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FEDERAL DISCOVERY UNDER THE 2000 AMENDMENTS TO RULE 26

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In our system of civil litigation, the discovery process is the principal means by which lawyers and parties assemble the facts and decide what information to present at trial. [1]

They are ill discoverers that think there is no land, when they can see nothing but sea.[2]

I. INTRODUCTION

The premise of the adversary model of litigation is that counsel for two opposing parties will "zealously assert [ ] [their] client's position under the rules of the adversary system," not revealing any confidential, privileged information, and avoiding any conflicts of interest that might conceivably distract from single-minded devotion to the client's cause.[3] It is hoped that if opposing counsel pursue diametrically opposite goals with vigor, when the dust settles, something approximating a true and just result will emerge. The adversary model is firmly entrenched in American jurisprudence and its merits or demerits are far beyond the scope of this paper. It should be noted, however, that a major component of modern civil litigation, namely the discovery/disclosure process, is in many ways inconsistent with a pure adversary process. The goal of discovery and disclosure is that each party eventually discloses to the other side all relevant information, including information that is devastating to that side's own case.

While this is a laudable result from the standpoint of a system that seeks equitable results based on a full exchange of relevant information, the potential tension is obvious. At a deep level, litigators can resent the necessity for full disclosure and discovery. In blunt terms, full disclosure can cause a lawyer to lose a case, where he is ethically obligated to zealously pursue victory (within the rules, of course). Some judges are unenthusiastic about discovery and disclosure disputes, believing that such matters are not as deserving of the court's attention as are more interesting matters, and/or that responsible counsel should be able to work out such matters among themselves (which in many cases is surely true). A perception of judicial disinterest, however, can cause concern among counsel that incomplete disclosure by the other side will not be properly addressed. Such a perception, if widespread, can lead to extensive noncompliance and can multiply discovery disputes exponentially.

The history of federal civil discovery over the last six decades has seen a series of pendulum swings, as courts have tried to accommodate a set of procedures in which

1 John L. Carroll, *Discovery Disputes and Electronic Media*, ALI-ABA Course No. SG045, Vol. 1 (Aug. 2001).
2 Francis Bacon, ADVANCEMENT OF LEARNING, bk. II, vii.5 (ed. 1605).
3 Preamble to MODEL RULES OF PROFESSIONAL CONDUCT; ER's 1.6, 1.7.

cooperative behavior is necessary and encouraged within the adversary system. The pendulum tends to swing between more disclosure/less judicial intervention, on the one hand, and less disclosure/more judicial intervention, on the other hand.

This paper explores the latest pendulum swing, represented by the 2000 amendments to Rule 26. Broadly speaking, those amendments continued a lengthy pendulum swing toward narrower initial disclosure, with more judicial intervention. This paper notes that, because there is such a deep-seated tension between the goals of discovery/disclosure and the "combat" theory of litigation, optimization of Rule 26 will require more than mere semantic tweaks or subtle shifts in emphasis. We suggest that major philosophical and procedural adjustments are necessary. While there are various approaches that could probably meet with some degree of success, all would require a level of consensus among the national bench and bar that has thus far been lacking.

II. HISTORICAL PERSPECTIVE

The Federal Rules of Civil Procedure ("FRCP") were promulgated under the Rules Enabling Act of 1934. Trial by surprise was officially rejected.[4] Since their enactment, the FRCP have generally allowed broad "relevant-to-the-subject-matter" discovery, with sufficient judicial discretion to alter the rules. "[T]he prevailing view seemed to be that the wise discretion of judges would save us from the potential evils and abuses of discovery."[5]

After decades of experience, however, the consensus was that the "broad discovery/activist judiciary" model was not working. Since 1980, there have been three major revisions to the FRCP.[6] The amendments of the past twenty years have fallen within four themes:

- Cooperation (1993 amendments)
- Focused Discovery (2000 amendments)
- Discovery Limits (1983, 1993, 2000 amendments)
- Judicial Management of Discovery (2000)[7]

The 1980 amendments were the first attempt to narrow discovery[8] and generally called for judges to become more active in case management, including mandatory discovery conferences and a directive that judges limit disproportionate discovery.[9]

A second set of revisions came along just three years later. The 1983 amendments were more focused on curbing discovery abuses – either seeking excessive discovery or excessively resisting discovery.[10] Part of the 1983 amendments included increased judicial authority to impose Rule 11 sanctions, which was the most controversial change in the fifty-year history of the FRCP.[11] This amendment led to the automatic disclosure requirements set forth in the 1993 revisions to the FRCP.

Further controversy ensued. The 1993 amendments concurrently established more rules to control discovery, yet provided additional methods to escape via judicial discretion.[12]

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4 Jeffrey W. Stempel, *Complex Litigation at the Millinnium: Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform"*, 64 Law & Contemp. Prob. 197, 204 (Spring/Summer 2001).
5 *Id.* at 198.
6 Carl Tobias, *The 2000 Federal Civil Rules Revisions,* 38 San Diego L. Rev. 875, 876 (Summer 2001).
7 Carroll, supra note 1.
8 Tobias, supra note 6, at 876.
9 Stempel, supra note 4, at 207.
10 *Id.* at 209.
11 Tobias, supra note 6, at 876.
12 Stempel, supra note 4, at 210.

In fact, the opt-out provision allowed districts to evade the automatic disclosure requirements altogether.[13] Further, the parties could alter the automatic disclosure requirements (as well as several others) by stipulation.[14] In short, as one commentator has argued, the 1993 amendments continued the "post-1976 pattern of making discovery the convenient scapegoat for generalized complaints about the dispute resolution system"[15] and further departed from the original spirit of the rules adopted in 1938 and 1970.[16]

In 1996, the Judicial Conference Advisory Committee set up a Discovery Subcommittee to consider the discovery rules. The subcommittee's investigation included two studies: one by the Federal Judicial Center ("FJC") and one by the RAND Corporation ("RAND").[17] These studies showed that:

- Three hours or fewer is spent on discovery in the majority of cases and in one-third of the cases studied, no discovery took place at all.
- Discovery is a significant expense in only a minority of cases, and then is almost always proportionate to the potential financial stakes of the case.
- Voluminous discovery usually only takes place in complex litigation.
- The average discovery expense amounted to one-half of the litigation expenses and about three percent of the total amount at stake in the case.
- Almost half of the attorneys surveyed in the FJC study reported discovery problems.[18]

The empirical data, then, did not support a finding of widespread, systematic abuse. Nevertheless, the Advisory Committee pressed on. In April 2000, the latest round of amendments was sent to Congress by the Supreme Court.

III. OVERVIEW OF THE 2000 CHANGES TO RULE 26

In general, the 2000 amendments are consistent with previous amendments in that they strive to limit discovery. The revisions are largely edits to the 1993 changes, except that the most controversial aspects of those revisions are now made nationally uniform.[19] "Probably the most important change — particularly for the practicing bar — is the removal of most of the opt-out provisions included in the 1993 amendments."[20]

While initial disclosure is required (opt-out was eliminated), each party must disclose only information "that the disclosing party may use to support its claims or defenses, unless solely for impeachment."[21] The current rules also:

- Require disclosure in all cases, except for eight categories of low-discovery types of cases.

13 *Id.*
14 Tobias, supra note 6, at 876.
15 Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope,* 52 Ala. L. Rev. 529, 532 (Winter 2001).
16 Stempel, supra note 4, at 210.
17 *Id.* at 217-218.
18 Stempel, supra note 15, at 574-577.
19 Richard L. Marcus, *The 2000 Amendments to the Discovery Rules,* 2001 Fed. Cts. L. Rev. 1 (2001).
20 *Id.* at 6.
21 FRCP 26(a)(1)(B) (2000).

- Establish a presumptive deposition time limit of one seven-hour day.

- Make failure to supplement disclosure responses sanctionable under Rule 37.[22]

These most recent amendments reveal the rulemakers' intent that litigants "carefully tailor their discovery requests."[23] If a discovery dispute arises, the party seeking discovery will have to show that the information they seek is both relevant and unprivileged. The court will have to perform a cost-benefit analysis to decide whether the discovery should be allowed.[24] The parties and the court must consider the "type of discovery sought[;] [w]hether the discovery is obtainable elsewhere with less cost and burden[;] [w]hether the information sought is duplicative of information already discovered[;] [w]hether the burden or expense of producing the information being sought outweighs its benefit."[25]

IV. REACTION TO THE RULE 26 AMENDMENTS

Criticism of the Rule 26 amendments was swift and brutal, including an observation by one commentator that the entire system was set up to the advantage of the elite bar.[26] That commentator (Jeffrey W. Stempel, Professor of Law and Associate Dean for Academic Affairs, William S. Boyd School of Law, University of Nevada, Las Vegas) argued:

> The ongoing problem with discovery reform is not simply its inconsistency; the discovery initiatives of the last decade are deficient in that they (1) claim to be premised on a reasoned response to empirical study but promote changes that seem unsupported by the very studies cited; (2) continue to reduce access to information without adequate support; (3) do little to prompt more meaningful engagement of courts in the discovery process despite continued evidence that lawyers want judicial intervention in contentious discovery matters; (4) fail to address directly the issue of effective discovery in complex litigation; and (5) fail to suggest, or provide means for, the enhanced application of reasoned discretion.[27]

The amended mandatory disclosure rule was supposed to accelerate the exchange of basic information by eliminating the requirement for requesting it, thereby reducing the expense of resources on rote discovery.[28] Critics found the mandatory disclosure rule unfair because each party's obligation to disclose was independent of the opposing party's compliance with the rule. Critics also found that the new language – "relevant to disputed facts alleged with particularity in the pleadings" – invited increased motion practice and manipulation by parties.

V. SCOPE AMENDMENT

The scope amendment was the most controversial of the 2000 revisions to the FRCP because it limited the initial scope of discovery to matters "relevant to the claim or defense of any party." However, a two-step process was created in which the court, if consulted, is given discretion to "order discovery of any matter relevant to the subject matter

22 Stempel, supra note 15, at 549-550.
23 Federal Discovery News, Vol. 7, No. 8 (July 16, 2001).
24 *Id.*
25 *Id.*
26 Stempel, supra note 15, at 588.
27 Stempel, supra note 4, at 200.
28 Gregory S. Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 McGeorge L. Rev. 1051, 1054 (Summer 2001).

involved in the action." FRCP 26(b)(1).[29] Overall, it was feared that the amendments would undermine the concept of notice pleading because discoverability is initially determined by the "claim or defense:"

> The rule changes signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.[30]

As might be expected, the plaintiffs' bar objected to the amendment while defense attorneys and business groups supported the narrower scope.[31] This effort to limit discovery began with the 1983 amendments, but is actually part of the larger backlash that began in the late 1970s against perceived discovery abuses that were thought to contribute to spiraling litigation costs.[32]

Ironically, the amended rules may well prompt substantial satellite litigation for the foreseeable future.[33] The revised rule shifts the burden of uncertainty in favor of those opposing release of information, and places it upon those who seek information, reversing more than a half-century of federal litigation policy.[34] In principle, the party that holds the information knows better than the party seeking information what facts or witnesses are crucial. Absent an obligation to disclose unfavorable information, the party seeking information may have to drill numerous dry holes before stumbling on the gusher — if he ever does. "[A]t 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.[35]

A further litigation-rich environment exists in the gray area between the first and second steps of the two-step discovery process. What is the difference between information that is "relevant to a claim or defense" and information that is "relevant to the subject matter of the action"? Inevitably, parties opposing discovery will take a conservative view of that issue, with judicial intervention the only solution. As the Committee Notes suggest:

> A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.[36]

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29 Gregory P. Joseph, *The 2000 Amendments to the Federal Rules of Civil Procedure & Evidence: A Preliminary Analysis*, ALI-ABA Course No. SG011 (Oct. 2001).
30 Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, ALI-ABA Course No. SF97, Vol. III (June 2001).
31 Stempel, supra note 15, at 583.
32 *Id.* at 532.
33 *Id.* at 584.
34 *Id.* at 584-585.
35 Morgan Cloud, *The 2000 Amendments to the Federal Discovery Rules and the Future of Adversarial Pretrial Litigation*, 74 Temple L. Rev. 27, 46 (Spring 2001).
36 Advisory Committee on Civil Rules, Committee Notes, quoted in Richard L. Marcus, *The 2000 Amendments to the Discovery Rules*, 2001 Fed. Cts. L. Rev. 1, 16 (2001).

Those distinctions, however, raise as many questions as they answer. Isn't information that impeaches a key witness likely to be "relevant to a claim or defense"? Judge Paul W. Grimm, District of Maryland,[37] suggests a balancing of Rule 26(b)(1) with Rule 26(b)(2) factors rather than trying to come up with a bright line rule.[38] Judge Grimm also advised that parties should not "feel restricted by the pleadings' four corners" as that would be in contravention of notice pleading.[39] Judge Grimm's prescription, while it preserves maximum discretion for a federal judge to do as he or she sees fit in a given case, is hardly conducive to bright-line dispute resolution without court intervention. Instead, judicial approval is required to broaden the scope of discovery if either party believes that information is "relevant to the subject matter" but not "relevant to a claim or defense".

"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."[40]

VI. THE SPECIAL PROBLEM OF ELECTRONIC DISCOVERY

Cutting across both tiers of Rule 26 and threatening to swamp all other issues in certain big cases is the issue of electronic discovery. The FRCP specifically address the discoverability of computer-based materials. The Manual for Complex Litigation encourages such discovery:

> Discovery requests relating to the computer, its programs, inputs and outputs should be processed under methods consistent with the approach taken to discovery of other types of information. [41]

With the amendments to the rules requiring mandatory initial disclosure, a separate discovery request for electronic data is not necessary for data pertaining to the claims or defenses of the party offering disclosure. In fact, attorneys should expect that opposing parties will, at some point in the discovery process, produce "both the data and the computers that produced them for bit-stream image copying of the storage media."[42] Particularly when applying a cost-benefit analysis to discovery, courts will increasingly embrace electronic production of documents; therefore, litigants can expect to be turning over stacks of backup media rather than — or in addition to — boxes of paper.[43]

As a practical matter, corporations and their counsel that are not prepared either to produce the relevant data or to show an in-place destruction, retention, and recovery policy, will likely (and should) find themselves at odds with the court.[44]

In addition to being a "data compilation," a computer system may be considered a "location" subject to inspection. Attorneys can reasonably expect that they will have to disclose the exact computer, network server, or even Internet Service Provider ("ISP") where discoverable electronic information is to be found. Likewise, when receiving disclosure, counsel can reasonably demand exact locations or on-site inspections of computer systems.[45] One notorious difference between paper documents and their electronic brethren is the existence of residual data: that electronic shadow that never leaves, whether purportedly

37 *Thompson v. Dept. of Housing and Urban Development*, No. MJG-95-309 (D. Md. 3/13/01).
38 *A View From the Bench: Balancing the Need for Discovery Against the Cost of Production*, Federal Discovery News, Vol. 7, No. 8 (July 16, 2001) quoting *Thompson*, supra note 37.
39 *Id.*
40 Cloud, supra note 35, at 49-52.
41 *Manual for Complex Litigation*, pt. 1, § 2.715, quoted in Roger Haydock and David Herr, DISCOVERY PRACTICE, § 9.7, 9.7.4, 3rd Ed. (2000).
42 Larry Johnson, *New Amendments to Rule 26 Dictate Use of Electronic Discovery Technology*, <http://www.lawcommerce.com/litigation/art_rule26.asp>, visited April 2, 2002.
43 *Id.*
44 *Id.*
45 James P. Flynn and Sheldon M. Finkelstein, *A Primer on "E-VIDE-N.C.E."*, 28 Litigation 34, 35-36 (Winter 2002).

deleted or not. "This reappearance propensity has been labeled 'the vampire effect' of electronic data."[46]

According to one computer forensics group[47], there are three trends in electronic discovery. First, litigants are going after email files which, for the majority of users, reflect the informality and candor of conversation more than the guarded circumspection of business correspondence. Second, courts are requiring such production. Finally, electronic data is entering the courtroom and "is having profound impact in many cases. Courts are generally not persuaded by the authenticity, best evidence rule, Daubert, chain of custody, and other challenges to the introduction of electronic data at trial."[48] For instance, in its case against Microsoft, the Justice Department collected more than three million documents in discovery, many of those email.[49]

The labyrinth of electronic discovery naturally lends itself to "disputes over the scope of disclosure, form of production, privilege, and alleged spoliation."[50] Attorneys will have an increased responsibility to their clients to, initially, understand their clients' technology systems. Further, counsel will be expected to educate their clients about destruction, retention, and preservation. In fact, to avoid sanctions for spoliation of evidence, attorneys need to counsel their clients on evidentiary preservation at the very outset of litigation.[51]

Conversely, disclosure of electronic data may include privileged materials, trade secrets, or information confidential or proprietary to the client. In that case, counsel for both parties should agree in advance on how they will handle inadvertent production to avoid later disputes.[52]

VII. THREE SOLUTIONS TO DISCOVERY MANAGEMENT

A. Far More Active Judicial Management

The 2000 amendments to the FRCP explicitly require judges now, more than ever, to actively manage discovery. The problem is that "judges are perpetually uninterested in becoming embroiled in discovery matters, even though the bar seems to crave supervision."[53]

The original intent of discovery was that it be "self-executing, with minimal judicial involvement."[54] After decades of experience with that model, most commentators agree that discovery would be more efficient if judges were more involved in discovery on a "prompt, decisive, and consistent basis."[55] However, the revisions do little to promote such involvement, even though it is widely believed that the only way to truly reform discovery – particularly for complex litigation — is through the active exercise of judicial oversight.[56] One method of policing and deterring discovery abuses would be for the courts to use Rule 37 to shift the costs to losing parties "as a matter of course."[57] The courts in a wide range of cases "from products liability to employment discrimination have recognized that Rule 26(b)(2)(iii) provides the authority to shift the costs of discovery to the requesting party."[58]

46 James A. Snyder and Angela Morelock, *Electronic Data Discovery: Litigation Gold Mine or Nightmare?*, 58 J. Mo. B. 18, 19 (Jan/Feb 2002), quoting Kenneth J. Withers, *Is Digital Different? Electronic Disclosure and Discovery in Civil Litigation*, Dec. 30, 1999, www.kenwithers.com.
47 James A. Snyder and Angela Morelock, supra note 46, are affiliated with BKD, LLP's Forensics and Dispute Consulting Services Group.
48 Snyder and Morelock, supra note 46, at 19.
49 Flynn and Finkelstein, supra note 45, at 36.
50 Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, ALI-ABA Course No. SF97 (June 2001).
51 *Id.*
52 *Id.*
53 Stempel, supra note 4, at 238.
54 Weber, supra note 28, at 1067.
55 Stempel, supra note 4, at 238.
56 *Id.*
57 *Id.* at 239.
58 Carroll, supra note 1.

With the advent of the 2000 amendments, the courts must take on the role of rectifying the problems that the amendments produce, including allowing access to discovery that may allow litigants "to prove their contentions or facilitate settlement, and avoiding technicalities which prevent merits-based disposition of lawsuits."[59]

B. Discovery Masters

Stempel argues for the appointment of Discovery Masters, much like the Discovery Commissioners used in Nevada, who would "receive, hear, and decide discovery motions and would also conduct any conferences or other motions directed toward discovery issues."[60] This approach would lend some uniformity to the application of the discovery rules, at least within the jurisdiction of the particular master.[61] This suggestion is in line with the Manual for Complex Litigation, which allows for magistrates, special masters, and deposition judges to oversee discovery disputes. "[The] Manual for Complex Litigation may be a convincing authority to a trial judge confronted with discovery problems."[62]

More extensive use of discovery masters would allow them to develop expertise in both the procedural and substantive aspects of discovery disputes. It would also allow for the creation of a subset of the judiciary that would concentrate on such disputes. For whatever reason, some federal judges are (or at least are perceived to be) uninterested in discovery disputes. This fuels the perception that recalcitrant litigants can have a field day, unencumbered by judicial intervention. Active use of the discovery master procedure is one available solution.

C. Mandatory Disclosure of <u>All</u> Relevant Facts – The Arizona Model

Arizona's state courts have pioneered the concept of extensive, mandatory disclosure at the outset of civil litigation. Attorneys practicing in Arizona are accustomed to liberal discovery and to engaging in mandatory disclosure as a matter of course.

The Arizona Rules of Civil Procedure do not limit initial disclosures to matters "relevant to facts alleged with particularity." Rather, Ariz. R. Civ. P. Rule 26.1, known locally as the Zlaket rule, named for its main proponent, former Arizona Supreme Court Chief Justice Thomas Zlaket, states, in part:

> Rule 26.1: Prompt disclosure of information.
>
> (a) Duty to disclose, scope. Within the time set forth in subdivision (b), each party shall disclose in writing to every other party:
>
> (1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.
>
> (2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.
>
> (3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.

59 Tobias, supra note 6, at 889.
60 Stempel, supra note 4, at 241.
61 *Id.* at 243.
62 Haydock and Herr, supra note 41, § 9.3.4.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence or relevant documents that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or, in the case of voluminous documentary information, a list of the categories of documents, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents will be made, or have been made, available for inspection and copying. Unless good cause is stated for not doing so, a copy of each document listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the document shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

Arizona also differs from the FRCP in that material required to be disclosed which was not disclosed is precluded at trial. Arizona courts allow such information to be used at trial if good cause is shown.[63]

After an initial flurry of commentary, much of it negative, Arizona's experience with voluntary disclosure has been remarkably encouraging. Attorneys accustomed to an adversarial model of civil litigation and discovery were skeptical about voluntary disclosure, fearing that disclosure would be asymmetrical in many cases. While there have certainly been instances — some dramatic — of nondisclosure, the system overall seems to be achieving its goal of "front-loading" litigation expense and encouraging a mutual exchange of information at the outset of a civil action.

63 Weber, supra note 28, at 1057-1058.