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ARTICLES

IN DEFENSE OF “AUTOMATIC DISCLOSURE IN DISCOVERY”

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In the Fall 1992 issue of this Law Review, three distinguished authors vigorously oppose the disclosure provisions of the proposed amendment of Rule 26 of the Federal Rules of Civil Procedure. Their article is thoroughly researched and well-written but, I submit, fails to tell the whole story. In this response, I analyze the five major propositions the authors advance in support of their argument that the proposal is flawed, and I draw attention to important aspects of the proposal that are relevant to whether it should be adopted.

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1 Griffin B. Bell et al., Automatic Disclosure in Discovery—The Rush to Reform, 27 Ga. L. Rev. 1 (1992). The article, authored by Griffin Bell, Chilton Davis Varner, and Hugh Q. Gottschalk, quotes relevant portions of the proposed amendment.
A. The disclosure standard will apply to all types of civil litigation, from simple collection cases to patent, securities, and antitrust claims. The only way to frame a standard covering such a broad range of cases is to use the broadest, most non-specific terms.\(^2\)

This argument proves too much. The federal rules are, and always have been, transubstantive and applicable to all categories of cases. Discovery in all cases has been governed by a single standard—requests must be relevant to the subject matter and calculated to lead to the discovery of admissible evidence. And that standard would continue to govern discovery under the authors' own alternative proposal.

More importantly, the authors err when they assert that the standard “will” apply to disclosure in all types of cases. They fail to take into account that the disclosure provision in Rule 26(a)(1) is in effect a default rule. The introductory clause states: “Except to the extent otherwise stipulated or directed by order or local rule, a party shall . . . .”\(^3\) This opt-out provision would give courts broad power to alter the obligations under the rule.\(^4\) The rule’s drafters expect that courts will, by local rule, exempt certain categories of cases in which disclosure would make no sense, such as social security and government collection cases.\(^5\) Courts may also establish different tracks for disclosure and discovery in different types of cases, as a number have done in their expense and delay

\(^2\) Id. at 39, 48-49.

\(^3\) Proposed Fed. R. Civ. P. 26, reprinted in Communication from the Chief Justice of the United States, Amendments to the Federal Rules of Civil Procedure and Forms, H.R. Doc. No. 103-74, 103d Cong., 1st Sess. 28 (1993) (on file with the Georgia Law Review) [hereinafter Supreme Court Transmittal]. This is also the text of the provision as it appears in the proposed amendments transmitted to the Supreme Court on November 27, 1992. The text of the amendment as it appears in the article, see Bell et al., supra note 1, at 3, omits the words “order or local rule” and thus conceals the fact that the disclosure provisions may be set aside by local rule as well as by case-specific order or stipulation of the parties.

\(^4\) The opt-out provision will in effect accomplish what the authors advocate, Bell et al., supra note 1, at 53-57, and what Justice Scalia urged be done, see Supreme Court Transmittal, supra note 3, at 108-09 (Scalia, J., dissenting), that is, to permit local experimentation.

\(^5\) Contrary to the authors’ suggestion, Bell et al., supra note 1, at 37, the opt-out provision is not limited to modification on a case-by-case basis. See supra note 3.
reduction plans under the Civil Justice Reform Act.\(^6\)

Proponents of the proposed rule also expect that courts will enter appropriate discovery and disclosure orders in particular cases, employing the procedure set forth in Rule 26(f). That section calls for a mandatory pre-disclosure conference of the parties to discuss the claims and defenses and develop a plan for disclosure and discovery, followed by the mandatory Rule 16 scheduling conference at which the judge takes appropriate action for the management of the case, including making orders governing discovery and disclosure. In this way, courts will adapt the disclosure obligation to the needs and circumstances of particular cases, such as complex cases in which the issues may not be clearly defined at the outset of the litigation.

The authors, moreover, ignore the reality that most civil cases litigated in the federal courts are "small" cases in the sense that, as a result of excessive discovery activity, the cost of litigation can become disproportionate to the amount at stake. The product liability and other complex cases about which they are concerned constitute a small percentage of the docket and are not representative of the overall system.\(^7\) Under the amendment, counsel in those cases will be able to develop procedural orders appropriate for the management of disclosure and discovery.

It is in the universe of the routine cases where disclosure is intended to have its principal effect.\(^8\) In those cases, the issues are generally less arcane and obscure than in some of the product liability cases that occupy the authors, and the information to be disclosed will often be obvious. The importance of the amendment is that it offers a device to cut through the tangle of discovery that now ensnares litigants as soon as the action begins. Discovery has

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\(^6\) 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)). The escape clause is sufficiently broad to allow for considerable variation among districts, which will provide experiences under a variety of regimes, as the authors urge. See Bell et al., supra note 1, at 57.

\(^7\) During the statistical year ending September 30, 1992, product liability cases, for example, accounted for only about 5% of all civil filings. 1992 ANN. REP. OF THE DIRECTOR OF THE ADMIN. OFF. OF THE U.S. CTS. tbl. C-2, at 24 (preliminary draft); see also Ralph K. Winter, Foreword: In Defense of Discovery Reform, 58 BROOK. L. REV. 263, 275-76 (1992). Judge Winter was a member of the Advisory Committee on Civil Rules and participated in the deliberations and decisions leading to the adoption of the amendment.

\(^8\) Winter, supra note 7, at 275-76.
become a knee-jerk reflex action that quickly takes on a life of its own, resulting in costs that tend to deny access to justice to both plaintiffs and defendants. The amendment is intended to encourage early definition and narrowing of issues and to get core information on the table quickly, cheaply, and without adversariness, in order to bring about an earlier and less expensive resolution. In fact, the mere knowledge of the rule’s operation may deter much litigation by discouraging the “discovery game,” where a party attempts to exhaust its opponent before having to disclose adverse evidence (or the lack of support for its position).  

B. The disclosure process is based on the puzzling belief that it would return a level of professionalism and harmony to the discovery process.

Though this is a consummation devoutly to be wished, the goals of the amendment’s supporters are more modest. The amendment grows out of a recognition that the unrestrained operation of the adversary process frustrates its larger purpose of promoting truth finding. As it functions in the context of discovery, the adversary process tends to have the opposite result. Meaningful discovery requires that lawyers comply with an obligation to disclose and produce material harmful to the client’s interest. That obligation, however, often seems to conflict with the postulate of the adversary process that a lawyer’s first duty is to protect the client’s interest. The adversary process is also premised on the presence of a neutral arbiter to oversee and control the litigation; yet discovery, by necessity, must function largely without oversight and control.

The purpose of the amendment is to moderate the excesses of the adversary process in two ways: (1) to remove any doubt that the lawyer owes a duty to the court to make disclosure of core information (though no more disclosure than good lawyers recognize they

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9 Proposed Fed. R. Civ. P. 26 advisory committee’s note, subdivision (a), reprinted in Supreme Court Transmittal, supra note 3, at 224-25.; see Winter, supra note 7, at 271.
10 See Bell et al., supra note 1, at 12.
11 Id. at 40.
must make now when the right discovery demand is made),\textsuperscript{13} and (2) to reduce the amount of controversy over discovery that some lawyers now generate, often in the hope of wearing down their opponent and delaying the evil day when they must produce or disclose that which they would rather withhold. Disclosure will not make litigation all sweetness and light, but by making a lawyer's obligation manifest, it should eliminate much of the game playing common to discovery. Consider how often lawyers ask themselves, "How can I interpret this interrogatory, or document request, to avoid giving up what I know my opponent is after?" While there will be follow-up discovery after disclosure (such as depositions), if disclosure works as intended, much important information will first have been exchanged.

That is not to say that the amendment would, as the authors contend, "undermine the adversary system and invade the work product of attorneys."\textsuperscript{14} Their assertion that it "ignores both the work product doctrine and attorney-client privileges"\textsuperscript{15} is simply wrong. Proposed Rule 26(b)(5) specifically allows parties to assert a work-product or privilege claim before materials subject to such a claim need to be disclosed or before a party may depose a witness.\textsuperscript{16} The rule requires nothing to be disclosed (such as privileged or irrelevant matter or work product) that would not now have to be disclosed if requested—it "simply [does] away with the need for a party to make a formal request for discovery and with the opportunity for the adversary to resist."\textsuperscript{17}

The authors also argue that the rule would require counsel to "use his or her creative and analytical talents to discern the

\textsuperscript{13} "All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly." Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993).

\textsuperscript{14} Bell et al., supra note 1, at 46-48.

\textsuperscript{15} Id. at 5.

\textsuperscript{16} Winter, supra note 7, at 270.

\textsuperscript{17} Id. at 271. The authors' suggestion that the amended rule would somehow undermine attorneys' ethical obligations by requiring disclosure of information "harmful to the client's cause" is baseless. See Bell et al., supra note 1, at 5. Lawyers must do so now, but their efforts to avoid it cause much of the delay and expense in discovery. Those who oppose disclosure as "fundamentally incompatible" with the adversary process, see id. at 46-47 (quoting Chairman of the Section of Litigation of the American Bar Association), have turned a blind eye to a lawyer's obligations to the court.
theories of the adversary” to determine what to disclose.\textsuperscript{18} The rule, however, requires disclosure only of “discoverable information relevant to disputed facts alleged with particularity in the pleadings.”\textsuperscript{19} As the Advisory Committee note points out, the extent of the disclosure obligation is directly proportional to the specificity of the allegation; vague and conclusory allegations do not oblige lawyers to search out witnesses and documents to make the opponent’s case.\textsuperscript{20} The new rule should reduce the cost and delay of obtaining plainly relevant core information, while limiting the opportunities to obstruct and delay the disclosure of such information when it has potentially adverse consequences. If in the process it also helps raise the level of professionalism and restore a measure of civility, so much the better.\textsuperscript{21}

\textbf{C. The vagueness of the disclosure rule will increase motion practice.}\textsuperscript{22}

In support of their contention, the authors refer to allegations from what they describe as a “typical case filed in federal court”.\textsuperscript{23} “Defendant . . . placed said automobile into the stream of commerce in a defective condition, unreasonably dangerous for the use of [plaintiff].”\textsuperscript{24} The authors maintain that under the proposed disclosure rule, such a pleading would give the defendant “no basis

\begin{itemize}
\item \textsuperscript{18} Bell et al., supra note 1, at 5.
\item \textsuperscript{19} Proposed Fed. R. Civ. P. 26(a)(1)(A), (B) (emphasis added), reprinted in Supreme Court Transmittal, supra note 3, at 28.
\item \textsuperscript{20} Proposed Fed. R. Civ. P. 26 advisory committee’s note, subdivision (a), para. (1), reprinted in Supreme Court Transmittal, supra note 3, at 226; Winter, supra note 7, at 269.
\item \textsuperscript{21} Justice Scalia, in his dissent, observes that “the [disclosure] regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker.” Supreme Court Transmittal, supra note 3, at 108 (Scalia, J., dissenting). But the problem (and the circumstance animating this reform effort) is that the safeguards and incentives of the adversary process do not work well in the discovery process, which largely occurs out of sight of the “neutral decisionmaker.” See Schwarzer, supra note 12, at 713.
\item \textsuperscript{22} Bell et al., supra note 1, at 5, 41-42.
\item \textsuperscript{23} While allegations such as those quoted in the text from a product liability case must be dealt with, they are hardly typical of federal court pleadings. See supra note 7.
\item \textsuperscript{24} Bell et al., supra note 1, at 42 (quoting Heath v. General Motors Corp., 756 F. Supp. 1144, 1145 (S.D. Ind. 1991)) (second alteration in original).
\end{itemize}
to determine what or how much information should be disclosed." The short answer is that such an allegation, failing to "allege . . . facts with particularity," does not trigger an obligation to disclose. Moreover, such pleadings in the present discovery regime routinely lead to vague, catch-all discovery requests that do not measure up to the standards the authors hold out in the article: "specific" requests conveying "clear and distinct obligations." All too often, discovery requests do not, as the authors think they should, "identify with some degree of specificity those documents the party needs." The authors will no doubt concede that lawyers are commonly left "wondering whether countless individuals, documents, data collections, and tangible things should be included in the . . . disclosures." There is no reason to suppose that motion practice will increase under disclosure over what now occurs to resolve discovery disputes, and the authors' dire prediction is not supported by the early experience of the approximately twenty-four districts that have adopted variants of prediscovery disclosure.

To the contrary, the new rule should operate to reduce motion practice. One reason for the reduction is the pre-discovery, prediscovery conference mandated by amended Rule 26(f), followed by the Rule 16 conference with a judge, leading to an order that would govern disclosure and future discovery. This procedure will help

\[25\] Id.
\[26\] Winter, supra note 7, at 269.
\[27\] Bell et al., supra note 1, at 42, 49.
\[28\] Id. at 47.
\[29\] Id. at 42. And the present regime regularly "places upon lawyers the obligation to disclose information damaging to their clients . . . in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment." Supreme Court Transmittal, supra note 3, at 108 (Scalia, J., dissenting). As discussed in the text, the mandatory pre-discovery conference, followed by the Rule 16 conference, will clarify the disclosure obligation more effectively than the existing discovery regime and will ameliorate the concern over having to disclose on a lawyer's "own initiative." See id.
\[30\] See Bell et al., supra note 1, at 20.
\[31\] Proposed Fed. R. Civ. P. 26 advisory committee's note, subdivision (f), reprinted in Supreme Court Transmittal, supra note 3, at 238-41. The authors' criticism that the Rule 26(f) conference "is almost totally unrelated to the discovery process," Bell et al., supra note 1, at 52, is belied by a plain reading of the rule. Among other things, the rule will require the attorneys to "submit[] to the court within 10 days after the meeting a written report outlining the [discovery] plan." Proposed Fed. R. Civ. P. 26(f), reprinted in Supreme Court
identify and clarify issues, thus cutting through the kinds of amorphous and uninformative allegations that concern the authors. The procedure will define the issues, where necessary, thereby narrowing the scope of disclosure and discovery and helping the parties anticipate and avoid disputes. Parties will be required to develop a plan for disclosure and discovery in light of the issues at the outset of the litigation.\textsuperscript{32} Another reason why disclosure may reduce motion practice is that reducing the amount of discovery will create fewer opportunities for disputes that lead to motions. Finally, the disclosure regime should discourage lawyers from using the uncertainties that surround many discovery requests as an invitation to obstruct, delay, avoid, and harass, thus spawning endless disputes and motions.\textsuperscript{33}

The authors' contention that early judicial involvement is essential to a cost-effective discovery process is unassailable, but it is difficult to see why they view the proposed rule as substituting "motion practice" for judicial involvement.\textsuperscript{34} Judicial involvement is mandated by Rule 16. In the disclosure system, that involvement will be more effective than it is under the current regime or under the authors' own proposal, because it will be informed by the parties' early disclosures. The attorneys will become more knowledgeable about their own and their opponents' cases earlier than is now the practice, and that in turn will lead to the judge's being better informed about the case. As a result, the Rule 16 conference will be more productive, and the orders made will be more effective in guiding future discovery; this too should reduce

\textsuperscript{32} See e.g., Malauta v. Suzuki Motor Co., 987 F.2d 1536 (11th Cir. 1993).

\textsuperscript{33} The Advisory Committee's purpose of accelerating the exchange of basic information and eliminating paperwork entailed in requesting it can hardly be equated, as the authors suggest, with a "desire to reduce judicial involvement." See Bell et al., supra note 1, at 53.
motion practice.\textsuperscript{35}

D. The vagueness of the rule would lead to over-production of marginally relevant documents and information.\textsuperscript{36}

The rule requires disclosure, not production. With respect to persons having discoverable information, it requires a brief statement identifying them and the subjects of their information. With respect to relevant documents, it requires a "description by category and location."\textsuperscript{37} Armed with this information, the opponent should be able to request only what is considered relevant and useful, thus avoiding over-production and leading to more cost-effective discovery. If a request nevertheless engenders overproduction, the cause does not lie in disclosure, but in a possible misuse of the discovery process.

E. Automatic disclosure will almost certainly increase costs.\textsuperscript{38}

The authors do not defend the existing discovery regime; they acknowledge with "unanimity . . . that discovery is now overused and abused, and that . . . the process requires lawyers to try their cases twice: once during discovery and . . . once again at trial."\textsuperscript{39} What evidence is there to suggest that a disclosure regime will increase costs over the existing discovery regime? The authors' speculation that it will increase costs is based on unfounded propositions derived from an erroneous and somewhat myopic view of the meaning and operation of the rule.

The new rule should in fact result in savings both in money and time. Disclosure will obviate wasteful and unnecessary discov-

\textsuperscript{35} As anyone having experience with early Rule 16 conferences knows, their principal shortcoming is that the attorneys often know little about their own case and less about their opponent's and thus are unable—and sometimes also unwilling—to disclose much to the judge. This in turn leaves the judge largely flying blind early in the case.
\textsuperscript{36} Bell et al., supra note 1, at 5, 43-44.
\textsuperscript{37} The rule provides a procedure for resolving any uncertainties over the scope of the required disclosure. See supra note 31 and accompanying text.
\textsuperscript{38} Bell et al., supra note 1, at 5, 44-46.
\textsuperscript{39} Id. at 11.
Parties will not have to labor to discover the identity of persons (known to the opponent) with relevant information, and they will be saved from taking unnecessary depositions of persons who turn out not to have information. Similarly, they will be spared the cost of identifying relevant documents and seeking production of irrelevant matter, and they will be able to obtain documents more quickly, making them more readily available at depositions.

No one can, of course, predict with assurance how practice under the disclosure provisions will turn out. But the case for discovery reform is overwhelming. Disclosure has compelling logic on its side and is surrounded by ample safeguards. It is part of a package that contains other desirable features of which the authors do not complain, such as the early disclosure required of plaintiff's damage computation and the extensive pretrial disclosure of the content and basis of expert testimony. Reform is never a sure thing, nor without some pain—it has been described as taking the bone away from the dog. But the proposed amended rule has received extraordinarily lengthy and thoughtful consideration and deserves support.

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40 The disclosing party’s “obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case,” Proposed Fed. R. Civ. P. 26 advisory committee’s note, subdivision (a) para. (1), reprinted in SUPREME COURT TRANSMITTAL, supra note 3, at 229, is no more than a lawyer's minimum professional obligation of due care.

41 The authors agree that reform is needed. See Bell et al., supra note 1, at 4, 39.