COLLISION COURSE
IN
FEDERAL CIVIL DISCOVERY

by

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Two important efforts to reform those procedures which cover federal civil litigation are currently proceeding on a collision course. The first is the Civil Justice Reform Act of 1990. That legislation requires each of the ninety-four federal district courts to assess its docket and promulgate procedures for decreasing expense and delay in civil lawsuits. The second is a constituent of the most thoroughgoing set of proposals to revise the Federal Rules of Civil Procedure in their fifty-five year history.

In September 1992, the Judicial Conference of the United States—the policymaking arm of the federal judiciary which Chief Justice Rehnquist chairs—considered this proposed amendment in the Federal Rules and could have prevented its collision with civil justice reform. The Conference did not treat the problem, and that inaction has engendered considerable confusion in the federal trial courts. Because the confusion appears likely to worsen over time, creating increasing controversy, it is important to examine why these procedural reform efforts are on a collision course and how such a collision might be averted. This essay undertakes that effort by evaluating the source of the difficulty and suggesting ways of avoiding the collision.

I. Federal Rules Proposals

The package of proposed revisions in the Federal Rules is very ambitious,[1] but comparatively few of the particular proposals now remain controversial. The rule revisors decided to delete certain suggested changes that had proved controversial. The Judicial Conference wisely chose to omit a proposal to amend Rule 56 governing summary judgment.[2] The Committee on Rules of Practice and Procedure of the

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1. *See* Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Civil Procedure (Sept. 1992).

2. *See* Proposed Amendments, *supra* note 1, at Table of Contents (showing deletion of Rule 56). *See also* Judicial Conference of the United States, Preliminary Report Judicial Conference Actions 8 (Sept. 22, 1992) (same).

Judicial Conference (Standing Committee) correspondingly deleted a recommended modification in Rule 83 that would have authorized districts to experiment for not more than five years with local rules which contravene Federal Rules if the Judicial Conference approved.[3] The Committee acted out of apparent deference to the ongoing efforts of the ninety-four districts which can achieve similar results under the Civil Justice Reform Act.[4]

The rule revisors substantially changed proposals to amend other provisions of the Federal Rules in ways that made them less controversial. For example, the 1983 revision of Rule 11 governing sanctions probably has been the most controversial in the Federal Rules' history.[5] The provision has generated considerable expensive, unnecessary satellite litigation and has discouraged resource-deficient litigants, such as civil rights plaintiffs, from vigorously pursuing their cases.[6]

The Advisory Committee on the Civil Rules and the Standing Committee, the entities which formulated the package that the Judicial Conference has now sent to the Supreme Court, labored assiduously to amend Rule 11 in ways that now make it palatable to most constituencies which Rule 11 affects. For instance, the Civil Rules Committee included safe harbors, which should afford resource-poor parties greater protection, and instructed judges to employ sanctions of attorneys' fees less frequently, which should reduce incentives to invoke the Rule.[7]

The proposal for revising other rules, principally Rule 26, to institute mandatory pre-discovery disclosure, however, remains highly controversial. The Advisory Committee reversed course twice on the issue in two months. The change as originally proposed proved to be extremely controversial. The most important component of the proposal would have required within thirty days of service of defendant's answer that the plaintiff and the defendant: designate individuals who are "likely to have information that bears significantly on any claim or defense, identifying" the information's subjects; copy or describe every document, data compilation, and tangible thing which is "likely to bear

3. *See* Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Proposed Amendments to the Federal Rules of Civil Procedure ii (July 1992) (showing deletion of Rule 83). *See generally* A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power,* 139 U.PA.L.REV. 1567 (1991).

4. *See* Carl Tobias, *Civil Justice Reform Roadmap,* 142 F.R.D. 507, 511 (1992). *See also infra* notes 29–38 and accompanying text.

5. *See* FED.R.CIV.P. 11. *See also* George Cochran, *Rule 11: The Road to Amendment,* 61 MISS.L.J. 5 (1991) (controversial); Carl Tobias, *Reconsidering Rule 11,* 46 U. MIAMI L.REV. 855 (1992) (same).

6. *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11,* 137 U.PA.L.REV. 1925, 1930–31 (1989) (satellite litigation); Carl Tobias, *Rule 11 and Civil Rights Litigation,* 37 BUFF.L.REV. 485, 514 (1988–89) (same); Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment,* 74 GEO.L.J. 1313, 1327, 1340 (1986) (discouraging civil rights plaintiffs); Georgene M. Vairo, *Rule 11: A Critical Analysis,* 118 F.R.D. 189, 200–01 (1988) (same).

7. *See* Judicial Conference of the United States, Proposed Amendment to Federal Rule of Civil Procedure 11 (Sept. 1992). *See also* Tobias, *supra* note 5, at 875–77, 880–89 (discussion of safe harbors and instructions to judges). *See generally* Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11,* 77 IOWA L.REV. No. 5 (forthcoming).

significantly on any claim or defense"; compute any category of damages which the disclosing party claims, "making available for inspection and copying" all supporting documentation; and make available for inspection and duplication any insurance agreement that could satisfy a judgment.[8] The plaintiff and the defendant would also have been under a continuing duty to augment earlier disclosure as new, relevant material became available.[9]

The proposal included two other significant, but less important, provisions. The first would have required within sixty days of trial that the plaintiff and the defendant disclose the substance of expert testimony through a comprehensive written report which each expert must prepare.[10] The proposal would have required that the statement include a thorough explanation of any opinion to be given and the reasons therefor; the material on which the expert relied in formulating the opinion; all exhibits to be employed in substantiating any opinion; the expert's qualifications; and a list of all lawsuits in which the expert had testified during the preceding four years.[11] The second provision would have required thirty days before trial that the plaintiff and the defendant designate every witness whom the party expected to, or might, call at trial; identify each witness whose deposition testimony the party anticipated presenting; and designate every document which the party expected to, or might, tender at trial.[12]

Numerous segments of the organized bar strongly criticized the proposal with written comments during a six-month comment period, which closed on February 15, 1992, and orally at public hearings in Los Angeles during November 1991 and in Atlanta during February 1992. At the conclusion of that hearing, the Advisory Committee decided to abandon the proposal governing mandatory pre-discovery disclosure partly because it wanted to capitalize on the experience of numerous districts that had begun experimenting with the concept under the Civil Justice Reform Act.[13]

Nonetheless, in April 1992, six committee members, at the instigation of Judge Ralph K. Winter, Jr., of the United States Court of Appeals for the Second Circuit, persuaded the remainder of the committee to recon-

8. *See* Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Proposed Amendment of Federal Rule of Civil Procedure 26, *reprinted in* 137 F.R.D. 53, 87–88 (1991) [hereinafter Rule 26 Proposal]. For helpful analysis of the proposal on which I rely substantially here, see Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155 (1991).

9. Rule 26 Proposal, *supra* note 8, 137 F.R.D. at 96.

10. Id., 137 F.R.D. at 89.

11. Id.

12. Id., 137 F.R.D. at 90–91.

13. *See* Randall Samborn, *U.S. Civil Procedure Revisited*, National L.J., May 4, 1992, at 1, 12 (decision to abandon). Judge Sam C. Pointer, Advisory Committee Chair, stated that it made "more sense to get the benefit of that experience [from experimentation] before moving ahead." *See* Ann Pelham & Howard Mintz, *Civil Reform Plan Stalls Amid National Dissent*, The Recorder, March 17, 1992, at 1.

sider the issue.[14] The most important change that the Advisory Committee made in reviving the proposal was to substitute the requirement that parties disclose "discoverable information relevant to disputed facts alleged with particularity in the pleadings" for the requirement that litigants disclose information which "bears significantly on any claim or defense." [15]

A number of lawyers believe that the modification represents improvement, although numerous concerns remain. A significant difficulty is the proposal's efficacy. The proposal may simply require disclosure too early in the litigation to permit "full informative disclosure." [16] Clever counsel and litigants could correspondingly avoid revealing any important information.[17] The new notion of relevance seems preferable to the concept of "bearing significantly," even though there is lingering doubt about what exactly will be "relevant to disputed facts alleged with particularity in the pleadings." [18]

This lack of certainty and lawyers' penchant for employing procedural provisions to secure strategic advantages [19] could foster extensive motion practice and expensive, time-consuming satellite litigation over, for example, the sufficiency of initial disclosures and compliance with the continuing duty to disclose.[20] Even in numerous cases in which the proposal does operate effectively, lawyers and litigants will have wasted substantial resources on voluntary disclosure when the suits are resolved early on motion or through settlement.[21]

Practitioners are also worried about their ethical responsibilities to clients, for instance, not to disclose privileged information, because the proposal could subordinate these duties to attorneys' obligations as officers of the court.[22] Requiring the disclosure of favorable information may concomitantly raise concerns involving attorney-client privilege and

14. *See* Samborn, *supra* note 13, at 12. *See also* Ralph K. Winter, *In Defense of Discovery Reform,* 58 Brook.L.Rev. 263, 268 (1992).

15. *See* Judicial Conference of the United States, Proposed Amendment to Federal Rule of Civil Procedure 26 (Sept. 1992). *See also* Winter, *supra* note 14, at 266–69; *supra* note 8 and accompanying text.

16. Mengler, *supra* note 8, at 158.

17. *Id.* at 158. *See also* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking,* 69 N.C.L.Rev. 795, 817 n. 15 (1991); Samborn, *supra* note 13, at 13.

18. *See supra* note 8 and accompanying text. *See also infra* notes 24–26 and accompanying text. *But cf.* Winter, *supra* note 14, at 268–69 (ambiguity reduced partly by language derived from Rule 9(b) and therefore has body of caselaw defining it).

19. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure,* 86 Colum.L.Rev. 433, 494 (1986) (lawyers' penchant).

20. Walter Lucas, *Bar Blasts Proposed Changes in Discovery,* N.J.L.J., Mar. 2, 1992, at 4 (satellite litigation). *See also* Samborn, *supra* note 13, at 13.

21. *See* Samborn, *supra* note 13, at 13. *See also* Carl Tobias, *Collision Course in Federal Civil Procedure,* Legal Times, Oct. 19, 1992, at 43.

22. *See* Lucas, *supra* note 20, at 4; Tobias, *supra* note 21, at 43. Rule 26(b)(5) seems responsive to this concern. *See* Winter, *supra* note 14, at 269–70.

communication by, for example, encouraging clients to be even less candid than they currently are with their lawyers.[23]

Counsel who represent plaintiffs in personal injury cases and public interest litigation believe that the proposal would particularly disadvantage them. These plaintiffs typically lack information and need discovery to secure the material which will enable them to prove their cases, while defendants ordinarily have the information in their files or minds and oppose relinquishing it.[24] Under the proposal, a judge could circumscribe the scope of a plaintiff's discovery based on this dearth of information on which to premise pleadings and make initial disclosures.[25] Plaintiffs' inability to plead in detail until they have conducted discovery creates a "Catch 22" situation, a circumstance which is exacerbated by proposed restrictions on permissive discovery.[26]

In short, the proposal governing compulsory pre-discovery disclosure significantly changes traditional notions of discovery, may insufficiently take into account certain essential realities of the discovery process, and could prove ineffectual. Despite these considerations, the Standing Committee, at its June 1992 meeting, approved without change the Advisory Committee's April draft.[27] During September, the Judicial Conference correspondingly decided to forward the April proposal to the Supreme Court.[28] The impact of the factors reviewed above is worsened, because the proposal could collide with mandatory pre-discovery disclosure requirements with which numerous federal districts are now experimenting under the Civil Justice Reform Act of 1990.

II. Civil Justice Reform

The Civil Justice Reform Act of 1990 requires that every federal court thoroughly assess conditions in its district and promulgate a civil justice expense and delay reduction plan.[29] The purposes of the plans are to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy and inexpensive resolutions of civil disputes." [30] The statute includes eleven

23. *See* Samborn, *supra* note 13, at 12–13. *But see* Winter, *supra* note 14, at 271.

24. *See* Letter from Trial Lawyers for Public Justice to Judge Robert E. Keeton, Chair, Standing Committee (June 16, 1992) (copy on file with author); Lucas, *supra* note 20, at 4–5. *See also* Tobias, *supra* note 6, at 495–98 (same as to civil rights plaintiffs).

25. *See* Mengler, *supra* note 8, at 158–60. *See also* Trial Lawyers Letter, *supra* note 24.

26. *See* Mengler, *supra* note 8, at 158–60. *See also* Trial Lawyers Letter, *supra* note 24. *See generally* Tobias, *supra* note 6, at 495–98.

27. *See* Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Proposed Amendment to Federal Rule of Civil Procedure 26 (July 1992).

28. *See* Judicial Conference of the United States, Proposed Amendment to Federal Rule of Civil Procedure 26 (Sept. 1992).

29. *See* Judicial Improvements Act of 1990, tit. I, Pub.L. No. 101–650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471–82 (Supp.1992)). *See generally* Senate Comm. on Judiciary, Judicial Improvements Act of 1990, S.Rep. No. 101–416, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802; Jeffrey J. Peck, *"Users United": The Civil Justice Reform Act of 1990*, 54 LAW AND CONTEMP.PROBS. 105 (Summer 1991).

30. *See* 28 U.S.C. § 471 (Supp.1992).

principles, guidelines and techniques, which prescribe, for instance, rigorous judicial case management, discovery limitations, and alternatives to trials for resolving civil cases, such as mediation. Most relevant to the issues examined in this article is the legislative suggestion that districts encourage "cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices".[31] Each court must consider, and may adopt, the eleven principles, guidelines, and techniques and "such other features as the district court considers appropriate." [32]

In July 1992, the Committee on Court Administration and Case Management of the Judicial Conference designated as Early Implementation District Courts (EIDC) thirty-four districts which had issued civil justice plans by December 31, 1991.[33] The Act requires that the remaining sixty districts promulgate plans by December 1993.[34] Twenty of the EIDCs included some form of mandatory pre-discovery disclosure in their plans, and these courts are currently experimenting with this new concept in different ways.

Most of the districts adopted procedures covering compulsory pre-discovery disclosure which diverge from the Federal Rules proposal described above and from the requirements that the other EIDCs prescribed. The principal reason why many courts promulgated procedures which conflict with the new proposal is that the districts modeled their procedures on the now-superseded articulation requiring disclosure of information and witnesses bearing significantly on claims or defenses.[35] That formulation was the subject of public comment when the EIDCs were finalizing their civil justice plans in late 1991.[36] One example of the differences among districts is that some courts require that parties provide a "general description" of the information to be disclosed, while

31. *See* 28 U.S.C. § 473(a)(4) (Supp.1992).

32. *See* 28 U.S.C. § 473(a), 473(b)(1)–(5) (Supp.1992) (eleven principles, guidelines and techniques); *id.* at b(6) (open-ended provision quoted in text). The court takes such action after reviewing the report and recommendations of an advisory group. *See* 28 U.S.C. § 472 (Supp.1992). *Cf.* Tobias, *supra* note 4, at 508 (more discussion of advisory groups).

33. *See, e.g.,* Letter to James DeAnda, Chief Judge, United States District Court for the Southern District of Texas, from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management (July 30, 1992); Letter to Patrick F. Kelly, Chief Judge, United States District Court for the District of Kansas, from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management (July 30, 1992). *Cf.* Carl Tobias, *Judicial Oversight of Civil Justice Reform,* 140 F.R.D. 49, 50, 54–55 (discussion of committee's oversight responsibilities).

34. *See* Judicial Improvements Act of 1990, tit. I, Pub.L. No. 101–650, § 103(b)(1). *Cf.* Civil Justice Expense and Delay Reduction Plan for the United States District Court for the Western District of Missouri (Apr. 30, 1992) (one of two courts to adopt plan in 1992); Civil Justice Expense and Delay Reduction Plan for the United States District Court for the Western District of Texas (Nov. 30, 1992).

35. *See, e.g.,* United States District Court for the Eastern District of Texas, Civil Justice Expense and Delay Reduction Plan 2 (Dec. 1991); United States District Court for the Northern District of West Virginia, Plan for Civil Justice Delay and Expense Reduction 83 (Dec. 1991). *See also supra* note 8 and accompanying text.

36. *See supra* text in sentence following note 12.

an analogous number of districts demand only a "description." [37] A few courts correspondingly require that litigants disclose documents which are "likely" to bear significantly on claims and defenses, even as a similar number require that documents be "reasonably likely" to do so.[38]

III. Collision Course

When the Judicial Conference approved the discovery proposal, the Conference neglected to treat the potential collision between the proposal and the continuing experimentation with compulsory pre-discovery disclosure in the context of civil justice reform's implementation. A number of judges in EIDCs have evidenced confusion or evinced concern about how to mesh the Federal Rules proposal with their districts' newly-prescribed requirements covering mandatory pre-discovery disclosure. Moreover, attorneys and litigants who participate in civil lawsuits in multiple districts, such as government attorneys, General Motors, and the Sierra Club, could be subject to conflicting discovery procedures.

It is also uncertain whether the twenty EIDCs will change their pre-discovery disclosure requirements to conform with the new proposal, should that rule amendment become effective in December 1993. The Rules Enabling Act would mandate such consistency,[39] although districts have historically adopted local rules that apparently or actually conflicted with the Federal Rules.[40] Indeed, an important criticism of the Civil Justice Reform Act and its implementation to date is that inconsistency has been fostered, rather than limited.[41]

The remaining federal districts which must promulgate civil justice plans before the same December 1993 date are facing similar difficulties. For example, the courts must decide whether to premise their pre-discovery disclosure provisions on the present proposal, which the remaining federal rule revision entities, the Supreme Court and Congress, could alter or on the procedures adopted in the twenty EIDCs. The

37. *Compare* United States District Court for the Western District of Oklahoma, Civil Justice Expense and Delay Reduction Plan 11 (Dec. 1991) and United States District Court for the Virgin Islands, Civil Justice Expense and Delay Reduction Plan 37 (Dec. 1991) *with* United States District and Bankruptcy Court for the District of Idaho, Civil Justice Expense and Delay Reduction Plan 10 (Dec. 1, 1991) and United States District Court for the District of Montana, Civil Justice and Expense and Delay Reduction Plan 32 (Dec. 1991).

38. *Compare* United States District Court for the Southern District of Illinois, Civil Justice Delay and Expense Reduction Plan 11 (Dec. 1991) and United States District Court for the Eastern District of Pennsylvania, Civil Justice Expense and Delay Reduction Plan 13 (Dec. 1991) *with* United States District Court for the District of Delaware, Civil Justice Expense and Delay Reduction Plan 3 (Dec. 1991) and United States District Court for the District of Massachusetts, Expense and Delay Reduction Plan 34–35 (Nov. 18, 1991).

39. The Act provides that local rules must be "consistent with Acts of Congress" and the Federal Rules of Civil Procedure. 28 U.S.C. § 2071(a) (Supp.1990).

40. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PROCEDURE (1989). *See also* Stephen N. Subrin, *Federal Rules, Local Rules and State Rules: Uniformity, Divergence and Emerging Patterns*, 137 U.PA.L.REV. 1999 (1989). *See generally* Levin, *supra* note 3.

41. *See, e.g.*, Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L.REV. 375, 380–82 (1992); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ.ST.L.J. 1393 (1993).

districts might also wait for the Federal Rules proposal to take effect. That approach is problematic, however, because the courts must publish their plans during the same month, December 1993, as the Federal Rules proposal would become effective.[42]

These complications prompted the Civil Justice Reform Act Advisory Group for the Eastern District of New York and the American Bar Association Litigation Section to recommend that the federal rule revisors suspend the pre-discovery disclosure proposal until experimentation with the concept in the EIDCs could be adequately analyzed.[43] Neither the Advisory Committee nor the Standing Committee chose to follow this course of action, and the Judicial Conference did not address the issue.

IV. Suggestions For The Future

The Supreme Court, which is currently considering the proposal on mandatory pre-discovery disclosure, should suspend the proposal for several reasons. There is already much confusion over conflicting pre-discovery disclosure requirements in the trial courts, and allowing the Federal Rules proposal to proceed through the rule revision process will only worsen this situation. The compulsory pre-discovery disclosure provisions prescribed in the twenty EIDCs are diverse enough to provide a valuable basis for experimentation and assessment, which should ultimately lead to promulgation of the most effective national requirements. Should more or different experimentation be deemed appropriate, the remaining districts which are presently writing their civil justice plans could afford the requisite diversity.

The Supreme Court might simply send the proposal forward to the Congress. By the time that Congress evaluates the proposal, there will have been additional opportunities for experimentation in the twenty EIDCs. There will also have been more opportunities for increasing confusion and inconsistency. Moreover, opponents of the proposal could well take their case to Congress, while political factors might affect congressional consideration of the proposal.[44]

The Supreme Court has been a comparatively inactive participant in the rules revision process for a quarter-century.[45] The Court, however,

42. *See* Judicial Improvements Act of 1990, tit. I, Pub.L. No. 101-650, § 103(b)(1). *See also supra* note 34 and accompanying text.

43. *See* Letter from Edwin J. Wesely, Chair, Advisory Group for the Eastern District of New York, to Robert Keeton, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Feb. 3, 1992); Bryan J. Holzberg, *Judicial Conference Approves Amendments to Civil Rules,* 18 LITIGATION NEWS 10 (Dec. 1992) (Litigation Section recommendation).

44. *See, e.g.,* Avern Cohn, *Comment: A Judge's View of Congressional Action Affecting the Courts,* 54 LAW & CONTEMP.PROBS. 99 (Summ.1991); Mullenix, *supra* note 17. If the Supreme Court does not adopt the suggestions offered here, Congress should do so.

45. This can be traced to Justice Hugo Black's revealing dissent from the promulgation of certain rule revisions in 1966. *See* Order Amending the Federal Rules of Civil Procedure, 383 U.S. 1029, 1043 (1966) (Black, J., dissenting). *But see* Order Amending the Federal Rules of Civil Procedure, 446 U.S. 995, 997 (1980) (Powell, J., dissenting). *See generally*

possesses the requisite expertise and enjoys the respect needed to prevent the unnecessary procedural collision between the Federal Rules proposal and civil justice reform. The Court should do so by suspending the proposal when it transmits the ambitious package of proposed Federal Rules amendments to Congress in late April.[46]

Conclusion

The Federal Rules proposal to amend Rule 26 and experimentation with mandatory pre-discovery disclosure pursuant to the Civil Justice Reform Act of 1990 are now on a collision course. The Supreme Court should suspend that proposal, thereby averting this collision and permitting experimentation to proceed under the 1990 statute. After diverse experimentation has continued for a reasonable period, it should be possible to ascertain more accurately whether national application of compulsory pre-discovery disclosure is warranted.

Harold S. Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision,* 85 MICH.L.REV. 1507 (1987).

46. One objection to the course of action suggested is that it would additionally delay discovery reform, an ostensible reason for the Advisory Committee's decision to revive the proposal in April 1992. *See* Samborn, *supra* note 13, at 12. *See also* Winter *supra,* note 14; *supra* notes 13–15 and accompanying text. One response to this objection is that any federal district which believes that mandatory pre-discovery disclosure is efficacious can implement the concept pursuant to the Civil Justice Reform Act.

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