justifying a proposed change of Minnesota discovery procedures, the Advisory Committee expressed a concern posed from existing procedures that the committee felt caused "substantial expense and delay for litigants . . . [that] may interfere with the resolution of civil disputes on their merits."[4] The proposed changes are thus apparently sought to achieve a goal of making "it easier for courts and litigants to prepare for trial or settlement in a fair and efficient manner"[5] by following recent "federal rule amendments"[6] regarding the disclosure of

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[3] *Id.* ("The amendments to Rule 26 include the most significant changes recommended at this time.").

[4] *Id.* ("discovery abuse and overuse . . . are still significant problems that result in substantial expense and delay for litigants and may interfere with the resolution of civil disputes on their merits.").

[5] *Id.*

[6] *Id.*

expert opinions. The perceived effect of the recommendations by the Committee is to "streamline the expert discovery process"[7] and hopefully achieve a savings of time and money while yielding a fuller and fairer exchange of information.

Of particular concern therefore, would be any negative implication of a proposed rule change that actually presents a barrier to the achievement of the expressed goals. Any proposed rule change that would threaten to produce added cost or delay, should thus be the target of careful scrutiny.

D. Proposed changes in expert disclosure requirements would admittedly introduce further costs and add delay to the discovery process.

1. Advisory Committee recognizes the proposed changes will create an added level of costs to the litigation system.

Among the proposed changes is the required development and exchange of a detailed expert report "prepared and signed by" each expert witness "retained or specially employed to provide expert testimony in the case . . . ."[8] The Advisory Committee notes that despite the literal requirement of the new rule that the expert prepare and sign the report, that as a practical matter the proposed change will "make it necessary to have the [newly required expert] report substantially prepared by counsel with consultation with the expert."[9]

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[7] *Id.* (The amendments require that "automatic . . . standardized and expanded . . . information must be disclosed. This information, including greater detail on the bases for opinions, is intended to streamline the expert discovery process.").

[8] PROPOSED MINN.R.CIV.P. 26.01(b)(2).

[9] ADVISORY COMMITTEE COMMENT--1996 AMENDMENTS, MINN.R.CIV.P. 26 ("The committee believes that considerations of cost may make it necessary to have the report substantially prepared by counsel with consultation with the expert.").

Significantly, the Committee's belief is that this need will develop because of "*considerations of cost*" posed by the proposed new requirement.[10]

2. Reports are merely a detailed substitute for interrogatory answers and thus debates over adequacy of discovery responses will continue to require at least the same level of motion practice.

The Committee's concern that the current practice of expert interrogatories allows parties to withhold important information,[11] will not likely find relief in a practice that merely switches the requirement of a written disclosure from formal interrogatories to an informal report.

Case law decisions under the new federal rules show that instead of achieving the goal of "possibly eliminat[ing] . . . problems,"[12] the change to a requirement of an exchange of reports has merely resulted in moving the adversarial debate from the adequacy of interrogatory answers to the adequacy of reports.[13]

The delay occasioned by discovery debates is thus not eliminated, but will instead--

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[10] *Id.* (emphasis added).

[11] *Id.* ("The advisory committee has learned of serious problems in Minnesota courts because parties fail adequately or timely to disclosure their experts and the substance of the expert's testimony. As a result, parties are unable to adequately cross-examine and rebut expert testimony. Adoption of Federal Rule 26(a)(2) should address and possibly eliminate many of these problems.").

[12] *Id.*

[13] *See, e.g.,* Walsh v. McCain Foods, Ltd., 81 F.3d 722, 727 (7th Cir. 1996) (sanctioning party for inadequately detailed report by limiting scope of the expert's testimony); Zarecki v. National Railroad Passenger Corp., 914 F. Supp. 1566, 1572-73 (N.D. Ill. 1996) (barring testimony of treating doctor in injury claim because no report was obtained from him and he should have been considered an "expert" subject to the report requirement).

particularly in the short term-- likely result in increased advocacy over the adequacy of reports and their applicability to classes of expert witnesses.[14]

Rather than achieve a goal of making it "easier for courts and litigants,"[15] the level of motion practice over discovery abuse will at least continue at the same pace if not increase in the short term as advocates come to understand the requirements of the new rules.

3. Added delay is inherent in the development of greater detail at an "earlier" stage of litigation.

Given the added time necessary to prepare the more detailed disclosures required by reports, the litigation process will actually more likely be slowed than advanced by the requirement of a report. Since the proposed rule's report-requirement has the stated goal and the structural requirement of more detailed disclosures of expert opinions, added time will be required to develop and present the more detailed information.

Expert opinions must have a reasonable foundation in the facts. Until facts are known, they cannot form the basis of an opinion. A party cannot disclose something it does not know. It should not be required to guess about what it may find. "Hiding the ball" is one thing. Determining its shape, size and color is quite another thing. Being made to disclose "early"-- before the exchange of fact-based discovery--is an invitation to speculate about what an expert

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[14] A disagreement apparently exists among federal judges within the same bench as to the requirement that treating doctors be subject to the report rule. *Compare* Richardson v. Consolidated Rail Corp., 17 F.3d 213, 218 (7th Cir. 1994) ("treating physician need not be disclosed as an expert"), *with* O'Connor v. Commonwealth Edison Co., 13 F.3d 1090, 1105 n.14 (7th Cir. 1994)("we do not distinguish the treating physician from other experts when the treating physician is offering expert testimony regarding causation.").

[15] ADVISORY COMMITTEE COMMENT--1996 AMENDMENTS, MINN.R.CIV.P. 26 .

may have to say should the facts develop in a certain way. While the proposed changes clearly intend a requirement of *supplementation*, imagining how the new process will work in practice is frightening.

E. Federal rule encourages costly re-deposing of witnesses and supplementation of reports.

Anecdotal experience of Minnesota federal trial practitioners under the new federal rule paints the following familiar refrain of federal trial practice:

- First, initial opinions are exchanged in the form of a preliminary report.
- Next, expert depositions are taken--without leave of court--to set down a preliminary measure of the opinion and its basis in the *then-existing* factual data base.
- The exchange of discovery and the undertaking of further testing to shore up dangling foundation breeds responsive tests by opposing experts.
- Next supplemental reports are exchanged to disclose the test and counter-test.
- Next supplemental expert depositions are exchanged to flesh out the reports.
- This process continues until costs have either grown too prohibitive for one side or the eventual trial date confronts the parties and the trial judge is forced to decide whether an expert will be excluded for inadequate disclosure, whether their opinion will be limited to one less than that which--on the merits of their actual work-to-date -- they would truly be able to give, or finally, whether yet additional last-minute discovery should be granted to give a fair basis for cross-examination.

Since often the plaintiffs' practitioners who embody the MTLA are opposing a more well-financed corporate entity or insurance company, the battle of competitive resources is continually threatened to go to the defendant by default.

Justice should not be measured by the size of one's trial budget any more than it currently

is. While the contingency fee is the ticket to the court room for middle and lower socio-economic classes, it has its practical limits.

Any system of rules that allows a *further* advantage to that side which can outspend its opponent is a system that shifts the balance of the judicial scales unfairly. Malpractice implications of not competitively matching deposition-for-deposition and expert-for-expert will raise further issues in the civil justice system.

Rather than "eliminate the need for expert depositions or at least reduce their length and cost," as the Advisory Committee hopes,[16] the anecdotal experience of the members of the MTLA who practice before the federal court under its new rules, is that the ready access to expert depositions presented by the equivalent to proposed new rule 26.02(d)(1)[17] engenders more and not less expert depositions and creates at least the same extent of debate over the adequacy of written disclosures.

F. Discovery depositions of treating doctors will substantially change Minnesota practice.

Unlike federal practice--which permits the taking of discovery depositions of treating

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[16] *Id.* ("The Federal Advisory Committee expects that the expert report disclosure will either eliminate the need for expert depositions or at least reduce the length and cost of expert depositions.").

[17] PROPOSED MINN.R.CIV.P. 26.01(d)(1) ("A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 26.02(b)(2), the deposition shall not be conducted until after the report is provided.").

physicians without a court order[18]--at present, MINN.R.CIV.P. 35.04 bars discovery depositions of treating doctors, absent a special showing and leave of court.[19] While no change to Rule 35.04 has been proposed directly, it would be in conflict with the proposed change that:

> A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 26.02(b)(2), the deposition shall not be conducted until after the report is provided.[20]

Reports are required from all those experts who have been "retained or specially employed to present expert testimony."[21] There is a narrow category of expert witnesses who would satisfy both the criteria of having not been specially employed to testify, yet be subject to deposition, and it would largely consist of treating doctors. If the proposed amended rule allowing such experts to be deposed becomes law, that more recent change would potentially supersede the antecedent rule barring discovery depositions of treating or examining doctors. The proposed change could radically alter Minnesota practice by inviting discovery depositions of these

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[18] *See* ADVISORY COMMITTEE NOTE--1993, FED.R.CIV.P. 26(a)(2)(B) (since a treating physician is not "retained or specially employed to provide expert testimony," a treating physician "can be deposed or called to testify at trial without any requirement for a written report."), *cf.* Wreath v. United States, 161 F.R.D. 448 (D. Kan. 1995) ("However, when a physicians proposed opinion testimony extends beyond the facts made known to him during the course of the care and treatment of the patient and the witness is retained to develop specific opinion testimony, he becomes subject to the [written report] provisions of Fed.R.Civ.P. 26(a)(2)(B).").

[19] MINN.R.CIV.P. 35.04 ("Depositions of treating or examining medical experts shall not be taken except upon order of the court for good cause shown upon motion and notice to the parties and upon such terms as the court may provide.").

[20] PROPOSED MINN.R.CIV.P. 26.01(d)(1).

[21] PROPOSED MINN.R.CIV.P. 26.01(b)(2).

physicians.

The 1968 Committee Comment to Rule 35.04 made clear the policy in Minnesota that:

> The limitation on depositions of medical experts is applicable to both treating and examining experts. The purpose for the limitation is to insure [*sic*] that depositions of medical experts will be taken only upon court order.[22]

The goal was to minimize the disruption or intrusion on the private medical practices of physicians whose main role was to provide medical treatment and not to serve as advocates, as the rule makers feared that doctors would be disinclined to make themselves available for testimony at all, should they be presumptively subject to depositions in addition to having to author reports and testify at trial.[23]

At a minimum, the proposed rule must be clarified as to treating doctors as it appears in conflict with current rule 35.04, which is not amended. In practically every case involving personal injuries, a treating doctor not only testifies as to their diagnosis, treatment and prognosis, but also offers "causation" opinions. The construction given to the proposed rule by the federal courts that have applied the equivalent rule, requires such treating doctors to both proffer reports and to testify at discovery depositions if they may be called to testify at trial.[24]

Only if the 1968 Advisory Committee was wrong in its assumption that repeated legal intrusions into medical practice of treating doctors would potentially detrimentally alter

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[22] ADVISORY COMMITTEE NOTE--1968, MINN.R.CIV.P. 35.04.

[23] *See* Wenninger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (1976).

[24] *See, e.g.*, O'Connor v. Commonwealth Edison Co., 13 F.3d 1090, 1105 n.14 (7th Cir. 1994); Zarecki v. National Railroad Passenger Corp., 914 F. Supp. 1566, 1573 (N.D. Ill. 1996).

plaintiffs' relationships with their physicians, can any change in the current practice be justified.

III. Evaluations of federal changes do not suggest a utility to Minnesota's conformity with federal rule practice.

The Practicing Law Institute annually meets to address "Current Problems in Federal Civil Practice," and in 1996 they addressed emerging issues under the 1993 amendments to the federal civil rules, in light of the experience of federal practitioners to date.[25]

The result of their analysis was that the harm of discovery abuse-- which appears to have motivated the Minnesota Advisory Committee to recommend change--is not resolved by changing to a requirement that expert disclosure be made by reports and depositions:

> This disclosure, deposition and supplementation regimen affords opportunities for abuse. For example, (1) an incomplete disclosure can be very materially supplemented at a deposition in ways that effectively preclude effective preparation for the deposition, *e.g.*, by the addition of previously undisclosed opinions; or (2) a party can intentionally submit a minimal or incomplete disclosure and only *after* the deposition has been taken supplement to add new and different opinions.
>
> - This is problematic because there is a harmless-error exception in the sanction provision [Rule 37(c)(1)] pursuant to which the Court might find that the original nondisclosure has been mooted by the belated supplementation. . . .
>
> - The problem is that dilatory supplementation may undermine the adversary's ability to prepare effectively--for cross-examination or by retaining experts--such that the failure to supplement [does] not truly constitute harmless [conduct]. . . .
>
> Potentially abusive behavior can be checked by reopening discovery . . . .[26]

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[25] *See* G. Joseph, *Emerging Issues under the 1993 Amendments to the Federal Civil Rules,* CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 1996, 429 (B. Garfinkel, ed. 1996).

[26] *Id.* at 462 (emphasis in original).

The problem with the "cure" of re-opened discovery, is that is sets up the "second wave" of costly disclosure and the potential for additional abuse that has been observed in the anecdotal experiences of Minnesota's federal bar practitioners.

If the proposed changes are admittedly not that critical because the current rules can readily address problems of abuse, and the abuses that the changes seek to address are actually perpetuated, with the added result of injecting further costs and delays into the civil justice system, the proposed rule changes should not be made.

It is also important to observe that if one of the motivations to conforming Minnesota's state rules to those of current federal practice is to achieve an advantage of easier interpretation of the new rules by assessing the interpretation of their federal counterparts, that goal is unlikely to be readily achieved. Since each federal judicial district was permitted to selectively exempt itself from the application of the discovery rule changes, an extensive "localism" of federal practice has emerged from the manifold local exceptions grafted onto the "uniform" federal rules.[27] Vanderbilt University Law Professor Barry Friedman has observed in a 1995 comprehensive study of the amended federal rules of disclosure that:

> The 1993 amendments exacerbate the problem with fragmentation of the federal rules. The amendments are rife with provisions permitting district courts to opt-out from the federal rule by local rule or order of the court. . . . We are unaware, prior to the adoption of Rule 26 amendments, of any other such provisions permitting districts to opt out of federal rules. . . . The history of the new mandatory disclosure rule 26(a), highlights more than any other[,] deep problems with the rulemaking process and the resultant

---

[27] *See* E. Cherinsky & B. Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757 (1995).

balkanization of the federal rules.[28]

Professor Friedman's attempt to even summarize the different approaches resulting from local variations has proven frustrating:

> The results of the compilation defy easy summary because so many district courts are doing so many different things. * * * The result is a hodgepodge, one for which it is difficult to see benefits. The diversity of practice is troubling, because discovery most assuredly is a practice that affects substantive rights and litigation outcomes.[29]

While Minnesota can avoid variation of local rule practices through the dictates of the General Rules of Practice, the existence of a wide assortment of local variations at the federal level has created a "crazy-quilt"[30] that does not produce a readily identifiable or instructive federal common law to aid in the construction of the federal rules. Modeling Minnesota practice after the federal rules cannot, therefore, truly be calculated to achieve the benefit of a well-defined body of interpretative law for the Minnesota courts to draw upon in implementing the proposed rules. Conformity to a federal rule is possible through the proposed change, but it seems that in practice each federal district has its own permutation, so the reality is that most every court follows some exception, rather than the actual federal rule.

If the goal of conformity is to achieve a clearer insight into developing federal practice, it must be recognized that the proposed changes in Minnesota will not likely yield a ready body of easily applicable decisions to draw upon as interpretive aids.

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[28] *Id.* at 775.

[29] *Id.* at 777-78.

[30] *Id.* at 778.

IV. Current rules promote judicial flexibility.

Currently practitioners often stipulate to allow the exchange of expert depositions in Minnesota practice, or the court will order it upon a party's motion.[31] Such a result is possible because of the flexibility the current rules system encourages.

Currently, to compel an opponent to make an expert available for deposition requires a

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[31] The attitude of the court and counsel toward a voluntary exchange of expert depositions has changed since the 1970 enactment of the federal rules of civil procedure. *See* C. WRIGHT & A. MILLER, 8 FEDERAL PRACTICE AND PROCEDURE, § 2029, at 241 (1970). Increasingly the courts have come to allow expert depositions:

> There are two reasons for the change in attitude. First, some courts had objected to the discovery of expert information on the grounds variously that it was privileged, or that it was protected as work product, or that it would be unfair if one party could learn through discovery what the other party has paid the expert for. Powerful scholarly commentary, however, showed that these objections are not well taken. The knowledge of an expert is not privileged, it is not part of work product, and any unfairness can be remedied by requiring the discovering party, in appropriate cases, to reimburse his opponent for a portion of the expert's fee.
>
> Second, the courts have come to have a better appreciation of the importance of expert testimony in the trial of cases and the need for discovery if the views of an expert are to be properly cross-examined or rebutted.

Id., § 20. Practitioners have also increasingly agreed to a voluntary exchange of expert reports and depositions without court order:

> In recent years, the bar has evinced an increasing acceptance of applying liberal discovery practices to expert information developed in anticipation of litigation. Often counsel will bypass the rigors of rule 26(b)(4) and exchange the reports of their experts or allow the opposing party to freely depose the expert.

Comment, *Discovery of Expert Information Under the Federal Rules*, 10 U. RICH. L. REV. 706, 722 (1976).

showing to a judge that interrogatories have been inadequate to establish parameters for an expert's trial opinions. By using the judge as the gatekeeper to non-paper discovery, measured doses may be meted out as individual remedies for individual discovery ills.

A system that incorporates written disclosure both by report and interrogatory seems doubly calculated to generate "satellite issues" to litigation as twice the opportunity for disagreement on the completeness of disclosure is created. A system that eliminates the judge as gatekeeper to the deposition process removes a measure of judicial monitoring and shifts the burden of a party to seek affirmatively a protective order to limit depositions rather than to merely defend the adequacy of a prior written disclosure. Where parties have represented that a witness will attest to a set of facts and opinions, the current system allows a judge to enforce that promise by limiting testimony to those issues, or to permit limited and precise discovery to assure a balanced "playing field."[32]

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[32]The "basic policy of discovery . . . is to prevent trial by ambush." F & S Offshore, Inc. v. K. O. Steel Castings, Inc., 662 F.2d 1104, 1108 (5th Cir. 1981). Yet there are cases in which just cause can be shown for the late disclosure of an expert opinion, and where courts have allowed testimony because of the inadvertent nature of delay. *See, e.g.,* Dennie v. Metropolitan Med. Ctr., 369 N.W.2d 552, (Minn. App. 1985), *aff'd*, 387 N.W.2d 401, 405 (Minn. 1986) (suppression is for the failure to make a timely disclosure when "counsel's dereliction is inexcusable . . . ."). Courts have allowed the testimony of late disclosed expert witnesses' opinions when there was a demonstration of a lack of prejudice. *See, e.g.,* Ford v. Chicago, M.; St. P. & P. Ry., 294 N.W.2d 844 (Minn. 1980); Krech v. Erdman, 305 Minn. 215, 219, 233 N.W.2d 555, 557 (1975); Krein v. Raudabough, 406 N.W.2d 315 (Minn. App. 1987). The general rule of current practice requires a showing of both conditions. *See, e.g.,* Cornfeldt v. Tongen, 262 N.W.2d 684 (Minn. 1977). The current rule of practice is that the court is allowed and encouraged to permit the testimony "where the opposing party fails to seek a continuance and fails to show prejudice from having had only brief notice of the appearance of an expert . . . witness." Phelps v. Blomberg Roseville Clinic, 253 N.W.2d 390 (Minn. 1977).

CONCLUSION

The potential for discovery practices to have a substantive effect on the outcome of litigation is significant. Current rules with which practitioners are readily familiar provide for remedies and sanctions that can be crafted to individual cases and needs. No overwhelming problem has been ascertained or measured in the current system, and the Advisory Committee has acknowledged that simple judicial enforcement of current rules would work well to achieve the goal of substantial justice for each litigant, at costs and within a time frame appropriate to an individual controversy.

The changes proposed to Rule 26 requiring disclosure through reports and allowing depositions of experts without court order, are well meaning. They will, however, likely have the result in actual practice of increasing costs and delay, and yet fail to achieve any greater measure of control over the limited abuse of discovery that exists in Minnesota state practice.

For these reasons, it is respectfully suggested that the proposal to enact a new Rule 26.01(b) and to modify access to expert depositions as suggested by new Rule 26.02(d)(1) should be rejected by this Court.

Dated: Sept 20 1996

Respectfully Submitted,

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APPENDIX

* * *

6.04 For Motions; Affidavits

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served no later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. ~~A motion may be supported by papers on file by reference; supporting papers not on file~~ When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59.04, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

6.05 Additional Time After Service by Mail or Service Late in Day

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party, ~~or whenever such service is required to be made a prescribed period before a specified event,~~ and the notice or paper is served upon the party by mail, three days shall be added to the prescribed period. If service is made by any means other than mail and accomplished after 5:00 p.m. local time on the day of service, one additional day shall be added to the prescribed period.

ADVISORY COMMITTEE COMMENTS - 1996 AMENDMENTS

The amendment to Rule 6.01 conforms the rule to its federal counterpart. The committee believes it is desirable to define explicitly what constitutes a "legal holiday." Given the nature of Minnesota's weather, the committee believes specific provision for dealing with inclement weather should be made in the rules. The federal rule enumerates specific holidays. That drafting approach is not feasible in Minnesota because Minn. Stat. § 645.44, subd. 5, defines legal holidays, but allows the judiciary to pick either Columbus Day or the Friday after Thanksgiving as a holiday. Whichever is selected is defined to be a holiday under the rule.

The amendment to Rule 6.05 conforms the rule to the federal rule except for the last sentence which is new and has no federal counterpart. This provision is intended to discourage the unseemly practices of sliding a "service" under the door of opposing counsel or sending a facsimile transmission after the close of business and asserting timely service. Such service will be timely under the rules, but will add a day to the time to respond. If the paper is due to be served a fixed number of days before an event, that number should be increased by one as well, making it necessary to serve late in the day before the deadline.

RULE 16 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

* * *

16.03 Subjects for Consideration

~~The participants~~ At any conference ~~held pursuant to~~ under this rule ~~may consider and take~~ consideration may be given, and the court may take appropriate action, with respect to:

(a) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(b) the necessity or desirability of amendments to the pleadings;

(c) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(d) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Minnesota Rules of Evidence;

(e) the appropriateness and timing of summary adjudication under Rule 56;

(f) ~~the advisability of referring matters pursuant to Rule 53;~~ the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

(~~e~~g) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(~~f~~h) the advisability of referring matters pursuant to Rule 53;

~~(g) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;~~

(i) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or rule;

(~~h~~j) the form and substance of the pretrial order;

(~~i~~k) the disposition of pending motions;

(~~j~~l) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; ~~and~~

~~(k) such other matters as may aid in the disposition of the action. At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.~~

(m) an order for a separate trial pursuant to Rule 42.02 with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(n) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a directed verdict under Rule 50.01 or an involuntary dismissal under Rule 41.02(b);

(o) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(p) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

ADVISORY COMMITTEE COMMENTS - 1996 AMENDMENTS

This change conforms Rule 16.03 to its federal counterpart. The rule is expanded to enumerate many of the functions with which pretrial conferences must deal. Although the courts have inherent power to deal with these matters even in the absence of a rule, it is desirable to have the appropriate subjects for consideration at pretrial conferences expressly provided for by rule. The federal changes expressly provide for discussion of settlement, in part, to remove any confusion over the power of the court to order participation in court-related settlement efforts. *See, e.g., G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989); *Strandell v. Jackson County, Ill. (In re Tobin)*, 838 F.2d 884 (7th Cir. 1988) *Klothe v. Smith*, 771 F.2d 667 (2d Cir. 1985); *Buss v. Western Airlines, Inc.*, 738 F.2d 1053 (9th Cir. 1984).

RULE 26 GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

26.01 Discovery Methods

(a) Discovery. Parties may obtain discovery by one or more of the following methods: depositions by oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property; for inspection and other purposes; physical (including blood) and mental examinations; and requests for admission.

(b) Disclosure of Expert Testimony.

(1) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Minnesota Rules of Evidence.

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

(3) These disclosures shall be made at the times and in the sequence

directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (b) (2), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under Rule 26.05(a).

26.02 Discovery, Scope and Limits

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. ~~It is not ground for objection that the information sought will be inadmissible~~ The information sought need not be admissible at the trial if ~~that~~ the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

~~The frequency or extent of use of the discovery methods set forth in Rule 26.01 shall be limited by the court if it determines that:~~

~~(1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is either more convenient, less burdensome, or less expensive;~~

~~(2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or~~

~~(3) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a Rule 26.03 motion.~~

The court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(b) Insurance Agreements. In any action in which there is an insurance policy which may afford coverage, any party may require any other party to disclose the coverage and limits of such insurance and the amounts paid and payable thereunder and, pursuant to Rule 34, may obtain production of the insurance policy; provided, however, that this provision will not permit such disclosed information to be introduced into evidence unless admissible on other grounds.

(c) Trial Preparation: Materials. Subject to the provisions of Rule 26.02(d) a party may obtain discovery of documents and tangible things otherwise discoverable pursuant to Rule 26.02(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party or other person may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. ~~who is not a party.~~ If the request is refused, the person may move for a court order. The provisions of Rule 37.01(d) apply to the award of expenses incurred in ~~connection with~~ relation to the motion. For purposes of this paragraph, a statement previously made is (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(d) Trial Preparation: Experts. ~~Discovery of facts known and opinions held by experts, otherwise discoverable pursuant to Rule 26.02(c) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:~~

~~(1) (A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (B) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to Rule 26.02(d) (3), concerning fees and expenses as the court may deem appropriate.~~

A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 26.01(b) (2), the deposition shall not be conducted until after the report is provided.

(2) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(3) Unless manifest injustice would result, (A) the court shall require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery ~~pursuant to Rules 26.02(d) (1) (B) and 26.02(d) (2);~~ under this subdivision and (B) with respect to discovery obtained ~~pursuant to~~ under ~~Rule 26.02(d) (1) (B), the court may require, and with respect to discovery obtained pursuant to~~ Rule 26.02(d) (2) the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(e) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

* * *

26.05 Supplementation of Responses

~~A party whose response to a request for discovery was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:~~

A party who has made a disclosure under Rule 26.01(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(a) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (1) the identity and location of persons having knowledge of discoverable matter, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony; and at appropriate intervals its disclosures under Rule 26.01(b) (2) 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

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EMERGING ISSUES UNDER THE 1993 AMENDMENTS TO THE FEDERAL CIVIL RULES

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EMERGING ISSUES UNDER THE 1993 AMENDMENTS TO THE FEDERAL CIVIL RULES*

Gregory P. Joseph
Fried, Frank, Harris, Shriver & Jacobson
New York City

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EMERGING ISSUES UNDER THE 1993 AMENDMENTS TO THE FEDERAL CIVIL RULES

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I. Rule 26 Disclosure Obligations.

Note: The December 1, 1993 amendments to Rule 26(a) imposing a duty of mandatory disclosure are not universally in effect. *See* the March 24, 1995 study prepared by Donna Stienstra of the Research Division of the Federal Judicial Center entitled "*Implementation of Disclosure in the United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26*" (the "*FJC Study*"). As the *FJC Study* reflects, many districts have opted out of some or all of Rule 26(a) -- but several of those nonetheless have very similar disclosure obligations under local rules or their respective Civil Justice Reform Act plans. The discussion that follows in this section focuses on the 1993 amendments to the Federal Rules and their procedural and evidentiary implications.

A. Pre-Discovery Disclosure (Rule 26(a)(1)). At the outset of the litigation, independent of discovery requests, each party is obliged to *provide* to every other party (absent a court order, local rule or stipulation to the contrary):

1. Witnesses. "[T]he name and, if known, address and telephone number of each individual likely to have discoverable information *relevant to disputed facts alleged with particularity in the pleadings*, identifying the subjects of the information" (Rule 26(a)(1)(A); emphasis added).

a. Tension with Rule 9(b). The italicized language -- which is also contained in subdivision (1)(B) (see below) -- focuses on the tension between Rule 26(a)(1)(A) and (B), on the one hand, and Rule 9(b) on the other. The mandatory disclosure obligations of Rules 26(a)(1)(A) and (B) are only triggered with respect to matters "*alleged with particularity in the pleadings*." Under Rule 9(b), in fraud actions, "the circumstances constituting fraud ... shall be stated with particularity." It may be tempting to a defendant to attempt to

halt disclosure -- by moving for a stay -- on the ground that the defendant intends to file (or has filed) a motion to dismiss for failure to plead fraud with particularity pursuant to Rule 9(b).[1]

b. **Issues.** Such a motion runs the risk of a premature decision on the merits of the 9(b) issue.

i. **Standard.**

- There is authority to the effect that, to achieve the stay, the defendant has to establish that it is likely to prevail on its Rule 9(b) motion. *See, e.g., In re Lotus Devel. Corp. Secs. Litig.*, 875 F. Supp. 48, 51 (D. Mass. 1995) ("There are several possible ways of reconciling the policies underpinning Rule 26(a)(1) with Rule 9(b). The first option would be to give primacy to Rule 26(a)(1) and require disclosure to proceed apace without any evaluation of the merits of defendants' claims. This option, however, both disserves the goals of Rule 9(b) and ignores a key stricture of Rule 26(a)(1), avoidance of unnecessary expense. The second solution -- that urged by defendants -- is to give primacy to Rule 9(b) and stay automatic disclosure until the motion to dismiss is fully briefed and decided, often a lengthy process. The problem with this approach is that it carves out a wholesale exception to automatic disclosure that is not specifically contemplated by the text or committee notes. Having rejected the extremes, the court explores the middle.... The procedure followed here is meant to be summary. The burden of proof imposed on the party seeking a stay is a stiff one.... [The defendant must] persuade this court that their motion to dismiss is a likely winner").

- There is an argument to be made that, to avoid imposing on the parties the potentially inordinate costs of discovery, the standard should be less weighty -- namely, that the Court should simply assess whether the Rule 9(b) motion appears to be substantial.

ii. **Congressional Initiative.** Legislation that has passed the House, and Senate (but is not at this writing reconciled) would impose an automatic stay of discovery pending any Rule 9(b) motion in a securities action.

iii. **Reservation of Rights.** In the absence of a stay, defendants should make an express reservation of rights in their 26(a)(1) disclosures that disclosure is being made without prejudice to any Rule 9(b) motion. In general, the disclosures should recite that they are being made:

- Without prejudice to any Rule 9(b) motion.
- Without representing that any particular document or thing (within a described category) exists.
- Without prejudice to objections, if any, to discovery.
- Based on still-incomplete investigation and subject to the right (and duty) to supplement.
- In recognition of the need for a confidentiality agreement or protective order prior to production, if appropriate.

2. **Documents.** "[A] copy of, or a description by category and location of, all documents, data compilations and tangible things *in the*

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[1] Many districts that have not adopted the 1993 version of Federal Rule 26(a)(1) nonetheless have mandatory disclosure, and the same issue may arise under the respective standards in effect in those districts -- often the standard contained in the 1991 draft version of the Rule 26(a)(1) ("likely to bear significantly on any claim or defense") on the theory that no claim or defense is validly stated.

possession, custody, or control of the party that are *relevant to disputed facts alleged with particularity in the pleadings*" (Rule 26(a)(1)(B); emphasis added).

a. **General Description Suffices.** The Rule permits a description in lieu of production. According to the Advisory Committee Note, "an itemized listing of each exhibit is not required," but "the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records."

b. **Control Requirement.** Only documents in the disclosing party's possession, custody and control need be disclosed. "Nothing in Rule 26(a) may be read to impose an obligation to inform opposing counsel which documents, already within opposing counsel's possession, the [disclosing] party intends to use to defeat (or support, for that matter) a motion for summary judgment." *McFarlane v. Ben-Menashe*, No. 93-1304 (TAF), 1995 U.S.Dist.Lexis 3463 at *8 (D.D.C. March 16, 1995).

3. **Damages.** "[A] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, *not privileged or protected from disclosure,* on which such computation is based, including materials bearing on the nature and extent of injuries suffered" (Rule 26(a)(1)(C); emphasis added).

4. **Insurance.** "*[F]or inspection and copying* as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments to satisfy the judgment" (Rule 26(a)(1)(D); emphasis added).

a. **Copy Required.** Note that, unlike the other categories, subdivision (a)(1)(D) "makes it clear that it is a copy of the insurance agreement itself that defendants must produce." *Wagner v. Cliff Viessman, Inc.*, 153 F.R.D. 154, 160 (N.D. Iowa 1994).

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b. **Discovery Impact.** The scope of this subdivision -- insurance agreements that may furnish coverage in the case -- has been held enforceable to bar discovery of other insurance agreements. *Resolution Trust Corp. v. Thornton*, 41 F.3d 1539, 1543, 1547 (D.C. Cir. 1994) (RTC administrative subpoena seeking financial and insurance information to ascertain the cost-effectiveness of pursuing litigation may not issue after litigation has commenced, in light of Rule 26(a)(1)(D); subpoena sought all policies of insurance and reinsurance for a several year period, and amounts of coverage remaining thereunder). But as a general matter this reading would appear to be inconsistent with the 1993 Advisory Committee Note and with the thrust of Rule 26(a)(5), discussed below.

Timing. Generally, these Rule 26(a)(1) disclosures are due within 85 days of a defendant's initial appearance. (They are due within 10 days after the parties' meeting, which must precede the Rule 16 scheduling conference by two weeks.) *See* Fed. R. Civ. P. 26(a)(1).

B. **Expert Disclosure (Rule 26(a)(2)).** Unless otherwise agreed or directed by the Court, at least 90 days before the case has been directed to be ready for trial or, if solely for rebuttal purposes, within 30 days after the disclosure which this testimony is intended to rebut, the parties must disclose to all other parties:

1. **Initial Disclosure.**

a. **Report.** Each party must provide a written report signed by the expert including: "a complete statement of *all opinions* to be expressed and the basis and reasons therefor;"

i. **Data.** "[T]he data or other information *considered* by the witness in forming the opinions;"

- The 1993 Advisory Committee Note makes it clear that "information considered" includes document collations or deposition excerpts provided by counsel. Whether that effects a complete waiver of core work product (not just collations of documents but "mental impressions, conclusions, opinions, or legal

theories of an attorney," as defined in Fed. R. Civ. P. 26(b)(3)) communicated to or discussed with an expert is highly debatable. *See* § III(A)(2) ("Core Work Product"), *infra*.

ii. **Exhibits.** "[A]ny exhibits to be used as a summary of or support for the opinions;"

- If a party wishes to add demonstrative or other exhibits not included in the Rule 26(a)(2)(B) report (absent stipulation or permission of the Court), that must be done by the time that the pretrial order is entered or, if there is none, by the time that the Rule 26(a)(3) disclosures are required, which is 30 days prior to trial. *See* § IV(B) ("Timing"), *infra*.

iii. **Qualifications/Publications.** "[T]he qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;"

- If a party wishes to supplement information not included in the Rule 26(a)(2)(B) report (absent stipulation or permission of the Court), that must be done by the time that the pretrial order is entered or, if there is none, by the time that the Rule 26(a)(3) disclosures are required, which is 30 days prior to trial. *See* § IV(B) ("Timing"), *infra*.

iv. **Compensation.** "[T]he compensation to be paid for the study and testimony;"

- By definition, the precise amount "to be paid" is not known or knowable at the time that the report is filed, unless a fixed fee is involved. No "testimony" has yet been taken, and that term presumably covers both deposition and trial testimony, neither of which may occur. Absent any reported case law, it would appear that disclosing an expert's hourly rate would ordinarily suffice. If a fixed fee or contingency is involved, a fair reading of the Rule would require its disclosure.

- If others assisted the testifying witness (whether within or outside his or her firm), their compensation information, too, should be disclosed since those amounts form part of the compensation paid "for the study." Disclosure should not depend on whether the compensation is paid directly to the expert, who in turn pays those assistants, or whether counsel (or client) pays them directly.

- Nothing prevents an adversary from seeking additional compensation information, such as total compensation paid to date (or any other information required by Rule 26(a)(1)), through traditional discovery methods. *See* § II(B) ("Additional Expert Discovery"), *infra*.

v. **Testimony.** "[A] listing of any *other cases* in which the witness has testified as an expert *at trial or by deposition* within the preceding four years."

- "The identification of 'cases' at a minimum should include the *courts or administrative agencies*, the names of the *parties*, the *case number*, and *whether* the testimony was by *deposition or at trial*." *Nguyen v. IBP, Inc.*, Case No. 94-4046-SAC, 1995 U.S.Dist.Lexis 10741 at *16 (D. Kan. July 27, 1995) (emphasis added).

- It is not self-evident precisely what "cases" are, and the Advisory Committee Note does not say. It is probably safe to include adjudicated disputes, such as arbitrations and some types of administrative action (as assumed in *Nguyen, supra*). Given the discoverability of this information (§ II(B) ("Additional Expert Discovery"), *infra*), the ambiguity in the Rule

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ought not be wielded against a disclosing party who has made a good faith effort to comply.

b. **Reporting Experts.** Reports are due from every "witness who is *retained or specially employed to provide expert testimony* in the case or whose duties...."

- Treating physicians are treated uniquely, largely as a function of the content of their testimony. *See* § III(C)(4) ("Treating Physicians"), *infra*.

2. **"Rebuttal" Disclosure.** Within 30 days after receiving the expert disclosure of another party, a party must provide its expert's disclosure of "the evidence ... intended solely to *contradict or rebut*" it."

a. **Rebuttal vs. Supplemental Testimony.** Subdivision (a)(2)(C) contemplates the designation of new witnesses, but only to the extent that they are to offer rebuttal evidence, not merely to "supplement the prior opinions" of timely-disclosed (a)(2)(B) experts. In other words, subdivision (a)(2)(C) is not designed as an avenue for the untimely designation of (a)(2)(B) experts. *Fuller v. Volvo GM Heavy Truck Corp.*, No. 92 C 1797, 1995 U.S.Dist.Lexis 11638 at *5 (N.D.Ill. Aug. 14, 1995).

b. **Rebuttal vs. Impeachment Testimony.** The relationship between this Rule 26(a)(2)(C) duty to disclose "contradict[ion]" and "rebut[tal]" evidence, on the one hand, and the apparent right, under Rule 26(a)(3), *not* to disclose impeachment evidence, is discussed in § III(C)(2)("Rebuttal vs. Impeachment Testimony"), *infra*.

c. **Expert Opinion vs. Lay Testimony.** The type of "evidence" is referred to in subdivision (a)(2)(C) is expert opinion evidence, not necessarily facts known to the expert as a percipient witness, even if they may be couched in Rule 701 lay opinion phrasing. *See* §§ III(C)(1) ("Opinion Witnesses: Rule 701 vs. Rule 702 Testimony") and III(C)(3) ("Expert Opinion vs. Lay Testimony"), *infra*.

d. **Rebutting Whom?** At least one court has raised, but not answered, the question whether the plaintiff may offer expert

testimony to rebut that offered by a third-party defendant against whom the plaintiff has not asserted a direct claim. *Fuller v. Volvo GM Heavy Truck Corp.*, 1995 U.S.Dist.Lexis 11638 at *6-*7. The Rule does not make this distinction (between adverse and non-adverse parties) -- it refers only to "another party" -- but that does not mean that it is not implicit in the meaning of "to contradict or rebut."[2]

e. **Silence of Pretrial Order: Right to Name New Witnesses on Rebuttal.** It is not uncommon for pretrial orders to set sequential dates for first the plaintiff and then the defendant to identify their respective experts -- and for the order *not* to specify a date for the plaintiff to identify new rebuttal witnesses on rebuttal. There is a split of authority as to whether the plaintiff may designate a rebuttal witness absent leave of court, but the designations are nonetheless being permitted as a practical matter. *Compare IBM Corp. v. Fasco Indus., Inc.*, No. C-93-20326 RPA, 1995 WL 115421 at *2 (N.D. Cal. March 15, 1995) (held, where a pretrial order is silent as to rebuttal expert reports, the Rule provision permitting rebuttal designation is overridden all expert testimony must be exchanged at the specified time; nonetheless permitting the offending party to add two of six proposed "rebuttal" witnesses) *with Knapp v. State Farm Fire & Cas. Co.*, No. 94-2420-EEO, 1995 U.S.Dist.Lexis 7830 at * 4 (N.D.Ill. May 31, 1995) (where the pretrial order set deadlines for designating expert testimony but did not specifically address rebuttal, the Rule's thirty-day default provision kicked in and the plaintiff was free to identify new rebuttal witnesses for 30 days after the defendant's Rule 26(a)(2)(B) disclosure); *accord Fuller v. Volvo GM Heavy Truck Corp.*, No. 92 C 1797, 1995 U.S.Dist.Lexis 11638 at *5-*6 (N.D.Ill Aug. 14, 1995) (same result; no analysis).

3. **Local Rules.** Local rules are permitted to carve out exceptions as to both the type and form of disclosure if made "with respect to

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2 *See* n. 5, *infra*.

particular experts or categories of experts, such as treating physicians." *See FJC Study.*

C. **Other Pretrial Disclosures (Rule 26(a)(3)).**

1. **Disclosure Obligation.** Unless otherwise directed by the Court, at least 30 days before trial each party must disclose the following information "regarding the evidence that it may present at trial *other than solely for impeachment purposes*:"

   a. **Witnesses.** The name, address and telephone number of each witness, identifying those tentatively and those definitely to be called at trial;

   b. **Deposition Designations.** A designation of those witnesses whose testimony will be presented by means of a deposition together with a transcript of the testimony if the deposition was not stenographically recorded and;

   c. **Exhibits.** Identification of each document or other exhibit intended to be used at trial, "including summaries, separately identifying those which the party expects to offer and those which the party may offer if the need arises."

2. **Reply/Objection.** Within 14 days of this exchange, each party must file any objections to the other party's deposition designations and to the admissibility of identified documents or other exhibits. All objections other than relevancy and Rule 403 prejudice objections "shall be deemed waived unless excused by the court for good cause shown."

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II. **Discovery into Disclosure Areas.**

A. **Timing of Discovery of Disclosure Information.**

1. **Rule-Driven Time Table.** Parties are entitled to discovery of the information required to be disclosed by Rule 26(a), such as the identity and expected testimony of specially-retained trial experts and other witnesses, only in accordance with the schedule set by Rule 26(a), the Court or local rule. *See Edward Lowe Indus., Inc. v. Oil-Dri Corp. of Am.*, No. 94 C 7568, 1995 U.S.Dist.Lexis 9347 (N.D.Ill. July 3, 1995) (defendant not entitled to Rule 26(a)(2)(B)

report prior to the time it is due pursuant to court order; opinion notes plaintiff's claim that it had not yet finally decided on its expert trial witnesses); *Basque Station, Inc. v. United States*, No. CV 94-0109-S-EJL, 1995 U.S.Dist.Lexis 7085 at *6 n.3 (D.Ida. May 9, 1995) (plaintiff not entitled to defense expert information in response to interrogatory until such time as it is due under federal and local rule; nor is plaintiff entitled to defendant's witness list until it is due under Rule 26(a)(3)).

2. **Practice Point.** As a practical matter, there is no reason why a party would make a final decision as to which expert or witness it intended to call until the last possible moment, rendering the timing issue largely academic.

B. **Additional Expert Discovery**

The 1993 Advisory Committee Note to Rule 26(a) recites that "parties are not precluded from using traditional discovery methods to obtain further information regarding these matters" (*i.e.*, matters that are subject to mandatory disclosure). Some courts have looked to this language, and to Rule 26(a)(5) -- the paragraph that has for years identified the traditional methods of discovery permitted by the Federal Rules (depositions, interrogatories, production of documents, and the like) in concluding that additional discovery in the subject areas covered by Rule 26(a)(1), (2) and (3) is generally available.

1. **Depositions.**

   a. **Testifying Experts.** *After* receiving the expert's report pursuant to Rule 26(a)(2)(A), a party may depose any expert under Rule 26(b)(4)(A).

      - The deposing party must "pay the expert a reasonable fee for the time spent in responding to discovery" (Rule 26(b)(4)(C)).

   b. **Non-Testifying Experts.** A party may still discover facts known and opinions held by non-testifying experts through interrogatories or by deposition *only* upon a showing of "exceptional circumstances" (Fed. R. Civ. P. 26(b)(4)(B)).

2. **Other Types of Available Expert Discovery.**

Discovery beyond the mandatory expert disclosure (Rule 26(A)(2)) and beyond a testifying expert's deposition (Rule 26(b)(4)(A)) -- is contemplated and permitted by Rule 26((a)(5). *Corrigan v. Methodist Hosp.*, 158 F.R.D. 54 (E.D. Pa. 1994). This includes:

a. Documents provided by counsel to the expert and on which the expert relied (or, presumably, considered) in coming to his or her opinions. *Corrigan v. Methodist Hosp.*, 158 F.R.D. 54, 58 (E.D. Pa. 1994) (pursuant to Rule 34 or 45[3]).

b. Drafts of expert "reports and notes relied upon and made in preparation of completing the final reports." *Caruso v. Coleman Co.*, No. 93-CV-6733, 1994 U.S.Dist.Lexis 18587, 1994 WL 719759 (E.D. Pa. Dec. 27, 1994) (pursuant to Rule 45; no showing of particularized need required).

c. Other testimony given by the expert. *All West Pet Supply Co. v. Hill's Pet Prods. Div'n*, 152 F.R.D. 634, 639-40 (D.Kan. 1993) (pursuant to Rule 45).

C. **Discoverability of Impeachment Evidence.**

1. **Generally.** The Advisory Committee Note does not indicate that the amendment of Rule 26(a), including the amendment of subdivision (a)(5), was in any respect intended to change prior law on the discoverability (or nondiscoverability) of impeachment evidence. Moreover, the text of the Advisory Committee Note refers only to discovery of "further information regarding these matters" --*i.e.*, matters that *must* be disclosed, not those carved out from disclosure.

[3] Since December 1, 1991, Rule 34(c) has provided that "[a] person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45." The 1991 amendment to Rule 45(a)(1) correspondingly permits the issuance of a subpoena solely for the production of evidence or to permit inspection, and, under the 1991 amendment to Rule 45(a)(2), non-party witnesses are subject to the same scope of discovery as are parties under Rule 34. The effect of these provisions is to permit documentary discovery of third parties without the necessity of subpoenaing the third parties for deposition.

2. **Surveillance Videotapes.** Discovery of at least some types of impeachment evidence -- of the sort not required to be disclosed under Rule 26(a)(3) -- has been held to be permitted under Rule 26(a)(5). *Corrigan v. Methodist Hospital*, 185 F.R.D. 54 (E.D. Pa. 1994) (surveillance videotape). However, surveillance films and videotapes have traditionally been *sui generis* in the discovery treatment they receive. *See generally* G. Joseph, MODERN VISUAL EVIDENCE § 4.03[2][b] (1984; Supp. 1995) ("MODERN VISUAL EVIDENCE").

III. **Emerging Expert Issues.**

A. **Counsel/Expert Communications: Impact of Mandatory Disclosure on Work Product & Privilege.**

Communications between counsel and expert are often essential to the understanding of both and therefore crucial to the prosecution or defense of a case. Communications of this type include brainstorming sessions and exchanges analyzing: (i) the strengths and weaknesses of claims and defenses, whether asserted or unasserted; (ii) esoterica in the expert's field, often but not necessarily relating either to expert's own, or to another expert's, actual or prospective opinion in the case; and (iii) damages issues. Discovery of such exchanges arguably runs counter to the rationale of *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) ("it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel"). *Cf., Upjohn Co. v. United States,* 449 U.S. 383, 400 (1981) (stressing that "Rule 26 accords special protection to work product revealing the attorney's mental processes"). Discoverability is governed by Rule 26(b)(3), which provides the general protection for attorney work product. This Rule distinguishes between ordinary work product (first sentence) and core work product (second sentence). Ordinary work product is defined to include otherwise-discoverable documents and things prepared in anticipation of litigation; discovery is permitted only upon a showing of "substantial need." Core work product consists of "mental impressions, conclusions, opinions, or legal theories of an attorney," and discovery is not permitted even upon a showing of substantial need.

1. **Ordinary Work Product; Document/Testimony Collations.**

The requirement of disclosure of all data or other information *considered* by the expert in forming his or her opinions was intended

by the Advisory Committee to preclude any viable claim of work product or privilege for materials assembled and provided for expert review. The 1993 Advisory Committee Note accompanying Rule 26(a)(2) observes: "Given the obligation of disclosure, litigants should no longer be able to argue the materials furnished to their experts to be used in forming their opinions are protected from disclosure when such persons are testifying or being deposed." As reflected § II(A)(2)(b), *supra*, the cases leave little doubt that compilations of factual materials provided to experts (*i.e.*, ordinary work product) may be discovered.

2. **Core Work Product.**

A key question is whether core work product -- attorney theories of the case, mental impressions, opinions and conclusions -- are discoverable if disclosed to an expert. The law is a bit unclear on this issue because, with all of the amending that the Civil Rules Committee has done, Rules 26(b)(3) and (b)(4) do not neatly jive. Further, the broad language of Advisory Committee Note to new Rule 26(a)(2) (set forth immediately above) neither defines the "materials" it intends to encompass nor does it address oral communications.

a. **"Subject to..."** The first sentence of Rule 26(b)(3) begins: "Subject to the provisions of subdivision (b)(4) of this Rule...." Due to the 1993 amendments, subdivision (b)(4)(A) is now the provision that confers the right to depose experts. An argument can be made that the "[s]ubject to" language means that there is no protection for core work product in an expert's deposition. Under prior versions of subdivision (b)(4), some decisions held that "all communications from counsel to a testifying expert that relate to the subjects about which the expert will testify are discoverable" -- even core work product. *See, e.g., Intermedix v. Ventritex, Inc.*, 139 F.R.D. 384, 388-89 (N.D.Cal. 1991). This result is understandable from a policy perspective, especially in a patent case like *Intermedix*, the concern being that counsel's influence on the witness ought to be aired. However, many courts, including the sole Circuit-level authority addressing this issue, rejected the *Intermedix* analysis and held that core work product was not discoverable (at least in the absence of

extraordinary circumstances). *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 594 (3d Cir. 1984).

b. **"Subject to" ≠ Except.** In the first reported decision on the issue under the 1993 amendments, the Western District of Michigan has expressly rejected the *Intermedix* reading of Rule 26(b)(3)-(4), and further held that, under Rule 26(a)(2)(B), only the factual information given by counsel to the expert is disclosable -- so that, as *Bogosian* held, core work product remains protected, in the absence of extraordinary circumstances. *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995).

i. The *Haworth* Court reversed a magistrate judge's ruling that permitted interrogation into the mental impressions of counsel as communicated to an expert. The district judge reasoned that Rule 26(b)(3) governs in expert depositions (as in expert discovery generally) because "the drafters intended the terms 'subject to' to mean that subdivision (b)(3) applies unless there is a standard to the contrary in subdivision (b)(4)" -- and there is no such standard, other than the *higher* standard applicable to non-testifying experts under subdivision (b)(4)(B).

ii. Construing Rule 26(a)(2)(B), *Haworth* interpreted "*data or other information* considered by the witness in forming the opinions" as referring only to factual information, not "mental impressions, conclusions, opinions or legal theories" of the sort protected by Rule 26(b)(3).

iii. The *Haworth* Court concluded that "the risk of counsel's influence "does not go unchecked in the adversarial system, for the reasonableness of an expert opinion can be judged against the knowledge the expert's field and is always subject to the scrutiny of other experts."

iv. This result has the added benefits of (1) not favoring wealthy parties who can afford to hire both testifying and non-testifying experts and (2) not encouraging

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counsel and experts to engage in coy or strained conversations cloaked as "hypothetical" to avoid discovery. Further, it is in any event not the attorney-expert communications themselves but the subject matter that has been communicated which might be considered "*in forming the opinions.*"

v. The *Haworth* opinion notes that if documents containing core work product are used to refresh a witness's recollection prior to or while testifying, they may be disclosable under Evidence Rule 612.

c. **Rules Enabling Act.** If *Haworth* is incorrect in its interpretation of Rule 26(a)(2)(B), the question arises whether the Rule has been adopted in a form that has the effect of "abolishing or modifying any evidentiary privilege," in contravention of the Rules Enabling Act, 28 U.S.C. § 2074(b), a provision that has never been the subject of a reported opinion. If *Haworth* is incorrect, Rule 26(a)(2)(B) makes waiver of core work-product an unavoidable cost of putting an expert forward to testify. This raises two interesting questions?

- Is core work-product an "evidentiary privilege"?

  -- There is a dearth of authority defining this phrase within § 2074(b). Within the confines of the Federal Rules of Civil Procedure, attorney work-product is sometimes said to be a Rule 26(b)(1) "privilege," *Vermont Gas Sys. v. United States Fid. & Guar. Co.*, 151 F.R.D. 268; 274 (D.Vt. 1993). As an interpretative matter, however, that it probably wrong since -- focusing on Rules 26(b)(1) and (3) -- it is more precise to consider work-product unprivileged matter the discovery of which is governed by Rule 26(b)(3). *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513; (5th Cir. 1993). However, (i) the meaning of "unprivileged" in Rule 26(b)(1) is not necessarily the obverse of the phrase "evidentiary privilege" as used in 2074(b), and (ii) Rule 26(b)(3) does not fully

codify the work-product protection recognized in *Hickman*. *See, e.g.*, MOORE'S FEDERAL PRACTICE ¶ 26.15[1] at 26-292, 26-293 (1995). Among other things, it is limited to documents and tangible things.

- Does mandating the waiver of an "evidentiary privilege" constitute "abolishing or modifying" it, in contravention of the § 2074(b)?

B. Expert Disqualification: Impact of Mandatory Disclosure.

Occasional motions seek to disqualify an expert because of his or her prior affiliation with the adverse party. The ground for disqualification is often attorney work product (sometimes mischaracterized as privilege) or fundamental fairness. To the extent that the 1993 amendments to Rule 26(a)(2) render discoverable everything given or said to an expert, the work product argument would appear to be undercut. To the extent that the 1993 amendments leave core work product protected, this ground of expert disqualification would remain intact. *See Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575 (D.N.J. 1994) (disqualifying expert; relying on pre-December 1, 1993 precedent).

C. Scope of Expert Disclosure Obligations.

1. Opinion Witnesses: Rule 701 vs. Rule 702 Testimony.

a. General Scope: Rule 702 Witnesses.

Rule 26(a)(2)(B) disclosure requirements pertain only to witnesses offering expert testimony under Fed. R. Evid. 702. *See* 1993 Advisory Committee Note to Fed. R. Civ. P. 26(a)(2) ("For convenience, this rule and revised Rule 30 continue to use the term 'expert' to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters").

b. Increasing Acceptance of Rule 701 Quasi-Experts.

Rule 701 of the Federal Rules of Evidence codifies the common law collective-facts doctrine, permitting lay witnesses to offer opinions "which are (a) rationally based on

the perception of the witness and (b) helpful to a clear understanding of the witness's testimony." Some decisions construing this Rule permit "lay opinion as to technical matters such as product defect or causation," provided that it "derive[s] from a sufficiently qualified source as to be reliable and hence helpful to the jury." *Asplundh Mfg. Div. v. Benton Harbor Engineering*, 57 F.3d 1190 (3d Cir. 1995) ("*a lay witness with first-hand knowledge can offer an opinion akin to expert testimony in most cases*, so long as the trial judge determines that the witness possesses sufficient and relevant specialized knowledge or experience to offer the opinion") (emphasis added).

c. Disclosure Obligations of Rule 701 Witnesses.

Since Rule 26(a)(2)(B) disclosure requirements pertain only to witnesses offering expert testimony pursuant to Fed. R. Evid. 702, parties may attempt to circumvent expert discovery and disclosure obligations by the sheer expedient of witness labeling. (At a minimum, the lay witness would presumably have to be designated in a Rule 26(a)(1)(A) disclosure, at least as supplemented pursuant to Rule 26(e)(1).) The line between Rule 701 and 702 testimony, on the *Asplundh* analysis, is not always easy to draw. To the extent that no Rule 26(a)(2)(B) disclosure has been made with respect to a witness, the Court may exclude any Rule 702 testimony from that witness and yet leave the door open for Rule 701 opinions. *See, e.g., United States ex rel. Jervis B. Webb Co. v. Gust K. Newberg Constr. Co.*, 1995 U.S.Dist.Lexis 8730 at *5-*6 (N.D. Ill. June 20, 1995). *See also Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), discussed in § III(C)(3)(b)(ii) ("*Hester*"), *infra*. The Court should be

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vigilant to avoid encouraging manipulative conduct designed to thwart the expert disclosure and discovery process.[4]

2. Rebuttal vs. Impeachment Testimony: Rule 26(a)(2)(C) vs. Rule 26(a)(3).

a. Textual Comparison.

i. "Solely to Contradict or Rebut." Rule 26(a)(2)(C) requires responsive disclosures when a party intends to elicit expert testimony "*solely to contradict or rebut evidence on the same subject matter* identified by another party under paragraph (2)(B)" (emphasis added).

ii. "Solely for Impeachment Purposes." Rule 26(a)(3) carves out from mandatory non-expert disclosure "evidence that [a party] may present at trial *other than solely for impeachment purposes*" (emphasis added).[5]

b. Reconciling Subdivisions (a)(2)(C) and (a)(3). The two subdivisions are reconcilable on three levels:

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4 It should be noted that *Asplundh* extended the application of the trial judge's gatekeeping responsibilities under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), to Rule 701 witnesses to avoid circumvention of the policy goals identified by the Supreme Court with respect to Rule 702 experts. A similar approach requiring Rule 26(a)(2)-type disclosures could be incorporated into pretrial orders or simply requested by parties in routine discovery.

5 Rule 26 contains no definitions and makes no effort to distinguish between contradiction or rebuttal evidence, on the one hand, and impeachment evidence on the other. The distinction can be elusive, depending on the facts. In common legal parlance, rebuttal is substantive evidence that is "introduced to contradict a specific point in the [opponent's] evidence" (*People v. James*, 123 Ill.2d 523, 550, 528 N.E.2d 723, 735 (1988)) -- evidence "which becomes relevant because of proof introduced by the adverse party" (*Crussel v. Kirk*, 894 P.2d 1116, 1119 (Okla. 1995)). In contrast, impeachment evidence "call[s] in question the veracity of a witness" (*Kennemur v. State*, 133 Cal.App.3d 907, 921, 184 Cal.Rptr. 393, 401 (1982), *quoting* BLACK'S LAW DICT. 886 (5th ed. 1979)). There is little point in attempting to resolve the potential conflict between Rule 26(a)(2)(C) and Rule 26(a)(3) on a purely linguistic basis, however, because there can be "but slight difference between impeachment, that [someone] was not a credible witness, and rebuttal, that [he did] not [do something] as he testified...." *People v. Blake*, 179 Ill.App.3d 249, 258, 534 N.E.2d 415, 421 (1989).

i. Subdivisions (a)(2) and (a)(3) state independent disclosure obligations. Subdivision (a)(2) is the provision specifically directed at expert opinion; subdivision (a)(3) covers experts only generically and indirectly (as witnesses to be identified or deponents whose transcripts are to be designated). Nothing in subdivision (a)(3) purports to circumscribe the disclosures required in subdivision (a)(2).

ii. There is no conflict between the subdivisions to the extent that an expert opinion is not offered *solely* for impeachment purposes (it rarely is -- *see* the learned-treatise discussion below); subdivision (a)(3) carves out only pure impeachment evidence.

iii. Even if an expert were to offer testimony *solely* for impeachment purposes, that would not create a conflict between these provisions to the extent that the expert's testimony is factual, and not in the nature of expert opinion.

c. **Illustration No. 1: Learned Treatise Impeachment Under Rule 803(18)**

i. Fed. R. Evid. 803(18) permits a party to cross-examine an expert witness using learned treatises that may be authenticated by the cross-examining party's own expert.[6] May the cross-examining party's expert authenticate a treatise as reliable at trial if the expert was silent on the subject in his or her Rule 26(a)(2) disclosures?

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6 Rule 803(18) excludes from operation of the hearsay rule:

> **Learned treatises.**--To the extent called to the attention of an expert witness upon cross-examination..., statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority ... by other expert testimony....

ii. On a strict reading of Rule 26(a)(2), the answer is No because the authentication consists of an expert opinion -- namely, that the treatise is reliable -- and subdivision (a)(2)(B) requires that the mandatory report "contain *a complete statement of all opinions* to be expressed" (emphasis added). At a minimum, this opinion should be in a subdivision (a)(2)(C) rebuttal or a subdivision (e)(1) supplement.

iii. Rule 26(a)(3) does not lead to a different result. Learned treatise evidence under the Federal Rules is not offered *solely* for impeachment purposes. "It is important to remember that statements in learned treatises come in for their truth; ... they are not limited to impeaching credibility, but can be used for the truth of the matters stated." 3 S. Saltzburg, M. Martin & D. Capra, FEDERAL RULES OF EVIDENCE MANUAL 1433 (6th ed. 1994). Nor should counsel be permitted to avoid disclosure obligations by claiming that he or she is not offering the treatise for all purposes but only to impeach.

iv. As a practice matter, there is no need to make it clear that a treatise is being authenticated for cross-examination purposes or even with respect to the particular point for which counsel may wish to use it. That is purely a matter of style in fashioning the disclosure.

d. **Illustration No. 2: Attack on Scientific Methodology Per *Daubert v. Merrell Dow.***

i. A planned attack on scientific methodology which, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), is a Rule 104(a) question for the Court and not the jury. Under Rule 104(a), the Court may consider any inadmissible, unprivileged evidence, such as an affidavit. Can a party submit an affidavit that attacks an opposing expert's methodology and is executed by an expert who has not made a disclosure? Or whose disclosure does not contain the attack?

ii. It would appear that the Rules did not contemplate the circumstance in which an expert has not made a disclosure and is not otherwise expected to testify yet submits an affidavit in an effort to preclude other expert testimony. Arguably, such a person (1) is a non-testifying witness within Rule 26(b)(4)(B) since he or she is "not expected to be called as a witness at trial," and (2) is not "a *witness* who is retained ... to provide expert *testimony* in the case" within the meaning of Rule 26(a)(2)(A). Even if the expert did submit a disclosure on other topics, as long as the proponent challenges the methodology only on an affidavit to the Court, and not through testimony before the jury, the absence of disclosure would not seem to trigger the strict requirements of the Rules.[7]

e. **Expert Opinion vs. Lay Rebuttal.** *See* § III(C)(3)("Expert Opinion vs. Lay Testimony"), immediately *infra*.

3. **Expert Opinion vs. Lay Testimony.**

a. **Disclosure Obligation: Expert Opinion.** Among other things, Rule 26(a)(2)(B) requires disclosure of all *opinions* to be expressed, the *basis* for those opinions, and all *information considered in forming* the opinions. That does not necessarily include everything that the expert knows. In the circumstances, the expert may know impeaching facts or have non-expert impeaching opinions.

b. **Other Impeachment.**

i. ***DeBiasio.*** The Seventh Circuit has ruled it error to exclude the impeaching, factual testimony of an expert witness who has personal knowledge (in this case, as

[7] These scenarios are unlikely to occur often in jury cases. Usually, the opponent of the evidence will want to continue the attack on methodology before the jury -- the focus there will be credibility -- and the opponent will be precluded from doing so in the absence of a disclosure because the attack does require the statement of an opinion as to which there will be testimony in front of the jury, thus clearly triggering Rule 26(a)(2)(C).

an employee of a party) of facts that impeach the underpinnings of an opposing expert's opinion. *DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678, 686 (7th Cir. 1995) (harmless error to exclude testimony). In *DeBiasio*, the excluded testimony consisted of authentication of an object about which the opposing expert opined and which on its face refuted the opinion. The *DeBiasio* Court reasoned that Rule 26(a)(3) protected the impeachment evidence from disclosure. *Id.* Had the proponent attempted to go further and offer opinions as to the significance of the condition of the object, that testimony would presumably have been excluded under Rule 37(c)(1) because it had not been disclosed under subdivision (a)(2)(B) or (C).

ii. ***Hester.*** The Fifth Circuit has similarly held that a trial judge properly admitted an expert's testimony (not previously disclosed) that certain photographs of the accident site offered by the adversary were misleading. *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995). Among other things, the *Hester* Court noted that "even a layperson may testify to the accuracy of a photograph of a scene that he has personally viewed" -- stated another way, this was a no more than a conventional Rule 701, not a Rule 702, opinion. While on the facts of *Hester*, the result may be appropriate, the approach raises the previously-discussed possibility of parties attempting to circumvent their expert disclosure obligations by labeling some opinions non-expert in nature. *See* § III(C)(1) ("Opinion Witnesses: Rule 701 vs. Rule 702 Testimony"), *supra*.

4. **Treating Physicians.**

a. **No Disclosure Required.** The 1993 Advisory Committee Note considers that a treating physician is not, in the words of Rule 26(a)(2)(B), "retained or specially employed to provide expert testimony" -- that his or her testimony simply follows from the care afforded to the patient in ordinary course. The Advisory Committee therefore concludes that a treating physician "can be deposed or called to testify at trial without

any requirement for a written report." *Accord Harlow v. Eli Lilly & Co.*, No. 94 C 4840, 1995 U.S.Dist.Lexis 7162 at *8-*9 (N.D.Ill. May 23, 1995).

b. **Disclosure Required.** That result may be limited, however, to circumstances in which the treating physician confines his or her testimony to the care and treatment afforded to a party: "To the extent that the treating physician testifies only as to the care and treatment of his/her patient, the physician is not to be considered a specially retained expert notwithstanding that the witness may offer opinion testimony However, *when the physician's proposed opinion testimony extends beyond the facts made known to him [or her] during the course of the care and treatment* of the patient *and* the witness is specially retained to develop specific opinion testimony, he [or she] becomes subject to the provisions of Fed. R Civ. P. 26(a)(2)(B)." *Wreath v. United States*, 161 F.R.D. 448 (D. Kan. 1995); *accord Harlow v. Eli Lilly & Co.*, 1995 U.S.Dist.Lexis 7162 at *9-*10.

c. **Issues.** *Wreath* and *Harlow* leave open at least two questions:

i. *First*, is the treating physician free to offer *any* opinions that are based solely on "the facts made known to him [or her] during the course of the care and treatment," even if the opinions are not essential to care and treatment -- *e.g.*, that a diagnosed condition is attributable to a particular, allegedly toxic substance -- as long as the physician has not been "specially retained" to develop that opinion? At a minimum, it must mean that, in a personal injury case, a treating physician is at liberty to opine as to the permanency of injury because, absent that, the exception would be swallowed up by the rule.

ii. *Second*, what exactly does "specially retained ... to provide expert testimony" mean? No doctor is going to testify without an assurance of payment -- hence, some sort of retainer is always present. Presumably, the distinction being drawn is between a physician who has cared for a patient and one who has not (the stereotypical hired gun). While even this distinction is

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subject to manipulation (since a patient can always start treating with a new, lawyer-suggested doctor), it is something of a bright line with which to begin the analysis. A treating physician may be called to testify as to any of a broad range of opinions, from the patient's initial condition to a treated injury's projected permanency to arcane questions of epidemiology. *Wreath* and *Harlow* explain that, if the treating physician crosses the line and becomes a hired gun, Rule 26(a)(2)(B) disclosure obligations kick in. If, in the circumstances, the Court should conclude that necessary disclosure was not made, preclusion of the offending opinion under Rule 37(c)(1) is the presumptive sanction. *See* § V(A)("Preclusion of Evidence (Rule 37(c)(1))"), *infra*.

IV. Supplementation Duty (Rule 26(e)(1)).

A. **Scope & Standard.** The duty to supplement has been broadened and the scope expanded to include the new disclosure obligations. The former "knowing concealment" standard has been abandoned. A party is instead obliged to amend any disclosure, any expert report or deposition, and any response to any interrogatory, request for production or request for admission, if it is later deemed "incomplete or incorrect." Fed. R. Civ. P. 26(e)(1).

- **Expert Disclosures & Depositions.** The duty to supplement expressly applies "*both* to information contained in the [expert's] *report* and to information provided through a *deposition* of the expert" (emphasis added).

B. **Timing.**

"[A]ny additions or other changes to this information *shall be disclosed* by the time the party's disclosures under Rule 26(a)(3) are due" (emphasis added) -- *i.e.*, at least 30 days before trial, unless otherwise directed by the Court.

1. **Pretrial Order.** In most cases, the pretrial disclosures required by Rule 26(a)(3) are contained in the Court's form of pretrial order. Therefore, any supplementation of expert disclosure or testimony is due by the date of the pretrial order. Since the key is the disclosure

made by each party, that date -- for supplementation purposes -- would seem to be the date that the pretrial order is finalized by the parties and presented to the Court, not the date that the Court executes it.

2. **Practice Point.** Consequently, the most propitious time for a party to supplement its expert disclosure is on the date of the pretrial order. That will prevent timely rebuttal by an adversary.

C. **Failure to Supplement: Sanctions.** Failure to supplement may result in the imposition of sanctions. *United States v. Shaffer Equipment Co.*, 158 F.R.D. 80 (S.D.W.Va. 1994) (sanctions imposed on government counsel for failure to supplement information concerning expert's credentials). *See* § V ("Impact of Failure to Disclose: Sanctions"), *infra*.

D. **Abusive Supplementation: Sanctions.**

1. **Potential Abuses.** This disclosure, deposition and supplementation regimen affords opportunities for abuse. For example, (1) an incomplete disclosure can be very materially supplemented at a deposition in ways that effectively preclude effective preparation for the deposition -- *e.g.*, by the addition of previously-undisclosed opinions; or (2) a party can intentionally submit a minimal or incomplete disclosure and only *after* any deposition has been taken supplement to add new and different opinions.

   - This is problematic because there is a harmless-error exception in the sanctions provision (Rule 37(c)(1)), pursuant to which the Court might find that the original nondisclosure has been mooted by the belated supplementation. *See* § V(D)(2)(b)(i) ("Prejudice to the Opponent"), *infra*.

   - The problem is that dilatory supplementation may undermine the adversary's ability to prepare effectively -- for cross-examination or by retaining appropriate experts -- such that the failure to supplement is not truly constitute harmless.

2. **Available Remedies.** Potentially abusive behavior of this sort can be checked by reopening discovery, by assessing additional costs caused by this behavior, in exacerbated cases by striking the party's original disclosure and the testimony -- generally by resort to the powers vested in the Court under Rules 37(a) and (c). *See generally*

G. Joseph, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE §§ 48-49 (2d ed. 1994; Supp. 1995) ("SANCTIONS").

3. **Assessing Abuse.** In deciding whether a party's supplementation of its disclosures after the conclusion of discovery, or of expert discovery, is fair in the circumstances, the Court may consider:

   a. **Good Faith.** The good faith, willfulness or negligence of the proponent in failing to make the disclosure in a timely fashion.

   b. **Availability of Information.** Whether the information was or should have been available earlier to the proponent or the opponent.

   c. **Prejudice.** The prejudice to the adversary, which will include review of such issues as:

      i. Time remaining prior to trial.

      ii. The importance of the disclosure.

      iii. The ability to cure the default as by continuing the relevant court date.

   d. **Other Factors.** Other factors discussed in the immediately succeeding section in connection with Rule 37(c)(1) generally.

V. Impact of Failure to Disclose: Sanctions

A. Preclusion of Evidence (Rule 37(c)(1)).

Rule 37(c)(1), as amended effective December 1, 1993, provides that, if a party fails to make disclosure or to supplement responses as required by Rule 26(a) and (e)(1), that party is not permitted to present as substantive evidence or on summary judgment (or other) motion any evidence not so disclosed, unless there is "substantial justification" for the failure to disclose or unless the "failure is harmless."

1. **Expert Evidence.**

   a. **Total Preclusion.** Failure to honor the disclosure obligations within the time limits set forth in Rule 26(a) can lead to

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preclusion of the testimony in accordance with Rule 37(c)(1). *Doe v. Johnson,* 52 F.3d 1448, 1464 (7th Cir. 1995) (trial court within its discretion in excluding undisclosed opinions under Rule 37(c)(1)); *Janopoulous v. Harvey L. Walner & Assocs., Ltd.*, No. 93 C 5176, 1994 U.S.Dist.Lexis 4041, 1994 WL 114853 (late designation; no reports; no opportunity to depose); *GEM Realty Trust v. First Nat'l Bank of Boston*, No. Civ. 93-606-SD, 1995 U.S.Dist.Lexis 3864, 1995 WL 127825 at *5 (D.N.H. March 20, 1995) (violation of pretrial order by late disclosure of expert report); *China Resources (USA) Ltd. v. Gayda Int'l, Inc.*, 856 F. Supp. 856, 866-67 (D. Del. 1994) (no disclosure); *Paradigm Sales, Inc. v. Weber Mktg. Sys., Inc.*, No 3:93-CV-202 RM, 1995 U.S.Dist.Lexis 3620, 1995 WL 132057 at *5 (N.D.Ind. March 16, 1995) (opinions not included in report are excluded); *251 CPW Housing, Ltd.. v. Paragon Cable Manhattan,* No. 93 Civ. 0944 (JSM), 1995 U.S.Dist.Lexis 2025 (S.D.N.Y. Feb. 21, 1995) ("Because the reports provided by both 257 and Nokit are so inadequate that it is impossible for defendant to ascertain any of the specifics to which plaintiffs' experts will testify or any of the bases from which they derived their conclusions, plaintiffs' experts will not be permitted to testify at trial pursuant to Fed. R. Civ. P. Rule 37(c)(1)") (citations omitted).

b. **Partial Preclusion.** Although Rule 37(c)(1) contemplates automatic preclusion of untimely or undisclosed testimony, the Rule includes both a "substantial justification" and a harmless-error exception (discussed below). Using these, courts are exercising their discretion not to exclude or not to exclude entirely. Automatic preclusion sanction is subject to a fundamental fairness exception. *See, e.g., Orjias v. Stevenson*, 31 F.3d 995, 1005 (10th Cir. 1994) (upholding limits imposed on -- but not exclusion of -- expert testimony); *Apel v. Rockwell Int'l Digital Communications Div'n*, No 92-C-6841, 1994 U.S.Dist.Lexis 8186, 1994 WL 275038 (N.D. Ill. June 20, 1994) (no exclusion where, in absence of trial date, adversary can still depose expert without prejudice); *IBM Corp. v. Fasco Indus., Inc.*, No. C-93-20326 RPA, 1995 WL 115421 at *4 (N.D.Cal. March 15, 1995) (only certain -- not all -- untimely rebuttal expert testimony excluded).

- Partial exclusion of testimony from an expert may take the form of precluding the expert from offering opinion testimony while permitting testimony as to facts. *See, e.g., GEM Realty Trust v. First Nat'l Bank of Boston,* Civil No. 93-606-SD, 1995 U.S.Dist.Lexis 3865 at *14-*15 (D.N.H. March 20, 1995).

2. **Non-Expert Evidence.**

The preclusion sanction of Rule 37(c)(1) is the same for violation of Rule 26(a)(3) as for Rule 26(a)(2), which is discussed above. Although total preclusion is presumptive, courts are exercising their discretion not to exclude or not to exclude entirely. *See, e.g., Kotes v. Super Fresh Food Markets, Inc.*, 157 F.R.D. 18, 20 (E.D. Pa. 1994) (no exclusion of non-expert witnesses where "neither party fully complied with the scheduling order and the Rule 26 disclosure requirements ... [but] their questionable conduct does not clearly evidence bad faith ... [and] the revised trial date permits the parties to cure any prejudice"). *See* § V(C) ("Other Available Sanctions"), *infra.*

B. Notifying Jury of Nondisclosure.

Rule 37(c)(1) further provides that (in the absence of "substantial justification" for the failure to disclose or unless the "failure is harmless) the Court may inform the jury of a party's failure to make disclosure.

C. Other Available Sanctions.

1. **"Other Appropriate Sanctions" (Rule 37(c)(1)).**

Rule 37(c)(1) also provides that, in the absence of "substantial justification" for the failure to disclose or unless the "failure is harmless, the Court "may impose other appropriate sanctions," including but not limited to assessing reasonable attorneys' fees or imposing sanctions of the sort enumerated in Rule 37(b)(2)(A)-(C).

2. **"An Appropriate Sanction" (Rule 26(g)(1)).**

Independent of Rule 37(c)(1), Rule 26(g)(1) now requires that every disclosure made pursuant to Fed. R. Civ. P. 26(a) (1) or (3) -- but not subdivision (a)(2) -- be signed and that the signature constitutes a certification that, based upon a reasonable inquiry, disclosure is

complete and correct when made. Rule 26(g)(3) contains a "substantial justification" safe harbor, like that which is contained in Rule 37(c)(1) and is discussed below. The standard of liability under Rule 26(g) is that which was imposed under the 1983 version of Rule 11, and the *mandatory*-sanction remedy it contains -- "an appropriate sanction" -- opens the door to the wide variety of sanctions mirroring available under Rule 11. *See generally* SANCTIONS at §§ 41-45.

3. **Order Compelling Disclosure (Rule 37(a)).**

If a party fails to make disclosure pursuant to Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions (just as any party could traditionally do if a deponent failed to answer a question, a corporation failed to make a Rule 30(b)(6) designation, or a party failed to answer an interrogatory or failed to respond appropriately to a document request).

a. **Evasion = Nondisclosure.** Additionally, Rule 37(a)(3) was expanded in December 1993 to provide that an evasive or incomplete disclosure or response is to be treated as a failure to disclose or respond. The prior Rule provided only that an evasive or complete answer could be treated as a failure to answer.

b. **Conferral Requirement.** In all of these circumstances, however, the new conferral requirement (discussed below) is imposed. The party making the motion must accompany it with a certification that the movant has in good faith conferred or attempted to confer with the party declining to make discovery or disclosure.

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D. Safe Harbors: "Substantial Justification" & Harmless Error.

In assessing whether to impose the preclusion sanction, in whole or in part, the Court is directed by Rule 37(c)(1) to consider whether there was "substantial justification" for the failure to disclose or supplement, or whether the failure was "harmless." Both of these are fact-driven determinations.

1. **Substantial Justification.** Among the factors that the Court may want to consider in determining whether a party's failure to disclose was substantially justified are:

a. **Good Faith.** The good faith or bad faith of the proponent in failing to make the disclosure, and of the opponent in opposing the introduction, of the evidence. *Hinton v. Patnaude*, No. 92-CV-405, 1995 U.S.Dist.Lexis 11009 at *11 (N.D.N.Y. Aug. 2, 1995) (no evidence of bad faith on part of the proponent).

b. **Willfulness or Negligence.** The willfulness or negligence of the proponent in failing to make the disclosure (*e.g.*, failure to discover documents despite a reasonable production effort) and of the opponent in not addressing the issue earlier (*e.g.*, lying in wait). *Cf., Doe v. Johnson*, 52 F.3d 1448, 1464 (7th Cir. 1995) (trial court within its discretion in excluding undisclosed opinions under Rule 37(c)(1), rejecting on the facts the argument that the opponent might be considered negligent for failing to uncover the opinions; "substantial justification" not specifically discussed).

c. **Control.** Whether conditions beyond the control of the proponent changed, and those conditions are the subject of the undisclosed evidence (*e.g.*, testimony from an undisclosed fact witness) or the basis for a change in the evidence (*e.g.*, different expert testimony based on new facts).

d. **Surprise.**

i. Whether the proponent reasonably believed that the matter in question was not disputed. *Friends of Santa Fe Cty. v. Lac Minerals, Inc.*, 892 F. Supp. 1333 (D.N.M. 1995).

ii. Whether the undisclosed evidence became relevant only after other, unanticipated evidence was introduced.

2. **Harmless Error.** Among the factors that the Court may want to consider in determining whether a party's failure to disclose was harmless are:

   a. **Good Faith of the Parties.** *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153 (3d Cir. 1995) (proponent); *Watts v. Healthdyne, Inc.*, No. 94-2195-EEO, 1995 U.S.Dist.Lexis 9818 at *5-*6 (D. Kan. June 29, 1995) (both parties' failure to identify a commonly-known witness on either of their Rule 26(a)(1) disclosures leads court to reopen discovery).

   b. **Prejudice to the Opponent.** *E.g.*:

      i. Whether the undisclosed evidence was otherwise made known to the opponent. *Nguyen v. IBP, Inc.*, 1995 U.S.Dist.Lexis 10741 at *17-*18 (failure to include compensation information, qualifications and publications in signed Rule 26(a)(2)(B) expert report harmless where the information was separately provided).

      ii. Whether there is sufficient time prior to trial to permit the disclosure to be made belatedly. *Apel v. Rockwell Int'l Digital Communications Div'n*, 1994 U.S.Dist.Lexis 8186 at *1-*2 (no trial date yet set; deposition granted).

   c. **Vigilance of the Adversary.** Whether the adversary intentionally or negligently turned a blind eye to the absence of disclosure. *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153 (3d Cir. 1995) (where opponent maintained it had never received the Rule 26(a)(1) disclosure but admitted receipt of a cover letter enclosing it, the "possible failure to supply the information in its self-executing disclosures or ... in response to ... interrogatories should not have prejudiced [the adversary] and therefore was harmless").

   d. **Impact of the Evidence.** *See, e.g., Friends of Santa Fe Cty. v. Lac Minerals, Inc.*, 892 F. Supp. 1333 (D.N.M. 1995) (prior nondisclosure of expert opinion offered in affidavit in support of summary judgment harmless where summary judgment denied).

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VI. Other Practice Changes.

A. Conferral Requirements.

1. Discovery Trigger.

   a. Except by leave of the court or by stipulation, no one may seek discovery before making the pre-discovery disclosures mandated by Rule 26(a)(1).

   b. Absent court order or exemption by local rule, no discovery may proceed until the parties have met and conferred to discuss the claims, the possibilities for a prompt settlement or resolution and to develop a discovery plan, under Rule 26(d). This meeting must occur at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b) (which is within 90 days after the appearance of a defendant and within 120 days after the complaint has been served).

   c. Nor may any party seek discovery from another party before the pre-discovery disclosures have been made by, or are due from, that other party, pursuant to Rule 26(d).

2. Motion Prerequisite.

   a. When a protective order is sought under Rule 26(c), the movant must now file a certificate that he or she has "in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." (This incorporates the practice required in many federal district courts pursuant to local rule. *See, e.g.*, S.D.N.Y. & E.D.N.Y. Local Rule 3(f).) The same conferral certificate is required in advance of a motion to compel disclosure or discovery under Fed. R. Civ. P. 37(a)(2) and (d).

   b. The new conferral requirement implicitly imposes the threat of sanctions on the certifying party. Currently Rule 11(d) eliminates Rule 11 as a possible source of authority with respect to discovery matters (pending Congressional action to the contrary) and Rule 26(g) does not by its terms apply. Consequently, Rule 37(a)(4), inherent power and 28 U.S.C. § 1927 would be most apt.

B. Motion to Compel: Venue.

Under Fed. R. Civ. P. 37(a)(1), a motion to compel discovery must be made in the court in which the action is pending when the application is for an order to a party. The application is to be made in the court in the district in which the discovery is being, or is to be taken, when the application is for an order to a person who is not a party.

C. Other Sanctions Provisions

1. **Depositions.**

   a. **Limitations on Objections.** Under Rule 30(d)(1), all objections during depositions "shall be stated concisely and in a non-argumentative and non-suggestive manner" and instructions not to answer are permitted "only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the Court or to present a motion" for a protective order. Rule 30(d)(2) adds that, "[i]f the Court finds ... an impediment, delay or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction ...."

   b. **Evasive Answers.** Additionally, Rule 37(a)(3) was expanded in December 1993 to provide that an evasive or incomplete disclosure or response is to be treated as a failure to disclose or respond. The prior Rule provided only that an evasive or complete answer could be treated as a failure to answer.

2. **Documentary Discovery.** Former Rule 26(g) was renumbered 26(g)(2). Other than the "reading" requirement, which has been deleted as surplusage, it remains unchanged.

D. Limitations on Discovery.

1. **Depositions.** Leave of court is required, absent stipulation or court rule to the contrary, for permission to:

   a. **Ten Depositions.** Take more than 10 depositions ("by the plaintiffs, or by the defendants, or by third-party defendants") (Fed. R. Civ. P. 30(a)(2)(A)).

   b. **Re-Deposing.** Depose any person who has previously been deposed (Fed. R. Civ. P. 30(a)(2)(B)).

   c. **No Time Limit.** An earlier proposal to limit the length of depositions to 6 hours was deleted from Fed. R. Civ. P. 30(d)(1). The matter of duration and limits is purely discretionary under Rule 26(b)(2).

      - In the absence of a limitation on duration, new Rules 30(d)(1) and (2) have the perhaps unintended consequence of precluding instructions not to answer even clearly redundant, duplicative questions or probes into offensive and undiscoverable (yet unprivileged) areas, absent a firm decision to resort to the court for relief.

      - One alternative is to advise of client of his or her right not to answer a thoroughly objectionable question without instructing the client not to answer. *See* the discussion of Rule 37(a)(3), *supra.*

   Note: The limitation to 10 depositions and the limitation on re-deposing a previously deposed witness also apply to depositions upon written questions taken pursuant to Rule 31. *See* Fed. R. Civ. P. 31(a)(2).

2. **Interrogatories.** Absent leave of court or written stipulation or court rule to the contrary, no more than 25 interrogatories (including all "discrete" subparts) may be served by "any party ... upon any other party." *See* Fed. R. Civ. P. 33(a).

   - Note that this 25-interrogatory limit is not imposed, as the 10-deposition limit is, collectively on all parties on each side of a case. *Compare* Fed. R. Civ. P. 33(a) *with* Fed. R. Civ. P. 30(a)(2)(A).

3. **Local Rule/Court Order Exception.** By order or local rule, the court may alter the limits on the number of depositions and interrogatories and may limit the length of depositions and the number of requests for admission. Fed. R. Civ. P. 26(b)(2).

E. **Expansion of Discovery.**

1. **Use of Depositions at Trial.** An earlier version of Rule 32(a)(3)(D), which would have permitted the deposition of any expert to be introduced at trial by any party for any purpose, was not promulgated.

2. **Sequestration.** Fed. R. Civ. P. 30(c) carves Fed. R. Evid. 615 out of the general proposition that the Federal Rules of Evidence apply at depositions. Previously, Rule 30(c) provided that examination and cross-examination of witnesses at depositions "may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence." This provision raised the litigated question whether Fed. R. Evid. 615, which provides for mandatory sequestration of witnesses, applied in the deposition setting. There was a split of authority as to whether Rule 615 applied to depositions. *Compare Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451, 453 (M.D. Ga. 1987), *with BCI Communications Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154 (N.D. Ala. 1986). Now, it clearly does not apply.

3. **Videotaped Depositions.**

   a. **Order vs. Notice.** Jettisoning the current requirement for a court order or stipulation, Fed. R. Civ. P. 30(b)(2) provides that a party noticing a deposition is to state in the notice the means by which the testimony is to be recorded and, absent a court order, the means "may be by sound, sound-and-visual, or stenographic means." Any party may provide for a transcript to be made from the recording or, at that party's own expense, may arrange for a contemporaneous recording by additional means (stenographic or non-stenographic), under Fed. R. Civ. P. 30(b)(3). This brings federal practice into line with the practice currently in place in several federal district courts by local rule and in 24 states. *See generally* MODERN VISUAL EVIDENCE at § 2.03[1]-[2] & Appendices B, D and N.

   b. **Procedure at Deposition.** The officer before whom the deposition is to be taken is now to begin all depositions (absent a stipulation to the contrary) with a statement on the record identifying the officer, the date, the time and place of the deposition, the name of the deponent, the oath and

identification of all persons present. During a videotaped or audiotaped deposition, all of this (except to the oath and the identification of persons present) must be repeated at the beginning of each tape. There are no other technical formalities set forth. Rather, there is a general injunction that "[t]he appearance or demeanor of deponents or attorneys shall not be distorted by the use of camera or sound-recording techniques." Fed. R. Civ. P. 30(b)(4). As under prior practice, any unfair videotape or audiotape may be excluded in the trial judge's discretion. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 28 F.R. Serv.2d 993, 996 (E.D.N.Y. 1980), and *Id.* 35 F.R. Serv.2d 1368, 1373 (E.D.N.Y. 1983).

   c. **Use.** On request of any party in a jury trial, any deposition which has been videotaped must be offered in its videotaped form "unless the court for good cause orders otherwise" or unless the deposition is used solely for impeachment purposes. Fed. R. Civ. P. 32(c).

4. **Right to Review Deposition Transcript.** The right to review a deposition transcript is now conditioned on a request by the deponent or a party "before completion of the deposition...." If the request is made, the deponent shall have 30 days after being notified by the court reporter that the transcript or recording is available in which to review it and to modify it in far more substance. Fed. R. Civ. P. 30(e).

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The Fragmentation of Federal Rules

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and
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I. INTRODUCTION

In 1938, the Federal Rules of Civil Procedure were adopted. Their adoption represented a triumph of uniformity over localism. The lengthy debate that prefaced the adoption of the rules focused upon the value of a national set of rules, as opposed to the then-governing practice of "conformity," in which local federal practice mirrored that of the state in which the federal courts sat. Although many different arguments were offered in favor of the federal rules, at bottom the rules' proponents carried the day by arguing that procedure ought to be the same across the federal courts and the cases those courts heard.[1]

Almost sixty years later, the central accomplishment of uniform federal rules is in serious jeopardy. The trend today is away from uniformity and toward localism, though perhaps not consciously so. The federal rules themselves permit individual district courts to enact their own local rules.[2] While concern about the impact of local rules upon the uniformity of the system of federal rules is long standing, recent years have seen a proliferation in these local rules. Although the ostensible

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1. On the enactment of the Federal Rules and the debate about localism versus uniformity, *see* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989).

2. FED. R. CIV. P. 83.

purpose of these rules is not to disrupt national rule uniformity, that often is their impact. Then, in 1990, Congress adopted the Civil Justice Reform Act ("CJRA").[3] The purpose of the CJRA is to achieve broad based reforms in the way federal civil cases are handled by lawyers and the courts. The primary mechanism of the CJRA, however, is individual rulemaking by the ninety-four separate district courts and their adjunct advisory committees established under the CJRA to effect reform.[4] Further, in 1993 the Federal Rules of Civil Procedure were amended in significant ways, particularly with regard to discovery procedure. Framed against the backdrop of the CJRA, the discovery amendments offer an opt-out for any district court that chooses not to participate. Many district courts have taken this option, formulating their own variant of the discovery process.[5] Thus, discovery also now operates quite differently in each district.

This fragmentation of procedure is not motivated by a strong drive toward localism. Almost no one is heard to offer support for the notion that the fundamental decision made in 1938 ought to be reversed. Rather, the current trend toward localism appears to be a by-product of a much broader concern about the direction and process of civil litigation generally.[6] The perception is that federal civil litigation is facing a crisis of burgeoning dockets and escalating costs.[7] Lacking strong central leadership, individual districts adopted local rules to address these perceived problems. Congress, caught in the reform fervor, also opted for local solutions. The Judicial Conference, when it tried its hand at reform, felt it had little choice but to continue the trend.

Whatever the impetus for the movement to localism, a topic we discuss below, its result can hardly be gainsaid. A study of local rules made seven years ago found some 5,000 local rules in existence, many of them at variance with the federal rules, not to mention one another.[8] The CJRA expressly invites every one of the ninety-four districts to adopt its own model of how federal litigation should proceed, dealing with such

3. The Civil Justice Reform Act was part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990). The Civil Justice Reform Act is codified at 28 U.S.C. §§ 471-482 (Supp. II 1990).

4. *See infra* notes 34-102 and accompanying text.

5. *See infra* notes 193-16 and accompanying text.

6. For a pointed critique of civil justice reform efforts generally, see Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for Moratorium*, 59 BROOKLYN L. REV. 841 (1993).

7. On the question of rising litigation costs *see* A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219 (1985).

8. *See* Subrin, *supra* note 1, at 2020 (describing the Judicial Conference's 1988 Local Rules Project).

important topics as case management, tracking for different cases, motion practice, and alternative dispute resolution. Early results display a tremendous disuniformity among federal districts, and increasing variance from the Federal Rules of Civil Procedure. The impact of the opt-out provisions of the 1993 Civil Rules Amendments is of like effect. Some seventy years ago, during the long conversation about uniform federal rules, one commentator stated that "[t]here is no more excuse for differing judicial procedure than for differing languages in the several States."[9] Despite the apparent kernel of sense in this statement, today the proliferation of local rules and the trend to local models of adjudication threaten to turn federal practice into a veritable Tower of Babel in which no court follows the process of any sister court.

In this Article we critique the movement to localism in rulemaking. In doing so, we put largely to one side the very difficult and very controversial questions of whether there is a litigation "crisis" in the federal courts, whether procedural reform can or will address that crisis, and whether any particular procedure is a good one. Rather, our focus is on the somewhat more limited but perhaps ultimately most important question of whether it really is a good idea for every district court in the country to go its own way in developing civil process. Our answer, simply put, is no. The ill-considered and unmanaged proliferation of local rules is likely to exacerbate any problems there are with civil litigation. Different procedural rules will have an impact upon substantive justice. Varying procedures will lead to forum shopping, unnecessary cost, and widespread confusion. Amidst strong arguments against localism in rulemaking, there is almost no serious argument that supports it.

In Part I of this Article we detail the trend toward localism in rulemaking, treating principally the development of local rules, the Civil Justice Reform Act of 1990, and the 1993 Amendments to the Civil Rules. This Part describes the movement toward localism, and discusses some of the motivations that prompt it. In Part II we make the case for federal uniformity and against localism. In this Part we explain why fragmentation of procedure is likely to cause harm to the federal district court system and the litigants that rely upon it. In Part III we take up and respond to the arguments that are advanced in favor of localism. We conclude that for the most part those arguments have little or no merit and certainly on balance do not justify the escalating trend we are seeing toward localism. Finally, we conclude by offering a proposal to centralize rulemaking authority, while allowing some room when

9. Thomas Shelton, 30 LAW NOTES 50, 52 (1926).

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variance is desirable or experimentation is required.

One ray of hope amidst the confusion of local rulemaking is a provision in the CJRA that ultimately requires the Judicial Conference to make recommendations based upon the experiences of the many district courts with their own CJRA plans.[10] This provision seems to treat at least part of the current trend toward localism as temporary only; a brief study period before adoption of new uniform rules. Below we express serious concern with the CJRA's methodology in this regard, pointing out that the scientific nature of the enterprise is illusory. Nonetheless, there is promise in the mandate of subsequent review with an eye toward uniformity. It is our considered hope and judgment that after several years of procedural fragmentation, the future holds an opportunity to collect all the pieces and reverse the trend, once again imposing procedural uniformity upon the federal courts.

II. The Trend to Localism

A. *Manifestations of the Trend*

An increasing array of important procedural issues are now dealt with in federal courts in a local, rather than a national fashion. Generally, this means that the judges in each federal district collectively make a decision as to specific procedures to be followed within that district. Sometimes, the procedures are even more localized with individual judges deciding the rules to be followed in their courtrooms. Overall, the result is that uniformity among federal districts and sometimes within them has been increasingly replaced by divergence.

There are many manifestations of this trend towards localism. Most notably, the development of local rules of procedure, the Civil Justice Reform Act, and the recent amendments to the discovery provisions of the Federal Rules of Civil Procedure all have contributed to the increasing diversity in procedures in federal courts across the country.[11]

1. Local Rules. The Rules Enabling Act provides that the "Supreme

10. 28 U.S.C. § 479 (1994).

11. In addition to local rules, individual judges often adopt their own "practices," further contributing to disuniformity of rules. For an article critical of individual judges' practices see Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN'S L. REV. 1 (1994). Similarly, commentary has been directed at the "patchwork" of rules within each district. *See* Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts be Remedied by Local Rules*, 67 ST. JOHN'S L. REV. 721, 735-36 (1993).

Court and all courts established by Act of Congress may from time to time prescribe rules for conduct of their business."[12] Thus, the Rules Enabling Act clearly authorizes federal districts and federal courts of appeals to promulgate rules of procedure for cases arising within their jurisdictions. The Rules Enabling Act contains both substantive and procedural limits on what these lower courts may do in their rules.

Substantively, all such rules must be consistent with acts of Congress and with rules promulgated by the Supreme Court, such as the Federal Rules of Appellate Procedure, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence.[13] Procedurally, in adopting local rules, courts are required to publish them in advance and allow time for public comment.[14] Rules adopted by a district can be abrogated by the judicial conference of the circuit or by the Judicial Conference of the United States.[15]

Traditionally, local rules adopted by districts have dealt with relatively minor matters, such as the size and type of paper to be used.[16] In general, the local rules have handled practical aspects of litigation not covered by the federal rules. Increasingly, however, local rules deal with much more important aspects of court procedure, and there is enormous variance among the districts.[17]

Not surprisingly, local rules have become especially important in areas where there have been great pressures for change in recent years: discovery; settlement; and the use of alternative dispute resolution. Concern about protracted litigation and a desire for greater efficiency have caused districts to adopt rules to better control discovery and to find ways to dispose of cases without trials.[18] The discovery provisions

12. 28 U.S.C. § 2071(a) (1994).

13. *Id.* ("Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title").

14. *Id.* § 2071(b).

15. *Id.* § 2071(c)(1).

16. For example, the local rules for the United States District Court for the Northern District of California require that pleadings and motions be filed on numbered paper with ruled lines at the left and right margins. *See* Local Rules of Practice for the United States District Court for the Northern District of California, Rule 120-1. Even as to these relatively minor areas, we question the lack of uniformity. Attorneys in a single state must vary their conduct in different districts in their state, to say nothing of attorneys engaged in multi-state practice.

17. The most elaborate and stunning discussion of local rule disuniformity may be in the Judicial Conference's Local Rules Project's 1988 Report, discussed in Subrin, *supra* note 1, at 2020-21. *See also* Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011.

18. For a discussion of the reasons for the greater reliance on local rules, see text accompanying notes 117-25.

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of the Federal Rules of Civil Procedure were revised in 1993 in response to the same concerns.[19] Districts also have tried on their own to deal with the problems.

For example, local rules across the country impose various limits on the discovery process. Fifty-seven districts have local rules that limit the number of interrogatories; fifteen districts have rules that impose discovery cut-off dates; fifteen districts limit the number of requests for admissions; one district limits the number of depositions; and one district limits the number of requests for production of documents.[20] In California, each of the four federal district courts have adopted local rules that provide that discovery requests and responses generally are not to be filed with the court.[21]

Of course, as discussed below, the disparity in discovery rules has grown substantially as a result of the revision in Rule 26 of the Federal Rules of Civil Procedure that allows individual districts to opt-out of the reforms. The new version of Rule 26 came into effect on December 1, 1993. Rule 26(a) requires that certain categories of information be disclosed without awaiting a demand for discovery. Rule 26(f) requires that the parties meet and prepare a discovery plan. Rule 26(d) generally prohibits discovery until after the discovery conference has been held. As of April 1994, only one-third of the districts have adopted the discovery provisions of Rule 26(a),[22] and about half of the districts have formally opted-out of the disclosure rules.[23]

The result is that discovery rules are increasingly determined at the local, district level, rather than at the national level. The result is enormous disparity in practice among the districts.

Another area where local rules frequently differ is in the way they encourage settlement and the use of alternative dispute resolution ("ADR") mechanisms. One of the major changes in civil procedure in the past decade has been the rise in attention to ADR. Although the Federal Rules of Civil Procedure do relatively little to encourage the use of ADR, an increasing array of local rules on the topic have been adopted.

For example, the District of Columbia's local rules provide for

19. *See, e.g.*, FED. R. CIV. P. 26. *See* discussion accompanying *supra* notes 103-16.

20. J. Stratton Shartel, *Case Tracking, Disclosure Provisions Lead the Way in District Reform Plans*, 7 INSIDE LITIGATION 1, 20 (1993).

21. Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUDIES 647, 657-58 n.43 (1994).

22. John Flynn Rooney, *Discovery Rule Lacks Uniformity, Is Source of Confusion: Critics*, CHI. D. BULL., April 23, 1994, at 17.

23. Marcia Coyle & Marianne Lavelle, *Half of Districts Opt Out of New Civil Rules*, NAT'L L.J., February 28, 1994, at 5.

mediation with the consent of the parties.[24] In the Western District of Washington and the Eastern District of Michigan, cases are assigned to panels of three attorneys who give written notification of their evaluation of the case within one week.[25] The United States Court of Appeals for the Sixth Circuit recently ruled that a provision in the local rule providing that attorneys accept mediation by their silence in not objecting is permissible.[26] In the Northern District of California, certain civil cases are assigned to an individual attorney for evaluation.[27]

Other districts have adopted a variety of other rules concerning ADR.[28] The Northern District of Ohio provides for summary jury trials where cases are presented to juries, in shortened form, for their nonbinding decisions.[29] In the Northern District of Oklahoma, a judge other than the one assigned to hear the case presides over settlement conferences.[30]

Countless other topics besides discovery and the use of ADR are covered in the various local rules. Local rules sometimes address the size of the jury,[31] the manner of service of process,[32] and the procedures for summary judgment.[33] The overall result is that substantial areas of procedure are covered by local rules, and these rules differ enormously across the country.

2. The Civil Justice Reform Act. The Civil Justice Reform Act of 1990("CJRA")[34] was Congress' response to frequent calls for court reform in the late 1980s. According to Senator Biden, the primary proponent of the CJRA, the Act "was intended to reverse a recent trend in which one's bank balance, rather than the merits of the case, controlled a decision to file suit."[35] Senator Biden's concern was that the cost of federal litigation had escalated, limiting access to the courts

24. Shelby F. Grubbs, *A Brief Survey of Court Annexed ADR: Where We Are and Where We Are Going*, 30 TENN. B.J. 20, 27 (1994).

25. *Id.*

26. Lenaghan v. Pepsico, Inc., 961 F.2d 1250, 1253 (6th Cir. 1992).

27. *Id.*

28. *See* Kimbrough v. Holiday Inn, 478 F. Supp. 566, 573-74 (E.D. Pa. 1979) (discussing use of local rules concerning ADR to aid in formulating national procedures)

29. Grubbs, *supra* note 24, at 27.

30. *Id.*

31. *See* Colgrove v. Battin, 413 U.S. 149 (1973) (allowing local rule authorizing six person jury in civil cases).

32. *See* Kroll Assocs. v. City & County of Honolulu, 21 F.3d 1114 (9th Cir. 1994).

33. *See* Custer v. Pan Am. Life Ins. Co., 12 F.3d 410, 416 (4th Cir. 1993).

34. 28 U.S.C.A. §§ 471-82 (Supp. 1991).

35. Joseph R. Biden, Jr., *Introduction*, 67 ST. JOHN'S L. REV. i (1993).

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by many segments of society. Moreover, there were concerns about the length of time it took to litigate a case in federal court. According to the Congress, these problems of cost and delay, coupled with limitations on judicial resources, were threatening the "just, speedy, and inexpensive resolution of civil disputes in our Nation's Federal courts."[36]

In enacting the CJRA, Congress sought to put its stamp upon the procedural process of civil litigation. Congress' broad goal in adopting the CJRA was to implement a set of changes designed to make the litigation process more efficient. The legislation as originally introduced required that each district put in place a plan to reduce cost and delay that incorporated many specific legislatively defined procedures.[37] For example, the legislation required differentiated case management, a discovery-case management conference in each case within forty-five days following a responsive pleading, early setting of trial dates, track-specific discovery procedures, and a provision for alternative dispute resolution.[38] In short, the CJRA represented an attempt by Congress to describe appropriate civil process. The legislation, as initially proposed, plainly reflected an impatience with "tinkering changes" adopted by the Judicial Conference. "By providing the necessary statutory components, Congress set the agenda for the federal courts to implement meaningful and effective reform."[39]

There was nothing inherent in the CJRA's model for how federal litigation should proceed that required localism in rulemaking. While one might agree or disagree with the notion that Congress (rather than the courts themselves) should adopt civil process reform, uniformity often is the goal of congressional legislation. Likewise, while there has been and will continue to be deep controversy over the nature of the reforms Congress proposed, these reforms assuredly could be implemented uniformly throughout the federal district courts. Nonetheless, there were two fatal flaws in the CJRA that ultimately accounted for the fragmentation of process that resulted.

First, from the start there was a certain schizophrenia to the CJRA, for while the bill as originally introduced mandated that district court plans contain certain uniform ingredients, the legislation nonetheless required that each district draft its own plan.[40] In other words, district

36. S. REP. NO. 101-416, 10th Cong., 2d Sess. at 1-2.
37. *See* S.2027 (introduced Jan. 25, 1990) at 12.
38. *Id.* at 14-22.
39. Biden, *supra* note 35, at ii.
40. *See* § 2027 at 12 ("each United States district court shall develop a civil justice expense and delay reduction plan in accordance with this dispute"). *Id.* at 13 ("Each . . . plan shall include the following . . .").

courts were charged to do the same thing, but on a district-by-district basis. The genesis for this schizophrenia apparently was the Brookings Institute's study, *Justice for All: Reducing Costs and Delays in Civil Litigation*.[41] Brookings conducted this study at the behest of Senator Biden and as a precursor for civil justice reform legislation.[42] Indeed, the CJRA proposals essentially reflect the recommendations of the Brookings study.[43]

At the same time as the Brookings study was recommending, and the original CJRA legislation was mandating very specific reforms, they were nonetheless insisting that the reforms come from the "bottom up." The Brookings report's "recommendations take account of the diversity of caseloads and types of litigations across different federal jurisdictions."[44] In light of these, the members of the Brookings Task Force stated they (despite many sections that seem flatly to the contrary) "do not advocate the adoption of a uniform set of reform suggestions to be applied by all district courts throughout the nation."[45] "Instead, reform must come from the 'bottom up,' or from those in each district who must live with the civil justice system on a regular basis."[46]

In order to achieve "bottom up" reform, the Brookings Task Force recommended, and Congress ultimately adopted, the idea of creating an advisory group in each district to work with the district court in fashioning a plan to reduce litigation cost and delay. The advisory groups were to be "balanced," that is, to be composed of a wide variety of representatives of all segments of the community that litigated before the court, including the plaintiffs' and defense bars, public interest attorneys and government attorneys, corporate representatives and other members of the lay public.[47] These groups, composed in large part of individuals with no prior rulemaking or social science background,[48] were to assess the state of the district court docket, identify the causes of cost and delay, and develop a plan to address those causes. The plans

41. Brookings Institution Task Force, *Justice for All: Reducing Costs and Delays in Civil Litigation* (Brookings Inst., 1989) [hereinafter "Brookings Study"].
42. Brookings Study, *supra* note 41, at vii.
43. Jeffrey J. Peck, *"Users United": The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105, 108 (1991).
44. Brookings Study, *supra* note 41, at 11.
45. *Id.*
46. *Id.*
47. *Id.* at 12.
48. This has been a complaint of commentators. *See, e.g.*, Linda Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 400-03 (1992); Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 905 (1993).

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would then be forwarded to the district court for eventual adoption or modification.

The Brookings Report, and the subsequent legislative process, are remarkably vague about the sense of, or rationale for, this process of "bottom up" rulemaking. What explanation there is consists largely of platitudes. *In toto*, the Brookings explanation for this unprecedented process is the Task Force's belief

> that the wide participation of those who use and are involved in the court system in each district will not only maximize the prospects that workable plans will be developed, but will also stimulate a much-needed dialogue between the bench, the bar, and client communities about methods of streamlining litigation practice.[49]

Nor did the Brookings explanation for "bottom up" reform receive much development in the legislative process that followed. The statement itself was repeated or paraphrased repeatedly in the speeches, testimony, and reports that accompanied the CJRA.[50] Witnesses seemed to make two primary points. First, at the local level there was a store of knowledge that could be drawn upon to accomplish reform. Second, reform was more likely to succeed if it was designed by those whom it would affect.

What is intriguing about the Brookings report and the original legislation is the illusion of local control. While purporting to create a process of local option, virtually everything else about the original recommendations was mandatory. Scanning the list of Brookings recommendations makes the point succinctly:

PROCEDURAL RECOMMENDATIONS[51]

1. By statute, direct all federal district courts to develop and implement within twelve months a "Civil Justice Reform Plan."

2. Include in each district court's plan a system of case tracking or differentiated case management.

3. Require in each district's tracking system the setting of early, firm trial dates at the outset of all noncomplex cases.

4. Set time guidelines for the completion of discovery in each district's tracking system.

49. Brookings Study, *supra* note 41, at 12.

50. As Linda Mullenix has observed, "The same corporate, business, and insurance interests who underwrite the various Harris surveys and who participated in the Brookings-Biden task force subsequently appeared to testify in support of the wholesale revamping of federal civil procedure." Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1419 (1994).

51. These are pulled verbatim from throughout the Brookings Report.

5. Permit in each district's plan only narrowly drawn "good cause" exceptions for delaying trials and discovery deadlines.

6. Include procedures for resolving motions necessary to meet the trial dates and the discovery deadlines in each district's plan.

7. Provide in each district court's plan for neutral evaluation procedures and mandatory scheduling or case management conferences at the outset of all but the simplest of cases.

8. Require in each district's plan that authorized representatives of the parties with decisionmaking authority be present or available by telephone during any settlement conference.

9. Shorten current service provisions from 120 to 60 days.

10. Provide in each district's plan for the regular publication of pending undecided motions and caseload progress.

11. Ensure in each district's plan that magistrates do not perform tasks best performed by the judiciary. Include mechanisms for reducing backlogs in the plans of district courts with significant backlogs.

The resulting legislation differed little in tone from the Brookings recommendation. Each district was told it "shall implement" its plan, and each plan "shall include," certain elements.[52] What followed in the legislation was an extremely detailed structure for civil case management allowing for little deviation except perhaps in the exact specification of the litigation tracks and the time deadlines for litigation on those tracks.

It is here, moreover, that the second flaw presented itself, a flaw perhaps as much of process as of substance. Senator Biden, it appears, decided to pursue judicial reform without consulting the judges.[53] The result was what one might have expected. "Early exchanges between representatives of the judiciary and sponsors of the legislation can only be described as acrimonious."[54] Individual judges, and the Judicial Conference as a whole, rose up to oppose the legislation.[55]

The ultimate result of judicial opposition, however, may well have done as much harm as good. The Judicial Conference, recognizing that the drumbeat of reform was going to overtake it unless it did something, promptly convened a committee of judges to study the problem and

52. See *supra* note 40. *See* S.2027.

53. *See Hearings Before the Committee on the Judiciary, United States Senate, on S.2027, The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990*, 101st Cong., 2d Sess. 220-21 (Mar. 6, 1990); *see also id.* at 221 (statement of Hon. Aubrey E. Robinson, Jr., describing negative reaction of judges to S.2027) [hereinafter Senate Hearings].

54. A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 882 (1993).

55. *See supra* note 53 (discussing negative reaction of federal bench).

present its own solution.[56] The plan finally approved by the Conference had very little substance in terms of specific steps that could or should be taken to address cost and delay. But, surprisingly, the plan did have as its cornerstone creation of individual advisory groups in each district that would help assess the docket and suggest "different measures that might be implemented to reduce cost and delay and improve case management practices."[57] District courts were instructed to "carefully consider" the advisory group reports, and to "implement the recommendations that the court concludes would be feasible and constructive . . . ."[58]

The end result of this sometimes bitter dialogue between Congress and the judiciary was legislation whose only result could be tremendous balkanization of the civil rules. The idea of advisory groups and "bottom up" reform stayed in.[59] The mandatory nature of the reforms, however, was thrown out.[60] The advisory groups, largely composed of people with little or no rulemaking experience, were required to be active in each district; suggestions were made as to what they should do, but the CJRA seems to require little beyond consideration by the advisory groups. Thus, the groups were set off on their own, with little requirement of uniform results. Review of the actual provisions of the Act indicate numerous aspects designed to inhibit rather than further a coherent framework of civil practice.

First, and perhaps most important, the CJRA may well permit deviation not only among districts, but also from the broad framework of the Federal Rules of Civil Procedure, and from other provisions of the United States Code as well. There is a sharp dispute about whether Congress intended such deviation. The General Counsel of the Administrative Office has taken the view that such deviance is permitted only in very limited circumstances.[61] But Professor Tobias concludes that Congress implicitly, and perhaps expressly, empowered advisory groups to suggest, and districts to adopt, procedures that

56. *See* Senate Hearings, *supra* note 53, at 217-18 (Statement of Hon. Aubrey E. Robinson, Jr.) (detailing Judicial Conference efforts to develop a response to S.2027).

57. *See* Judicial Conference Approves Plan to Improve Civil Case Management, 22 THE THIRD BRANCH No. 5, May 1990, at 1.

58. *Id.* at 2.

59. *See* 28 U.S.C. § 478 (advisory groups).

60. 28 U.S.C. § 473 (advisory group "shall consider and may include" CJRA principles) (emphasis supplied).

61. Levin, *supra* note 54, at 890; *see also* Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1448 (1994) (CJRA not intended to permit deviation from Federal Rules).

contravene provisions in the Federal Rules and the United States Code.[62] Tobias quotes the United States District Court for the Eastern District of Texas as stating, "'[T]o the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling.'"[63] The issue awaits resolution in the courts and in the circuit and judicial conference committees that have review authority over the CJRA plans.[64]

Whatever the correct legal conclusion, the reality is that district court plans *are* deviating from the Federal Rules of Civil Procedure.[65] Even the General Counsel of the Administrative Office appeared to accept deviation on discovery matters, concluding that the CJRA "expands the civil rules" in limited areas such as discovery.[66] Professor Tobias targets other explicit deviation. The Eastern District of Texas adopted an offer of judgment provision inconsistent with Rule 68.[67] The Montana District is assigning cases equally to Article III and magistrate judges, with a time-limited opt-out provision, in conflict with 28 U.S.C. Section 636(c)(2) (and perhaps with the Constitution).[68]

In fact, as Tobias points out, many districts are adopting rules that not only are inconsistent with the framework of federal practice, but seem not even expressly permitted by the CJRA itself.[69] Examples are deeply troubling. The Eastern District of Texas imposed a limit on contingency fees.[70] The Western District of Missouri adopted its own mandatory, non-binding ADR program.[71] The Montana District set up a peer review committee to review litigation conduct of lawyers.[72] While the CJRA does permit adoption of "other features," at least some of the innovations conflict with statutory or constitutional principles.[73]

Second, the very nature of the advisory groups is likely to lead to ill-advised and balkanized reform. The chief judge was ordered to appoint the group within ninety days, and required that each group "shall be

62. Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 54-55.

63. *Id.* at 51 (quoting Civil Justice Expense and Delay Reduction Plan, at 9 (Dec. 20, 1991)).

64. TAN regarding this review authority.

65. On such conflicts *see* Robel, *supra* note 61, at 1452-53.

66. Levin, *supra* note 54, at 890.

67. Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1417 (1992).

68. *Id.*

69. *Id.* at 1416-17.

70. *Id.* at 1420.

71. *Id.*

72. *Id.* at 1421.

73. 28 U.S.C. § 473(b)(6) (Supp. II 1990).

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balanced and include attorneys and other persons who are representatives of major categories of litigants in such court . . . ."[74] There was no requirement of, or provision for, expertise in either rulemaking or social science skills each group would desperately need. Moreover, with the exception of the United States Attorney, no member was permitted to serve for more than four years, eliminating any hope of continuity.

Third, the heart of the groups' task was entirely discretionary. The advisory groups were required to recommend measures to eliminate cost and delay, but nothing specific was required in those plans. Rather, the legislation set out six principles that the plans "may include."[75] To make matters worse, the legislation as adopted specifically required that the advisory groups "shall take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys."[76] This, quite obviously, is an invitation to disuniformity.

Finally, the Act creates an illusion of careful study and experimentation that is just that—an illusion. To read the Act one gets an idea that the CJRA is a carefully controlled study that commences with local projects and ends with comprehensive reporting on the projects that have worked, along with national direction from the Judicial Conference on the effectiveness of management techniques. The advisory groups and district courts are charged to initially and on a continuing basis assess the state of the docket.[77] The Judicial Conference is to review plans created by early implementation districts and may develop a model plan or plans.[78] Finally, section 479 of the CJRA mandated an elaborate process of information collection and reporting about the cost and delay plans.[79]

The difficulty with all this is that true experimentation—which can be very valuable—requires accurate data collection and reporting, control groups, and a basis for assessing success and failure. The CJRA provides for none of this.[80] Advisory groups necessarily engaged in extremely unscientific studies of cost and delay, as well as the state of the docket. There were no national questionnaires or studies. Much of the "evidence" collected was anecdotal. As we discuss below, plans varied widely. For most of the districts there were no control groups.

74. 28 U.S.C. § 5473(b)(6) (Supp. 1992).
75. *Id.* § 473.
76. *Id.* § 472(c)(2).
77. *Id.* § 472(c).
78. *See* Civil Justice Reform Act, Pub. L. No. 101-650, Title I, § 103(c).
79. 28 U.S.C. § 479(c).
80. *See infra* notes 152-56 and accompanying text regarding experimentation.

As the saying goes, "garbage in, garbage out." The Judicial Conference's conclusions cannot hope to have any real value, because the "data" are so unreliable. Experiments can yield important information, but not if they are designed improperly.

Although the final results will be some time in coming, every early indication is that the very fragmentation in process one might have expected is occurring. The CJRA required a series of reports on the various plans from the district courts.[81] The final report on the contents of the various plans (but not yet, obviously, on their ostensible success or failure) is not due out until December 1994. But many of the plans are available. Moreover, the Judicial Conference prepared a Model Plan, as well as documentation about the plans in early implementation and pilot districts.

The "Model Plan"[82] is perhaps a good place to start, for it is not a model plan at all. Rather, the Introduction tells us, "no single method of case management is suitable for all courts."[83] For this reason, the Model Plan appears in the form of a "menu," which allows the courts to select the provisions most responsive to each court's needs.[84] What follows is perhaps best described as a smorgasbord, including numerous provisions relating to every aspect of the Act, as well as "a number of unique initiatives undertaken by individual courts to address special problem areas."[85] Given the wide variety of choices, even if districts looked only to the Model Plan, there likely would be tremendous diversity.

Opportunities for variance are rife in the Model Plan. For almost any aspect of case management there are two to four "alternatives." With regard to ADR programs alone, there are seven categories of possible ADR programs, each with several possible alternatives.[86] Under the "Ohio Northern" alternative, Early Neutral Evaluation ("ENE") is upon motion of the court or parties. The rules governing evaluation under that alternative run almost six pages in length.[87] Under the "Idaho" alternative, ENE is upon consent of all parties.[88] Under the "California Southern" alternative, ENE is mandatory.[89] Under the "Pennsylvania

81. 28 U.S.C. § 472.
82. JUDICIAL CONFERENCE OF THE UNITED STATES, MODEL CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Oct. 1992).
83. *Id.* (introduction).
84. *Id.*
85. *Id.*
86. *Id.* at 52-82.
87. *Id.* at 52-57.
88. *Id.* at 57.
89. *Id.* at 58.

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Eastern" alternative, arbitration is compulsory in many civil cases in which over $100,000 is in controversy.[90] Under the "Idaho" alternative, arbitration is available upon consent of the parties.[91]

Of course, the existence of these district-named alternatives reveals that the Model Plan is not a model at all, but simply an indication of the balkanization that has occurred in the Early Implementation Districts ("EIDS") under the CJRA. The Judicial Conference apparently has subscribed wholeheartedly to the idea of "bottom up" reform, adopting diversity as its plan for civil procedure. Although the Model Plan provides some commentary, by and large it leaves districts free to do anything they like, providing little guidance as to what might be preferable.

Early reports on the CJRA suggest tremendous fragmentation is occurring. The final reports on the CJRA are not yet out, but Congress required the Judicial Conference to report on the EIDs by June 1, 1992. That report comprehensively describes the CJRA plans of thirty-four EIDs, roughly one-third of all the federal districts.[92] The report demonstrates tremendous diversity in approaches to data-gathering and rulemaking, not to speak of procedures themselves. Anyone wanting a comprehensive view of the fragmentation of civil procedure will need to read the entire report, with its numerous multi-cell charts collecting and trying to organize all the different approaches. But for a taste of the situation, this part of the report, dealing with Differential Case Management ("DCM"), may make the point succinctly:

> *Track Numbers.* Two of the twenty-six courts that adopted DCM decided not to use formalized "tracks" for case management. The remainder established tracks numbering from two to six. Three and six track systems were the most favored, representing eight and seven of the subject courts, respectively. Four courts chose two tracks, three courts chose four tracks, and two courts chose five.[93]

The Report on EIDs demonstrated not just inter-district divergence, but intra-district divergence as well. For example, the Western District of Missouri has an "early assessment program" for civil cases.[94] The program "is designed to encourage parties to assess their case at an early stage."[95] But not all cases are in the program. Of the eligible cases, one in three is randomly assigned to the program; one in three is not permitted to use the program; and in one of three cases the parties may opt-in.[96] For cases in the program, the parties must choose one of four ADR options (arbitration, mediation, early neutral evaluation, or magistrate judge settlement conference).[97] If the parties cannot choose, the choice is made for them.[98]

It would be difficult to summarize the fragmentation the CJRA is yielding. Perhaps, when all is said and done, a picture *is* worth a thousand words. What follows, then, is the chart used to summarize the state of affairs in the Middle District of Tennessee following "adoption" by the district court of the advisory group's plan.[99] Adoption is set out in quotations, for reasons that the chart makes amply clear. The vertical axis of the chart reflects key aspects of the district plan. The horizontal axis lists the judges in the district (the latter two columns are magistrate judges, who under the adopted plan have primary responsibility for case management). The chart informs users of the system of the rules that will govern their cases. It, of course, is not published in any fashion available nationally. Need we say more?

90. *Id.* at 67.
91. *Id.* at 65.
92. JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL JUSTICE REFORM ACT REPORT: DEVELOPMENT AND IMPLEMENTATION OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT OR COMPARE (June 1, 1992).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. For what it is worth, one of us, Barry Friedman, was a member of the Middle District of Tennessee's Advisory Committee. Despite some initial skepticism about the

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Chart from June 23, 1994, CJRA Assessment Meeting
DIFFERENCES IN CASE MANAGEMENT PROCEDURES

	Nixon	Wiseman	Higgins	Echols	Morton	Sandidge	Haynes
1. Who is Case Manager?	MJ	MJ	DJ	MJ-1/2 DJ-1/2	N/A		
2. Time within which ICMC scheduled after case filed	45 days	45 days	45 days	MJ-45 DJ-90	N/A	45 days	45 days
3. Discovery Stay pre-ICMC	Yes	Yes	Yes-unless ordered in specific case	MJ-Yes DJ-No	No N/A	Yes	Yes
4. Description of Order entered after ICMC	N/A	N/A	"Order"	"Discovery Plan"	N/A	"CM Order"	"CM Order"
5. Trial Scheduled at ICMC or in initial order	No	No	Yes	No	Yes	No	No
6. Refers Dispositive Motions in CCM cases to MJs	None yet	No	Yes-but not in all cases	None yet	No		
7. Requires compliance with FRCP 26(a)(1)	No	No	No	No	Yes	No	No
8. Has indicated that, as a general rule, will require compliance with Local Rule 12(c)(6)(c)	No	No	Yes	No	Yes		
9. Stages Discovery	N/A	N/A	No-except for discovery on qualified immunity	Yes	No	Yes	Yes
10. As a general rule, enforces stay of discovery while dispositive motions pending			No	Yes	No	Yes	Yes

LEGEND: CCM Customized Case Management
DJ District Judge
ICMC Initial Case Management Conference
CM Case Management
MJ Magistrate Judge

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B. *The 1993 Civil Rules Amendments*

The judiciary—or at least the Judicial Conference and the Federal Rules Committees—weighed in on the question of reform with the 1993 amendments to the Federal Rules of Civil Procedure. The most controversial of these amendments were the amendments to Rule 26, which require mandatory disclosure by the parties of certain information at the outset of litigation and without a discovery request. Three Supreme Court Justices dissented on the merits from the order transmitting the rules to Congress.[100] A vigorous effort was made to kill these amendments in Congress,[101] an effort that ultimately failed more for scheduling reasons that anything else.

The 1993 amendments exacerbate the problem with fragmentation of the federal rules. The amendments generally are rife with provisions permitting district courts to opt-out from the federal rule by local rule or order of the court. Opt-out provisions extend to a variety of rules both minor and significant, ranging from the "meet and confer" requirement of Rule 26(f) to modification of the newly presumptive number of interrogatories or depositions permitted under the rules.[102]

We are unaware, prior to the adoption of the Rule 26 amendments, of any other such provisions permitting districts to opt-out of federal rules. There have been rules—Rule 16 comes notably to mind—that left certain procedures to the discretion of the district court.[103] Moreover, for better or for worse, local districts might adopt their own general rules regarding such discretionary features. But no rule we can pinpoint simply gave district courts the option of ignoring the rule.[104]

The history of the new mandatory disclosure rule, Rule 26(a), highlights more than any other deep problems with the rulemaking process and the resultant balkanization of the federal rules. When the mandatory disclosure rule was proposed in August of 1991, it ran into a gale of criticism from the bench and bar. In addition to attacking the rule on the merits, critics argued that widespread change of this nature

100. *See* 113 S. Ct. 581 (Scalia, J., dissenting, joined by Justices Thomas and Souter) (dissenting from transmission of rules); *Id.* at 575 (statement of Justice White expressing concern about rulemaking process).

101. *See Thumbs Down From House Rule Changes*, CONGRESSIONAL QUARTERLY WEEKLY REPORT, Nov. 6, 1993 at 3057.

102. *See, e.g.*, FED. R. CIV. P. 26(a) ("Except to the extent otherwise stipulated or directed by order or local rule, . . ."); *accord* FED. R. CIV. P. 26(a)(4); 26(b); 26(d).

103. FED. R. CIV. P. 16.

104. *See* Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of*

was inappropriate given the experimentation encouraged under the CJRA. In their CJRA plans, several districts had previously adopted some form of mandatory disclosure requirement. Responding to these criticisms, the Advisory Committee initially withdrew the proposal, only to reinsert it at the last moment albeit with some substantive changes. The Advisory Committee Notes indicate that the Committee felt that to wait for the results of the CJRA experimentation period would delay the reforms too long—another five years.[105]

In a nod to the CJRA, however, the Advisory Committee did decide to permit courts by local rule or order of the court to opt out of the mandatory disclosure provisions in whole or in part.[106] In essence, the result is a national standard from which courts may opt-out, rather than the CJRA's approach of inviting courts to opt-in if they choose. The mandatory disclosure provision was voted down in the House of Representatives, and the Committee Report expresses a preference for the latter approach.[107] As will be obvious in a moment, this may be a distinction without a difference from the perspective of uniformity.

The adoption of the mandatory disclosure rules demonstrate numerous problems with the rulemaking process in general. Perhaps the most pervasive is, again, the sad state of what seems to be accepted as experimentation. The Advisory Committee Notes appear to rely upon "the experience of district courts that have required disclosure of some of this information . . .," and the "far more limited, experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated . . ." by the new rule.[108] In his dissent, Justice Scalia chided the Advisory Committee for not awaiting more detailed study.[109] So too did the Committee Report from the House of Representatives.[110] But in the latter case, at least, the further study was to be provided by the process of CJRA experimentation, a process that we already have seen is somewhat less than scientific. One may comfortably add to this problem with "junk science" a certain hubris on the part of those involved in the rulemaking process, who displayed an odd eagerness to achieve reform at any cost, and over vast opposition.

105. FED. R. CIV. P. 26(1)(1) advisory committee's notes (1993 Amendments). *See* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1445 (1994) (reviewing failure to conduct study before changing discovery rule).
106. FED. R. CIV. P. 26(1)(1), advisory committee notes (1993 Amendments).
107. *See* H. R. REP. No. 103-319, 103d Cong., 1st Sess., at 5 (1993).
108. FED. R. CIV. P. 26 advisory committee's notes (1993 Amendments).
109. 113 S. Ct. at 5-6.
110. H. R. REP. No. 103-319 at 5.

The result of the rulemaking process is nothing that can seriously be called a rule at all. On March 1, 1994 the Federal Judicial Center released a compilation of federal district court practice regarding the mandatory disclosure provisions of Rule 26.[111] The results of the compilation defy easy summary because so many district courts are doing so many different things. The compilation itself includes a five-page table showing the practices of the district courts, with this attempt at tallying:

Nature of the Court's Response	Number of Courts
Courts whose decisions are final and where FRCP 26(a) is in effect	32
Courts whose decisions are final and where FRCP 26(a) is not in effect	6
(a)(1) only is not in effect	4
Courts whose decisions are final and where FRCP 26(a) is not in effect but that have other provisions for disclosure	21
The individual judge is explicitly given authority to require disclosure	13
Local rules or the CJRA plan require disclosure	8
Courts whose decisions are provisional	30
FRCP 26(a) provisionally is not in effect	25
(a)(1) only is provisionally not in effect	12
Local requirements are in place	6
(a)(1)-(3) are provisionally not in effect	13
Local requirements are in place	2
FRCP 26(a) provisionally is in effect	5[112]

The report states that "few of the fifteen largest districts, as measured by number of judgeships, are fully implementing Rule 26(a)."[113]

Of course, counting the practices of districts themselves minimizes the extent of diversity. In many of the districts, the decision whether to engage in mandatory discovery is left to individual judges, and judges are likely to have practices strung out on a continuum. Moreover, districts (and individual judges) may, and do, pick and choose among the various new provisions of Rule 26.

The result is a hodgepodge, one for which it is difficult to see the benefits. The diversity of practice is troubling, because discovery most assuredly is a practice that affects substantive rights and litigation

111. *See* 1994 U.S.S.C.A.N. No.3, 103rd Cong., 2d Sess., at 130.
112. *Id.* at 6135-36.
113. *Id.* at 6136.

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outcomes. Undoubtedly, if the relevant information is available, there will be forum and judge shopping based upon the diverse application of the rules. Moreover, there is no serious argument that experimentation justifies this crazy-quilt, for the nature of the exercise promises highly conflicting and unscientific results.

C. *Why the Trend to Localism?*

No single factor accounts for the increased reliance on local decisions concerning procedural rules. Above all, concern with managing the enormous caseloads of the district courts has led to calls for procedural reform and the enactment of local rules throughout the country. In 1975, for example, 117,320 new civil cases were filed in federal courts,[114] and 230,509 new civil cases were filed in 1992.[115]

The growth in the caseload can be dealt with in only three possible ways. One would be to increase the number of judges. Although there has been some increase in the size of the federal bench, the result still has been a substantial increase in the number of civil cases filed per judge.[116] In 1975, approximately 293 cases were commenced per judge;[117] now it is about 355 cases per judge.[118] There is no indication that Congress is prepared to create enough new judges to deal with the increased volume of cases in federal courts.[119]

A second way to deal with the growing caseload is for Congress to curtail some aspects of federal jurisdiction. For example, a few years ago Congress increased the jurisdictional amount in diversity cases from in excess of $10,000 to in excess of $50,000.[120] The Federal Court Study Commission proposed other ways of decreasing the caseload in federal courts, including abolishing diversity jurisdiction.[121] Again,

114. 1977 Annual Report of the Director of the Administrative Office of the United States Courts, table 11, at 189 (1977).

115. 1992 Annual Report of the Director of the Administrative Office of the United States Courts, table c, at A1-48 (1993).

116. *See* William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 699 (1994).

117. 1977 Annual Report of the Director of the Administrative Office of the United States Courts, table 15, at 205 (1977).

118. 1992 Annual Report of the Director of the Administrative Office of the United States Courts, table 5, at 7 (1993).

119. Increasing the number of federal judges is controversial, with some claiming substantial disadvantages to a great increase in the size of the federal judiciary. For a review of these arguments *see* Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67 (1990).

120. 28 U.S.C. § 1332 (1988 amendment).

121. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURT STUDY COMMITTEE 14 (1990).

although there have been some efforts in this regard, major reductions in the scope of federal jurisdiction are unlikely.

That leaves the final alternative: managerial reforms. Procedural rules are changed to try to make courts more efficient and better able to handle the crush of their caseloads. For example, the local rules discussed above that encourage settlements and require, or at least promote, the use of ADR are efforts to free up judicial resources. The Civil Justice Reform Act required each district to devise plans for better case management and thus fostered this trend towards localism.[122] Local rules are much easier to change and to adopt than are revisions in the Federal Rules of Civil Procedure. Thus, as districts perceived a need for additional reforms to make procedures more efficient they changed their local rules and adopted new rules to cover matters that previously had been unregulated.

At the same time, the lack of consensus as to how to deal with the rise in the federal courts' caseload also is responsible for the greater divergence among districts. Allowing individual districts to opt-out of the new version of Rule 26 was a political compromise in response to strong opposition to the disclosure provisions. Likewise, permitting individual districts to implement various discovery rules reflects a lack of national agreement and a compromise to allow the matter to be handled locally. There is a widespread sense of discovery abuse, but no agreement as to how to solve the problem. The result, especially after allowing districts to opt-out of new Rule 26, is enormous divergence in discovery procedures across the country.

Allowing matters to be resolved at the local level also has a political benefit for decisionmakers: they can duck deciding a hard question by leaving it to local rules to handle. Especially in highly controversial areas where any particular solution is likely to produce intense disagreement, local rules allow the Judicial Conference to propose solutions, but not encounter political heat because the actual choices are made at the local level.

A sense of federalism, or more precisely, localism, also explains the increasing lack of uniformity. Although all federal courts are part of the same federal judicial system, there is a view that solutions are often best arrived at locally. In part, this is based on a sense that local participation will produce more satisfaction with the rules and therefore make them easier to implement. In part, too, there is a view that problems and needs vary across the country and that local rules can best be tailored to local concerns.

122. 28 U.S.C. § 471.

Finally, the trend towards local rules is exacerbated by the relatively minimal oversight by federal courts of appeals. The courts of appeals, and the Judicial Conference, have the authority to overrule the local rules. Yet, this is very rarely done. Court of appeals judges seem to defer to district court judges as to matters of procedure in the district courts. The courts of appeals seem much more willing to accept disuniformity among districts than to invalidate local rules.

All of these pressures push in one direction: ever more matters covered in local rules and ever more divergence among districts in their rules of procedure. Below we argue this trend should be reversed.

III. The Case for Uniformity

A primary justification for adopting the Federal Rules of Civil Procedure was to increase the uniformity in procedural rules in federal courts across the country. Prior to the adoption of the Federal Rules of Civil Procedure, a federal district court was supposed to follow the procedural rules for state courts in that state.[123] Rules thus varied enormously among federal courts as state law determined the federal courts' procedural rules. In response to an enormous disparity among federal courts in procedures, the Federal Rules were adopted with "the very purpose . . . of providing for a single uniform system of procedure."[124]

But more than a half century after the adoption of the Federal Rules, is uniformity still a value worth seeking? Are there greater benefits in allowing diversity in the procedural rules among the federal districts? In addressing these questions, initially we consider the benefits of uniformity that are compromised or lost with the trend to localism that is described above. Then, we respond to the claimed benefits of localism—such as local customs, differences in dockets, and experimentation—and argue that these are largely illusory and do not justify the current trend away from uniformity.

A. *The Benefits of Uniform Federal Rules*

Prior to the adoption of the Federal Rules of Civil Procedure, the Conformity Act of 1872[125] required that federal courts conform to the procedural rules of the state courts.[126] Specifically, the Conformity Act

123. Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 451 (1935).
124. *Id.* at 448.
125. Act of June 1, 1872, ch. 255, § 5, 17 stat. 197.
126. *Id.*

required that

> the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity or admiralty cases, shall conform, as near as may be, to the practice, pleadings, and forms and modes of procedure existing at the time in like causes in the courts of record in the State within which such district courts are held.[127]

The result, by definition, was an enormous divergence of procedure in federal courts. There was "great disuniformity in practice among the federal courts, which varied widely from the archaic to the relatively modern, depending on the varying practice among the states."[128]

There is thus no doubt that the creation of the Federal Rules of Civil Procedure was motivated, in part, by the desire for uniform procedures in the federal courts.[129] The justifications for uniformity in the 1930s are still powerful today.[130] Indeed, today few question the value of uniformity. If asked whether the Federal Rules should be abolished and replaced entirely by local rules, it is safe to say that virtually no judge or attorney would make that choice. The trend towards localism is paradoxical because it coexists with a strong consensus that uniform procedural rules are desirable.

There are many commonly accepted values to uniformity. First, uniform federal rules are more fair to litigants. When rules vary among districts, the costs of litigating can vary enormously. For example, districts with strict limits on discovery might be much less expensive to litigate in than districts without limits on discovery. The outcome of cases can depend not on the merits, but on the district and its procedural rules. The result of a case might be different in a district which pressures settlement and the use of ADR compared with one that does not. It seems unfair that the result in federal courts might turn on geography.

The response to this, however, is that such disparity is an inherent part of a large nation and that diversity can be a good thing. For example, criminal laws and penalties vary greatly among the states. Why then should procedures not vary among federal districts to reflect differing needs and views?

The difference is that federalism accords to each state great latitude

127. *Id.*
128. JAMES FLEMING, ET AL., CIVIL PROCEDURE 20 (4th ed. 1992).
129. *See* William D. Mitchell, *Uniform State and Federal Practice: A Demand for More Efficient Judicial Procedure*, 24 A.B.A. J. 981 (1938).
130. In addition to the values discussed here, *see* Janice Toran, *'Tis a Gift to Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352 (1990) (discussing the aesthetics of procedural simplicity).

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in devising its own laws so long as they are not inconsistent with the Constitution and federal laws. A consequence of this is that there will be disparity among the states in both the law's substance and procedure. But the federal courts are supposed to be a single system. Within that system it is unfair for the outcome to depend on the accident of location.

Second, uniformity is desirable to avoid forum shopping. The more local rules cover important matters and the more that such rules vary, the greater the amount of likely forum shopping. For instance, if one district has a requirement for mandatory ADR and another does not, lawyers are likely, at times, to choose where to file based on their desire to have or to avoid such mechanisms. Similarly, a lawyer's desire to have or to avoid the mandatory disclosure provisions of the new discovery rules will affect, and perhaps determine, where the case is filed.

The response to this is to question whether forum shopping is undesirable. The presumption in many areas of procedural law is that forum shopping is something to be avoided. For example, the landmark case of *Erie Railroad v. Tompkins*,[131] which held that state law should be used in diversity cases, was based, in large part, on a desire to decrease forum shopping.[132] Yet, what is undesirable about litigants selecting the forum where they believe that they have the best chance of succeeding? Certainly, litigants choose whether to file a case in federal or state court partly based on an assessment of where they have the greatest chance of prevailing. Likewise, a litigant might choose to file in one state or another, or in one district or another, based on an assessment of the judges in each jurisdiction and their likely views on the issues at stake.

Perhaps the dislike of forum shopping is based on an inchoate sense that it is wrong to have results turn on the choice of forum. But put in this way, the opposition to forum shopping seems to assume a degree of fungibility among judges and a degree of formalism that is unrealistic and simply wrong.

The opposition to forum shopping might be the sense that it is unfair that results vary depending on geography within the federal system. This, of course, means that the forum shopping argument is just another way of expressing the fairness claim discussed above.

There also is an efficiency-based reason for wanting to discourage forum shopping. The more the two sides in a lawsuit see the costs or outcome depending on the district where the case is litigated, the more there will be fights over venue and jurisdiction. Uniformity in procedural rules thus eliminates one reason why the parties might have lengthy and costly fights over the location of the litigation.

131. 304 U.S. 64 (1938).
132. 304 F.2d 603, 74-75 (1938).

This is closely related to a third justification for uniformity: the benefits of standardization. If rules vary among districts, lawyers must expend substantial time learning the individual rules for each district. Inevitably, lawyers will sometimes err in dealing with unfamiliar procedures, leading to additional court time in admonishing attorneys and in enforcing compliance. Standardization is more efficient and decreases the costs of litigation.

Lawyers increasingly practice in a nationwide market for legal services. Such nationalism is good in that it increases the competition among lawyers and allows more specialization. The greater the divergence among local rules, the harder it is for the out-of-state attorney to practice in a different jurisdiction. Although such localism might be a boost to the local bar, it is the type of parochialism that is ultimately inefficient. In California, a plaintiff in San Diego should not be encouraged to choose a San Diego attorney over one from Los Angeles or San Francisco simply because the San Diego attorney knows the local rules better than the other lawyers.

B. The Supposed Benefits of Local Rules

Despite what we believe are good arguments against a fragmented system of local rules, there are those who argue that local rules serve their purposes. In this section we address the primary arguments in favor of local rules. Our conclusion is that there are very few instances in which local rules are necessary or appropriate. Further, we conclude that there should be a central system for reviewing proposed local rules, in order to ensure that a local rule is necessary and furthers a purpose that outweighs the disadvantages of rule fragmentation.

1. Local Custom. One of the arguments advanced most frequently in favor of local rules is "local custom." The argument seems to have two related pieces; first, that conditions differ in different districts requiring different rules, and second, that local actors simply are familar with doing things a certain way. For example, just two years after the Federal Rules of Civil Procedure were adopted, a committee of district judges charged to study local rules concluded that "varying local conditions made 'absolute uniformity in the local rules of the district courts . . . impracticable and inadvisable.'"[133]

To the extent that the argument rests on local custom, it seems to be

133. Subrin, *supra* note 1, at 2017 (quoting the Knox Report).

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a thin argument indeed. Stephen Flanders explains that the practice of law is specific to a jurisdiction "in a degree unheard of in professions such as medicine or engineering."[134] He goes on to say, "Federal judges, for the most part, are products of the locations they serve.[135] Diversity is a necessity in federal courts so that they can respond not only to local expectations and practice but also to specific institutional demands."[136] Putting the very last piece aside for a moment, this sounds a good deal more like an explanation of why local rules do exist than why they should. Undoubtedly it is convenient for locales to have rules that reflect local practice, particularly to the extent that "local practice" means "the same as practice in the state courts." This very argument, however, was rejected when the federal rules were adopted. One of the primary arguments in favor of the Conformity Act was that it would be easier for practioners in a locale to have to learn only one set of rules. The federal rules were adopted despite this plea, however, largely because it was felt that a system of national courts should run under uniform rules. In other words, national uniformity won out over local uniformity.[137]

What made sense in 1938 makes even more sense today. While it is certainly correct that much of the practice of law for many practioners is local, it also is true that increasingly the practice of law is crossing not only state but national boundaries.[138] The premise of the federal courts is that they reflect one court system doing the nation's business. Permitting a profusion of local rules for the simple reason that local practioners are familiar with them inappropriately disadvantages litigants and their counsel coming from out of state. Absent some better reason, it is insufficient simply to argue in favor of local rules for no other reason than that locals like to do things a certain way.

The argument takes on a bit more force when proponents of localism seek to justify local rules on the ground that local conditions differ, requiring a different set of procedures. This may be what Flanders is getting at when he discusses "specific institutional demands,"[139] and it certainly is what the framers of the CJRA had in mind when they

134. Steven Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?* 14 LOY. L.A. L. REV. 213, 263 (1981).

135. *Id.*

136. *Id.* at 263-64.

137. *See generally* Subrin, *supra* note 1, at 1999-2011. *See also* Herbert M. Kritzer & Frances Kahn Zemans, 27 LAW & SOC. REV. 535, 549-52 (1993) (questioning existence of "local legal culture" in federal districts).

138. *See* Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1458 (1994) (discussing how GATT will internationalize the practice of law).

139. Flanders, *supra* note 137, at 263-64.

advocated "bottom up" reform. Beginning with the Brookings Institute Study there was recognition that "our recommendations take account of the diversity of caseloads and types of litigation across different federal jurisdictions."[140] Dockets may differ significantly in districts due to a heavy caseload of criminal cases, or a concentration of products liability cases such as asbestos or breast implants.

While the argument for local rulemaking based upon diversity has some superficial appeal, it does not hold up well under close scrutiny. As we stress above, procedure affects substance; the way the rules work affects outcomes. It may well be that certain districts are laboring under numerous criminal cases, and so it is more convenient to change the way civil cases are handled in order to free up judicial time. Rural districts may simply have smaller caseloads making it easier to deal with the docket without substantial reform. But despite these factors, we are troubled by the answer being to change the procedure in a class of cases to accomodate others. While this might, within a district, seem an appropriate approach, across district lines it serves to exacerbate unfairness. The answer to overburdening should come from Congress, either in the form of new judgeships or curtailed jurisdiction. Concededly congressional reform has been slow in coming in the past, but it seems to do little good to take the heat off by developing a special assembly line for general civil cases that must be handled expeditiously to make way for other cases.

Indeed, the closer one looks the more doubtful the argument becomes. The advocates of local choice based on local custom or diversity unfortunately do not offer numerous examples of necessary diversity in local rules. More often, the argument is stated at a high degree of generality. When examples are given, however, the practice of fragmentation appears even odder. For example, Professor Cavanagh suggests that "minutiae" such as "time limits for filing and responding to motions, the form and content of briefs, the content of final pretrial orders, and whether the court will entertain oral argument on motions," is not the stuff of federal rules, and "by and large . . . turn on local custom."[141] As long ago as the Knox Committee Report, local rules were seen as necessary regarding "rules of admission of attorneys to practice, calendaring motions, and assignment of cases for trial."[142]

It is readily apparent that many of these "minutiae" have the ability substantially to affect rights, and virtually none of the items is such that

140. Brookings Study, *supra* note 41, at 11.

141. Cavanaugh, *supra* note 11, at 731.

142. REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON LOCAL DISTRICT COURT RULES III (1940) at 7-9, *quoted in* Subrin, *supra* note 1, at 2017.

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local rules are required. The availability of oral argument, or the time available to file motions are good examples of rules that can affect an outcome. The very diverse practices of the federal circuit courts with regard to oral argument are troubling. Oral argument is important or it is not; there ought to be some concensus. Surely the importance of oral argument does not vary by circuit.

Similarly, rules that treat "*minutiae*" are not (simply for this reason) appropriate for local variance. We discuss below the problem of whether and when local rules are necessary to fill the interstices of the federal rule. Answers may differ depending upon circumstances. But the need for a set of less weighty rules is not an argument that those rules be different in every jurisdiction of the country. It is the nature of such rules that they are numerous and multiply. A danger of the rulemaking process is that rules become the panacea for every problem. While this problem must be addressed, it will not help matters to have the problem addressed in every district. This will only contribute to delay, cost, and unfairness to out-of-district litigants.

2. Information and Management. Some local rules are justified as essentially housekeeping matters. For example, some local rules "simply provide[] mundane information for lawyers about how, where, and when the court operates."[143] Stephen Flanders offers this as a primary and important function of local rules. He cites as examples the hours of the clerk's office, and rules about case assignment.[144] Another category of rules that Flanders *conjoins* are rules relating to management, rules that are "essential tools in implementing court policy in administrative matters."[145] "Matters such as determining the balance between 'free press' and 'fair trial' concerns, dismissing cases for failure to prosecute and interrogating jurors after verdict all involve regulation of the conduct of lawyers, and are clearly within a court's discretion."[146] Simply pointing to housekeeping purposes does not truly justify local rules, however, as a distinction between Flanders' categories makes clear. The first category—rules that simply inform—are unobjectionable, precisely because they are not rules. If they merely inform, but do not require anything of lawyers, then the provision of information is commendable. The only question is whether the

143. Flanders, *supra* note 137, at 262.
144. *Id.* at 262-63.
145. *Id.* at 218.
146. *Id.* at 218-19.

information needs to be packaged as a "rule."[147]

To the extent that the local rules require conduct of lawyers, however, these rules—be they for "administrative matters," "management," or whatever—still are going to implicate the concerns we discuss above. The labels themselves are, to a certain extent, misleading in that they mask what might be a very real impact on substantive rights. An evident example of Mr. Flanders' own is "dismissing cases for failure to prosecute."[148] These rules are rules, and appropriately are covered in the section immediately following.

3. Interstitial Rules. Many rules are justified on the ground they are interstitial. Often-times this is explicit, as when Professor Cavanagh explains that local rules are beneficial when they "fill in the gaps left by national rules."[149] Other times interstitial rules are explained as being within the district court's discretionary authority.[150] Interstitial rules prove to be a difficult topic, though less so after some ground is cleared away.

First, it comes as at least some surprise that there is a debate about whether local rules in conflict with federal rules should be permitted. Rule 83 explicitly prohibits this, and for what would seem to be good reason.[151] What, after all, is the point of having a national rule if local districts may deviate at will? Nonetheless, both the CJRA and the 1993 Amendments appear to contemplate local rules inconsistent with national standards. The CJRA is unclear as to this, but many districts have adopted plans inconsistent with the federal rules. The 1993 Amendments have an explicit opt-out provision, so in a sense local choice is not "inconsistent" with the federal rule. In either event the trend is a bad one, and probably results from an inability to reach concensus on the national level.

Second, the field of interstitial rules is—or ought to be— markedly smaller than the "gaps" in the federal rules. One interpretation of

147. Having said this, two related points present themselves. First, obviously any information also in a sense is a rule. If the clerk's office is open between 9:00 a.m. and 5:00 p.m., then one must file papers between those hours. Second, one reasonably might question the amount of "information" that really must differ from district to district. Why not have the clerk's offices open at the same time throughout the country so attorneys do not need to guess or try to locate the local rule? Despite these two points, we are willing to assume there is some information (directions to the courthouse?) that is useful to all lawyers, might differ among districts, and ought to be published.
148. Flanders, *supra* note 137, at 219.
149. Edward D. Cavanaugh, *supra* note 11, at 731.
150. *See generally* Flanders, *supra* note 137, at 221.
151. *See* FED. R. CIV. P. 83.

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interstitial rules might allow for any rule not flat out contradicted by the federal rules. This, however, is too broad a definition. For example, the federal rules, until recently, set no limits on interrogatories or depositions. By local rule, however, limits were set in some districts. This type of local rule strikes us as too fundamentally different in policy from the federal rules to be taken as "interstitial." Interstitial rules ought to be those that either fill in the local rules where wide discretion is granted, or clear up something left unclear by the national rules. An example might be a local rule setting out the procedure for drafting a Rule 16 order. Rules of broader scope than this might also be appropriate, but they should be seen for what they are: an attempt to formulate important new policy. As such, we deal with them below in the section on experimentation.

With these understandings in mind, we take the general position that although there might be some narrow compass for interstitial local rules, such rules still should be the exception. Indeed, we believe that such rules never should be permitted to take effect without central approval. While this position no doubt will be controversial, it rests on well-reasoned views about the appropriate level of case management.

In our view, local rules are the least optimal of possible case management techniques, and result most often from an inability or unwillingness to make case management decisions at the optimal level. Much rulemaking is simply seen as beneath the dignity of a national rule or rulemaking body. On the other hand, it is bothersome for a district judge to have to make decisions on a case-by-case basis. But the result is decisionmaking at a level calculated to be least efficient.

Take the frequently offered example of establishing page limits on brief, or other matters about the form and contents of briefs. Whether the rule should be national or case-by-case may depend upon the type of brief at stake, but there is little apparent benefit to a local rule. The circuit courts have their own elaborate rules about contents of briefs and page limits. The reason for this local choice is unclear, however. Appellate briefs are similar, and vary little from case to case in their particulars. That is why circuit-wide rules suffice, with exceptions granted by motion. Yet, there is no reason for rules to differ circuit by circuit either. This creates inefficiency, expense, and unfairness, all to no appreciable end. Another example is presumptive discovery limits. It seems difficult to avoid the conclusion that if limits are desirable they ought to be set on a case-by-case basis. Every case is different. Some cases may profit from no interrogatories except the most basic, and a long series of depositions. In other cases a deposition of anyone but the plaintiff may be unnecessary. But district courts are looking to find a way to avoid the difficulty of managing discovery on a case-by-case basis.

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Thus, they draft local rules in the hope the rules will solve the problem. Local rules are a Procrustean bed likely to satisfy no one.

Particularly in light of our discussion about local custom, it should be clear that rarely if ever should a rule turn on conditions unique to a district. If a rule is needed it is not too trivial to be promulgated nationally. If a rule is not needed, it is not needed. By the same token, cases are different and require differentiated management. By this we do not mean tracking, which is just an ill-fitting rule of its own. We mean that most cases require the careful attention of a district judge. Judges may not like this task. But it will not solve anything to promulgate one size fits all rules to substitute for individualized case management.

Having said all this, we concede there may well be examples of rules that are necessary and appropriate at the local level. We would not seek to rule them out entirely. But by the same token, we think it essential to establish a mechanism by which local rules are tested by some entity other than the local judges who favor the rule. We suggest that mechanism below.

4. Districts as Laboratories. In a bow to a fashionable rationale for federalism, one of the most frequent defenses of local rules is that beneficial national rules are often the product of local reforms. To hear the story told—and we have no doubt it is a true one in this regard—local judges think up solutions to local problems and adopt them as local rules, several similar approaches are tried in different places, then the experiments that seem to work get adopted as national rules.[152] If local rulemaking is eliminated, critics argue, this process of experimentation will be lost.

While the "local rules as laboratories for experimentation" has merit in theory, it runs into serious difficulty in practice. Below we propose a way in which district courts could be used for true procedural experimentation. But as currently operating, these laboratories are as likely to yield incorrect results as correct ones. Moreover, there is no reason that experimentation must operate from the bottom up, and more reason to believe that in fact it would operate far better from the top down.

What currently passes for experimentation only may do so in the very loosest sense. Many critics, while applauding in theory the idea of experimentation before procedural change, nonetheless have been

152. *See, e.g.*, A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1579 (1991).

sharply critical of the way in which that experimentation is occurring.[153] Leo Levin, former director of the Federal Judicial Center, puts the case succinctly:

> To experiment without paying due regard to the resulting data is an exercise in self-contradiction. Nor can impressionistic accounts of the effects of particular procedures substitute for hard data. By the same token, it is of little use to collect data produced by experiments that are so poorly or improperly designed that they cannot serve as the proper basis for solid conclusions. Moreover, it has been wisely said that where human subjects are involved, a poorly or improperly designed experiment "is by definition unethical."[154]

Levin's comment highlights serious deficiencies in both the front and back ends of current process. First, the "design" of existing experiments is extremely poor. For the most part they seem not to be designed at all, but simply put into operation in districts that want to try something new. This method of experimentation stands in sharp contrast to, for example, that suggested by Professor Laurens Walker, who argues that procedural innovation be tested in true field experiments and quasi-experiments designed to yield valid and significant data.[155] Accomplishing this would involve designing experiments to rule out as far as possible any cause for results other than the innovation being tested, to establish control groups against which the innovative districts may be compared, and to ensure to as great an extent as possible that the results are generalizable to the context in which they will operate. Professor Walker's description of the process of scientific experimentation indicates why the CJRA, including countless surveys promulgated by CJRA advisory groups operating with no training in the relevant techniques, is unlikely to yield valid information.

Second, innovation often is put into operation on the basis of what ostensibly is data, but for the most part reduces to isolated anecdotes. The hearings before the Biden Committee on the CJRA stand as a crowning example. One would hope Congress was not making decisions

153. *See, e.g.*, Levin, *supra* note 155, at 1581, 1590; Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67 (Summer 1988); Linda S. Mullenix, *supra* note 48, at 403-04.

154. Levin, *supra* note 155, at 1590.

155. *See* Walker, *supra* note 156, at 75-77. *See also* Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, 51 LAW & CONTEMP. PROB. 55 (1988) (discussing difficulties with empirical study of civil justice system); Marc Galanter, Bryant Garth, Deborah Hensler & Frances Kahn Zemas, *Viewpoint: How to Improve Civil Justice Policy*, 77 JUDICATURE 185 (1994) (arguing for better data collection on civil justice system indicator).

about national procedural innovation based on random stories about what one judge did with a particular case, or upon vague reports of what was accomplished in a district with some innovation. Yet a reader of the hearing transcript is left to almost no other conclusion.

Moreover, experiments should not be designed without some sense of the difficulty they pose. Many of the problems we identify with procedural fragmentation necessarily are present when controlled experimentation occurs. For example, both inefficiencies of differing procedures across districts and procedural unfairness from different applicable rules will result. At least in a controlled experiment, however, there can be attention to minimizing these costs, or to maximizing the value of data collected while the costs are incurred.

On balance we believe some careful experimentation may be both commendable and necessary. Particularly in light of procedural change that seems particularly innovative and far-reaching, it would be better to test new ideas before using the entire country as a guinea pig. The adoption of, and changes to, Rule 11, as well as the new mandatory disclosure rules are examples of procedural innovation that might well have benefitted from testing before implementation. Experimentation, however, is hardly an argument for local rules fashioned by local districts operating on their own. Recall that the argument about experimentation is offered to support local rulemaking autonomy. But we believe quite the contrary is true. In an important article Professors Rubin and Feeley make the point, in the context of discussing the federal system, that experimentation may be effected best with strong central control, rather than letting each state go its own way.[156] While we reserve judgment on the Rubin/Feeley argument in the context of federalism generally, the argument certainly holds sway in the rulemaking context.

True experimentation should occur with strong central control. There should be national debate about which experiments to pursue, and central control to ensure the experiments (to the greatest extent possible) actually yield results. Much of the difficulty we have identified with existing stabs at experimentation prevails because districts are proceeding on their own. From a central standpoint, experiments can be designed and implemented across districts.

IV. CONCLUSION

As must be evident, we believe the current proliferation of local rules

156. Edward L. Rubin & Malcolm Feeley, *Federalism & Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910 (1994).

and the trend to localized reform and innovation is ill-advised. The very purpose of a system of Federal Rules of Civil Procedure was uniformity, and the case has not been made, nor seriously attempted, to overthrow that regime. Rather, the trends we observe are all the more disturbing because they are occurring without careful consideration, or as a matter of political compromise unrelated to the goals of a functioning procedural system.

For the most part we believe uniform national rules are a good idea, and local rules a bad one. Uniformity is desirable for reasons including efficiency and substantive outcome fairness. Local rules are undesirable because they interfere with the system of uniformity and by-and-large offer little real benefit. By the same token, we concede there is some role for disuniformity in appropriate circumstances. The most prominent example is probably the need for some controlled experimentation. But there also may be instances in which local rules are needed to account for local condition.

Ultimately we believe that a stronger system of central control is essential to reassert uniformity while dealing with instances in which local rules are appropriate. While we leave for another day the question of what that central authority should be, it seems at least initially that the authority ought to be an adjunct to, and under the control of, the Judicial Conference. We say that with at least some misgiving, however, because we are concerned that a body composed entirely of judges may overvalue anecdotes and opinions about reform and be insufficiently attentive both to social science process and to the needs of court users.[157]

At any rate, our proposal is a simple one, with four basic pieces.

1. No local rules should be permitted to go into effect without approval of the central authority. The criteria for approval should be whether there is a unique local problem that requires its own rule, and whether the unique problem is such that solving the problem justifies the cost of disuniformity.

2. Proposed rules that do not meet the above criteria nonetheless should be considered for national adoption. We should discard the notion that trivial matters are inappropriate for a national rule. If there is a needed rule, it should be national in scope. National rulemakers should carefully consider whether the subject matter of the proposal should be dealt with on a case-by-case basis. If not, and if a rule is needed but the rule does not deal with a unique local situation, the solution should be a national rule.

3. There should be no opting out of federal rules. The Federal Rules of Civil Procedure should be uniform and national in scope. Political pressures should not be resolved by simply deferring questions to local choice.

4. Finally, experimentation is to be encouraged on a national basis, through carefully considered and developed experiments. When rules deal with significant innovation, the central authority should consider an experiment. Experimentation necessarily must be limited, which means proposals will compete against one another. Significant procedural innovation ought to proceed on the basis of valid data, with some advance idea of pitfalls and how they can be addressed.

In sum, we believe there may be some place for local rules. But even that decision should be made nationally. For the most part the Federal Rules of Civil Procedure should be the rules by which all lawyers play.

157. In this regard we note the current debate about the composition of the Rules Advisory Committees. It is at least our tentative view that whatever central control there is ought to have adequate representation by court users as well as judges, with good assistance from qualified social scientists. We also note the current discussion of whether the rulemaking process really should be one that follows a pluralistic political model, as many argue. It again is our tentative view that even if rulemaking should occur in some other fashion, good rulemaking still may require decisionmakers other than judges, who may overrule their expertise in procedural reform, and discount the skills of other professionals.

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OFFICE OF
APPELLATE COURTS
OCT 10 1996
FILED

October 9, 1996

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Proposed changes to Rules of Civil Procedure

Dear Mr. Grittner:

Pursuant to our telephone conversation this morning enclosed is an original and eleven copies of a letter expressing my concerns regarding a proposed change to rule 5.02 of the Rules of Civil Procedure which would permit service by facsimile transmission.

Please forward these letters to the Justices.

Very truly yours,

Michael A. Feist

MAF/ms

Encls.

Michael A. Feist
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OFFICE OF APPELLATE
OCT 10 1996
FILED

October 9, 1996

The Justices of the Minnesota Supreme Court
Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Proposed changes to Rules of Civil Procedure

Dear Justices of the Minnesota Supreme Court:

The October issue of Bench and Bar contains recommendations from an advisory committee concerning amendments to the Rules of Civil Procedure. Of concern to me is the proposed change to rule 5.02 permitting service by facsimile.

According to my office sharing arrangement I must pay $1 per page for faxes I either send or receive. Obviously, I can control the faxes I send. On the other hand, however, I have no control of faxes sent to me.

In my opinion the fax machine is abused now by attorneys who do everything at the last minute. Likewise, government attorneys and attorneys in large law firms have substituted the U.S. mail with a fax. Permitting service by fax will not only condone this practice but also place the expense of service on my clients and the clients of lawyers similarly situated. Instead of paying a courier to hand deliver documents or placing postage on documents served by mail a lawyer can, pursuant to the proposed amendment, shift the expense of service of process on the party being served.

When considering the proposed change, I ask that the Court either reject service by facsimile or provide language in the rule whereby the server bears the cost, if any, of service by facsimile. Making the one who utilizes the fax machine to serve documents pay for the convenience is no different than the $5 paid to court administrators when filing documents by facsimile.

Very truly yours,

Michael A. Feist
MAF/ms

OFFICE OF
APPELLATE COURTS

OCT - 8 1996

FILED

BURKE & THOMAS

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Michael J. Heifort

October 4, 1996

OFFICE OF
APPELLATE COURTS

OCT - 8 1996

FILED

SENT VIA FACSIMILE
Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Proposed Amendments to the Minnesota Rules of Civil Procedure

Dear Sir:

Enclosed is a Request for Oral Presentation and Written Statement by the MDLA with regard to proposed amendments to the Minnesota Rules of Civil Procedure.

Thank you.

Very truly yours,

Richard J. Thomas
for
BURKE & THOMAS

RJT:jo
Enclosure

cc. John M. Degnan, Esq.
Rebecca Egge Moos, Esq.
Ms. Linda Jude

OFFICE OF
APPELLATE COURTS

OCT - 8 1996

FILED

STATE OF MINNESOTA
IN SUPREME COURT
NO.:C6-84-2134

IN RE: HEARING TO CONSIDER
PROPOSED AMENDMENTS TO THE
MINNESOTA RULES OF CIVIL PROCEDURE.

REQUEST FOR ORAL PRESENTATION AND WRITTEN SUBMISSION

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA:

Richard J. Thomas states as follows:

1. That he is an attorney licensed to practice law in the state of Minnesota and is co-chair of the Minnesota Defense Lawyers Association Law Improvement Committee and Vice President of the Association.

2. That he requests that a member of the MDLA, Mr. John Degnan, be allowed to participate in oral presentations scheduled by the court for October 9, 1996, to address proposed changes in the Minnesota Rules of Civil Procedure, which are of interest or concern to the membership of the Minnesota Defense Lawyers Association.

3. That he respectfully submits the attached written statement outlining the issues upon which the MDLA would like to address the Court.

Dated: 10/3/96

Respectfully submitted,

BURKE & THOMAS

By _____
Richard J. Thomas (#137327)
299 Coon Rapids Boulevard
Suite 101
Coon Rapids, MN 55433
(612) 784-2998
Attorneys for Amicus, Minnesota Defense Lawyers Association

WRITTEN STATEMENT

The Minnesota Defense Lawyers Association is a voluntary organization of more than 800 Minnesota attorneys whose practice is substantially related to the defense of civil litigation.

The Minnesota Defense Lawyers Association would like to voice its objection to the proposed rule changes for new Rules 26.01(b) and 26.02(d)(1).

I.

DISCUSSION

The Minnesota Defense Lawyers Association recognizes the pivotal role that expert witnesses play in civil actions. Indeed, in professional negligence cases, the failure to produce supporting expert testimony is often times fatal to the claim.

The MDLA also favors those changes which reduce the cost of litigation and the potential for abuse and delay. Unfortunately, mandatory or "automatic" depositions of experts, following the exchange of reports "prepared and signed by" each expert, will increase costs, potentially delay proceedings, and will not enhance the trial of civil actions.

Undoubtedly there are many cases where the depositions of experts are important and helpful in the resolution of the cases involved. Under current Minnesota practice, these depositions are routinely taken when warranted. Nevertheless, Minnesota does allow for the protection of litigants in those cases where the desire to depose another's expert is not motivated by the need for additional information to adequately prepare for trial, but

rather, is a "tactic" to make litigation more difficult for the party or the party's expert.

Unquestionably, the depositions of experts are expensive. In addition, the experts themselves are often disinclined to be engaged in the civil litigation process at all (i.e., treating physicians) or are inclined to be in the civil litigation process but at great expense.

Under current Minnesota practice, a party is obligated to disclose those opinions, and the basis for those opinions, held by their testifying experts. If those answers are inadequate, a motion to compel further disclosure is available and, of course, costs can be awarded for the motion. Finally, in cases of need, the depositions can be ordered by the court with appropriate costs apportioned on the basis of need.

Minnesota's current process allows for judicial intervention in the event that the discovery is being sought for reasons other than the need for legitimate information.

Under the proposed new rules, however, the process changes entirely. First of all, every witness must prepare a report. See, Rule 26.01(b)(2).[1] After a party incurs the expense of a "witness" preparing a report, the witness can then be automatically deposed pursuant to Rule 26.02(d)(1).

The better practice is for a party, through his or her attorney, to disclose the expert opinions, the bases therefor, and

[1] Ironically, although the rule requires the witness to prepare the report, the committee assumes the report will be prepared by attorneys. A Rule should not be promulgated which a committee assumes will, as a matter of practice, be broken as a matter of course. If the committee contemplates attorney preparation, the Rule should say so.

then contemplate a judiciary which will enforce a limitation on the opinions expressed at trial in conformity with the opinions disclosed. This process enhances the responsibility, efficiency and low cost.

The problem arises when inadequate disclosure is made and then, at trial, the offending party is allowed to go beyond the scope of the disclosure. That problem, however, can be solved entirely by a judiciary which simply enforces the rules.

II.

RECOMMENDED CHANGE.

Accountability is essential in civil litigation. The MDLA agrees that the opinions disclosed must be the opinions actually held by the experts. If the rule only provides that an attorney or party can sign a disclosure, the potential exists for an inadequate or inaccurate disclosure.

This potential problem has been solved in medical malpractice litigation pursuant to Minn. Stat.§ 145.682, subd. 4. The expert witness must sign the interrogatory disclosure of that expert's opinion. As such, accountability is assured in an efficient and cost-effective manner. For that reason, the MDLA fully supports that aspect of new Rule 26.01(b) which requires the signature of an expert on all expert witness disclosures. The additional requirement (fallacy) that the witness prepare the report is both unnecessary and redundant in the event that an expert's signature to the disclosure is required.

The MDLA further recognizes the need for accurate information from an expert and, at the same time, a method by which the process can be reduced. Turning again to medical malpractice

litigation, this balance has been met by Minn. Stat. § 595.02, subd. 5, which allows defense counsel to meet, on an informal basis, with treating physicians to understand their opinions. This has proved to be less costly than taking a deposition, more readily available, and provides counsel with the information necessary for an effective cross examination. The MDLA recommends that the scope of Minn. Stat. § 595.02, subd. 5, be broadened to include access to treating physicians in other types of cases, as well.

III.

CONCLUSION.

Minnesota law currently has in place an effective, efficient and cost-conscious method of exchanging valuable information in the discovery process. The proposed Rules which mirror the federal rules will burden Minnesota litigants with increased costs, discourage experts (notably physicians) from being involved in the litigation process, and will be counter-productive to the committee's goal of reduced cost and abuse.

The MDLA agrees that expert accountability is essential and, therefore, suggests that the Court adopt a rule requiring an expert to sign an expert witness disclosure. In addition, if the Court believes that increased access to treating physicians is essential, the MDLA supports the Court's recommendation to the legislature to expand Minn. Stat. § 595.02, subd. 5 to allow for these informal conferences in all civil cases. An informal

conference with other experts can prove to be a cost-effective supplement to the deposition process and it is recommended.

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Respectfully submitted,

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