THE 2000 AMENDMENTS TO THE FEDERAL DISCOVERY RULES AND THE FUTURE OF ADVERSARIAL PRETRIAL LITIGATION

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INTRODUCTION

The Federal Rules of Civil Procedure (the "Rules") governing pretrial discovery have been amended yet again.[1] Some of the amendments are trivial,[2] but others are designed to work fundamental changes in the behavior of judges and lawyers.[3] For example, the 2000 amendments truncate the scope of discovery that parties are entitled to pursue.[4] Parties now must obtain permission from the court before they can pursue discovery that is as broad as the Rules had permitted for more than a generation.[5] The change in the scope of discovery is intended to produce two related results: (1) to prod judges into more active involvement in and management of the discovery process, and (2) to encourage lawyers to confine discovery to issues at the heart of the litigation.[6] The new system attempts to produce these behavioral changes by creating two new categories of discovery, which the Advisory Committee labeled as "attorney managed" and "court managed" discovery.[7] Whether the new classification system will alter the fundamental behaviors of judges and lawyers is debatable. It is certain to provoke discovery disputes, motions to resolve those disputes, and changes in pleading practice.[8]

The new Rules also amend the provisions imposing mandatory duties to

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1. The federal discovery rules have been amended numerous times. For example, prior to the important 2000 amendments to Rule 26, that rule had been amended in 1946, 1963, 1966, 1970, 1980, 1983, 1987, and 1993.

2. *See, e.g.*, FED. R. CIV. P. 5(d), 26(a)(1), 26(a)(3), 26(a)(4), 30(d)(1), 30(d)(4), 30(f)(1) (replacing "shall" with "must").

3. See *infra* Part III.C for a discussion of the effect of new amendments on attorney practice.

4. See *infra* Part III.A.2 for a discussion of the scope of information that must be disclosed under mandatory discovery rules.

5. See *infra* III.C for a discussion of the changes in scope of the subjects that parties are entitled to discover under the 2000 amendments.

6. See *infra* Part III.A.2 for a discussion of the scope of the duty of voluntary disclosure.

7. See *infra* Part III.C for a discussion of the attorney managed and court managed discovery.

8. See *infra* Part III.C.1-3 for a discussion of the effect of changes on motion practice, pleadings, and litigation costs.

disclose certain information without awaiting a discovery request.[9] Like the original mandatory disclosure provisions added to Rule 26(a) in 1993, these changes are intended to alter the behavior of judges and lawyers.[10] The mandatory disclosure rules are imposed upon all districts for the first time, and the scope of these disclosures is narrowed by a formula certain to provoke new disputes among some litigants.[11] Those unfamiliar with the disclosure rules may be surprised at the extent of their impact upon the conduct of pretrial discovery. One example is the duty to supplement information provided during the disclosure and discovery processes.[12] In part because disclosures are required early in the litigation—often before the litigants have been able to fully develop the fact record in the dispute—the Rules now impose increased duties to supplement information previously disclosed or discovered.[13]

This Article identifies the most important of the 2000 amendments to the federal discovery rules and explains some of the ways these changes will affect pretrial litigation in the near term. Careful analysis of the 2000 amendments also reveals that these changes may signal more fundamental, long term changes in litigation practice in the federal courts. The most recent amendments to the discovery rules represent a movement away from some of the fundamental concepts upon which the federal discovery rules have rested for decades.[14] The principles which apparently generated these changes suggest that even more fundamental changes in the rules and practices governing pretrial litigation in federal courts may be adopted in the future.

To permit analysis of both the immediate impact that the 2000 amendments will have on practice in the federal courts and their longer term implications, this Article proceeds chronologically. Part I examines rules that have embodied the theories underlying the federal pretrial discovery rules prior to the 1993 and 2000 amendments.[15] This discussion is important for several reasons. First, these rules and theories remain in effect in a majority of states, where pretrial discovery practice has been modeled after the previous versions of the federal rules.[16] Obviously, attorneys who practice in both state and federal courts must be aware of the new divergence in practice in these different forums.

This leads to a second and related reason for discussing both the old and

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9. See *infra* Part III.A for a discussion of the scope of mandatory discovery.

10. See *infra* Part II.A for a discussion of judicial authority to control mandatory discovery.

11. See *infra* Part III.A for a discussion of the scope of mandatory discovery.

12. FED. R. CIV. P. 26(e).

13. See *infra* Part III.D.2 for a discussion of increased duty to supplement under the 2000 rules.

14. See *infra* Part I.A.1 for a discussion of discovery methods under the adversary model.

15. This discussion examines the rules as enacted through the December 1, 1991 Amendments, because this was the version in effect just prior to the changes wrought by the 1993 and 2000 amendments.

16. *See, e.g.*, John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1378-1434 (1986) (discussing states' adoption of rules modeled after, copying, or influenced by federal rules, including rules governing discovery). *See also* GA. CODE. ANN. §§ 9-11-26 (2000) (providing Georgia civil discovery rules generally modeled after pre-2000 federal rules).

new rules. Because the rules and theories discussed in Part I long have governed federal practice, and in recent decades have been part of the practice in most states, most attorneys involved in civil litigation—including judges—have been trained to employ these concepts. Where the 2000 amendments conflict with these traditional rules and practices, we can anticipate that inertial resistance to change will delay the full implementation of these new rules. The differences between the two regimes of rules thus dictate that lawyers who either wish to take advantage of the new rules, or to resist those efforts, must comprehend those differences if they are to devise successful litigation strategies.

Part II of the Article discusses the controversial, if limited, 1993 amendments that imposed new mandatory disclosure obligations on litigants in the federal districts that adopted these amendments. Discussion of the 1993 amendments is essential, if only because some of the more important revisions enacted in 2000 expand upon the tentative steps taken seven years earlier. In particular, the 2000 Rules impose the mandatory disclosure obligation on all districts for the first time, while narrowing the scope of the duty to disclose.[17] The significance of these changes is readily apparent when the 1993 and 2000 versions of the disclosure rules are compared.

The most important changes adopted in the December 1, 2000 amendments are discussed in Part III. These include revisions intended to: (1) limit the scope of discovery conducted as a matter of right, (2) limit the scope of the mandatory disclosure obligation, (3) impose the mandatory disclosure duty in all federal districts, and (4) impose new quantitative limits on depositions. Again, both the immediate and long term significance of the new rules can be understood only by comparing them with their predecessors. This comparison leads to the conclusion that the recent amendments to the federal rules are intended to move federal practice away from the traditional model of adversarial pretrial discovery conducted by largely autonomous attorneys, and toward a model in which attorney autonomy is severely limited by formal rules and more active judicial management of pretrial litigation.

I. THE ADVERSARY MODEL OF LITIGATION EMBODIED IN THE FEDERAL DISCOVERY RULES

The federal discovery rules—as copied by most of the states—have traditionally rested upon an adversary model of pretrial litigation.[18] This adversarial theory of pretrial discovery has been implemented by three fundamental decisions made by the rules' drafters: (1) pretrial discovery should be wide open—as unlimited as possible; (2) it should be managed primarily by the litigants' attorneys; and (3) judges should act primarily as referees, typically intervening only as needed to resolve disputes brought to them by the litigants.[19]

17. See *infra* Part III.A for a discussion of mandatory disclosure under the 2000 rules.

18. *See generally* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698-700 (1998) (positing that purpose of discovery is to allow party seeking it to prove his case through adverse party).

19. *See generally* Subrin, *supra* note 18, at 702-10 (discussing pro-discovery approach with courts

This defining set of characteristics is still the norm under most state discovery systems, and despite numerous amendments to the discovery rules over the years, has survived as the norm in most federal litigation.[20] The 2000 amendments to the federal discovery rules contain measures that, if strictly enforced, will erode that adversarial model.[21]

A. The Adversary Model: Wide Open Discovery

1. Discovery Methods

Before the Federal Rules of Civil Procedure were adopted in 1938, discovery was rare in federal litigation.[22] Only two statutes and two rules of equity permitted pretrial discovery.[23] Discovery practice varied among the states, but in most states was much more limited than the expansive practices adopted in the 1938 Rules.[24] In most of the jurisdictions permitting some form of pretrial discovery, not all devices were available and usually the rules imposed significant limitations upon their use.[25] For example, some jurisdictions permitted use of interrogatories but not depositions.[26] Among the most remarkable innovations of the federal discovery rules were the provisions permitting attorneys to deploy—almost at will—the full range of discovery devices in use in the early decades of the twentieth century.[27] In language that now seems unremarkable, the pre-1993 discovery rules opened with the following grant of authority to the parties and their lawyers:

> Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to

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acting only to prevent abuse).

20. See *infra* Part I.A-B for a discussion of mandatory disclosures.

21. The following discussion will quote from the version of the federal rules in effect after the December, 1991 amendments until the December 1993 changes. This version has been selected for several reasons. It is the last version of the rules in effect before the potentially radical 1993 changes; the theories and language of the 1991 rules were substantively unchanged from the original 1938 version of the rules; and this text contains language similar to that deployed in many of the state procedural systems.

22. *See* GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 267-72 (1932) (citing rules applicable to discovery). *See also* Subrin, *supra* note 18, at 691-745 (discussing background of 1938 discovery rules).

23. *See* RAGLAND, *supra* note 22 at 267-72 (citing rules applicable to discovery).

24. *See id.* at 25-26 (providing overview of methods allowed in various jurisdictions); *Id.* at 272-391 (providing provisions of each jurisdiction). *See also* Subrin, *supra* note 18, at 702-10 (noting that discovery was more limited prior to 1938 rules).

25. *See* RAGLAND, *supra* note 22, at 25-31 (listing types of actions where discovery allowed or prohibited in various states); Subrin, *supra* note 18, at 705-08 (discussing pre-1938 state discovery rules).

26. *See* Subrin, *supra* note 18, at 703, 707 n.108 (listing states that permitted oral deposition and those that permitted written interrogatories).

27. *See id.* at 705 (noting that federal rules incorporated discovery rules previously permitted only in particular states).

enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.[28]

As noted earlier, before 1938, use of these methods was limited in both the federal and state courts.[29] Although some states had adopted some of these devices, most jurisdictions only permitted use of some, not all, of these methods, and their use was often strictly constrained.[30] For example, only seven states permitted depositions, and all imposed limitations on their use.[31] In four of those seven states, depositions had to be conducted in front of a judge, who ruled on evidentiary objections.[32] Obviously, this is a true judicial proceeding, in which many of the abuses common to deposition practice under the Rules would be ameliorated, if not eliminated. The Rules, in contrast, created depositions largely controlled by the attorneys participating in them. Judges would be present during depositions only under exceptional circumstances, and would rule upon evidentiary and other disputes only if the matters were brought to them by the litigants.[33]

2. Scope and Quantity of Discovery

Another traditional limitation restricted discovery to the discovering party's own defenses, as presented in the pleadings.[34] A party was not entitled to any discovery about his own affirmative claims for relief, nor anything about the adverse party's claims or defenses.[35]

The Rules, on the other hand, boldly reversed this longstanding tradition by proclaiming that 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."[36] This language swept away old limitations on the scope of discovery, while defining the scope of discovery about as broadly

28. FED. R. CIV. P. 26(a) (1991) (amended 2000).

29. *See* RAGLAND, *supra* note 22, at 25-31 (discussing state limitations on discovery); *id.* at 1-8 (noting that disclosure of facts was accomplished through pleadings and denials).

30. *See id.* at 25-26 (summarizing availability of pretrial discovery in years preceding adoption of 1938 rules).

31. *See, e.g.*, Subrin, *supra* note 18, at 703 (listing Indiana, Kentucky, Missouri, Nebraska, New Hampshire, Ohio, and Texas).

32. *See id.* (listing Missouri, Nebraska, New Hampshire, and Ohio).

33. For example, FED. R. CIV. P. 30(c) (1991) (amended 2000) commanded:

> Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. . . . All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections.

34. *See* RAGLAND, *supra* note 22, at 263 (noting that New York rules permitted defendant discovery only on affirmative defenses, causing addition of meritless defense claims to expand discovery).

35. *See, e.g., id.* (discussing limitations enacted in New York practice).

36. FED. R. CIV. P. 26(b)(1) (1991) (amended 2000).

as one can imagine in a legal system relying upon the concept of evidentiary relevance.[37]

Any doubts about the breadth of the scope of discovery enacted by these rules surely were eliminated by another passage in the same rule: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[38] Attorneys not only could use all known discovery devices to inquire about any issues relevant to the "subject matter" of the lawsuit, but even could pursue information not itself admissible at trial.[39]

But even this did not exhaust the largesse of the Rules' drafters. Until recently, the federal discovery rules granted expansive authority to the litigants to determine the quantity of discovery.[40] As long as parties sought information relevant to the "subject matter" of the lawsuit and their conduct was not egregious enough to be considered harassment of the adversary or witness, the rules allowed them to ask as many deposition questions, propound as many

37. Of course the scope of discovery was not unlimited. In addition to privileged materials, the rules placed severe limits on the discovery of an adversary's trial preparation materials and expert witnesses. For example, Rule 26(b)(3) permitted a party to discover an adversary's trial preparation materials that were "prepared in anticipation of litigation or for trial" only by showing a "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." FED. R. CIV. P. 26(b)(3) (1991) (amended 2000). Even in circumstances where disclosure was justified, the Rule dictated that "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." *Id.*

Similarly, Rule 26(b)(4) granted even more limited discovery about an adversary's experts—although by custom and practice, discovery of experts expected to testify at trial was common and extensive. Nonetheless, the text of the rules was restrictive, permitting only limited discovery "of facts known and opinions held by experts . . . acquired or developed in anticipation of litigation or for trial." FED. R. CIV. P. 26(b)(4)(B) (1991) (amended 2000). Discovery of non-testifying experts was even more limited. *Id.*

38. FED. R. CIV. P. 26(b)(1) (1991) (amended 2000).

39. Consider, for example, the expansive power that Rule 34 granted to parties to force their adversaries and even non-party witnesses to turn over private records at any time after the early stages of a lawsuit:

> (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request . . . to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained . . .) or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served . . . .
>
> (b) Procedure. The request may, *without leave of court*, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.
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> (c) Persons not parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

FED. R. CIV. P. 34 (1991) (amended 1993) (emphasis added).

40. *See* FED R. CIV. P. 26-37 (1991).

interrogatories, request production of as many documents,[41] and request as many admissions[42] as their imaginations and budgets would permit.[43]

3. Timing, Sequence, and Conduct of Discovery

The Rules also ceded control over the sequence and timing of most discovery to the litigants' attorneys.[44] Indeed, the text suggested that judicial authority over the process would be triggered only if a party affirmatively sought the court's help.[45] Rule 26, which established the general parameters of discovery, specifically provided:

> Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.[46]

Similarly, the Rules governing the use of specific discovery devices conveyed the same message: the lawyers were in charge of the scope, quantity, and quality of discovery.[47] For example, once the initial period for pleading had passed, Rule 30(a) allowed lawyers to schedule depositions of both parties and witnesses at will, without requiring any judicial approval:

> When Depositions May be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery.... The attendance of witnesses may be compelled by subpoena as provided in Rule 45.[48]

None of the federal discovery provisions better expresses the revolution in pretrial procedure achieved by the Rules than does this language from Rule

41. Requests for production "may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party." FED. R. CIV. P. 34(b) (1991) (amended 1993).

42. Rule 36 authorized a party to "serve upon any other party a written request for the admission ... of the truth of *any matters within the scope of Rule 26(b)* set forth in the request that relate to statements or opinions of fact or of the application of law to fact including the genuineness of any documents described in the request...." FED. R. CIV. P. 36(a) (1991) (amended 1993) (emphasis added).

43. *See* FED. R. CIV. P. 26, 30, 33, 34, 36 (1991).

44. *See generally* Subrin, *supra* note 18, at 691-745 (discussing reasons federal discovery provisions were adopted).

45. *Id.*

46. FED. R. CIV. P. 26(d) (1991) (amended 2000).

47. *See* FED. R. CIV. P. 31 (1991) (amended 1993) (providing for depositions upon written requirements).

48. FED. R. CIV. P. 30(a) (1991) (amended 2000).

30(a). Before 1938, it was unusual for a deposition to be taken in federal litigation.[49] After 1938, with "reasonable" notice and adequate process, lawyers could take the live testimony under oath in a pretrial deposition of any person about any subject relevant to the litigation without the presence of a judge, and without the need for prior judicial approval.[50] Similar authority was granted to attorneys by the rules governing the use of interrogatories, requests for production, and requests for admission.[51]

Even this did not exhaust the attorney's power. By notice or subpoena, for example, the deposition witness could be compelled to bring documents or other evidence for inspection at the deposition proceeding.[52] Perhaps most vexing to the generations of lawyers who have practiced under these rules, once the witness arrived at the deposition, the nature and quality of the proceeding was left to the whim of the attorneys in the room.[53] Most depositions have been taken in private offices with no judicial officer present, although in recent years it has become more common for judges or magistrates in some federal districts to make themselves available to resolve discovery disputes while the discovery is proceeding. But this remains the exception, and every experienced litigator has suffered through countless hours of deposition psychodramas directly attributable to the absence of a judge to run the show.

The text of Rule 30(c) exemplified the drafters' decision to place attorneys in charge of the deposition process:

> Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence.... All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections.[54]

Attorneys were to run the deposition. When objections were made, they were to be noted for the record and the proceedings were to continue without bothering to wait for a judicial ruling. A judge would never even learn of the objections unless a party brought it up later at a separate proceeding or at trial. As a result, judges have ruled upon only a minuscule percentage of the

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49. *See* Subrin, *supra* note 18, at 692 (discussing public debates for and against the Rules Enabling Act and uniform procedural rules for civil cases in law).

50. *See id.* at 698-701 (noting that oral depositions were the most important change made by the federal discovery rules).

51. *See id.* at 703 (discussing Sunderland's initial draft of the proposed summary judgment and discovery rules).

52. The rules provided for Notices to Produce under Rules 30(b)(5) and 34 for parties, and for subpoenas duces tecum under Rules 30(b)(1) and 45 for parties and non-party witnesses respectively. FED. R. CIV. P. 30, 34, 45 (1991) (rule 34 amended 1993; rule 30 amended 2000).

53. *See* FED. R. CIV. P. 28 (1991) (amended 1993) (providing for persons before whom depositions may be taken).

54. FED. R. CIV. P. 30(c) (1991) (amended 2000).

evidentiary issues raised during the course of the depositions conducted under this model of attorney controlled discovery.[55] Judges had final authority, but it would be exercised only if an attorney decided to bring a particular dispute to the court.[56]

B. *Judges as Referees*

The federal discovery rules made it clear that the courts possessed inherent power to control the discovery process.[57] For example, the broad scope of discovery adopted in 26(b)(1) was subject to the caveat that it could be "limited by order of the court in accordance with these rules . . . ."[58] Rule 26 expressly permitted a court to act on its own: "The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c)."[59] But the latter phrase better described the actual practice implemented by the Rules and employed by judges and lawyers alike. Judges typically have exercised their authority over pretrial discovery, at least as a matter of common practice, only when the litigants sought the court's assistance in limiting or ordering discovery after a dispute arose between the parties.[60]

The text of the Rules reveals this underlying assumption. Courts had broad authority to grant motions to protect a party or witness from abusive discovery tactics: "*Upon motion by a party or by the person from whom discovery is sought* and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."[61] The rules governing depositions echoed this theme. Rule 30(d) described how a judge would get involved in a deposition dispute:

> At any time during the taking of the deposition, *on motion of a party or of the deponent and upon a showing* that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending . . . may order . . . the examination to cease forthwith . . . , or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c).[62]

The judge's broad power was limited in an odd way. Like a referee at a

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55. *Id.*

56. FED. R. CIV. P. 30(b)(3) (1991) (amended 2000), for example, authorized the court, "for cause shown [to] enlarge or shorten the time for taking the deposition." Judges could control the details of depositions in a particular case, but this authority typically would be exercised only in response to a motion by a party or deponent—otherwise the attorneys and parties could schedule as many depositions as they chose—or could agree upon.

57. *See* FED. R. CIV. P. 26 (1991) (amended 2000) (providing discovery methods, scope, and limits).

58. FED. R. CIV. P 26(b)(1) (1991) (amended 2000).

59. *Id.*

60. *See generally* Subrin, *supra* note 18, at 691-745 (discussing discovery practice).

61. FED. R. CIV. P. 26(c) (1991) (amended 2000) (emphasis added).

62. FED. R. CIV. P. 30(d) (1991) (amended 2000) (emphasis added).

sporting event, the judge had broad discretion to enforce the rules governing the proceeding. But the sports referee is part of the event, an on-the-scene observer whose job is not only to enforce the rules, but also to personally identify violations and impose sanctions without awaiting a request for help from the participants. The judge, on the other hand, was removed from the discovery event, and depended upon the efforts of the adversaries to identify actions calling for a response from the rule enforcer.[63]

C. *Discovery Conferences and Supplementation of Responses*

Two other attributes of the pretrial discovery model implemented in the Rules warrant mention here because both have been changed in recent years and will be discussed later in this Article. The first, Rule 26(f) discovery conferences, highlights the authority the original federal discovery model ceded to attorneys.[64] The second, the duty to supplement responses under Rule 26(e), emphasizes the truly adversarial nature of these processes.[65]

1. Discovery Conferences

One of the most intriguing examples of the roles played by lawyers and judges was inserted into the text of Rule 26(f), which now governs discovery planning conferences.[66] No innovation in the discovery rules would seem better designed to get judges involved in the pretrial discovery process in positive and proactive ways. Yet originally the rule did not require discovery conferences in all cases. Instead, it granted judges discretion to decide whether to hold the conferences, providing that "[a]t any time after commencement of an action the court *may direct* the attorneys for the parties to appear before it for a conference on the subject of discovery."[67] These conferences were discretionary, with one exception. A judge was required to hold a discovery conference if any party's attorney requested one and attached specified information to the motion.[68] The Rule decreed: "The court *shall do so upon motion by the attorney for any party* if the motion includes" specified information about the issues in the case, proposals for the conduct of discovery in the case, and a "statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion."[69] In other words, the text granted attorneys who complied with the rule the power to compel a judge to order a discovery conference. The drafters of this provision apparently conceived of it as a fall-back position to be used when the attorneys

63. *See id.* (requiring motion to involve court in discovery dispute).

64. *See* FED. R. CIV. P. 26(f) (1991) (amended 2000) (covering meetings of parties and planning for discovery).

65. FED. R. CIV. P. 26(e) (1991) (amended 2000).

66. *See* FED. R. CIV. P. 26(f) (1991) (amended 2000) (requiring parties to meet early in litigation to discuss discovery).

67. *Id.* (emphasis added).

68. *Id.*

69. *Id.* (emphasis added).

who generally managed discovery could not agree.[70]

Judges had broad power to regulate the discovery process in cases where these conferences were held—whether at the instance of parties or judges. What is striking about the original formulation of Rule 26(f) is that it gave litigants authority to compel a judge to hold the conference, but in the absence of this action by a party, did not require a judge to get involved.[71] Again, the underlying conception was of an adversarial process largely managed by the parties' attorneys.

2. Supplementation of Responses to Discovery

The discovery rules have operated on the theory that if a party wanted information, it was responsible for taking advantage of the wide open methods available and ask for it.[72] The other party generally had no duty to assist its adversary's discovery efforts. One of the most striking examples of this assumption was Rule 26(e), which until December 1993, established a general rule (narrowed by some exceptions) that litigants who had given correct responses to discovery requests had no duty to supplement those answers except in specific and limited circumstances.[73]

The text of the rule, as it existed prior to the 1993 amendments, reflected the notion that each party was responsible for wringing information out of its adversaries.[74] Each litigant was required to frame discovery requests—regardless of the discovery device employed—in a way that produced the information they sought or needed.[75] The adverse party need not volunteer information.[76] As a general rule, a party had no duty to voluntarily supplement earlier responses to discovery requests, even if it subsequently obtained information that might be helpful to the opposing party.[77] A duty to supplement earlier responses to discovery questions arose only under limited circumstances.[78]

The general rule was: "A party who has responded to a request for discovery with a response that was complete when made *is under no duty to supplement the response to include information thereafter acquired*, except as

70. The discovery conference mechanism was adopted in 1980. The Advisory Committee Notes to the amendment described its purpose as follows: "[C]ounsel who has attempted without success to effect with opposing counsel a reasonable . . . plan for discovery is entitled to the assistance of the court. . . . It is not contemplated that requests for discovery conferences will be made routinely." FED. R. CIV. P. 26(f) (1980 Advisory Committee Note).

71. *See* FED. R. CIV. P. 26(f) (1991) (amended 2000) (requiring motion to initiate discovery conference with court).

72. *See* FED. R. CIV. P. 26 (1991) (amended 2000) (outlining general discovery provisions).

73. FED. R. CIV. P. 26(e) (1991) (amended 2000).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. FED. R. CIV. P. 26(e) (1991) (amended 2000).

follows . . . ."[79] The most important exception[80] simply expressed the fundamental rule against submitting false testimony or evidence:

> A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.[81]

In other words, a party cannot knowingly mislead an adversary by submitting false testimony or evidence. But the text of the rule created only a limited duty even in these circumstances.[82] A duty to supplement arose only if a party "knew" that the earlier response was incorrect. Arguably, a strong suspicion, even a reasonable suspicion, was not enough to trigger the duty. Instead, the party's information must have risen to the level of knowledge. Similarly, if a party failed to supplement answers under sub-paragraph (B), a judge could impose sanctions, but only if she found that the failure was in substance "a knowing concealment."[83] This is a rather daunting evidentiary burden. For example, the text permitted the argument that even a party who knowingly failed to supplement a response that was correct at the time given but now is untrue should not be punished if it could show that the failure was not a "knowing concealment."[84]

We need not quibble about the wisdom of this rule. For present purposes, it is enough to note how it embodied the concept of an adversarial discovery system. The most important of the 1993 amendments explicitly confronted the assumptions underlying Rule 26(e).

II. THE 1993 AMENDMENTS TO THE FEDERAL DISCOVERY RULES

The important 1993 amendments to the federal discovery rules were in large part a response to costs generated by the practice of pretrial discovery. Supporters of the 1938 federal discovery rules predicted that their new system would eliminate delays, reduce costs, avoid unnecessary procedural battles, and encourage the parties to get to the merits of their disputes.[85] Of course, they

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79. *Id.* (emphasis added).

80. The Rule also imposed a duty to supplement responses to "any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) 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." FED. R. CIV. P. 26(e)(1) (1991) (amended 2000).

81. FED. R. CIV. P. 26(e)(2) (1991) (amended 2000).

82. *Id.*

83. *Id.*

84. *Id.*

85. *See* W. Calvin Chesnut, *Analysis of Proposed New Federal Rules of Civil Procedure*, 22 A.B.A. J. 533, 534 (1936) (welcoming proposed rules as consistent with fundamental purposes of procedural rules); Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 450 (1936) (noting that proposed rules will lessen perjured testimony and promote justice); Martin

turned out to be terrible prognosticators. The manipulation of the discovery rules by lawyers is legendary. In the second half of the twentieth century, lawyers learned to exploit the pretrial discovery process as well as their predecessors had manipulated the mechanisms of common law pleading—to grind down their opponents, to hide or obfuscate facts, to delay, to run up their adversary's expenses, to increase their own fees . . . and on and on.

The 1993 amendments represented an attempt to implement a systemic solution to some of these problems.[86] The most controversial of these provisions required parties to voluntarily disclose certain information to their adversaries without awaiting a discovery request.[87] These "voluntary" mandatory disclosures were controversial precisely because they represented a challenge to two of the fundamental premises upon which the federal system of discovery had been based: this should be an adversarial process that is largely controlled by the litigants' attorneys. Other amendments represented a challenge to the assumption of attorney autonomy in planning and conducting discovery by imposing limits on the quantity of discovery available to the parties.[88] Each of these changes will be discussed in order.

A. Mandatory Disclosures

As originally formulated, the federal discovery rules were premised on the notion that, in practice, pretrial discovery was an adversarial process generally managed by attorneys.[89] The parties' attorneys would decide what discovery devices to use, the quantity of discovery to pursue, the timing of sequence of discovery, and would only obtain the information they requested. The most important of the 1993 amendments attacked this root theory by imposing upon parties a duty to disclose certain information to their adversaries without awaiting a mandatory discovery request, and by linking the timing of discovery to completion of the disclosure process.[90]

As a result, attorneys were required to gather information and turn it over to their adversaries, and the sequence and timing of discovery was subjected to a schedule partially dictated by the rule makers and not by the attorneys in individual cases. Not surprisingly, these amendments produced fierce

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Conboy, *Depositions, Discovery and Summary Judgments,* 22 A.B.A. J. 881, 884 (1936) (discussing practical advantages of right to free and unlimited discovery).

86. Earlier efforts had included adoption of local rules in the various districts limiting the quantity of discovery. For example, local rules limited the number of interrogatories parties could serve, the length of depositions, and so forth. Similarly, some judges began using pretrial conferences as opportunities to force parties to discuss settlement, to narrow the issues for discovery, and even to disclose "voluntarily" information to each other as a device for avoiding the cost and expense of formal discovery. But these were relatively piecemeal efforts, without the broad impact possible from a system of rules imposed nationally on all federal courts.

87. See *infra* Part II.A for a discussion of mandatory disclosure rules.

88. See *infra* Part II.B for a discussion of reduced attorney control over the discovery process.

89. *See supra* Part I.

90. *See* FED. R. CIV. P. 26(a)(1) (1993) (amended 2000) (requiring initial disclosures without awaiting discovery).

opposition.[91] The reasons for the opposition become apparent when we examine the text of the amendments.

The central innovation was contained in Rule 26(a)(1), which imposed a new duty to disclose information. The new text commanded: "Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties"[92] the name, address, telephone number and information possessed by potential witnesses;[93] copies or descriptions of documents, data compilations, or tangible things;[94] computations of damages and the documents upon which they are based;[95] the identity of possible trial experts, a written report containing "a complete statement of all opinions to be expressed" and the bases for those opinions, together with information about the expert's qualifications and compensation;[96] and pretrial disclosures about witnesses and evidence that a party "may present at trial other than solely for impeachment purposes."[97]

One of the most vexing parts of the new rule was the definition of the scope of the duty to disclose information about potential witnesses and evidence.[98] Parties had to disclose information that was "relevant to disputed facts alleged with particularity in the pleadings."[99] This definition created burdens for attorneys. On its face, Rule 26(a) ordered attorneys to first decide what facts were disputed and alleged with particularity in the pleadings. It then required them to identify and turn over the information they possessed that was relevant to those disputed facts alleged with particularity in the pleadings. In effect, a lawyer became the adversary's helper, acting without any discovery request to identify information potentially helpful to the adversary—and then disclosing this information to the opponent. As an added irritant, an adversary's attorney

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91. See *infra* notes 95-103 and accompanying text for a discussion of mandatory disclosure.

92. FED. R. CIV. P. 26(a)(1) (1993) (amended 2000).

93. Parties now had to disclose "the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information. . . ." FED. R. CIV. P. 26(a)(1)(A) (1993) (amended 2000).

94. Parties now had to provide "a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings. . . ." FED. R. CIV. P. 26(a)(1)(B) (1993) (amended 2000).

95. FED. R. CIV. P. 26(a)(1)(C) (1993).

96. FED. R. CIV. P. 26(a)(2) (1993).

97. FED. R. CIV. P. 26(a)(3) (1993).

98. In addition to information about witnesses and evidence, parties also were required to disclose:

> [A] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and information about relevant insurance coverage.

FED. R. CIV. P. 26(a)(1)(C), (D) (1993) (amended 2000).

99. FED. R. CIV. P. 26(a)(1)(A) (1993) (amended 2000).

apparently could increase the disclosure duty by pleading "with particularity" as many "disputed facts" as possible.

Once again, we need not debate the wisdom of the rule. It is enough to recognize how the mandatory disclosure concept conflicts with the adversary discovery model that preceded it. Many attorneys and judges did recognize this conflict, and the resulting outcry produced the oddest of compromises for a system originally enacted to create a uniform national system of procedural rules. As amended in 1993, Rule 26(a)(1) authorized the individual federal districts to "opt out" of the disclosure rules,[100] and nearly half ultimately did. The result was a crazy quilt of rules that varied from district to district.[101] The "opt out" provision in 26(a)(1) had an even odder and surely unanticipated side effect. Other mandatory disclosure provisions adopted in 1993 did not contain an "opt out" provision,[102] but a significant minority of districts "opted out" of these disclosure rules, as well.[103]

Rule 37 was amended to incorporate the new disclosure mechanisms, giving courts which had not "opted out" authority to impose sanctions on those who failed to make the disclosures required under Rule 26(a).[104] A range of sanctions was authorized for violations of the disclosure obligations. Courts could forbid the use of non-disclosed evidence or witnesses at trials and hearings, require payment of the adversary's "reasonable expenses, including attorney's fees, caused by the failure,"[105] or impose any other appropriate sanctions, including those previously available for violations of the discovery rules.[106]

As a result of the fragmented adoption of the 1993 amendments, the mandatory disclosure provisions have not been tested in all of the federal districts. That should change with the December 2000 amendments, which eliminate the "opt out" mechanism, and attempt to impose mandatory disclosures in all districts.[107] This will in turn highlight other related amendments first adopted in 1993. In particular, the extent to which the 1993 and 2000 changes, taken as a whole, appear designed to reduce attorney

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100. The discovery rules now commenced with the caveat: "[e]xcept to the extent . . . directed by local rule." FED. R. CIV. P. 26(a)(1) (1993) (amended 2000).

101. *See generally* Donna Stienstra, *Implementation of Disclosure in Federal District Courts*, 182 F.R.D. 304, 308-33 (1998) (charting different district courts' responses to Federal Rules of Civil Procedure 26).

102. Rule 26(a)(2) as enacted in the 1993 Amendments imposed new and extensive disclosure duties regarding experts and expert testimony. FED. R. CIV. P. 26(a)(2) (1993) (amended 2000). Rule 26(a)(3) imposed on each party extensive obligations to disclose information "regarding the evidence that it may present at trial other than solely for impeachment purposes." FED. R. CIV. P. 26(a)(3) (1993) (amended 2000).

103. *See* Steinstra, *supra* note 101, at 309-10 (charting districts that opted out of different parts of Rule 26(a)).

104. Rule 37 was amended to allow parties to file motions asking the court to compel disclosures and to impose appropriate sanctions. FED. R. CIV. P. 37(a) (1993) (amended 2000).

105. FED. R. CIV. P. 37(c)(1) (1993) (amended 2000).

106. FED. R. CIV. P. 37(c) (1993) (amended 2000).

107. See *infra* Part III for a discussion of mandatory disclosure requirements and other changes to the federal discovery rules.

autonomy in the discovery process will become more apparent.

B. Reduced Attorney Control Over the Discovery Process

The 1993 amendments adopted other mechanisms that reduced attorney autonomy in managing the discovery process.[108] For example, the 1993 amendments imposed limits on the sequence and timing of discovery.[109] Most dramatically, they prohibited any discovery until the parties had met and conferred to plan discovery under Rule 26(f).[110] They also dictated the timing of the disclosures, requiring that "[u]nless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f)."[111] The new rules specified the timing of pretrial and expert witness disclosures, as well.[112]

The new Rule 26(a)(1) emphasized that the duty to disclose could not be deferred, even for legitimate tactical considerations, including a party's wish to complete its own investigation before disclosing information to an adversary, or a party's concerns that its adversary was not complying with the mandatory disclosure rules. The rule commanded that:

> A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.[113]

In addition, the rule governing the duty to supplement responses was amended to account for the new mandatory disclosure provisions.[114] The 1993 amendments expanded the duty to supplement both responses to discovery

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108. See *infra* Part II.B for a discussion of reduced attorney autonomy in managing the discovery process.

109. See *infra* notes 110-12 and accompanying text for a discussion of the limits imposed on the sequence and timing of discovery by the 1993 Amendments.

110. Rule 26(d) provides: "Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f)." FED. R. CIV. P. 26(d) (1993) (amended 2000). Rule 26(f) provided, in part:

> Except in actions exempted by local rule or where otherwise ordered, the parties shall, as soon as practicable . . . meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan.

FED. R. CIV. P. 26(f) (1993) (amended 2000).

111. FED. R. CIV. P. 26(a)(1) (1993) (amended 2000).

112. *See* FED. R. CIV. P. 26(a)(2), (3) (1993) (amended 2000) (stating that disclosure of expert testimony shall be made at times and in sequence directed by court; and other pretrial disclosures shall be made at least thirty days before trial).

113. FED. R. CIV. P. 26(a)(1) (1993) (amended 2000).

114. "A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court" or in circumstances specified by the rule. FED. R. CIV. P. 26(e) (1993) (amended 2000).

requests and disclosures, a logical addition given the command that disclosures must be made according to the Rule's time schedule, even if a party has not completed its investigation of the case. Rule 26(e) now commanded that

> [A] party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.[115]

Identical duties were imposed for responses to written discovery requests.[116] On its face, this language expands the earlier duty to supplement only when the party *knows* an earlier response was incorrect or no longer is correct and failing to amend amounts to a "knowing concealment."[117]

The 1993 amendments also imposed new limits on attorney control over the quantity, timing, and conduct of depositions automatically available to attorneys.[118] Absent a written stipulation, judicial permission was required if an attorney wished to take more than *ten* depositions, to depose someone previously deposed in the case, or to take a deposition before the Rule 26(f) discovery conference.[119] Language was added to Rule 30 designed to restrict the opportunity for attorneys to interfere with the deposition process.[120]

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115. FED. R. CIV. P. 26(e)(1) (1993) (amended 2000).

116. FED. R. CIV. P. 26(e)(2) (1993) (amended 2000) provided:

> A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

117. *See* FED. R. CIV. P. 26(e)(2) (1993) (amended 2000) (discussing "knowing concealment").

118. See *infra* notes 119-20 and accompanying text for discussion of new limits placed upon attorney control by 1993 Amendments to Rule 30.

119. FED. R. CIV. P. 30 (1987) (amended 2000) (emphasis added). The text of Rule 30(a) was amended to require leave of court in the circumstances set forth below:

> (1) A Party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). . . .
>
> (2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), . . . if, without the written stipulation of the parties
>
> > (A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;
> >
> > (B) the person to be examined already has been deposed in the case; or
> >
> > (C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

FED. R. CIV. P. 30(a) (1993) (amended 2000). Identical limitations were imposed upon the use of written depositions under Rule 31. FED. R. CIV. P. 31 (1993) (amended 2000).

120. FED. R. CIV. P. 30(d)(1) (1993) (amended 2000) provided:

> Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer

Similar limits were imposed upon the use of interrogatories.[121] Absent a written stipulation, judicial permission was required if an attorney wished to serve more than twenty-five interrogatories, including subparts, or serve interrogatories before the Rule 26(f) discovery conference.[122] New language was added dictating how objections to interrogatories were to be made.[123]

While districts were not granted authority to "opt out" of these limits on the quantity of discovery, in practice these were not the most significant of the 1993 changes. Although they directly limited attorney autonomy, these kinds of provisions already had been adopted in many districts, and had already become a common part of pretrial litigation in the federal courts.[124] The most important changes in 1993 were the mandatory disclosure rules, because they signaled a fundamental shift in the nature of the adversarial discovery process. For a number of reasons, including the balkanized adoption of the disclosure rules, their impact has been blunted. Their impact will be felt more fully with the adoption of the 2000 amendments, which impose the disclosure rules on all districts—yet even this may not be the most significant of the changes contained in the new rules.

III. THE Y2K AMENDMENTS

The December 2000 amendments make a number of important changes to the federal discovery rules. First, by eliminating the "opt out" safety valve, they impose the mandatory disclosure requirements on all districts.[125] In an apparent

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only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

121. After the 1993 Amendments, the text of Rule 33, governing interrogatories to parties, included the following language:

> (a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).
>
> (b) Answers and Objections.
>
> > (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.
> >
> > ....
> >
> > (4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

FED. R. CIV. P. 33 (1993).

122. *Id.*

123. *Id.*

124. See *supra* Part II.B for a discussion of reduced attorney autonomy in managing the discovery process.

125. See *infra* Part III.A.1 for a discussion of the elimination of the "opt out" provision and

effort to mollify critics of the disclosure concept, the new rules also attempt to narrow the scope of the information that must be disclosed.[126] Second, these amendments impose additional quantitative limits on deposition practice.[127] Finally, they redefine—and narrow—the scope of discovery which parties are entitled to pursue.[128] As a result, attorneys can be required to obtain prior judicial approval before conducting discovery that automatically would have been available in the past.[129] These changes are likely to generate expensive and time consuming changes in motion and pleading practice.

The following discussion will review the most important of the 2000 amendments to the federal discovery rules. In many ways these changes build upon and extend the 1993 amendments discussed above. Examined in that context, the 2000 amendments reveal a continuing movement away from the adversarial model of attorney managed discovery and toward a system of court managed discovery and pretrial litigation.

A. Mandatory Disclosures

1. The End of the "Opt Out" Safety Valve

The 2000 amendments eliminate the "opt out" provision adopted in 1993 by simply deleting the phrase "local rule" from Rule 26(a)(1).[130] As a result, for the first time all districts are subject to the mandatory disclosure rules. A primary purpose behind this change is to create uniform national rules of procedure.[131] The new text of these rules still permits judges to issue orders altering the quantity of discovery in individual cases, while prohibiting local rules that deviate more globally from the national discovery rules.

2. The Scope of the Duty to Disclose

To mollify critics who objected to abolition of the opt out safety valve, the 2000 amendments narrow the scope of the information that must be disclosed under the mandatory disclosure rules.[132] As noted earlier, the 1993 version of Rule 26(a)(1) required litigants to disclose specified information about witnesses, evidence, damages, and insurance that was "relevant to disputed facts

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universal application of mandatory discovery rules.

126. See *infra* Part III.A.2 for a discussion of the scope of the information that must be disclosed under the mandatory disclosure rules.

127. See *infra* Part III.B for a discussion of the quantitative limit on discovery.

128. See *infra* Part III.C for a discussion of changes in the scope of the subjects that parties are entitled to discover under the 2000 amendments.

129. *See infra* notes 149-72 and accompanying text.

130. FED. R. CIV. P. 26(a)(1).

131. See *infra* notes 147-48 and accompanying text for a discussion of the Advisory Committee's deliberations.

132. FED. R. CIV. P. 26(a). See *infra* notes 134-38 and accompanying text for a discussion of the scope of information disclosures under the 2000 amendments.

alleged with particularity in the pleadings."[133] The 2000 amendments leave unchanged the categories of information that must be disclosed, but alter the scope of the obligation to disclose information about witnesses and evidence.[134]

The new rules require litigants to disclose information about witnesses and evidence "that the disclosing party may use to support its claims or defenses, unless solely for impeachment. . . ."[135] This change is to some extent inconsistent with the thesis (presented in this Article) that in general the recent amendments move away from the adversarial model. The 1993 definition of the scope of disclosures—witnesses or evidence "relevant to disputed facts alleged with particularity in the pleadings"—left attorneys somewhat at the mercy of their adversaries, who might have been able to increase the disclosure burden by pleading with greater specificity.[136] The 2000 disclosure standard—witnesses or evidence "that the disclosing party may use to support its claims or defenses, unless solely for impeachment"[137]—obviously is crafted to give attorneys more strategic control over the information they must disclose. Their own litigation strategy is more likely to dictate what information they must disclose, and at the very least, attorneys are freed from the burden of disclosing evidence that is the proverbial "smoking gun." Because this is evidence they will not use in support of their claims or defenses, they need not provide this information until an adversary presents a proper discovery request.

On the other hand, this new standard inevitably will permit attorneys to try to "game" the disclosure process, and will almost certainly generate additional disputes within individual lawsuits. Since the rules, particularly Rule 37, permit sanctions for failure to make the required disclosures, it is easy to imagine how this change in the scope of disclosures will produce disputes.[138]

Imagine, for example, that one party attempts to call a witness or use evidence in its case-in-chief (even at a pretrial evidentiary hearing) that had not been disclosed as required under 26(a)(1). The adverse party is entitled, under the Rules, to seek to have the court exclude the witness or evidence from any proceeding.[139] The non-disclosing proponent nonetheless might claim that it had complied with the rule because, until the last moment, it did not intend, expect,

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133. See *supra* notes 92-99 and accompanying text for a discussion of the 1993 version of Rule 26(a)(1).

134. The mandatory disclosures about experts remain unchanged under FED. R. CIV. P. 26(a)(2). The disclosures required for "information regarding the evidence that it may present at trial other than solely for impeachment" (information about witnesses, evidence, etc.) also remain unchanged, except that the rule was amended to specifically refer to "the disclosures required by Rule 26(a)(1) and (2)," and it now requires that in addition to providing that information "to other parties," it must also "promptly file [it] with the court." FED. R. CIV. P. 26(a)(3). The time periods for making these trial related disclosures are unchanged. *Id.*

135. FED. R. CIV. P. 26(a)(1)(A), (B).

136. *See supra* notes 89-107 and accompanying text.

137. FED. R. CIV. P. 26(a)(1)(A), (B).

138. *See, e.g.*, FED. R. CIV. P. 37(c)(1) (authorizing sanctions including prohibiting use of evidence at trial, at a hearing, or on motion; requiring payment of attorney fees and reasonable expenses caused by failure; and informing jury of failure to make such a disclosure).

139. FED. R. CIV. P. 37.

or even think it was remotely possible that it would call the witness or to use the evidence in its case in chief. Therefore, the failure to disclose did not violate the duty to disclose such information "that the disclosing party *may use to support its claims or defenses,* unless solely for impeachment."[140]

The question is not if these disputes will arise. The question is how quickly, and how often.

3. Exempted Proceedings and the Timing of Disclosures

The drafters also acted to reduce the impact of the now universal disclosure rules by exempting eight categories of lawsuits from the disclosure rules.[141] These categories encompassed types of litigation where the Advisory Committee concluded that disclosures were not required because they were not useful—and frequently not used—for various reasons, but often because the nature or value of the dispute did not justify incurring the costs of complying with the disclosure requirements.[142] Rule 26(a)(1) now also grants litigants a few more days to make the disclosures after the Rule 26(f) conference, and reaffirms judicial authority to alter the disclosure and discovery rules in individual cases, although not by promulgating more global local rules.[143]

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140. FED. R. CIV. P. 26(a)(1) (emphasis added).

141. See *infra* note 142 for the text of the eight categories. The Advisory Committee apparently conceived of this as "low end" exclusion, in contrast to "high end" exclusion, exemplified by complex cases in which parties are likely to agree that mandatory disclosure is not appropriate. *See generally* Minutes: Civil Rules Advisory Committee (April 19 and 20, 1999) (hereinafter "April 1999 Minutes"), *available at* http://www.uscourts.gov/rules/Minutes/0499civilminutes.htm; Minutes: Civil Rules Advisory Committee (March 16 and 17, 1998) (hereinafter "March 1998 Minutes"), *available at* http://www.uscourts.gov/rules/Minutes/0398civilminutes.htm (documenting Advisory Committee proceedings).

142. The new Rule 26(a)(1)(E) exempts from the initial disclosures required by Rule 26(a)(1):

(i) an action for review on an administrative record;

(ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(iv) an action to enforce or quash an administrative summons or subpoena;

(v) an action by the United States to recover benefit payments;

(vi) an action by the United States to collect on a student loan guaranteed by the United States;

(vii) a proceeding ancillary to proceedings in other courts; and

(viii) an action to enforce an arbitration award.

FED. R. CIV. P. 26(a)(1)(E).

143. The new text decrees:

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. . . . Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. . . .

FED. R. CIV. P. 26(a)(1).

B. *Additional Limits on the Quantity of Discovery*

The 1993 Rules imposed limits on the quantity of discovery automatically available to lawyers.[144] Unless a party was successful at obtaining a written stipulation of the parties or "leave of court," that party was limited to a total of no more than ten oral and written depositions under Rules 30 and 31, and under Rule 33 could "serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served . . . ."[145]

The Rules, as amended in 2000, retain these limits but also add a presumptive limit on the length of depositions.[146] The new rule (italics indicate the new language) decrees:

> *Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours.* The court *must* allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another *person, or other circumstance,* impedes or delays the examination.[147]

Again it is easy to imagine how lawyers will try to exploit the rule in ways that will generate collateral disputes. Indeed, even the text of the amended rule anticipates that some witnesses and lawyers will use delaying tactics by allowing judges to permit additional time to compensate for dilatory conduct.[148]

C. *Restricting Attorney Autonomy: Attorney Managed Discovery and Court Managed Discovery*

The most significant of the 2000 revisions change the scope of the subjects that the parties are entitled to discover. Until this latest round of amendments, the scope of discovery was so broad that parties could "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 . . . ."[149] This expansive definition allowed attorneys to conduct detailed inquires about matters not directly related to the issues in dispute in the litigation. An attorney typically would be entitled to inquire at deposition, for example, about the education and employment background of an adversary's witnesses, even when that information was not directly at issue in the lawsuit. All that was required was that the "information sought appear[ed] reasonably calculated to lead to the

144. *See supra* notes 108-24 and accompanying text.

145. FED. R. CIV. P. 30, 31, 33 (1993) (Rule 30 amended 2000).

146. FED. R. CIV. P. 30(d).

147. FED. R. CIV. P. 30(d)(2) (emphasis added).

148. The new language includes dilatory conduct by "another person," which is terminology consistent with a minor textual change to Rule 30(d)(1). The amendment substitutes the word "person" for "party," so the text now provides that "[a] *person* may instruct a deponent not to answer only when necessary to preserve a privilege. . . ." FED. R. CIV. P. 30(d)(1) (emphasis added).

149. FED. R. CIV. P. 26(b)(1) (1991) (amended 2000).

discovery of admissible evidence."[150] And the attorney need not bother to ask for judicial permission to conduct the inquiry—she was entitled to pursue the topic.[151]

The 2000 amendments to Rule 26(b)(1) may change this kind of discovery practice. They create two categories of discovery. The first, "attorney managed" discovery, includes the topics an attorney may discover without getting permission from a judge.[152] The second category, "court managed" discovery, requires judicial approval.[153] Both are defined in the new text of Rule 26(b)(1), which directs that unless altered by court order, the scope of discovery is: "*Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, ... For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.*"[154]

The first italicized passage defines "attorney managed" discovery. Under this new formulation, attorneys are only entitled to "obtain discovery regarding any matter, not privileged, that is *relevant to the claim or defense of any party.*"[155] This new language—"*relevant to the claim or defense*"—is purposely narrower than the old language—"*relevant to the subject matter involved in the pending action.*"[156] Attorneys are entitled to conduct discovery—subject to the limitations now imposed on the quantity and timing of discovery—using any means, and in any sequence, only about matters that fit within this category. If they want to conduct discovery that ranges as broadly in scope as that to which they generally have been entitled for the past six decades, the new rule decrees that they first must get judicial permission. To inquire about topics not "relevant to the claim or defense of any party" but nonetheless "relevant to the subject matter involved in the pending action," a lawyer will have to persuade a judge that "good cause" exists for this additional discovery.

In other words, to discover some kinds of information that may prove to be useful, the discovering attorney must obtain prior judicial approval, and that approval is not guaranteed or required. Judges are left with discretion to decide whether to permit discovery to which a litigant typically would have been entitled—absent some overreaching or misconduct in the past.

Some of the problems with this formulation are readily apparent. How are judges and lawyers to draw the line between information relevant to claims and defenses and information relevant to the litigation's subject matter? In some situations, we can anticipate that members of the profession will simply continue to practice as they have in the past, following the old ways for as long as that is

150. *Id.*

151. See *supra* notes 38-56 and accompanying text for a discussion of attorneys' ability to conduct discovery prior to the amendments.

152. The Advisory Committee uses the labels "lawyer-managed discovery" and "court managed discovery" to describe the two categories of discovery. *See, e.g.*, March 1998 Minutes, *supra* note 141, at 10 (using these terms).

153. *See supra* note 152 (discussing term "court managed").

154. FED. R. CIV. P. 26(b)(1) (emphasis added).

155. *Id.* (emphasis added).

156. FED. R. CIV. P. 26(b)(1) (1991) (amended 2000) (emphasis added).

possible. In some situations, we can anticipate that lawyers will finesse the issue by either tacit or explicit agreement. If all parties want to engage in wide-ranging discovery, mutual incentives exist for ignoring this distinction. If no one complains to the judge, after all, this distinction will have little "bite."

But if experience teaches us anything, it is that lawyers engaged in the contentious processes of litigation do not always agree. We can expect that in many situations lawyers will not agree about the scope of discovery, but instead will—for a variety of reasons—stake out adversarial positions on this issue. As a result, the new bifurcated classification will provoke many new discovery battles that will, in turn, generate countless motions. In addition, it is likely that these amendments will lead to changes in pleading practice.

1. Discovery Motions

It is impossible, of course, to predict with certainty how lawyers will respond to this change in the Rules. One likely result is that discovery related motion practice will increase as lawyers attempt both to restrict the scope of their adversaries' discovery and to obtain judicial permission to seek information that falls outside the scope of attorney managed discovery. It is easy to imagine how the motion battle will be fought, and easy to see how this new language will cause parties to file motions. Assume that a plaintiff's attorney asks a deposition question or serves an interrogatory that the defendant's attorney does not want his client to answer, and the defendant's attorney can identify some arguably good faith basis for claiming that the issue is beyond the scope of attorney managed discovery. The defense attorney can object to the question and file a motion for a protective order, claiming that even if the disputed deposition question or interrogatory is relevant to the subject matter of the litigation, it is not relevant to a claim or defense, and discovery should be prohibited on the issue. To obtain this information, the discovery proponent would be forced to file a motion to compel discovery, along with a response in opposition to the motion for protective order. The discovery opponent then would file a response in opposition to the motion to compel.[157]

157. The procedure for raising the objection that the question is beyond the scope of attorney managed discovery should follow prior practice with some discovery methods. For example, an attorney objecting to an interrogatory can simply state this as her ground for refusing to answer in the written response. *See* FED. R. CIV. P. 33(b) ("Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable."). Objections to requests for admissions and production also can be made in written responses to these discovery requests. FED. R. CIV. P. 34, 36(a).

How this kind of objection will be made during depositions raises more difficult questions. The rules still provide that:

> [a]ll objections made at the time of the examination to the . . . manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections.

FED. R. CIV. P. 30(c).

This language suggests that the attorney should note her objection for the record and then oppose

Because all parties will be entitled to object that their adversaries' discovery requests are beyond the scope of attorney managed discovery, the new scheme with two categories of discovery provides countless opportunities for collateral discovery disputes. Of course, in some cases these disputes will be limited by the reality that all of the parties will want broad discovery, and will be willing to stipulate around these disagreements. But this will not always be the case. The predictable result of the creation of two classes of discovery is, at least in the near term, that more motions will be filed; more hearings will be held on these motions; costs will soar; attorneys will bill clients for the work; and clients will complain that litigation is too slow, costly, and inefficient.

2. Impact on Pleading Practice

By linking the scope of attorney managed discovery to information relevant to claims and defenses pleaded by the parties, the 2000 amendments provide incentives for attorneys to plead more broadly. In particular, attorneys who hope to engage in wide ranging discovery will be encouraged to include all possible claims and defenses in their pleadings. By expanding the issues raised in their claims and defenses, attorneys will be entitled to obtain more discovery without being forced to get a court order allowing it. It is also possible that some of these attorneys will conclude that they are more likely to prevail in disputes about the scope of attorney managed discovery by drafting pleadings containing much greater detail than the bare bones pleading required under Rule 8.[158] In most settings, lengthier and more detailed pleadings will take more time to draft, be more costly to produce, and inevitably will generate other costs. An

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the use of the material objected to at a later proceeding. This position is supported by another passage in Rule 30, imposing limits on instructions not to answer: "A person may instruct a deponent not to answer only when necessary to preserve a privilege. . . ." FED. R. CIV. P. 30(d)(1).

On the other hand, if the scope of attorney managed discovery has been restricted in order to save time and money and discourage discovery abuse by preventing inquiry into these matters without judicial approval, then logically the discovery opponent can instruct the deponent not to answer questions outside the scope of attorney managed discovery. Because the discovering party now is entitled to discover only those matters relevant to claims and defenses, a deponent should not be obligated to answer questions beyond that scope.

The discovery opponent can support this argument by pointing to Rule 26(c), which provides:

> Upon motion by a party or by the person from whom discovery is sought . . . and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters.

FED. R. CIV. P. 26(c).

Rather than answer questions exceeding the scope of attorney managed discovery and seek to exclude them from use in later proceedings, the proper procedure may be to refuse to answer those questions and seek a protective order—or force an adversary to file a motion to compel discovery. The alternative to an instruction not to answer specific questions, after all, may be to terminate the deposition until a judge can rule on the dispute. Ultimately, this will be more costly and time consuming than having the deposition continue onto other matters, with the dispute about scope raised in later proceedings.

158. FED. R. CIV. P. 8.

important byproduct of lengthier, more detailed pleadings will be an increase in motion practice.[159]

Lengthier and more complex pleadings are likely to produce more motions, including motions to dismiss for failure to state a claim,[160] motions to strike,[161] and motions for a more definite statement.[162] The irony of this result should be apparent to anyone who recalls that one of the original goals of the 1938 Rules was to save time and money by minimizing disputes generated by the pleadings.[163] One of the central reforms of the 1993 Rules was to abandon the lengthy and technical requirements of earlier common law and code pleading.[164] Because the Rules' drafters believed that those forms of pleading had been a primary cause of litigation delay, expense, inconvenience, and emphasized procedural games over the substantive merits of the disputes, they embraced notice pleading, with its bare bones and easy to satisfy requirements for stating a claim.[165]

Of course, minimal content in the pleadings made pretrial discovery a necessity. Without detailed information in the pleadings, the Rules' drafters recognized that discovery was essential for the parties to learn what the dispute entailed.[166] The drafters of the 1938 Rules believed—naively and inaccurately it turns out—that pretrial discovery would allow the parties to get to the merits of disputes quickly and cheaply, and that any problems associated with the new wide-open discovery would be corrected by the judiciary.[167] It is more than a little ironic that after more than sixty years of struggling with this system, the current version of the Rules seems likely to promote more complex pleadings, accompanied by an inevitable increase in motion practice.

The current Rules do provide some mechanisms for reducing these kinds of discovery costs. For example, it is arguable that the quantitative limits now imposed on discovery will reduce the incentive to overplead in an attempt to obtain broader discovery as a matter of right. A party is only entitled to serve twenty-five interrogatories, including subparts, and to take ten depositions, each lasting only seven hours. Parties who plead broadly in an effort to obtain more discovery remain subject to these quantitative limits unless a judge grants them additional discovery. If judges enforce the Rules strictly, and parties do not stipulate around these limits, perhaps the Rules will discourage expansive pleading to obtain the benefits of expansive discovery. Of course, the Rules

159. These issues were debated within the Advisory Committee, which enacted these amendments despite the possibility that they would generate these collateral costs for litigants. *See, e.g.*, April 1999 Minutes, *supra* note 141 (documenting Advisory Committee proceedings).

160. FED. R. CIV. P. 12(b)(6).

161. FED. R. CIV. P. 12(f).

162. FED. R. CIV. P. 12(e).

163. *See* Subrin, *supra* note 18, at 717-29.

164. *Id.*

165. FED. R. CIV. P. 8.

166. *See* Subrin, *supra* note 18, at 709.

167. *Id.* at 717-29.

permit a judge to expand these quantitative limits in individual cases.[168] It is easy to imagine, for example, that a judge would be willing to expand these limits in complex products liability, antitrust, or class action litigation, particularly if the lengthy pleadings contained expansive claims that in turn included detailed allegations.

3. Shifting Litigation Costs

Any doubts that the Advisory Committee intended to affect the scope of discovery should be dispelled by proposed changes to Rule 26(b)(2) that ultimately were not adopted in December 2000. The proposed amendments to Rule 26(b)(2) contained explicit cost shifting authority permitting judges to require parties seeking broad discovery to bear not only their own costs, but also the costs—including attorneys' fees—incurred by other parties as a result.[169] The proposed Rule 26(b)(2) allowed courts to "require a party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party" if specified conditions existed.[170]

The Advisory Committee notes make it quite clear that the purpose of this proposed cost shifting mechanism, in the context on the new limits on the scope of discovery, was to discourage litigants from seeking extra discovery.[171] Not only would this mechanism make discovery more expensive, it would force a party to suffer the indignity of being forced to pay its adversary's attorneys' fees.

Although this language was removed when the 2000 amendments were submitted to the Judicial Conference, it may still have "life." During the debates about the cost shifting provision, some argued that the Rules, including 26(b)(2) and 26(c), already grant judges the implicit authority to deploy this device.[172]

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168. *See* FED. R. CIV. P. 26(b)(2) (1993) (amended 2000) (stating that "the courts may alter the limits in [the federal 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").

169. *See* March 1998 Minutes, April 1999 Minutes, *supra* note 141.

170. The conditions specified remain part of the rule despite rejection of the explicit cost shifting language. A judge may limit discovery when:

> (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 Rule 26(c).

FED. R. CIV. P. 26(b)(2) (1993) (amended 2000).

171. *See, e.g.*, March 1998 Minutes, April 1999 Minutes, *supra* note 141.

172. Should this argument be accepted, it is easy to imagine the motions this theory would generate by parties who have lost in their attempts to restrict an adversary to attorney managed discovery. The losing discovery opponent would then ask the judge to condition the broader discovery upon payment of its reasonable costs, including fees. Of course, that would not be the end of the motions. Later, when the opponent sought payment of its costs, we can anticipate additional motions and hearings designed to determine what would be a reasonable charge.

Regardless of the future of this argument, the attempt to add an explicit cost shifting mechanism to discourage broader discovery sends a clear signal. The creation of two classes of discovery in Rule 26(b) was intended as a presumptive restraint upon the quantity of discovery.

D. Miscellaneous Changes

1. Discovery Conference: Timing and Sequence of Discovery

In general, the amendments to Rule 26(f), which governs discovery conferences, are technical and limited. One amendment recognizes the invention of the telephone by eliminating the requirement that parties *meet* and confer. Now they must only confer.[173] On the other hand, new language permits the court to order the parties and their counsel to personally attend the conference.[174]

The 2000 amendments change the time limits imposed upon litigants. The new rule forces the parties to confer and to submit their proposals to the court a few days earlier than was previously required. The stated purpose is to give the court more time. The rule does, however, permit the court to shorten these time limits in individual cases, and even to dispense with the requirement of a written report—and to permit instead an oral report at the Rule 16(b) conference.[175] Of greatest significance for this Article, Rule 26(f), together with Rule 26(d), retain both the moratorium upon discovery linked to the discovery conference and the limits on the timing of discovery enacted in the 1993 amendments.[176]

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173. *See* FED. R. CIV. P. 26(f) (1993) (amended 2000).

174. *Id.*

175. *Id.*

176. The new Rule 26(f) includes the following text (italicized language indicates text added in the December 2000 amendments):

> *Conference* of Parties; Planning for Discovery. Except in *categories of proceedings* exempted *from initial disclosure under Rule 26(a)(1)(E)* or when otherwise ordered, the parties *must*, as soon as practicable and in any event at least *21* days before a scheduling conference is held or a scheduling order is due under Rule 16(b), *confer* to *consider* the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by *Rule 26*(a)(1), and to develop a proposed discovery plan. . . .
>
> The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging *the conference*, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within *14* days after the *conference* a written report outlining the plan. *A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.*

FED. R. CIV. P. 26(f) (emphasis added).

2. Sanctions for Failure to Disclose Information

The 2000 amendments added language to Rule 37 augmenting the expanded duty to supplement responses to discovery requests first adopted in 1993. The rule now provides that a party is subject to the sanctions authorized in the rule if that party "without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), *or to amend a prior response to discovery as required by Rule 26(e)(2).*"[177]

CONCLUSION

The amendments to Rules 26(f) and 37 discussed in the preceding paragraphs are generally technical changes, but they highlight an important point. Taken together, the 1993 and 2000 amendments have eroded the model of adversarial pretrial discovery managed by largely autonomous attorneys that has been embodied in the federal rules. Attorney behavior is increasingly constrained by rule based limitations, some of which command that they act proactively to provide information to their adversaries.

Obviously, attorneys who practice in federal courts must become aware of these new rules. For attorneys who litigate in numerous federal districts, the 2000 amendments should reduce the burdens created by the balkanized rules that resulted from the 1993 round of changes. On the other hand, the recent amendments are likely to create burdens for litigators who practice only in federal districts that had opted out of the 1993 disclosure rules, or in states that have adopted discovery rules based upon the federal discovery rules as they existed before 1993.

Taken together, the 1993 and 2000 changes to the federal discovery rules have created a divergence between state and federal practice that arises from increasingly different theories about the nature of discovery—and the role of lawyers in discovery. In the long run, the most significant attribute of recent amendments to the federal rules is the underlying set of theories upon which they rest. These theories have the potential to produce fundamental changes in civil litigation in the federal courts.

This may not be obvious if we look only at the details of the individual amendments. Some information must be disclosed without awaiting a discovery request, but much information still is not subject to the mandatory disclosure rules. Lawyer control over the timing of discovery is constrained by the disclosure and discovery conference provisions of the rules, but once those deadlines are passed attorneys control the timing and sequence of discovery much as they did before. The scope of discovery that attorneys can orchestrate without obtaining permission from a judge has been restricted, but attorneys still can in engage in discovery that appears almost unlimited compared to that which was available before adoption of the 1938 Rules. The full panoply of discovery devices remains available, and attorneys remain free to discover information

177. FED. R. CIV. P. 37(c)(1) (emphasis added).

relevant to any party's claims and defenses. If this is not enough, they can discover even more broadly if they can persuade judges to allow it. Quantitative limits have been imposed on the use of interrogatories and depositions, but these kinds of limits had already been adopted by local rules in the various districts. The duty to supplement earlier responses has been increased, but it is still limited to amending answers that are not correct. Viewed separately, the changes may appear insignificant.

But if we look at these changes collectively, and not as isolated events, it becomes apparent that the trend is away from attorney autonomy and toward rule based and judge managed limits on the process. This is no accident. The drafters of the recent amendments appear to be influenced by the federal district that has imposed the most effective and stringent system of judicial management of pretrial litigation.

Perhaps the most ambitious mechanisms for controlling the processes of pretrial litigation have been developed by the judges in the Eastern District of Virginia, which has become famous, or infamous depending on how you view these things, as the "Rocket Docket"—a reference to the speed with which cases are moved through the pretrial stages of pleading, discovery, and motion practice to trial or other disposition. By local rule, the Eastern District judges have imposed and enforced strict limits on pretrial practice, including both motion and discovery practice, including the kinds of limits on the quantity of discovery recently enacted in the federal rules. The hallmark of litigation in the Eastern District is that judges actively manage the cases.

The text of the 2000 amendments suggest that the Rules Advisory Committee was influenced by the local rules and practices of the Rocket Docket. Indeed, the Advisory Committee even included language in Rule 26 designed to exempt that district from the new time limits for Rule 26(f) conference procedures.[178]

It is easy to understand why this is an attractive model and yet be skeptical about the latest reform efforts. The goals of the federal discovery rules have remained unchanged for over sixty years: to create a faster, cheaper, more efficient system that reduces lawyer manipulation of procedural rules in favor of focusing on the merits of the case. The unfortunate reality is that after decades of reform efforts, civil litigation remains slow, expensive, inefficient, subject to manipulation by lawyers, and often fails to produce optimal outcomes. With this disappointing track record, we are certainly entitled to suspect that the current round of changes to the rules will be similarly ineffective.

In the short term, this will be the likely result. As has happened in the past, the current round of amendments may simply shift the focus of attorney activity. Just as the 1938 Rules shifted much of lawyers' pretrial activity from the pleadings to discovery, the current rules may reduce the effort expended upon exhaustive discovery but increase the time and resources devoted to motion and pleading practice.

178. *See* April 1999 Minutes, *supra* note 141.

In the long term, the changes to the Rules could alter the fundamental nature of civil litigation. The judges of the Rocket Docket have demonstrated that large numbers of cases can be moved expeditiously through the processes of pretrial litigation if strict rules are strictly enforced by judges willing to devote personal and institutional resources to the task. The federal discovery rules as written appear to be evolving in ways that increasingly encourage judges to exert just this kind of control over the processes of pretrial litigation; but the rules written in the "books" are not necessarily the rules in action. The real test will be how the new rules are—or are not—enforced.