1994

The Transmittal Letter Translated

Carl W. Tobias

University of Richmond, ctobias@richmond.edu

Follow this and additional works at: http://scholarship.richmond.edu/law-faculty-publications

Part of the Civil Procedure Commons

Recommended Citation

THE TRANSMITTAL LETTER TRANSLATED

Carl Tobias*

I. THE ACTUAL LETTER ........................................ 128

II. THE TRANSLATION ......................................... 129
   A. Introduction ........................................... 129
   B. Specific Amendments ................................. 130
      1. Amended Rule 11 ................................. 130
      2. Automatic Disclosure ........................... 138

III. FINAL THOUGHTS ........................................ 144

* Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.
I. THE ACTUAL LETTER

Supreme Court of the United States
Washington, D.C. 20543

Chambers of
THE CHIEF JUSTICE April 22, 1993

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Justice White has issued a separate statement. Justice Scalia has issued a dissenting statement, which Justice Thomas joins and Justice Souter joins in part.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

---

1. Editor's Note: THE AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS were originally published in a House Document at H.R. Doc. No. 74, 103d Cong., 1st Sess. 98 (1993). The House Document appears in its entirety at AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401. The Florida Law Review has elected to cite to Federal Rules Decisions for the sake of efficiency. The reprinted in form is used throughout the symposium issue to refer to the original publication of the material in House Document form, however, the citation to H.R. Doc. No. 74 will appear only in the initial citation to the amendments in each article. Thereafter, the citation will be to AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401. As a final note, portions of the material are also in the Interim Edition of the 114th volume of the Supreme Court Reporter.

THE TRANSMITTAL LETTER TRANSLATED

Sincerely,

William H. Rehnquist

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

II. THE TRANSLATION

A. Introduction

The Chief Justice transmits to Congress the following amendments to the Federal Rules of Civil Procedure in accordance with Section 2074 of Title 28 of the United States Code. These revisions constitute the most ambitious package of amendments to the Federal Rules in their half-century history. The three-year revision process under which the Supreme Court adopted these amendments is the first important test of new revision procedures that Congress instituted in 1988 to increase public scrutiny of and to improve the revision process.

The Court emphasizes the changes in Rule 11 governing sanctions and the amendment of Rule 26 covering discovery, the latter concentrating on mandatory or automatic prediscovery disclosure. The Court focuses on revised Rule 11 because its 1983 amendment has proven to be the most controversial revision of the civil rules ever promulgated. The Court focuses on revised Rule 26 because numerous complications that attend discovery seriously threaten the civil justice system. Moreover, the

3. This is my translation of what the letter did not say, but what I interpret to have actually happened in the rule revision process.
amendment prescribing automatic disclosure may prove to be the most controversial formal proposal to modify the Federal Rules in their history. In short, because sanctions and discovery are critical to federal civil litigation, analysis of the Rule 11 and Rule 26 revisions and of the rule amendment process affords instructive insights on modern civil procedure.

B. Specific Amendments

1. Amended Rule 11

The Rule 11 revision process was replete with ironies. The Advisory Committee on the Civil Rules (Advisory Committee) issued a preliminary draft proposal to amend Rule 11 only eight years after Rule 11's significant revision. This time frame constituted a substantially shorter period for testing an amendment's efficacy than the one generation time frame prescribed by knowledgeable experts including Judge Benjamin Kaplan and Professor Arthur Miller, two former Advisory Committee Reporters. Unfortunately, the preliminary draft failed to address many of the complications that plagued the 1983 alteration of Rule 11.

The Advisory Committee based its decision to propose revision partly on the perception that the 1983 provision was “unduly discouraging vigorous advocacy on behalf of particular parties, especially civil rights plaintiffs.” The reality may have been that Rule 11 was disadvantaging civil

---


12. Tobias, Roundelay, supra note 9, at 326; see also PRELIMINARY DRAFT, supra note 10, at 64, 79 (stating that one purpose of rule change is to "equalize the burdens" between plaintiffs and defendants); Tobias, Reconsidering, supra note 9, at 862 (observing that members of the public criticized the 1983 version of Rule 11 as having a chilling effect upon civil rights litigation); Georgene M. Vairo, Rule 11: Where We Are and Where We Are Going, 60 FORD. L. REV. 475, 484-85 (1991) (arguing that defendants in civil rights actions often use Rule 11 to attack civil rights plaintiffs unfairly).
rights plaintiffs less than numerous such plaintiffs and their counsel had argued, according to a 1991 Federal Judicial Center (FJC) Rule 11 study commissioned by the Advisory Committee. Thus, while the Advisory Committee admirably commissioned the study, the Committee appeared to rely rather selectively on its findings. Such selective reliance might have been appropriate because Rule 11 has been studied extensively, producing a veritable "cottage industry" of seven major assessments and hundreds of law review articles, some of which have yielded controversial or conflicting conclusions.

In the final analysis, however, the Advisory Committee's decision to premise proposed amendment of Rule 11 on the perception that the rule unduly discouraged zealous representation of civil rights plaintiffs and other litigants may actually have been correct. The most comprehensive Rule 11 study, conducted under the auspices of the American Judicature Society, showed that judges have sanctioned civil rights plaintiffs as frequently as any other category of federal court litigants. Furthermore, the study asserted that the 1983 version of Rule 11 prompted civil rights lawyers to advise clients to abandon potentially legitimate cases.

In an important component of the 1991 FJC study, the FJC circulated a questionnaire to every federal district judge. Although four-fifths of the judges who responded thought that the 1983 revision of Rule 11 should be retained, a like percentage believed that groundless litigation, the reduction of which was a major reason for the 1983 amendment, posed minor difficulty. The trial bench was also evenly divided over whether groundless lawsuits had increased since 1983. Moreover, a majority of

But see Tobias, Reconsidering, supra note 9, at 864-65 (citing studies which stated that Rule 11 "was not as problematic as many civil rights plaintiffs and attorneys had contended").


17. See id. at 971.

18. Tobias, Reconsidering, supra note 9, at 863.


20. See id. at 29-30.

21. Id. at 29.
the judges found that prompt resolution of motions to dismiss and motions for summary judgment as well as use of pretrial conferences, Rule 26 and Rule 37 sanctions, and informal warnings were more effective in disposing of groundless cases than Rule 11.22

Another irony of the recent Rule 11 amendment was that the Advisory Committee's work on the preliminary draft proposal to revise Rule 11 apparently pleased few of the interested constituencies which the proposal would have affected.23 For instance, the imposition of a continuing duty to withdraw tiny portions of papers when they cease being meritorious and the prospect of having to pay substantial financial sanctions for violating the rule troubled resource-poor litigants.24 The defense bar was bothered by specific inclusion of denials as components of papers that must satisfy Rule 11 and by the decreased likelihood of recovering attorneys' fees for Rule 11 violations.25 Latent ambiguities in the draft's language relating, for instance, to the calculation of proper sanctions and attorneys' fees concerned numerous lawyers and parties who participate in federal civil litigation.26 The Advisory Committee thoroughly studied the 1983 amendment, solicited and seriously considered public input before proposing an amendment,27 and carefully prepared a draft which it believed would be acceptable to all affected interests.28

The Advisory Committee's preliminary draft of the Rule 11 revision was published together with a counter-proposal written by judges and other distinguished members of the American legal community in the same Federal Rules Decisions advance sheets.29 This counter-proposal to the Advisory Committee's draft suggested, for example, the deletion of any continuing duty to amend pleadings and the proscription of attorney

22. Id. at 29-30; see also Carl Tobias, Judicial Discretion and the 1983 Amendments to the Federal Civil Rules, 43 Rutgers L. Rev. 933, 958-59 (1991) (discussing Rule 26 and Rule 37 sanctions).

23. See generally Tobias, Rule 11, supra note 8, at 498-501 (discussing the hardship created by a party's limited financial resources in civil rights cases); Vairo, supra note 12, at 483-85 (discussing the chilling effect and satellite litigation problems inherent in Rule 11).

24. See Tobias, Roundelay, supra note 9, at 237.

25. See id. See generally Vairo, supra note 12, at 495-500 (criticizing the Advisory Committee's major revisions to Rule 11).

26. See Tobias, Reconsidering, supra note 9, at 894-95; Tobias, Roundelay, supra note 9, at 238.


28. See, e.g., Tobias, Reconsidering, supra note 9, at 893-905; Vairo, supra note 12, at 495-500.

29. See PRELIMINARY DRAFT, supra note 10, at 75; A. LEON HIGGINBOTHAM ET AL., BENCH-BAR PROPOSAL TO REVISE CIVIL PROCEDURE RULE 11, reprinted in 137 F.R.D. 159, 159 (1991). The counter-proposal was formulated by a group of distinguished members of the legal community, including Judges Leon and Patrick Higginbotham, former Advisory Committee member John Frank, and former president of the Association of Trial Lawyers of America Bill Wagner. Id.
fee awards as sanctions. The plaintiffs' public interest and civil rights bars found this counter-proposal considerably more palatable.

The Advisory Committee developed additional iterations of the preliminary draft, so that the final document submitted by the Committee during May 1992 to the Judicial Conference Committee on Rules of Evidence and Procedure (Standing Committee) ironically resembled the counter-proposal in several respects. Although the counter-proposal may have influenced the Advisory Committee, and members of the group sponsoring it might claim such credit, the Advisory Committee would probably have reached the same result without the group's prompting and without the group making certain Committee members feel unduly pressured.

The changes in the preliminary draft were apparently attributable to the Advisory Committee's conscientious efforts to solicit and review considerable written public comment, to hear testimony at three public hearings, and to rethink and rewrite numerous aspects of the preliminary draft. These endeavors enabled the Advisory Committee to craft the fairest, clearest, most efficacious revision possible. Indeed, the Advisory Committee's work in assembling the final proposal to amend Rule 11 closely approximates the type of reasoned decisionmaking and open, responsive rule revision process that Congress envisioned when it recently modified the rule amendment procedures.

Notwithstanding the Advisory Committee's prodigious efforts and the significant improvements in the proposed revision of Rule 11, some observers continued to oppose the changes recommended. Justice Antonin Scalia, who pens an acerbic dissent to the Court's transmittal of amended

30. HIGGINBOTHAM ET AL., supra note 29, at 165-70.
31. The assertion regarding palatability is premised on my personal conversations with numerous members of these bars.
32. See supra note 24 and accompanying text; infra text accompanying note 72 (asserting that the Advisory Committee omitted several of the Rule 11 requirements from the Preliminary Draft). Compare EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE SEPTEMBER 1992, reprinted in AMENDMENTS, supra note 2, at 577-83, 585-86 (limiting the duty to correct papers that include unsupported factual allegations) with HIGGINBOTHAM ET AL., supra note 29, at 165-66 (suggesting that the continuing duty to withdraw non-meritorious claims in court documents be circumscribed).
33. This is premised on my assessment of the Advisory Committee's work and on my personal conversations with several individuals who are knowledgeable about the Committee's work. See generally Tobias, supra note 6, at 1789-93 (analyzing the Standing Committee's draft).
35. See Tobias, Reconsidering, supra note 9, at 859-65.
36. See supra note 32 and accompanying text.
37. See supra notes 34-35 and accompanying text.
38. See supra note 5 and accompanying text. See generally Walker, supra note 6, at 457 (suggesting reforms for improving federal civil rule revision).
Rule 11, 40 is perhaps the amendment's most prominent critic. 41 He contends that adoption of the Rule 11 revision would "eliminate a significant and necessary deterrent to frivolous litigation." 42 Justice Scalia argues that the amendment will make Rule 11 "toothless," because it accords judges discretion to levy sanctions, disfavors compensation for litigation costs, and provides safe harbors which would enable parties who contravene Rule 11 to avoid sanctions altogether. 43

Justice Scalia claims that safe harbors are overly solicitous of attorneys and litigants who abuse the litigation process, permitting them to "file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose" because they can withdraw the offending papers upon notification. 44 He criticizes the proposal for entrusting sanctions to judicial discretion, remarking that courts will not punish offenders unless required to do so. 45 Moreover, Justice Scalia warns that restrictions on sanctioning for compensatory purposes will reduce "the likelihood that frivolousness will even be challenged" by decreasing the incentives of those who can best alert judges to perversion of the litigation process. 46

Despite his criticisms, Justice Scalia states that he would not have dissented had there been convincing evidence that the 1983 "Rule 11 regime [was] ineffective, or encourage[d] excessive satellite litigation." 47 Justice Scalia relies upon the judicial responses to the FJC survey for the idea that the federal bench generally agrees that the current 1983 version of Rule 11 essentially works. 48 The responses suggest that trial judges, who face litigation abuse daily, overwhelmingly favor the 1983 provision and these responses persuade Justice Scalia that the Court should not gut the rule through the proposed amendment. 49

However, Justice Scalia does not mention that the relative inability of the 1983 Rule 11 to prevent frivolous litigation and the rule's promotion of satellite litigation were apparently two important reasons for the Advisory Committee's proposed revision. 50 Justice Scalia rather selectively

41. Id. at 507.
42. Id.
43. Id. at 507-08.
44. Id. at 508.
45. Id.
46. Id. at 508-09.
47. Id. at 509.
48. Id.
49. Id. at 509-10.
50. See Letter from Judge Sam C. Pointer, Jr., Chairman, Advisory Committee, to Judge Robert
invokes the survey results by not mentioning the survey replies which showed that eighty percent of the federal district bench thinks that groundless litigation is a minor problem. Justice Scalia correspondingly neglected to mention that a majority of federal judges find numerous procedures other than Rule 11 more effective in thwarting groundless lawsuits. Moreover, if the trial bench favored the 1983 Rule as much as Justice Scalia suggests, the bench could well have insured the 1983 version's retention because every entity in the rule revision hierarchy respects and defers to those federal judges' perspectives on civil rules modification. In any event, the rule revision entities, whose membership consists primarily of federal judges, seemingly concluded that a stricter amendment's potential disadvantages, such as satellite litigation and chilling effects, outweighed its benefits, namely deterrence of frivolous cases.

Indeed, the federal judiciary's support for changing Rule 11 would apparently suffice for Representative William J. Hughes (D.-N.J.), who chairs the House Judiciary Subcommittee on Intellectual Property and Judicial Administration. This subcommittee has the responsibility for overseeing revision of the Federal Rules of Civil Procedure. Even though Hughes harbors reservations about certain aspects of the amendment, the subcommittee chair will probably defer to the federal bench because he finds broad support for the revision and for curtailing "the

---

E. Keeton, Chairman, Standing Committee, Attach. B (May 1, 1992), reprinted in AMENDMENTS, supra note 2, at 523-24; Tobias, supra note 34, at 174, 177 & n.49, 178 n.51, 179 & n.62. See generally supra notes 20-22 and accompanying text (discussing the issue of groundless litigation in the Rule 11 amendment process).

51. See supra notes 20-21 and accompanying text.
52. See supra note 22 and accompanying text.
53. Dissenting Statement of Justice Scalia, reprinted in AMENDMENTS, supra note 2, at 509-10 ("But the overwhelming approval of the Rule by the federal district judges who daily grapple with the problem of litigation abuse is enough to persuade me that it should not be gutted as the proposed revision suggests.").
54. See S. 2212, 103d Cong., 2d Sess. (1994) (bill requiring that rule revision committees "have a majority of members of the practicing bar"); Laura A. Kaster & Kenneth A. Wittenberg, Rulemakers Should Be Litigators, NAT'L L.J., Aug. 17, 1992, at 15, 16, available in WESTLAW, NLJ Database (suggesting that fewer judges and more litigators serve as rulemakers because judges control the rule revision process); John P. Frank, Rule 11—The Need to Start Over 15 (May 1, 1992) (same) (unpublished manuscript, on file with the Florida Law Review). These entities are the Advisory Committee, the Standing Committee, the Judicial Conference, and the Supreme Court. Id. at 14-15.
55. See Tobias, supra note 34, at 178 & n.53.
explosion of satellite litigation” which the 1983 version of Rule 11 has fostered.\textsuperscript{58} Other members of the House of Representatives and of the Senate, however, have evinced less deference to the federal bench. The members’ lack of deference is manifested by their introduction of several bills that would postpone the amendment’s effective date for a year.\textsuperscript{59}

Congress will experience considerable difficulty attempting to improve on many components of the amended Rule 11. The modifications represent the well-considered judgment of the rule revision entities and their expert advisors.\textsuperscript{60} The amendment concomitantly constitutes the most efficacious means of addressing the broad range of factual situations which Rule 11 implicates. For instance, the amended Rule 11 employs terms such as “reasonable” and “likely.”\textsuperscript{61} These terms are the clearest and fairest terminology for treating the inherently fact-specific issues that motions to sanction raise.\textsuperscript{62}

Congress also will encounter problems attempting to enhance even those remaining aspects of the rule revision which could be improved. For example, two potentially troublesome components are the Advisory Committee’s use of the adjective “nonfrivolous” to describe acceptable legal arguments\textsuperscript{63} and the Committee’s use of the words “appropriate sanctions” to delineate the assessments that courts may award.\textsuperscript{64} Use of these terms will foster inconsistent application and satellite litigation.\textsuperscript{65} Retaining the 1983 Rule’s phrase, “good faith,” rather than substituting “nonfrivolous,” and additionally circumscribing judicial discretion to sanction, would remedy or ameliorate these complications.\textsuperscript{66} Nonetheless, Congress will encounter the greatest resistance to modifying these changes because they represent the very areas on which compromises were struck, consensus solidified, or political interests reached equilibrium.\textsuperscript{67}

In short, Congress will realize little advantage by suspending the effective date of amended Rule 11 for an additional year. Indeed, mounting political pressure, to which Congress has few responses, will only intensify.\textsuperscript{68} Therefore, Congress may prefer not to delay the inevitable, but to

\begin{itemize}
  \item \textsuperscript{58} See \textit{id.}.
  \item \textsuperscript{60} See supra text accompanying notes 32-38.
  \item \textsuperscript{61} See \textit{FED. R. CIV. P. 11(a)-(b)}.
  \item \textsuperscript{62} See Tobias, supra note 6, at 1791. See generally Colin S. Diver, The Optimal Precision of Administrative Rules, 93 \textit{YALE L.J.} 65 (1983) (suggesting the difficulty of writing and applying precise rules).
  \item \textsuperscript{64} See \textit{FED. R. CIV. P. 11(c)}; Tobias, supra note 34, at 209-14.
  \item \textsuperscript{65} See supra notes 62-63 and accompanying text.
  \item \textsuperscript{66} See supra notes 62-63 and accompanying text.
  \item \textsuperscript{67} See supra text accompanying notes 29-38, 56-59.
  \item \textsuperscript{68} See S. 1382, 103d Cong., 1st Sess. (1993) (calling for the enactment of a new Rule 11); H.R.
bite the political bullet now. Of course, 1994 is an election year.

The truth regarding many of the above propositions relating to Rule 11 may well lie somewhere in the middle.69 For instance, the rule revisors substantially reduced the incentives for invoking Rule 11 by prescribing safe harbors from sanctions,70 by permitting judges to exercise discretion in deciding whether to sanction, and by granting judicial discretion to decide what type of sanction to impose when judges find Rule 11 violations.71 The Advisory Committee concomitantly omitted several onerous requirements from the preliminary proposed Rule 11 draft, such as the continuing duty which would have demanded that lawyers and parties meticulously track small fragments of papers throughout litigation and that they withdraw those papers when the papers became untenable.72 The revisors decreased incentives for using Rule 11 and the Advisory Committee deleted these burdensome strictures despite the lingering concerns about deterring groundless lawsuits which Justice Scalia so forcefully expresses.73

Nevertheless, the rule revisors simultaneously employed terminology, such as “nonfrivolous” and “appropriate sanctions,”74 which will inexorably engender inconsistent application and satellite litigation.75 The revisors correspondingly retained certain incentives for seeking sanctions.76 For example, the amended Rule authorizes judges to award parties who pursue Rule 11 motions the costs of prevailing and to levy sanctions of attorneys’ fees in certain situations.77

In the final analysis, the 1993 Rule may not be perfect, but the 1993 revision substantially improves the 1983 version,78 and is much clearer and fairer than the Advisory Committee’s preliminary draft.79 Moreover, the 1993 Rule is considerably better than could be expected given the significant restraints imposed upon the rule revision entities. These restraints include the need to accommodate the various interests, such as the

69. Compare supra text accompanying notes 32-38 (discussing the Advisory Committee’s view) with supra text accompanying notes 39-49 (discussing Justice Scalia’s view).
70. See FED. R. CIV. P. 11(e); Tobias, supra note 6, at 1784-85.
71. See FED. R. CIV. P. 11(e); Tobias, supra note 6, at 1783-88.
72. See Tobias, Reconsidering, supra note 9, at 866-71; Tobias, supra note 34, at 192-96; supra text accompanying note 24.
73. See supra notes 41-49 and accompanying text.
74. FED. R. CIV. P. 11(a)-(b).
75. See supra notes 62-65 and accompanying text.
76. Tobias, supra note 6, at 1788.
77. See FED. R. CIV. P. 11(e); Tobias, supra note 6, at 1787-88 (discussing the Advisory Committee’s efforts to reduce some incentives to seek sanctions and leave others intact).
78. See Tobias, supra note 6, at 1776-77.
79. See supra notes 61-62 and accompanying text.
federal judiciary and diverse elements of the bar, affected by the amend-
ment.80

Perhaps the most accurate explanation for the revisors' action on Rule
11 is that many federal judges apparently concluded that the 1983 Rule
had achieved as much as it could accomplish81 by encouraging counsel
and litigants to perform reasonable prefiling inquiries and by discouraging
the presentation of frivolous papers.82 The revision entities may have con-
comitantly determined that Rule 11's vigorous enforcement was no longer
worth the expenditure of scarce time, money, and energy of courts, law-
yers, and parties, for instance, to resolve satellite litigation which the rule
necessitates.83 Essential as well to the Rule 26 revision was the percep-
tion among judges, practitioners, and parties that discovery has now be-
come the bête noire of civil litigation84 and that discovery is in greater
need of reform and holds more promise for real improvement than Rule
11.85

2. Automatic Disclosure

The process of revising Rule 26 to prescribe automatic disclosure86
was as ironic as the Rule 11 amendment process.87 The Advisory Com-
mittee seemed to forget the recent, unfortunate experience with the 1983
revision of Rule 11. Although the Advisory Committee possessed little
empirical data on the operation of the 1938 version of Rule 11, the Com-
mittee changed the provision fundamentally and that 1983 amendment has
become the most controversial revision ever adopted.88

Notwithstanding extremely limited experimentation with, much less
evaluation of, automatic disclosure,89 the Advisory Committee published
a 1991 preliminary draft proposal which could have substantially modified

80. See generally CALL FOR COMMENTS, supra note 27 (requesting criticism of Rule 11 from
affected members of the legal community and the public); supra text accompanying note 67 (dis-
cussing the balancing of interests in adopting new Rule 11 language).
81. See supra text accompanying note 52.
82. See Fed. R. Civ. P. 11 advisory committee's note (stating that the 1993 rule revision is in-
tended to remedy problems stemming from sanctions imposed based on the 1983 amendment while
maintaining high conduct and pleading standards).
84. See Griffin B. Bell et al., Automatic Disclosure in Discovery—The Rush to Reform, 27 GA. L.
REV. 1, 2-3 (1992) (discussing discovery reform as the focus of judicial reform efforts).
85. See id. at 2; Tobias, supra note 83, at 140.
86. See infra text accompanying note 91 (describing automatic disclosure).
87. See Bell et al., supra note 84, at 3-4; Tobias, supra note 83, at 141-42. See generally Winter,
supra note 7, at 263, 264-74 (supporting reform and discussing proposed amendment).
88. See Burbank, supra note 14, at 1927-28; supra note 6 and accompanying text.
89. Only three federal districts had experimented with the procedure. Bell et al., supra note 84, at
17-18; see Mullenix, supra note 5, at 813-21.
the discovery process.\textsuperscript{90} That draft would have required plaintiffs and defendants to disclose before discovery considerable information which was "likely to bear significantly on any claim or defense."\textsuperscript{91} Few federal districts had tested automatic disclosure\textsuperscript{92} and two of the procedure's early advocates had previously urged that a national rule be adopted only after widespread experimentation.\textsuperscript{93} Moreover, passage of the Civil Justice Reform Act of 1990 (CJRA) evidenced Congress' belief that testing should precede major change.\textsuperscript{94}

No formal proposal in the fifty-five year history of the Federal Rules has provoked so much vociferous criticism from such a broad spectrum of practitioners and parties who participate in the civil justice system.\textsuperscript{95} The rule revisors received a veritable flood of written opposition during the six-month comment period and listened to practically universal criticism during public hearings in Los Angeles and Atlanta.\textsuperscript{96} At the conclusion of the Atlanta session, the Advisory Committee responded to this public input by abandoning the automatic disclosure proposal in apparent deference to numerous districts' experimentation with the procedure under the CJRA.\textsuperscript{97} For a short time, therefore, the Advisory Committee seemed to think that the controversial measure's national imposition was less advisable than selective, local testing of the automatic disclosure concept.\textsuperscript{98}

\begin{footnotes}

\footnote{90. See PRELIMINARY DRAFT, supra note 10, at 87-99.}
\footnote{91. See id. at 87-88; infra note 102 and accompanying text.}
\footnote{92. See supra note 89 and accompanying text.}
\footnote{93. See Wayne D. Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 VAND. L. REV. 1295, 1361 (1978) (acknowledging the need for experimentation); William W Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. PITT. L. REV. 703, 723 (1989) (suggesting national prescription of his disclosure proposal only after a successful "trial period"). Both of these articles influenced the Advisory Committee's deliberations. Bell et al., supra note 84, at 40.}
\footnote{95. Dissenting Statement of Justice Scalia, reprinted in AMENDMENTS, supra note 2, at 512; Bell et al., supra note 84, at 28-32; Ann Pelham, Forcing Litigants to Share, LEGAL TIMES, May 3, 1993, at 1.}
\footnote{96. See Bell et al., supra note 84, at 28-32; Tobias, supra note 83, at 141.}
\footnote{98. See Bell et al., supra note 84, at 34-35; Samborn, supra note 97, at 1.}
\end{footnotes}
The Advisory Committee briefly sustained its apparent change of heart because the Committee reversed course again six weeks later without additional public comment or explanation. Half of the Advisory Committee convinced the remainder to reconsider, at the instigation of Second Circuit Judge Ralph K. Winter, a persuasive proponent of automatic disclosure. In the April 1992 Advisory Committee meeting, the Committee members revitalized the automatic disclosure proposal, imposing the core requirement that litigants disclose "discoverable information relevant to disputed facts alleged with particularity in the pleadings.

Justice Scalia suggests that the Advisory Committee apparently found the CJRA's experimentation schedule too protracted, "preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation." The Advisory Committee couched in principled terms its decision to modify course twice during a six-week period. Members claimed that discovery was operating ineffectively, that maintenance of the status quo was unsatisfactory, and that the legal profession's self-interest prevented it from instituting constructive change. For instance, Winter perceptively stated at the April meeting that attorneys will resist discovery reform as long as they bill by the hour.

However, the Advisory Committee seemed to appreciate that the three-year time frame for amending rules which the new revision process prescribed meant that its failure to require automatic disclosure would essentially postpone judicially-controlled reform of discovery until the late 1990s. Some observers even characterized the reversal as a desperate

99. Bell et al., supra note 84, at 35.
100. Ann Pelham, Panel Flips, OKs Discovery Reform, LEGAL TIMES, Apr. 20, 1992, at 6; Samborn, supra note 97, at 1.
101. See generally Winter, supra note 7, at 274-78 (arguing for discovery reform).
102. FED. R. CIV. P. 26(a)(1); see Bell et al., supra note 84, at 35-39; PROPOSED AMENDMENTS, supra note 32, at 517-18 & n.3 (stating that these changes in the revised proposal "do not significantly expand the extent of change between current rules and the published proposals" and do not require additional comment). Winter, however, suggests that the revised proposal was intended to be responsive to some critics' "'legitimate concerns." Winter, supra note 7, at 269.
103. See Dissenting Statement of Justice Scalia, reprinted in AMENDMENTS, supra note 2, at 512.
104. Bell et al., supra note 84, at 35-39.
105. Pelham, supra note 100, at 6; see Randall Samborn, Derailing the Rules, NAT'L L.J., May 24, 1993, at 1, available in WESTLAW, NLJ Database.
106. Pelham, supra note 95, at 20; Samborn, supra note 105, at 1. The last observation illuminates another irony. Virtually all segments of the organized bar seemed to oppose the disclosure proposal and to agree that many problems accompany modern discovery. See, e.g., Bell et al., supra note 84, at 2-3 (criticizing the present system); Pelham, supra note 95, at 1, 20 (opposing discovery changes).
107. Pelham, supra note 100, at 6; Samborn, supra note 97, at 12; see also Winter, supra note 7, at 277 (observing that the interests of attorneys who bill by the hour conflict with the interests of their clients on the issue of having less discovery).
108. Samborn, supra note 97, at 1.
attempt by the Advisory Committee to preserve the judiciary's flagging procedural influence, which has been eroded by both congressional reforms and executive branch initiatives.\textsuperscript{109}

The difficulty of definitively ascertaining whether any of the automatic disclosure procedures will prove effective and if so, which, obviously complicates the debate over automatic disclosure. Very few of the considerable number of districts which have been experimenting with disclosure\textsuperscript{110} have employed provisions like the one that the Court is transmitting.\textsuperscript{111} Many districts modeled their procedures instead on the Advisory Committee's preliminary draft automatic disclosure procedure.\textsuperscript{112} Even these district courts have not tested, much less assessed, the automatic discovery mechanism for a period sufficient to yield conclusive determinations regarding its efficacy.\textsuperscript{113}

Anecdotal evidence indicates that a number of Early Implementation District Courts (EIDCs), and other courts, experimenting with automatic disclosure have encountered minimal difficulty implementing the measure.\textsuperscript{114} The procedure apparently operates quite well in some contexts, particularly when the litigation is relatively simple or the disclosure is very general.\textsuperscript{115} Unfortunately, discovery poses the greatest problems and requires the most effective reform in complex lawsuits with national ramifications, such as products liability cases, and when litigants need particularized information.\textsuperscript{116}

Additional anecdotal material suggests that, as practitioners acquire experience with automatic disclosure, they become less critical of the concept.\textsuperscript{117} In other words, familiarity does not breed contempt. The principal explanation for this phenomenon seems to be that, while attor-
neys resist any procedural change, once attorneys attempt to satisfy a particular stricture imposed they have little difficulty complying. More specifically, numerous practitioners reportedly find that automatic disclosure simply requires attorneys and their clients to participate in certain activities, especially document retrieval and labeling, at an earlier juncture in litigation. 118

Equally respected authorities have declared with similar assurance that the disclosure proposal transmitted will clearly work, or will certainly prove inefficacious. Former Judge Griffin B. Bell, who compiled an excellent record of service on the United States Court of Appeals for the Fifth Circuit before President Jimmy Carter appointed him attorney general, has persuasively argued that the proposal will be ineffective. 119 For example, Bell contended that the vagueness of the automatic disclosure proposal would foster greater motion practice and promote overproduction while increasing expense. 120 Justice Scalia, in dissenting from the Court's transmittal of the revision, subscribes to several of Bell's ideas and articulates additional convincing propositions. 121 Most importantly, Justice Scalia suggests that the disclosure amendment "adds a further layer of discovery" 122 and "does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker." 123

By contrast, Senior Judge William Schwarzer 124 has also argued just as persuasively that the discovery revision will be efficacious. 125 Schwarzer evaluated and convincingly criticized the five major precepts which Bell enunciated in support of his contention that the revision is flawed. 126 For instance, Schwarzer showed that Bell's speculation about the revision enhancing expense was premised on unfounded notions and on a "somewhat myopic view of the meaning and operation of the rule." 127 Winter made an equally strong case for the amendment's effec-

118. See supra note 114.
119. Bell et al., supra note 84, at 4.
120. Id. at 41-46. Others, considerably less eminent than Bell, have agreed. See, e.g., Tobias, supra note 83, at 142-43.
121. Dissenting Statement of Justice Scalia, reprinted in AMENDMENTS, supra note 2, at 510-12.
122. Id. at 510.
123. Id. at 511.
124. Schwarzer rendered distinguished service as a judge of the United States District Court for the Northern District of California and has been a prolific, frequently-cited writer on civil procedure. Bell et al., supra note 84, at 17. Schwarzer was also named Director of the Federal Judicial Center on March 24, 1990. Id.
126. See id. at 656-64.
127. Id. at 663; accord Bell et al., supra note 84, at 44-46.
tiveness by claiming, for example, that disclosure will combat certain economic incentives to participate in excessive discovery.128

The Supreme Court transmits the automatic disclosure revision without change,129 although three Justices dissent from the transmittal and other members of the Court express reservations about the transmittal.130 A majority of the Justices believe that the amendment is sufficiently workable, the core idea embodied in automatic disclosure is sufficiently worthwhile, and the need to revamp discovery is so important that adoption of the automatic disclosure revision is warranted.131

If national application of automatic disclosure troubles Congress, it could rely on the CJRA, which affords district courts a valuable vehicle for testing different approaches to disclosure.132 Congress might refine experimentation by prescribing testing with several disclosure regimes that seem most promising in a manageable number of federal districts.133 In addition to all of the usual difficulties, such as temporal restraints, which ordinarily plague congressional efforts to rewrite the transmitted amendments, Congress may currently lack sufficient knowledge about the efficacy of various disclosure measures to select one for nationwide implementation.134

Perhaps the consummate irony is that a congressional decision to omit the provision for automatic disclosure would have little practical effect. Most of the thirty-four EIDCs have already adopted some type of disclosure procedure135 and a number of the remaining districts have prescribed the technique, or will provide for automatic disclosure, under the CJRA.136 Therefore, a significant percentage of the ninety-four districts

---

128. See Winter, supra note 7, at 265-73, 276-77.
129. Compare PROPOSED AMENDMENTS, supra note 32, at 606-27 (including amendments as proposed to the Supreme Court) with AMENDMENTS TO THE FED. RULES OF CIVIL PROCEDURE, reprinted in 146 F.R.D. 401, 403-04, 431-47 (1993) (including the amendments transmitted to Congress by the Supreme Court).
130. See Statement of Justice White, reprinted in AMENDMENTS, supra note 2, at 501; Dissenting Statement of Justice Scalia, reprinted in AMENDMENTS, supra note 2, at 507 (joining the dissent in full is Justice Thomas with Justice Souter joining in part).
131. See Transmittal Letter, supra note 2 (transmitting the amendments to Congress). But see infra note 146 and accompanying text (suggesting that the Supreme Court's language in the transmittal letter indicated that the Court approved of the revision in form, but not necessarily in substance).
132. See supra note 94 and accompanying text.
134. See supra note 114. Seven months is simply insufficient time for a busy Congress to rewrite complex amendments. See 28 U.S.C. § 2074(a) (1988) (providing that Congress has seven months to make changes to the amendments); cf. supra text accompanying notes 59-66 (discussing congressional efforts to consider Rule 11).
135. Tobias, supra note 83, at 144-45.
136. As to the remaining districts, I premise this assertion on personal conversations with numerous individuals involved in civil justice reform in those districts.
will implement disclosure mechanisms that are inconsistent with the current Federal Rules and with procedures in other districts.\textsuperscript{137}

These conflicts will complicate participation in federal civil litigation for attorneys and parties, such as government lawyers and public interest organizations, which litigate in multiple districts.\textsuperscript{138} Such conflicts will also test judges' and practitioners' tolerance for inconsistency. Indeed, the CJRA Advisory Group for the Eastern District of New York urged that the rule revisors observe a "three-year moratorium on affected national rules so that each district can have a fair opportunity to assess reforms at the local level."\textsuperscript{139} Nonetheless, as courts, counsel, and parties become accustomed to the disclosure concept in specific districts,\textsuperscript{140} and as studies evaluate the procedure's efficacy, the resulting familiarity and documentation will probably indicate that one form of disclosure is superior, thereby facilitating the promulgation of a uniform, national discovery provision by the year 2000.\textsuperscript{141}

\section*{III. Final Thoughts}

The Court would not presume to offer suggestions regarding rule revision for several reasons as theoretical as concerns about maintaining the separation of powers and even about appearing to advise a separate branch of the federal government.\textsuperscript{142} These factors have peculiar applicability today. Indeed, the federal judiciary is acutely sensitive to the delicate, and even deteriorating nature of interbranch relationships, especially in the important area of court rulemaking, and is carefully cultivating those relations.\textsuperscript{143}


\textsuperscript{138.} See generally Tobias, supra note 83 (delineating conflict between CJRA reforms and the new Rule 26).


\textsuperscript{140.} See supra notes 110-18 and accompanying text.

\textsuperscript{141.} See supra text accompanying notes 110-18 (discussing the increased implementation of automatic disclosure in some districts pursuant to the CJRA).


\textsuperscript{143.} See, e.g., Tobias, supra note 94, at 1425-26; Don J. DeBenedictis, Tight Budget Squeezes Courts, 78 A.B.A. J., Dec. 1992, at 22-23 (recounting the relationship between Congress and the ju-
Additional reasons are as pragmatic as the Justices’ decreasingly active participation in the amendment process, which is consistent with the relative passivity that spans the last three decades. The Court’s decision to transmit all of the revisors’ proposals without change is a telling reminder that the Justices play an extremely circumscribed role in modern rule revision. Equally revealing is the cover letter’s disclaimer that, “[w]hile the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.” Although the Justices are obviously reluctant to offer anything which might be characterized as advice, they are also cognizant that the present is a critical moment in the history of civil rules revision. This timing compels the Court to formulate a few significant questions which Congress should address when considering the package of transmitted amendments and to provide some final thoughts on the amendments.

Perhaps the crucial queries are how Congress, having opened the national rule revision process, can maximize the benefits and minimize the disadvantages of increased public participation in that process while continuing to capitalize on the finest aspects of a process that has served the federal courts, Congress, and the public remarkably well during the last half-century. For example, the rule revision entities have accumulated a wealth of expertise, particularly regarding the complexities and subtleties of federal civil practice, and have applied this expertise to many difficult civil procedure problems. They have studied developments in civil litigation, collected, analyzed, and synthesized relevant data, and drafted proposals for improvements that responded to the needs of all civil justice system participants. The 1993 revisions represent the handiwork of the Advisory Committee, the Standing Committee, the Judicial
Conference, and the Court, all of which focused their expertise on the important complications of modern procedure and vigorously toiled for three years to develop the most efficacious amendments.

The 1993 revisions are the fruits of the initial major experiment with the procedures governing national rule amendment that Congress prescribed in 1988. The new process, which Congress intended to improve rule revision by opening the process to greater public scrutiny, yielded mixed results. Numerous public comments on the proposed amendments were of high quality. Considerable public input persuaded the rule revisors to reexamine significant issues and even to modify a few proposals, such as those governing Rule 11 and automatic disclosure. Some of the public participation was less constructive, however. A number of contributions were inaccurate, or were based on minimal empirical data, while certain submissions were duplicative. This material may have required that the revisors devote time and energy to ascertaining the relevance of input that ultimately was not useful.

The rule revision entities did not always maximize the benefits and minimize the disadvantages of public participation by, for instance, using the cogent comments and ignoring the inaccurate contributions. Moreover, political factors, reflected in certain submissions, might have unduly influenced the revisors to alter several proposals, namely Rule 11. By comparison, additional political considerations, and even convincing input,

151. Cf. supra note 54 and accompanying text (describing participants in Rule 11 adoption).
153. See 28 U.S.C. § 2073(c)(1) (1988) (mandating that the Advisory Committee provide notice of meetings and that Committee proceedings be open to the public, with limited exceptions).
154. See, e.g., Letter from Judge Sam C. Pointer, Jr., Chairman, Advisory Committee, to Judge Robert E. Keeton, Chairman, Standing Committee, Attach. B (May 1, 1992), reprinted in AMENDMENTS, supra note 2, at 523-24 (indicating that the Advisory Committee changed the Rule 11 draft in response to public input); supra notes 95-102 and accompanying text (indicating that the Advisory Committee changed the automatic disclosure draft in response to public input).
155. These ideas are primarily premised on my review of the written comments of Rule 11 submitted throughout the revision process. See Tobias, Reconsidering, supra note 9, at 862-63. The characteristics of public input here resemble those attributed to public participation in administrative agency proceedings. Compare Tobias, supra note 34, at 176-87 (discussing the committee's process of revising Rule 11, including Call for Comments) with Barry B. Boyer, Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience, 70 Geo. L.J. 51, 128-29, 139-40 (1981) (evaluating the appearance of, and compensation for, representatives of consumer interests at FTC rulemaking hearings) and Carl W. Tobias, Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings, 82 Colum. L. Rev. 906, 907-09, 945-47 (1982) (discussing generally the problem of encouraging public input in administrative proceedings and deficiencies associated with compensating participants). This was predictable, as the new revision process is analogous to notice and comment rulemaking. See 28 U.S.C. § 2073(c) (1988) (providing for public hearings preceded by "sufficient notice").
156. See supra note 155 and accompanying text.
157. See supra notes 28-33, 154 and accompanying text; supra text accompanying notes 67-68.
apparently had little effect on the revisors' treatment of other proposals, particularly automatic disclosure.\textsuperscript{158}

Increased openness in the process exposed the rule revision entities to greater political pressure. For example, many attorneys and parties interested in proposed amendments sent numerous overnight packages, including eleventh-hour pleas for revisions in various provisions, to Judge Robert Keeton, the Standing Committee Chair.\textsuperscript{159} Supplicants were not bashful about communicating their views to Court members either, although the Justices lack any formal procedure for reviewing such communications.\textsuperscript{160}

Congress will soon be intensively lobbied by attorneys, litigants, and additional affected interests who did not secure all that they wanted in the rule amendment process.\textsuperscript{161} Those participants who failed to persuade the rule revisors will inevitably bring their case to Congress. If in seven months, Congress freely modifies proposals which the revisors spent three years developing, the rule revision process will be undermined and perhaps eviscerated. If Congress substantially changes the Rule 11 and automatic disclosure revisions, the two components of the 1993 package that are integral to modern civil litigation, Congress could seriously jeopardize the continued vitality of, and even sound the requiem for, national rule amendment. Perhaps the supreme irony of the 1988 congressional efforts to reform rule revision is that the first important test of the new revision procedures may effectively be the final one.

\textsuperscript{158} See supra notes 95-102, 154-57 and accompanying text. Justice Scalia similarly considered much bar input on automatic disclosure as highly persuasive, even as he apparently discounted analogous input on Rule 11. See Dissenting Statement of Justice Scalia, reprinted in AMENDMENTS, supra note 2, at 512-13; supra notes 47-52 and accompanying text.


\textsuperscript{160} See Statement of Justice White, reprinted in AMENDMENTS, supra note 2, at 505 (observing that the letters Justice White received indicated the proposals did not please everyone but assuming that opposing views were properly aired at committee proceedings); Samborn, supra note 105, at 1 (referring to a February 1993 memorandum to the Supreme Court by former Solicitor General Erwin Griswold).

\textsuperscript{161} See Mullenix, supra note 5, at 854-55.