Summary of Proposed Memorandum to the Supreme Court on the Proposed Disclosure Amendment to Rule 26(a) of the Federal Rules of Civil Procedure to be Joined in by the Litigation Section of the District of Columbia Bar

The Litigation Section intends to join in a Memorandum to be submitted to the Supreme Court of the United States urging the rejection of the proposed disclosure amendment to Rule 26(a) of the Federal Rules of Civil Procedure that would impose "on parties a duty to disclose, without awaiting formal discovery requests, certain basic information."

The Memorandum requests that the Supreme Court reject the proposed disclosure amendment and return it to the Judicial Conference of the United States for further study and comment. To begin with, the Memorandum points out the defects in the process through which the proposal was recommended for adoption. No public comment was solicited from the Bench or Bar on the final version of the proposed amendment. Opposition to an earlier version of the proposal was extremely strong and widespread.

The Memorandum identifies three major procedural reasons why the Supreme Court should not adopt the proposal at this juncture. First, adoption now, without adequate attention to the public concerns expressed about the controversial proposed rule, could compromise judicial control of the rulemaking process. Second, because the potential efficacy of reforms depends upon broad support and respect for the reform proposals, which are lacking for the proposed amendment, successful implementation of the proposed rule is highly unlikely. Third, empirical data from ongoing experiments in the district courts under the Civil Justice Reform Act on discovery reform should be evaluated before any decision is made to go forward with a nationwide disclosure requirement.

The Memorandum also argues that the proposal of automatic, pre-discovery disclosure is substantively flawed in three significant respects. First, the proposal's disclosure standard is unacceptably vague; it fails to describe a party's disclosure obligation with sufficient clarity and specificity to allow a party to make disclosure with any certainty of compliance. Second, the proposal will cause unnecessary, burdensome costs and delays, primarily by precipitating satellite litigation. Third, mandatory disclosure conflicts with the ethical obligations of lawyers to their clients under the adversary system, adversely affecting the attorney-client relationship and the work product doctrine.

The Memorandum was prepared by the Procedural Rules Committee of the Lawyers for Civil Justice, a non-profit public interest organization. It is expected that, in addition to the Litigation Section, the following organizations will join in the Memorandum: the Litigation Section of the American Bar Association, the American Corporate Counsel Association, the Business Roundtable Lawyers Committee, the Defense Research Institute, the National Association of Manufacturers, the Product Liability Advisory Council, the U.S. Chamber of Commerce and the Alliance for Justice.

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February 10, 1993

To the Chief Justice of the United States and the
Associate Justices of the Supreme Court of the United States

Dear Members of the Supreme Court,

With this letter, I am filing a statement which has been prepared by a group of lawyers practicing before the Federal Courts. The purpose of the statement is to oppose the adoption of the proposed "disclosure" amendment to Rule 26(a)(1) of the Federal Rules of Civil Procedure, at least until further hearings have been held. This is based on defects in the process through which the proposal was presented to this Court, and substantive flaws in the proposal itself.

The lawyers participating in this presentation are representing the following organizations, all of which have indicated their approval of the attached memorandum by action of their governing bodies.

American Legislative Exchange Council
Association of Defense Trial Attorneys
Business Roundtable Lawyers' Committee
Chamber of Commerce of the United States
Federation of Insurance and Corporate Counsel
International Association of Defense Counsel
Lawyers for Civil Justice
Litigation Section of the District of Columbia Bar
Public Citizen Litigation Group

If the committee of lawyers on whose behalf I write can be of any further assistance to the Court, the Clerk may notify us, and we will be glad to respond.

Respectfully submitted,

Erwin N. Griswold

Erwin N. Griswold
A Member of the Bar of this Court

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

COMMENTS ON PROPOSED "DISCLOSURE" AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 26(A)(1)

SUBMITTED BY

AMERICAN LEGISLATIVE EXCHANGE COUNCIL
ASSOCIATION OF DEFENSE TRIAL ATTORNEYS
BUSINESS ROUNDTABLE LAWYERS COMMITTEE
CHAMBER OF COMMERCE OF THE UNITED STATES
FEDERATION OF INSURANCE AND CORPORATE COUNSEL
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL
LAWYERS FOR CIVIL JUSTICE
LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR*
PUBLIC CITIZEN LITIGATION GROUP

February 10, 1993

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MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

COMMENTS ON PROPOSED "DISCLOSURE" AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 26(a)(1)

Submitted By

I. Summary

The undersigned organizations respectfully request that the Court reject the proposed amendment to Federal Rule of Civil Procedure 26(a)(1) that would impose "on parties a duty to disclose, without awaiting formal discovery requests, certain basic information . . . ."[1] The proposed automatic, pre-discovery disclosure amendment, described by even its drafters as "radical," is the most widely controversial of the amendments to the federal civil rules and forms that the Judicial Conference forwarded to the Court for approval on November 27, 1992.[2] The disclosure proposal should be returned to the Committee on Rules because of defects in the process through which the proposal was adopted, and substantive flaws in the proposal itself. Although the organizations joining this memorandum oppose the proposed disclosure amendment to Rule 26(a)(1), we commend the Committee for its excellent work in making significant other improvements in the Rules.

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[1] Committee Notes on Rule 26(a)(1), Standing Comm. on Rules of Practice and Procedure, Judicial Conference of the United States, Proposed Amendments To The Federal Rules of Civil Procedure and Forms, 93-94 (November 1992) [hereinafter "November 1992 Amendments"]. Attached as Appendix A.

[2] See Administrative Office of the U.S. Courts, November 27, 1992 Memorandum to the Chief Justice of the United States and the Associate Justices of the Supreme Court [hereinafter "Transmittal Memorandum to Supreme Court"].

Contrary to the spirit of the 1988 congressional mandate directing increased public involvement in the rules amendment process, no public comment was solicited from the bench or bar on the final version of the Rule 26(a)(1) amendment. Public comment was solicited on an earlier version of the disclosure amendment put forth in August of 1991. Over two hundred written statements of opposition from every segment of the bench, bar, and business community were filed with the Advisory Committee in response.[3] At two public hearings on the August 1991 version of the amendments, one in November of 1991 in Los Angeles and the second in February of 1992 in Atlanta, 76 witnesses testified against disclosure because of the harmful effects the concept will have on litigants, discovery, and the civil justice system generally.

The widespread opposition was based on firmly expressed views that the disclosure proposal would create serious new problems with the pretrial process and exacerbate the very discovery abuses that the Advisory Committee intended to cure. The Advisory Committee initially seemed responsive to these concerns. In fact, it voted to withdraw the disclosure concept from the remaining proposed amendments at the close of the last public hearing in February 1992. Shortly before the Committee's next meeting, however, but after the period for public comment had closed, a memorandum was circulated calling for the Advisory Committee to reinstate the disclosure proposal.[4] In response, a

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[3] Over 95% of the 208 judges, bar organizations, scholars, corporations, and individual members of the bar who commented on the initial public version of the proposed disclosure amendment were against it. See Appendix B, Summary of Comments In Opposition To Disclosure; Appendix C, Individuals and Organizations Submitting Comments In Opposition To Disclosure.

[4] See Ann Pelham, Panel Flips, OKs Discovery Reform, Legal Times, Apr. 20. 1992, at 6 (copy of article attached at Appendix D).

substantially revised version of the disclosure proposal was drafted overnight during the April 1992 meeting, approved, and forwarded to the Rules Committee without being circulated to the public or published in even a single legal periodical. As a consequence, the bench, bar, and public were prevented from having any meaningful opportunity to comment on the revisions or to consider whether the amendments were responsive to the significant concerns initially expressed.

The decision not to allow public comment on the revised disclosure amendment assumes even greater importance in light of the amendment's potential to undermine other discovery reform activities now underway in a significant number of federal district courts.[5] Under a mandate from Congress enacted in the Civil Justice Reform Act of 1990, federal district courts must identify the most effective means for eliminating abuse, expense, and delay in litigation generally and discovery in particular, and implement experimental reform plans to correct the abuse, expense, and delay.[6] Most of the plans already effected by district courts have implemented an experimental disclosure plan different from the proposed amendment to Rule 26(a)(1) and some have not proposed disclosure at all.

Preliminary information from these experiments would have been available in a short time if the Committee had stayed its hand as many commenters requested. With empirical data from the experimental districts, the Committee could have fine-tuned its

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[5] Cf. Ann Pelham, Irate Litigators Abort Federal Discovery Reforms, American Lawyers News Service, Mar. 23, 1992, reprinted in The Connecticut Law Tribune, pg. 14 (Committee chairman Judge Sam Pointer acknowledges value of waiting for results from reform experiments before changing discovery rule).

[6] See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990).

proposal, embracing the most workable disclosure ideas to emerge from the experiments for implementation nationwide as part of the Committee's revisions to Rule 26(a)(1) or abandoning the concept altogether if it was found unworkable. Instead, the Committee chose to go forward without guidance from the experimental plans, just as it decided not to accept further comments from the bench and bar. As a result, the proposed amendment to Rule 26(a)(1) lacks empirical support and is opposed by most of those practitioners who have to deal with it on a day-to-day basis.

The disclosure proposal is just as flawed in concept as it is in execution. Proposed automatic disclosure merely adds another layer to discovery: an untested and certainly unproven preliminary procedure that will not eliminate discovery abuses. The vague and unwieldy disclosure standard itself will precipitate additional litigation abuse, expense, and delay. Moreover, disclosure is incompatible with the adversary system. It places counsel's new obligations to the opponent and the court in conflict with counsel's traditional ethical obligation to the client, and it undermines the attorney work product doctrine.

Because of the flaws in both its execution and its substance, the proposed amendment to Rule 26(a)(1) should be returned to the Committee on Rules for additional public comment and debate. Whether disclosure is the most viable discovery reform, and if so, what form it should take, should be debated publicly in light of real world experience with the CJRA plans. Public comment can help identify pitfalls inherent in the current draft and solutions to the most objectionable aspects of the amendment. Full consideration of the public comments should facilitate greater acceptance of the disclosure concept by members of the bench and bar. Ultimately, additional comment and review of all the reform options

will provide a more realistic basis for final decisions about the future of the pending disclosure amendment and the most appropriate means of eliminating discovery abuse.

II. Approving The Proposed Disclosure Amendment to Rule 26(a)(1) In The Face Of Overwhelming Opposition, Without Additional Public Comment, Compromises The Rules Amendment Process.

As Congress deliberated over the 1988 amendments to the Rules Enabling Act, it debated whether to eliminate this Court's role in the process of reviewing and approving proposed amendments to the rules of procedure in light of the Court's history of serving as "a mere conduit" to Congress.[7] The Court specifically requested Congress to keep it in the review process and Congress did so.[8] Although the Court's authority over the rules amendment process has been exercised sparingly, the instances where it has been used to return proposed rules for further comment and revision are strikingly similar to the situation here -- there was a wealth of public opposition to the initial version of the rule and a significant failure by the Rules Committee to respond fully to that opposition. Consequently,

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[7] See H.R. Rep. No. 422, 99th Cong., 1st Sess. 20 (1985); see also Order of Nov. 20, 1972, 34 L. Ed. 2d lxv, lxvi (1972) (approving and transmitting rules of evidence amendments to Congress) (Douglas, J., dissenting) ("[T]his Court does not write the Rules, nor supervise their writing, nor appraise them on their merits, weighing the pros and cons. The Court concededly is a mere conduit.")

[8] June 25, 1984 Letter from Chief Justice Warren E. Burger to Representative Robert W. Kastenmeier, reprinted in Rules Enabling Act Hearings on Oversight and H.R. 4144 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 98th Cong., 1st & 2d Sess., 195 (Apr. 21, 1983 and March 1, 1984).

precedent amply supports a decision to return proposed Rule 26(a)(1) for further public comment and revision at this time.[9]

History also signals that Congress has become involved with the rulemaking process when the process was not responsive to public concerns. Until the massive opposition expressed to the pending disclosure proposal, the civil rules amendment process has only twice before evoked such universal protest from all segments of the bench and bar. In fact, Congress blocked Court approved rules on both of those two occasions: in the early 1970's when the new federal rules of evidence were proposed;[10] and in the early 1980's when a far-reaching change to federal rule 4 was put forth.[11] Approval of proposed Rule 26(a)(1) by this Court in the shadow of so much opposition to both the proposed Rule and the process by which it was developed could signal a breakdown in the only function of the judicial branch in which the public is permitted by law to participate.[12] It also raises the

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[9] See Transmittal Memorandum To Supreme Court, supra note 2, at "Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure," September 1992, pg. 1 (discussing return of amendments by Supreme Court to Judicial Conference for additional study in light of objections from British Embassy); Winifred R. Brown, Federal Judicial Center, Federal Rulemaking: Problems and Possibilities 32 n.73 (June 1981) (discussing incidences where Supreme Court returned proposed rules); Rules of Evidence, S. Rep. No. 1277, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. and Admin. News 7051, 7052 (acknowledging Supreme Court decision to return proposed rules to rules committee).

[10] See Brown, supra note 9; Jack H. Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 Stan. L. Rev. 673, 677 (1975).

[11] See 28 U.S.C.A. § 2073 (West Supp. 1992), David D. Siegel, Commentary on 1988 Revision, at 37 (describing controversy in 1980's over revisions to Rule 4 and congressional intervention).

[12] Ann Pelham, Judges Make Quite A Discovery: Litigators Erupt, Kill Plan To Reform Federal Civil Rule, Legal Times, Mar. 16, 1992, at 1.

specter of jeopardizing judicial branch independence in the rulemaking process,[13] and could diminish respect for and belief in the fairness of the rulemaking process itself.[14] More important, however, it will saddle the civil justice system with a thoroughly unworkable new rule without improving the process of preparing cases for trial.

A. Inadequate Attention To Public Concerns About Proposed Rules Could Compromise Judicial Control Of The Rulemaking Process.

When openness for the civil rulemaking process was mandated in the 1988 amendments to the Rules Enabling Act,[15] Congress clearly contemplated that public comment would be solicited not just on initial drafts of amendments, but also on any significant revisions that were based on the earlier public comments.[16] Public comment and additional deliberation on substantial revisions is the only means of ensuring that the rulemaking process considers the practical experience of, and is responsive to the needs of, judges, lawyers, and litigants. Commentators have suggested that a major factor contributing to the congressional override of the rulemaking process in both the 1970's and the 1980's

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[13] See Ann Pelham, Federal Court Watch: A Legend Worries, Legal Times, June 29, 1992, at 6 (quoting Prof. Charles A. Wright) ("I really worry that if we send this prematurely, we will jeopardize the continued existence of the court rule-making process.") (attached at Appendix E); Siegel, supra note 11, at 37; Friedenthal, supra note 10.

[14] See A Legend Worries, supra note 13.

[15] See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 403, 102 Stat. 4642 (1988).

[16] See H.R. Rep. No. 422, 99th Cong. 1st Sess., 10; cf. Friedenthal, supra note 10 at 677 (failure to seek public comment on substantially revised evidence rules compromised process and resulted in congressional intervention in rulemaking process).

was "the insertion of major alterations [in the rules] at the last minute so that they appeared for the first time as approved without any opportunity for public comment."[17]

Although the federal rulemaking process expressly contemplates some congressional oversight, primary control over the process was vested in the judicial branch in part so that the rules would benefit from the vastly greater experience and insight into the litigation process that judges have over legislators.[18] The judicial branch also was perceived as being less responsive to "interest group politics" than the legislature, providing greater assurance that rules of procedure would be neutral and provide a "level playing field" for all litigants.[19] As such, significant congressional intervention in the rulemaking process is not the norm and, according to the drafters of the rules amendment process, has the potential to compromise both the technical quality of the rules as well as their political neutrality. If a groundswell of public opposition to a proposed rule is likely to trigger congressional intervention, as it has in the past, the rulemaking process and the civil justice system as a whole would be better served if the Court took action to respond to the opposition within the structure of the rulemaking process and the judicial branch. Here, returning the proposed disclosure rule for public comment will protect the integrity of the rulemaking

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[17] Siegel, supra note 11; Friedenthal, supra note 10, at 677. Indeed, in voting against the pending disclosure proposal, Standing Committee member Professor Charles A. Wright noted "[i]f . . . judicial rulemaking . . . is not responsive to [lawyers'] concerns . . . lawyers will seek a veto of the rules from Congress." A Legend Worries, supra note 13, at 6 (paraphrasing Prof. Charles A. Wright).

[18] See generally J. Weinstein, Reform of Court Rule-Making Procedures (1977).

[19] Paul D. Carrington, Making Rules To Dispose Of Manifestly Unfounded Assertions: An Exorcism Of the Bogy Of Non-Trans-substantive Rules Of Civil Procedure, 137 U. of Pa. L. Rev. 2067, 2074-75 (1989).

process, increase responsiveness to the needs of the bench and bar, and ensure promulgation of well-crafted rules that preserve the political neutrality of the civil litigation process.

B. The Potential Efficacy Of Reforms Depends Upon Broad Support And Respect For The Reform Proposals.

The strength, depth, and uniformity of opposition to disclosure expressed by virtually all those who commented on it is quite remarkable. Public interest law advocates, plaintiff and defense bar groups, major corporations, small businesses, trade associations, individual practitioners, and federal district court judges opposed it with equal vehemence. If those required to use Rule 26(a)(1) have serious reservations about the rule's utility, the likelihood of its smooth implementation and ultimate value is greatly diminished.

Every procedural reform is dependent to a large extent on the willingness of the bench and bar to make it work. Frustration and annoyance on the part of judges and litigators alike, coupled with widespread doubts that the Rule will eliminate discovery abuse, will make the road to smooth implementation difficult at best. These tensions could be substantially relieved by allowing additional time for members of the bench and bar to fully air their concerns about the revised disclosure proposal, and to allow present understanding of the disclosure process to mature and be tempered by more debate and reflection.

C. Even Preliminary Results From The Civil Justice Reform Act Experiments Could Help Calm Public Concerns And Guide The Decision On Whether Disclosure Can Cure Discovery Abuse.

Failure to await at least preliminary data from the CJRA experiments before moving ahead with the disclosure process contained in Rule 26(a)(1), is inconsistent with the purposes behind those experiments. Recognizing that significant discovery reforms needed to be grounded in empirical data, Congress directed establishment of the experimental

district plans to serve as examples of possible reforms while at the same time yielding empirical data based on actual practice.[20] The data from the experimental plans were intended to help guide discovery reforms targeted for nationwide implementation.[21]

Twenty-three of the 34 federal district courts participating in the experiment have opted to implement pre-discovery disclosure procedures, in one of several different forms, as part of their "Expense and Delay Reduction" plans.[22] These experimental plans will produce valuable data about whether disclosure is a workable concept at all, and if so, which type of disclosure plan is the most effective and efficient. Delaying implementation of this radical reform to ensure that it has the potential to be effective rather than to cause mischief would be an invaluable safeguard of the integrity of the civil justice process. In fact, Judge Pointer, chairman of the Advisory Committee, recognized the potential value of adopting a wait-and-see attitude when the disclosure amendment initially was tabled, publicly stating that "[i]t makes more sense to get the benefit of that [CJRA] experience before moving ahead."[23]

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[20] See S. Rep. No. 416, 101st Cong., 2d Sess. 2 (1990); 136 Cong. Rec. S17575 (daily ed. Oct. 27, 1990) (Remarks of Sen. Biden).

[21] See 136 Cong. Rec. S17575, supra note 20.

[22] See CJRA Report, supra note 25, at 12. At the time the Advisory Committee first adopted the disclosure concept, it had been briefly in effect in the local rules of only four district courts. See Linda S. Mullenix, Hope Over Experience: Mandatory Informal Discovery And The Politics Of Rulemaking, 69 N. C. L. Rev. 795, 798 n.4 (1991). None of these early local disclosure rules were comparable to the pending disclosure plan because they are self-reflective. That is, they only required disclosure of information related to a party's own claims. These local rules do not require speculation as to what disclosures might be relevant to an opponent's claims. Compare Cal. (C.D.) Local Rules 6.1.1, 6.1.3.-.4. and Fla. (S.D.) Local Rules 14.A.1., 14.A.3.-.4. with Proposed Rule 26(a), November 1992 Amendments, supra note 1, at 72.

[23] Irate Litigators, supra note 5, at 14 (quoting Judge Sam C. Pointer, Jr.).

After initially deciding to defer implementation pending study of the CJRA experimental reform plans,[24] the Advisory Committee reversed itself and proposed immediate nationwide adoption of the disclosure amendment.[25] Committee members apparently were concerned that any further delay to await early results from the experimental districts would inevitably postpone significant discovery reforms until 1998 at the earliest.[26]

Reasonable delay to allow consideration and additional input would not require the years of deliberation that went into the initial formulation of the disclosure proposal. In fact, public comment could be obtained and further revisions could be made in little more than one year's time. Only slightly more than one year elapsed from August 1991, when the disclosure rule was initially circulated for public comment, and November 1992, when the final rule was submitted to this Court for approval. Six months were allowed for public comment (from August 1991 to February 1992).[27] In the course of a six-month public comment period if this Court returns the rule, the Committee also concurrently could

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[24] See id.(Advisory Committee Chairman notes that delay in adopting disclosure amendment will benefit from Civil Justice Reform Act experiments).

[25] See Judicial Conference of the U.S., Civil Justice Reform Act Report: Development and Implementation of Plans By Early Implementation Districts and Pilot Courts 2 (June 1, 1992) [hereinafter "CJRA Report"].

[26] See May 1, 1992 Transmittal Letter from Sam C. Pointer, Chairman, Advisory Committee on Civil Rules, to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, Attachment B, "Issues and Changes," at 7; Committee Notes on November 1992 Amendments, supra note 1 at 95; see also Panel Flips, supra note 4.

[27] See Transmittal Letter Accompanying August 1991 Amendments, Comm. on Rules of Practice and Procedure, Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence (August 1991) [hereinafter "August 1991 Amendments"].

solicit preliminary results from the CJRA experiments, which now have been in effect for one full year. If the Committee then takes six to eight months to consider the new information collected and to arrive at a Rule 26 reform more consistent with public opinion and practical experience, the revised amendment could be returned to the Court by early 1994, forwarded to Congress by the statutory cut-off of May 1994, with a potential effective date of December 1, 1994 -- a delay of only one year's time.[28]

A delay in implementation of the disclosure amendment also will ameliorate potential conflicts between the Committee's reforms and the CJRA experiments. Although the Committee's proposed rule permits the experimental districts to opt out of proposed Rule 26(a)(1) disclosure in favor of a different local experimental plan, nationwide imposition of the Committee's disclosure proposal inevitably will undermine the vitality of the experimental plans. Once the Committee's disclosure proposal is in effect nationally, even the very best experimental disclosure plan is unlikely to be adopted nationally to supersede the Committee's already-implemented version of disclosure. The inertia and practical problems connected with replacing one national disclosure process with another, just as the bench and bar are starting to become accustomed to the first, would be insurmountable.

Failure to give full consideration to the best plans to emerge from the experimental districts would fly in the face of Congress' mandate and be in direct conflict with the core purpose of the experimental plans, which is to test, identify, and implement the very best reform proposals. The only means of reconciling the two tracks of discovery

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[28] See, e.g., S. Rep. No. 1277, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. and Admin. News 7051, 7052 (revised rules returned to Supreme Court one year from court remand to solicit public comment); see also 28 U.S.C.A. § 2074 (West Supp. 1992).

reform now ongoing in the federal courts is to incorporate results from the CJRA experiments into the federal rules at a time when their incorporation will be meaningful. If discovery reforms cannot be delayed until the CJRA experiments are concluded fully in 1995, the reforms undertaken now at least should reflect information already produced in the CJRA experiments during the first year. Such information would at least reveal whether disclosure, in any of its various forms, is a workable concept. In the views of the organizations submitting this memorandum, it is not.

III. Disclosure Is A Flawed Concept.

The Rules Committee's commitment to meaningful discovery reform, and its diligence in developing the pending amendments is obvious. Nonetheless, the belief that disclosure will lessen discovery abuse is based on little more than theory. In fact, disclosure is likely to create new problems not previously experienced in discovery.[29] The Committee Notes indicate that the disclosure rule is derived from theories advanced over the years by two respected jurists.[30] The original disclosure theories, however, would have replaced discovery entirely. In contrast, the disclosure process now before the Court grafts another layer onto the pretrial process as a prelude to discovery. Thus, the arguments that

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[29] As one commentator put it, the Advisory Committee's decision to put its faith in the proposed disclosure process, without hard evidence that disclosure could work, is a "triumph of hope over experience." Mullenix, supra note 22, at 820.

[30] Committee Notes, November 1992 Amendments, supra note 1, at 94, citing Brazil, The Adversary Character of Civil Discovery: A Critique and Proposal For Change, 31 Vand. L. Rev. 1348 (1978); Schwarzer, The Federal Rules, The Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703 (1989); see Schwarzer, Slaying The Monsters of Discovery Cost and Delay: Would Disclosure Be More Effective Than Discovery?, 74 Judicature 178 (1991).

supported the original disclosure theories do not provide even slight theoretical support for the proposed disclosure amendment. Conspicuously absent from the public comments on the proposed disclosure process is support for the disclosure concept from practicing lawyers and their clients -- those who bear the costs and burdens of the present discovery system. The fact that disclosure as a concept failed to produce any significant support, much less advocates, from among the practicing bar signals a need for reexamination of the basic disclosure concept.

As a threshold matter, the disclosure standard is unacceptably vague. It fails to describe a party's disclosure obligation with sufficient clarity and specificity to allow a party to make disclosure with any certainty of compliance. Second, disclosure will cause unnecessary, burdensome costs and delays, primarily by precipitating satellite litigation. Finally, disclosure conflicts with the ethical obligations of lawyers to their clients under the adversary system, adversely affecting the attorney-client relationship and the work product doctrine.

A. The Ambiguity Of The Disclosure Standard Will Confound Efforts To Comply With It.

The standard for disclosure contained in the pending amendment requires each party, in advance of a formal request, to identify to an opponent all witnesses and to describe "by category" documents "relevant" to "disputed facts alleged with particularity in the pleadings."[31] None of these three key terms can be defined objectively, in advance, by a party intent on making a meaningful disclosure that complies with the terms of the Rule.

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[31] See Proposed Rule 26, November 1992 Amendments, supra note 1, at 72-73.

The term "category" can range from the very broad (e.g., "engineering drawings") to the very specific (e.g., engineering layout drawings showing the location of one part of a product manufactured in a specific year). "Relevancy" is a commonly litigated concept; it currently breeds more satellite litigation in discovery than any other -- a harbinger that it will lead to just as much contentiousness in pre-discovery disclosure.[32] Disputes over which allegations are pled with sufficient "particularity" to trigger disclosure also are certain to arise. "Particularity" -- a broad concept at best -- is not a self-defining term, as the substantial body of case law on pleading fraud with "particularity" under Rule 9(b) demonstrates.[33]

B. The Proposal Will Encourage Unnecessary Satellite Litigation.

Because of the uncertainty surrounding the scope of the disclosure obligation, and concerns regarding privilege and the lawyer's ethical obligations, conscientious parties are likely to move for protective orders or to turn to other motion practice to define their disclosure obligations with greater certainty. As a result, satellite litigation is certain to increase, even before disclosures are made.

More motion practice will increase the burdens on already overworked courts and court personnel, primarily at the trial court level, but also at the appellate level as the ambiguities and vagaries of the disclosure concept are resolved. In light of the strain the existing caseload already places on federal judges and courts, rules amendments should be

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[32] Cf. R.W. Int'l Corp. v. Welch Foods, Inc., 937 F.2d 11 (1st Cir. 1991) (plaintiff viewed discovery related to subsidiary as not relevant; trial court disagreed, awarding sanctions; appellate court reversed; disputes over relevancy most common in discovery).

[33] See, e.g., Ross v. Bolton, 904 F.2d 819 (2d Cir. 1990).

made only when they will reduce the workload, and not when they will increase it as disclosure almost certainly will.

Sanctions litigation under Rule 37(b) also is likely to increase against parties who have attempted in good faith, but perhaps unsuccessfully, to meet their vaguely defined disclosure obligations. The sanctions now available under Rule 37, as revised by the Committee, are severe because the proposed Rule 37(b) amendment equates inadequate disclosure with failure to comply with a court order under the present discovery rules. Either violation can trigger the ultimate sanction -- default judgment. Yet, failure to comply adequately with an ambiguous, voluntary disclosure obligation would not and should not rise to the level of deliberate violation of a court order. Thus, it is difficult to discern a substantial relationship between the error of failing to disclose, and the sanction for that error as currently drafted in proposed Rule 26.

C. The Proposal Distorts the Adversary Process and Compels Disclosure of Attorney Mental Impressions and Work Product.

The proposed disclosure process more closely resembles procedures followed in the inquisitorial civil justice systems used in Western Europe and Japan than American jurisprudence.[34] Voluntary disclosure of information harmful to one's own case, without even a request for that information, is antithetical to any adversary system such as ours, which is premised on the belief that each side presents its best, not worst, case and the truth

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[34] See Cortese & Blaner, Civil Justice Reform in America: A Question of Parity With Our International Rivals, 13 Univ. Pa. J. Int'l Bus. L. 1 (1992) (comparing civil justice systems in Germany, England and Japan with American civil justice system); see also Committee Notes, November 1992 Amendments, supra note 1, at 95 (United Kingdom and Canada require disclosure).

emerges from the clash of conflicting positions.[35] If adversity does not exist during the pretrial process, it substantially weakens the underpinnings for having adversity at trial -- a complex issue that the Committee did not, and indeed, could not fully consider.

The disclosure requirement also will create mischief in the attorney-client relationship. Clients do not, and should not, expect their own lawyers to search client files for self-destructive information only to dutifully turn it over to the adversary. By creating a disclosure obligation that runs from the attorney to the opponent, the proposed amendment creates an unavoidable conflict with the attorney's obligation to the client. Although the proposed disclosure process does not modify the attorney-client privilege directly, it will undermine essential aspects of the relationship that the privilege was created to protect.

Moreover, the proposed disclosure process is inconsistent with the policies underlying the work product doctrine. The very process of deciding what is "relevant" to disputed facts in the pleadings necessarily incorporates counsel's judgments and mental impressions based on investigations, strategies, and decisions regarding theories of the case. Requiring counsel to make disclosure requires counsel to disclose work product. Disclosure unavoidably may cause a party to reveal to an opponent a line of factual inquiry or legal reasoning that the opponent never would have considered or litigated on its own. Consequently, disclosure will expand the scope of each matter litigated instead of limiting it to the minimum. The work product doctrine was intended to protect and promote inventiveness, diligence, and excellence among attorneys. The disclosure process, which

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[35] Cf. Brazil, supra note 30 at 1345 (discovery reform, such as disclosure, unlikely to be effective unless adversary nature of justice system is changed, including attorney's ethical obligations).

would force an attorney to reveal his thought processes early on in litigation, is antithetical to these goals.

The adversary nature of civil litigation in this country pervades all aspects of the civil justice system. Importation of a starkly non-adversarial procedure, such as disclosure, into this process will have far-reaching, largely unforeseen implications for the civil justice system as a whole -- implications that the Committee has not fully considered.[36]

IV. Conclusion

If Rule 26(a)(1) moves forward at this time, it will weaken the integrity of the rules amendment process.[37] The unprecedented opposition to and lack of support for the proposed Rule 26(a)(1) disclosure amendment, the lack of a meaningful opportunity for public comment on the final proposal, and the numerous, significant flaws in the proposal all coalesce to provide compelling justification for returning Rule 26(a)(1) to the Committee

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[36] See also Mullenix, supra note 22, at 820-21 (proposed disclosure rule "presents unresolved research issues as well as several lurking problems.") Brazil, supra note 30 at 1345.

[37] See A Legend Worries, supra note 13.

on Rules. We respectfully ask the Court to exercise its authority over the rules amendment process, to decline to approve proposed Rule 26(a)(1), and to remand the Rule to the Committee on Rules for additional public comment and reconsideration in light of experience with the CJRA experimental disclosure plans.

Respectfully submitted,

AMERICAN LEGISLATIVE EXCHANGE COUNCIL
ASSOCIATION OF DEFENSE TRIAL ATTORNEYS
BUSINESS ROUNDTABLE LAWYERS COMMITTEE
CHAMBER OF COMMERCE OF THE UNITED STATES
FEDERATION OF INSURANCE AND CORPORATE COUNSEL
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL
LAWYERS FOR CIVIL JUSTICE
LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR*
PUBLIC CITIZEN LITIGATION GROUP

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* The views expressed herein represent only those of the Litigation Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

COMMITTEE NOTES

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal

discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3) as the trial date approaches to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1348 (1978), and Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 721-23 (1989).

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge

supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus

the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the

documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence "relevant to disputed facts alleged with particularity in the pleadings." There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product. Likewise, a party would

not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant

witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)--a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint--should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be

made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness, 1986 U. Ill. L. Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who

are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--e.g., a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted

documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide "foundation" testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion "in limine" and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may,

APPENDIX B

SUMMARY OF COMMENTS ON RULE 26 DISCLOSURE

(comments received as of January 29, 1992)

A total of 101 comments were reviewed addressing the proposed amendment to Federal Rule of Civil Procedure 26 that would require disclosure of information in advance of discovery. Ninety-five percent of the comments were in opposition to the proposed disclosure process. Eight federal district court judges commented, and seven out of the eight were opposed to disclosure. The following is a summary of the primary objections against the proposal and a tally of the percentage of commenters who raised these objections.

Specific Objections	Percent Commenting
The standard for making disclosure, "likely to bear significantly" is too vague.	58
A disclosure process will spawn more satellite litigation and disputes.	50
The disclosure process will be unworkable under the notice pleading system.	49
The 30 day time limit for making disclosures after the answer is filed is too short.	43
Empirical data on disclosure is needed from the Biden bill districts before nationwide implementation.	37
Disclosure will result in much unnecessary and burdensome production of documents and information.	37
The disclosure process is inconsistent with the attorney-client relationship and will undermine the work product doctrine.	13
The disclosure process is inconsistent with the adversary system.	13
Simultaneous disclosure places an unfair burden on the defendant.	4

APPENDIX C

Formal Comments In Opposition To Rule 26
Submitted by Bar Associations, Business Associations, and Government Agencies

Alliance of American Insurers

Alliance for Justice

American Bar Association
Section of Litigation
Section of Antitrust Law
Anthony R. Palermo, Secretary
Admiralty and Maritime Litigation
Committee

American Board of Trial Advocates

American Civil Liberties Union

American College of Trial Lawyers

American Corporate Counsel Association

American Institute of Certified Public Accountants

American Insurance Association

Arkansas Association of Defense Counsel

Association of American Railroads

Association of Trial Lawyers

Business Roundtable

State Bar of California

Central District of California Lawyer Representatives,
Ninth Circuit Judicial Conference

Chamber of Commerce of the United States

Chicago Council of Lawyers

Colorado Bar Association

Connecticut Bar Association
Federal Practice and Litigation
Sections

Defense Counsel of Delaware

Federal Bar Association, Los Angeles Chapter

State Bar of Georgia

Hawaii Defense Lawyers Association

Idaho Association of Defense Counsel

Illinois Asocition of Defense Trial Counsel

International Association of Defense Counsel

Iowa Defense Counsel Association

U.S. Department of Justice

Lawyers for Civil Justice

Los Angeles County Bar Association

Maritime Law Association of the United States

Michigan Defense Trial Counsel, Inc.
Mississippi Defense Lawyers Association

State Bar of Montana

NAACP, Legal Defense and Educational Fund

National Association of Independent Insurers

National Association of Railroad Trial Counsel

New Jersey Defense Association

New Jersey State Bar Association

New York State Bar Association Commercial and Federal Litigation Section

Pharmaceutical Manufacturers Association

Philadelphia Bar Association

Product Liability Advisory Council

Public Citizen Litigation Group

South Carolina Defense Trial Attoneys' Association

Trial Lawyers for Public Justice

Virginia Association of Defense Attorneys

Washington Defense Trial Lawyers

Washington Trial Lawyers Association

Wichita (Kansas) Bar Association

Formal Comments In Opposition To Rule 26
Filed By Corporations

American Standard Inc.

Amoco Corporation

ARCO

Bausch & Lomb Inc.

Bethlehem Steel Corporation

Bridgestone/Firestone, Inc.

Caterpillar, Inc.

Chesapeake Corporation

The Clorox Company

The Coca-Cola Company

Control Data

Corning Inc.

Cooper Tire & Rubber Company

Deere & Company

The Dow Chemical Company

Duquesne Light Company

E.I. DuPont de Nemours and Company

Eastman Kodak Company

Emerson Electric Co.

E-Systems, Inc.

Fina, Inc.

Ford Motor Company

Gates Energy Products

GenCorp

General Motors

Georgia-Pacific Corporation

Harley-Davidson, Inc.

Harris Corporation

Hershey Foods

Hughes Aircraft Company

Joy Technologies, Inc.

Lone Star Technologies

LTV Steel Company

Mazda Motor of America

McDermott, Inc.

McGraw-Hill, Inc.

Mead

Melroe Company

Michelin Tire Corporation

Mobil Corporation

Morgan Stanley & Co

Morton International

Murphy Oil USA, Inc.

Nalco Chemical Company

Nissan North America, Inc.

Olin Corporation

Oryx

Otis Elevator (United Technologies)

Phelps Dodge Corporation

Piper Aircraft Corporation

The Procter & Gamble Company

Ralston Purina Company

Raytheon

Sears, Roebuck and Co.

The Sherwin-Williams Company

Snap-On Tools

Sundstrand Corporation

Tenneco Inc.

The Timken Company

TRW Inc.

Union Carbide Corporation

The Uniroyal Goodrich Company

USX

Waltco Truck Equipment Co.

Washington Corporations

Zurn Industries, Inc.

APPENDIX D

FEDERAL COURT WATCH

BY ANN PELHAM

Panel Flips, OKs Discovery Reform

PHILIPS JONES

Judge Ralph Winter initiated reconsideration of the panel's earlier vote to abandon reform of discovery in civil cases.

A far-reaching and controversial proposal designed to force litigators into early exchange of information in civil cases has been approved by a key federal judicial panel.

The requirement for mandatory disclosure had drawn such opposition from both the plaintiffs and defense bars that the Advisory Committee on Civil Rules had backed off from the idea in February. But in a surprising about-face, the 11-member panel of judges, practitioners, and academics voted unanimously April 15 to endorse the reform.

Judge Ralph Winter of the U.S. Court of Appeals for the 2nd Circuit initiated the reconsideration of the earlier vote. Before the meeting, held at the Federal Judicial Center in Washington, he lined up support from a majority of his fellow panel members for a new, revised version of mandatory disclosure.

"There will be resistance [to discovery reform] so long as some lawyers are paid by the hour," Winter told the committee. But there is also widespread dissatisfaction with the status quo, "and this committee has the principal responsibility for reform," Winter said.

Voluntary disclosure signals a "significant change in philosophy," added committee member James Powers of Phoenix's Fennemore Craig. "Instead of having lawyers spend years trying to hide the existence of a letter, we're saying, 'Put it on the table today.' "

The change in Rule 26 would require initial, voluntary disclosure of all information "relevant to disputed facts alleged with particularity in the pleadings," as well as a calculation of damages and information about insurance coverage. The requirement has teeth because documents or witnesses improperly kept secret could not be used at trial.

The committee abandoned an earlier, much broader definition that called for disclosure of anything that "bears significantly on a claim or defense."

The new wording resolves some concerns among practitioners, who worried that the broader definition would force them to reveal legal theories and attorney-client communications. However, widespread opposition is still expected to this and other proposed changes, such as limits on depositions and interrogatories and a requirement that each expert witness write a report. *(See "Judges Make Quite a Discovery," Legal Times, March 16, 1992, Page 1.)*

"What they did was adopt a somewhat improved reformulation of a basically flawed concept," says Alfred Cortese Jr. of the D.C. office of Chicago's Kirkland & Ellis, who attended the panel's meetings and has testified on behalf of the U.S. Chamber of Commerce and Lawyers for Civil Justice, a defense and corporate counsel group. "They've selected the wrong method [for improving the process]—a method opposed by almost all of their customers."

Those unhappy "customers" include the public-interest bar, which believes the panel's latest version of mandatory disclosure—and its new limits on depositions and interrogatories—will hurt plaintiffs.

"This cuts down on plaintiffs' ability to use discovery to find out what's going on," says Michael Tankersley, a staff attorney at Public Citizen Litigation Group.

The advisory committee now forwards its recommendations to the Judicial Conference's Standing Committee on Rules of Practice and Procedure, which meets in June and is chaired by U.S. District Judge Robert Keeton of Massachusetts. Under the Rules Enabling Act, proposed changes then go to the Judicial Conference, the Supreme Court, and eventually to Congress. The legislators have 90 days to vote to reject the rules changes; otherwise, they take effect. In this case, the changes could not be in place before Dec. 1, 1993.

Although the advisory committee's work is usually accepted by the various layers of authority, this set of reforms is the most controversial ever proposed—and may not get the traditional rubber stamps.

Critics could end up taking their fight to Congress, thus politicizing a process that the judiciary has sought to keep neutral.

But if the advisory panel had rejected substantial reform, the judiciary's central role in rule-making could have been placed at risk. Congressionally mandated experiments in civil justice reform are already under way in each federal district, and the Bush administration is also pushing reforms.

The advisory committee had in fact hesitated to set a national disclosure rule until the local reform plans, required by the Civil Justice Reform Act of 1990, had been implemented and assessed. After public hearings in Atlanta in mid-February, where numerous critics urged a delay in national rules changes, the advisory committee voted to postpone action.

By early April, though, Winter and several other panel members had had second thoughts and began talking by telephone about another vote. On April 8, a letter calling for reconsideration was sent to Chief Judge Sam Pointer Jr. of the Northern District of Alabama, who chairs the advisory panel. The committee members signing, along with Winter, were Powers, the Phoenix lawyer; Judge J. Dickson Phillips Jr. of the 4th Circuit; Magistrate Judge Wayne Brazil of the Northern District of California; Dennis Linder, director of federal programs in the Justice Department's Civil Division; and Mark Nordenberg, dean of the University of Pittsburgh School of Law.

At the panel's April 14 session in Washington, the rebels quickly picked up support from Judge Joseph Stevens Jr. of the Western District of Missouri.

"I think we are making a serious mistake in delaying the work of this committee for some experimental, temporary, and perhaps futile work undertaken at the behest of Senator Biden and his committee," said Stevens, referring to Senate Judiciary Chairman Joseph Biden Jr., who wrote the Civil Justice Reform Act. "I had the feeling they didn't even know we were over here" when the legislation was being considered.

Phillips, the 4th Circuit judge, noted the panel's years-long consideration of rules changes. "Nobody else has had the opportunity to think about this thing with as much depth as we have," said Phillips. "I think we have an obligation. To fail to do so would put the whole of the national amendment process back to 1996, and we ought not to do it." Phillips was alluding to the judiciary's lengthy, formal rule-making process.

Linder, the Justice Department official, lamented the bar's reluctance to change the culture of litigation.

"If this committee is perceived as backing away, that resistance is going to increase dramatically," said Linder.

"It's already happened," interjected Brazil.

As for the opposition from lawyers, Winter suggested they had the wrong impression.

PHILIPS JONES

Chief Judge Sam Pointer Jr. found his colleagues had changed their minds.

"We aren't saying you have to turn over a smoking gun or a privileged document," he told the panel. Lawyers must identify categories of documents, but can still claim that a document is protected by attorney-client privilege, as a trade secret, or for other reasons, he explained.

Chairman Pointer, faced with a majority seeking reconsideration, was amenable and focused on the practical aspects of requiring disclosure. "How can we do it in a way that is most workable?" Pointer asked.

Carol Fines, a partner at Springfield, Ill.'s Giffin, Winning, Cohen & Bodewes, suggested that only information favorable, not adverse, to a lawyer's position be provided to the other side. "It's much easier to begin with your own case," she said.

But her approach was rejected in an 8-1 vote.

After much discussion of wording changes, Pointer agreed to draft a new version of Rule 26. The next day, on April 15, the panel voted unanimously to adopt Pointer's proposal.

"Federal Court Watch" appears alternately in this space with "Superior Court Watch."

FEDERAL COURT WATCH

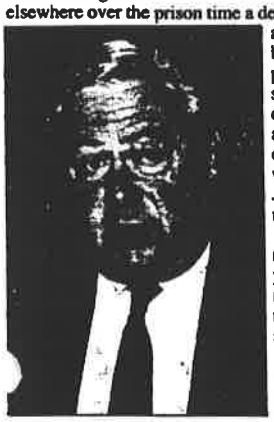
BY ANN PELHAM

Judge Takes On U.S. Attorney With New Sentencing Issue

One of the more establishment-minded members of the federal bench here has challenged Congress and the U.S. Sentencing Commission over application of federal sentencing guidelines in the District of Columbia.

In justifying his decision to cut a drug defendant's sentence by almost half, Judge Thomas Penfield Jackson cited U.S. Attorney Jay Stephens' dual role as both local and federal prosecutor and suggested that it had not been considered when the guidelines were crafted.

The U.S. attorney in the District is "able to exercise far greater control than his counterparts elsewhere over the prison time a defendant will actually serve by electing to prosecute the same criminal conduct in either a local or federal court," Jackson wrote in the June 24 memorandum.



Thomas Penfield Jackson

Jackson reduced from 30 years, the minimum required by the sentencing guidelines, to 13½ years the sentence of 28-year-old Frank Dave Clark, who was convicted of possession with intent to distribute 9.22 grams of crack cocaine—less than a third of an ounce.

Although other judges have been troubled by Stephens' dual role, suggesting that local criminals are too readily charged with federal crimes, Jackson is apparently the first to call the U.S. attorney a "mitigating factor" in justifying a departure from the sentencing guidelines.

The judge, appointed to the bench in 1982 by President Ronald Reagan, also cited the "extraordinarily dismal childhood and adolescence" of defendant Clark and the local nature of his earlier crimes, which under the guidelines required that he be considered a "career criminal" and subject to several years' additional time in prison.

The latter points had been made by Assistant Federal Public Defender Michael Wallace, who represented Clark and sought a reduced sentence. Presented with Jackson's view that the prosecutor was also a factor, Wallace readily endorsed that argument as well.

"In another state, these kinds of cases are not going to get shuffled from local to federal court," says Wallace.

Jackson agrees. "Unless and until Congress and the Sentencing Commission make it expressly clear that it is truly the penal policy of the United States to cause the incarceration of petty local offenders, particularly in the District of Columbia, until they are too old and infirm to transgress again, no matter how commonplace their 'career criminal' records may be, it should be open to a federal court in the District of Columbia to sentence comparably for comparable crimes having neither a federal connection nor any extraterritorial importance," Jackson wrote.

Jackson had brought up the Clark case, without naming the defendant, during the question-and-answer period following a June 11 panel on sentencing guidelines at the D.C. Circuit's Judicial Conference in Williamsburg, Va. The guidelines, he explained, clearly called for a 30-year sentence. "What do I do with a guy who is going to get 30 years for 9.2 grams of crack, and how am I going to live with myself?" asked the judge.

Jackson managed to find a way to reduce the sentence; now the question is whether the government will challenge his reasoning on appeal.

Mark Liedl, spokesman for the U.S. attorney's office, says no decision on an appeal has been made. But he took issue with Jackson's ruling: "We believe that a defendant with six felony convictions in the last 10 years, including manslaughter, robbery, drug distribution, and weapons crimes, has demonstrated a career of serious criminality which warrants the maximum sentence provided by Congress."

A Legend Worries

Charles Alan Wright is nothing short of a legend in the world of federal procedure. A constitutional-law professor at the University of Texas in Austin, he is author of the basic federal-practice texts and holder of not one but two distinguished chairs at the university.

None of this carried much weight, though, when the Judicial Conference's Committee on Rules of Practice and Procedure recently voted 9-1 to approve a controversial proposal to reform discovery in federal civil litigation. Wright cast the lone vote against a new requirement for prediscovery disclosure of information by both plaintiff and defendant—a reform that supporters hope will shorten the expensive, often protracted early stage of litigation.

Now the proposal goes on to the Judicial Conference, which meets in September, then to the Supreme Court, and finally, in 1993, to Congress, which has the power to veto the new rule.

"Though I tended to favor the rule on its merits," Wright says, explaining his June 20 vote, "I thought there was so much controversy, such strong opposition from both sides of the bar, that going forward would put the Supreme Court in a difficult position. They have enough controversial constitutional questions; we ought not to get them into hot water over discovery rules."

But his colleagues believe that the Rules Committee will be in hot water if nothing is done to reform discovery. Critics like Vice President Dan Quayle are pushing for major change, and Sen. Joseph Biden Jr. (D-Del.) has already pushed through the Civil Justice Reform Act, which requires civil-justice reform plans in every district. Waiting any longer, the other committee members reason, could leave the judiciary and its rule-making process in the dust.

Charles Alan Wright

For Wright, the greater risk to that process, in place since 1938, is moving ahead with a change opposed by lawyers of all stripes. If they find that judicial rule-making, traditionally more academic than political, is not responsive to their concerns, Wright predicts, lawyers will seek a veto of the rules from Congress, where lobbying is not colored by the awkwardness many lawyers feel when they approach judicial bodies.

"I really worry that if we send this prematurely, we will jeopardize the continued existence of the court rule-making process," warns Wright, who has had one of the longest associations with the Rules Committee of any current member—or perhaps any person ever. He first served the committee as an assistant reporter in the early 1950s and then as a member from 1964 to 1976; his current stint began in 1986.

Adding to Wright's worries is a procedural argument that opponents are likely to make. The version of the discovery reform, Rule 26, now pending before the Judicial Conference was never offered for public review. The Advisory Committee on Civil Rules, which reports to the Rules Committee, offered a draft for public comment in August 1991, but it drew so much strong opposition that the panel backed off in February. The panel reconsidered in April, however, and after revisions forwarded the discovery reform to the Rules Committee. *(See "Panel Flips, OKs Discovery Reform," April 20, 1992, Page 6.)*

"That's a good lever with which to argue to Congress" against approving the recommended changes, Wright points out.

In fact, that argument has already been used by the National Chamber Litigation Center, which reiterated its opposition in a June 11 letter addressed to U.S. District Judge Robert Keeton of Massachusetts, who chairs the Rules Committee.

"This new proposal was drafted overnight and was not circulated for public comment," wrote Stephen Bokat, executive vice president of the center, who also spoke for the Product Liability Advisory Council and a task force of the Business Roundtable. "Thus, none of the individuals, associations, or businesses that commented on the original proposal has had any meaningful opportunity to comment on the new one."

The advisory panel's revisions, however, were designed to answer complaints by Bokat's group and others about vague, overly broad requirements they say would increase, not reduce, the expense of litigation. Each side would have to provide a list of witnesses and a description, by category, of documents relevant to "disputed facts alleged with particularity in the pleadings," according to the proposal. There's a loophole, though: A District Court could vote to exempt itself from the mandatory-disclosure provision, even if it did not have in place its own version of early disclosure as suggested by the Civil Justice Reform Act.

These revisions satisfied most members of the Rules Committee. "We came up with a pretty good compromise," says William Wilson, a committee member and a partner in Little Rock, Ark.'s Wilson, Engstrom, Corum & Dudley. As for the business community's concerns, Wilson offers, "I think they've gotten a little overheated."

Although the Rule 26 change is the most controversial, the Rules Committee also modified Rule 11, the sanctions provision. Instead of saying that a judge "shall" sanction a litigator who acts improperly, the proposed revision would give a judge more discretion by replacing "shall" with "may." The committee also reworded the rule to clarify that sanctions should be paid to the court, with costs and fees only rarely awarded to the opposing side.

Another hotly debated proposal—a revision of Rule 702 of the Federal Rules of Evidence, which covers expert witnesses—was not approved; the committee instead suggested that a new advisory panel on evidence be created and that it consider the Rule 702 revision.

The next target for critics of the discovery reform is the Judicial Conference, which consists of the chief judge and a district judge from each circuit. Chief Justice William Rehnquist chairs the group.

Just one person sits on both the Rules Committee and the Judicial Conference: Chief Judge Dolores Sloviter of the U.S. Court of Appeals for the 3rd Circuit. But she probably won't be carrying water for the rules panel come September, when the conference meets. After expressing concerns similar to Wright's during the discussion of mandatory disclosure, Sloviter chose to abstain from the vote.

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