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Automatic Disclosure and Disuniformity in the Ninth Circuit

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AUTOMATIC DISCLOSURE AND DISUNIFORMITY IN THE NINTH CIRCUIT

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I. INTRODUCTION

The 1993 amendment to Federal Rule of Civil Procedure 26(a)(1) imposes automatic disclosure and is the most controversial formal proposal to revise the Federal Rules ever developed. The

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provision requires litigants to divulge information that is important to their cases before commencing formal discovery. The amendment also permits all ninety-four federal districts to vary the revision or to reject it completely. Moreover, judges and parties in specific cases may modify any disclosure requirements adopted by the districts.

The amendment has remained controversial since it became effective on December 1, 1993. Less than a majority of districts subscribe to the Federal Rule revision, and many of the remaining courts prescribe a broad array of disclosure procedures. These procedures include requirements that are somewhat stricter and considerably less rigorous than the Federal Rule amendment.

The applicable strictures, therefore, foster substantial interdistrict court and intrastate disuniformity. Moreover, the disclosure requirements appear in local rules, civil justice expense and delay reduction plans issued under the Civil Justice Reform Act (CJRA) of 1990, district court orders, individual judge procedures, and unwritten informal practices. These considerations complicate federal civil practice because the disclosure strictures are difficult to locate, understand, and satisfy. Furthermore, they vary significantly from district to district and within states.

All these factors mean that early implementation of automatic disclosure warrants analysis. This Essay undertakes that effort by emphasizing the process problems raised by disclosure. First, it examines the origins and development of the automatic disclosure mechanism. The Essay then evaluates the effectuation of disclosure, focusing on the disuniform disclosure procedures adopted by the federal district courts and the state and territorial court systems located within the United States Court of Appeals for the Ninth Circuit.

This Essay ascertains that disclosure has enhanced interdistrict federal court disuniformity. For example, a mere two of the fifteen districts subscribe to the Federal Rule requirements. Disclosure has also increased intrastate disuniformity. For instance, the federal

courts in multi-district states have instituted diverse disclosure regimes. Indeed, each of the four federal districts in California prescribe different disclosure procedures. Alaska and Arizona are the only two of eleven state or territorial court systems that apply disclosure. This Essay next assesses the implications of these findings regarding the implementation of disclosure, and concludes with suggestions for the future.

II. ORIGINS AND DEVELOPMENTS OF THE AUTOMATIC DISCLOSURE PROCEDURE

Increasing concern about numerous difficulties with discovery and its abuse prompted the Federal Advisory Committee on the Civil Rules (Advisory Committee) to issue a preliminary draft proposal providing for automatic disclosure in 1991.¹ The Advisory Committee suggested FRCP 26 (a)(1), which represented a dramatic departure from traditional discovery, although minimal empirical information indicated that there was widespread discovery abuse, and the procedure had received comparatively little prior experimentation.² Passage of the Civil Justice Reform Act of 1990

1. I rely substantially in this section on Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1609-13 (1994). See, e.g., Committee on Discovery, New York State Bar Association Section on Commercial and Federal Litigation, *Report on Discovery Under Rule 26(b)(1)*, 127 F.R.D. 625 (1990); see also Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579; Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992). But see Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994).

2. See Mullenix, *supra* note 1; Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's THE BARRISTER AND THE BOMB*, 69 B.U. L. REV. 649 (1990); see also Griffin B. Bell et al., *Automatic Disclosure in Discovery - The Rush to Reform*, 27 GA. L. REV. 1, 30 (1993) (noting three federal districts had experimented with automatic disclosure); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L.

correspondingly evidenced congressional intent that considerable testing precede major discovery reform.³

The preliminary draft proposal would have mandated that plaintiffs and defendants divulge prior to formal discovery information that was likely to "bear significantly on any claim or defense."⁴ Practically all of the more than twenty Early Implementation District Courts (EIDCs) designated under the 1990 legislation that instituted automatic disclosure relied substantially on the phrasing in this preliminary draft proposal.⁵

The automatic disclosure amendment ultimately engendered greater controversy than any formal proposal to revise the Federal Rules.⁶ In a lengthy public comment period and in hearings, virtually all elements of the organized bar and numerous additional interests strongly criticized the preliminary draft proposal.⁷ These opponents thought that the procedure failed to clearly delineate disclosure requirements and that it would add an additional layer

REV. 1295, 1361 (1978) (demonstrating the earliest advocates recommending adoption of a national rule only after considerable experimentation); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 723 (1989).

3. See 28 U.S.C. § 471 (Supp. 1993); see also 28 U.S.C. § 473 (Supp. 1993) (affording guidance to district courts for conducting experimental programs and prescribing experimentation with discovery). See generally Carl Tobias, *In Defense of Experimentation with Automatic Disclosure*, 27 GA. L. REV. 665, 667-68 (1993).

4. See *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 87-88 (1991) [hereinafter *Preliminary Draft*].

5. See, e.g., U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 15-16 (1991); U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 5, 1991 WL 525112, at *5 (C.J.R.A.). The dearth of disclosure models probably led the districts to depend substantially on the phrasing of the Committee's preliminary draft.

6. See Tobias, *supra* note 1, at 1605.

7. See Bell et al., *supra* note 2, at 28-32.

of discovery, create ethical problems, and impose cost and delay.⁸

At the end of a February 1992 public hearing, the Advisory Committee decided to omit the disclosure draft, apparently choosing to defer the consideration of the procedure until the completion of disclosure experimentation, which was ongoing under the CJRA in many federal districts.⁹ The Committee seemed to prefer the selective local application of the procedure over the national implementation of the controversial, nascent measure.¹⁰

This view was short-lived. In April 1992, the Advisory Committee revitalized its preliminary draft and required that litigants disclose the names of all individuals who are likely to have "discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information" and "all documents, data compilations, and tangible things" that are relevant to disputed facts.¹¹ The Committee seemingly attempted to accommodate CJRA experimentation by authorizing districts to vary the amendment or to reject it totally.¹²

The Judicial Conference Committee on Rules of Practice and Evidence (Standing Committee) and the Judicial Conference of the United States, additional entities responsible for rule revision, approved the Advisory Committee proposal, notwithstanding continuing opposition. The United States Supreme Court tendered the disclosure amendment without modification to Congress, with

8. Carl Tobias, *Collision Course in Federal Civil Discovery*, in 145 F.R.D. 139, 141 (1993); Tobias, *supra* note 1, at 1612.

9. See Bell et al., *supra* note 2, at 34-35; Winter, *supra* note 1, at 268; 145 F.R.D. at 141; see also Randall Samborn, *U.S. Civil Procedure Revisited: Committee Debates Further Amendments*, NAT'L L.J., May 4, 1992, at 1, 12.

10. See Bell et al., *supra* note 2, at 34-35; Samborn, *supra* note 9, at 12.

11. See Amendments to Federal Rules of Civil Procedure, Effective Dec. 1, 1993, reprinted in 146 F.R.D. 401-431 (1993) [hereinafter *Amendments*].

12. See Bell et al., *supra* note 2, at 35-39. But see Winter, *supra* note 1, at 269 (observing that the revised proposal responded to the legitimate concerns of critics).

three Justices dissenting from transmittal.¹³

Once Congress received the revision, nearly all segments of the bar and numerous other interests attempted to persuade Congress to omit disclosure.¹⁴ Both Houses of Congress conducted hearings on the disclosure amendment, and a bill which would have deleted disclosure passed the House by voice vote.¹⁵ The Senate unexpectedly failed to consider the legislation, and the disclosure revision took effect on December 1, 1993.¹⁶

The Senate's inaction fostered uncertainty and consternation in the federal districts, particularly in the significant number of courts attempting to comply with the December deadline by which the CJRA mandated that they adopt civil justice expense and delay reduction plans and on which the federal disclosure changes became effective.¹⁷ Because a number of districts believed that Congress would omit disclosure, some courts did not anticipate other possibilities and needed to make last-minute determinations respecting the amendment.¹⁸

These districts and numerous EIDCs, most of which had adopted disclosure procedures that varied from the federal requirements,¹⁹ responded in diverse ways. Many courts issued or

13. See *Amendments*, *supra* note 11, at 401-03.

14. See Tobias, *supra* note 1, at 1612.

15. See William J. Hughes, *Reflections from the House: Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 SETON HALL LEGIS. J. 1, 3-4, 9-11 (1993) (discussing hearings); see also H.R. 2814, 103d Cong., 1st Sess. (1993) (bill deleting disclosure); 139 CONG. REC. H8744-47 (daily ed. Nov. 3, 1993) (passing by voice vote).

16. See Randall Samborn, *Bill to Stop Change Dies: New Discovery Rules Take Effect*, NAT'L L.J., Dec. 6, 1993, at 3, 40; see also Randall Samborn, *Derailing the Rules*, NAT'L L.J., May 24, 1993, at 1, 33.

17. See Carl Tobias, *Automatic Disclosure: Let It Be*, LEGAL TIMES, Jan. 30, 1994, at 25; see also 28 U.S.C. §§ 471, 2074 (Supp. 1993) (providing statutory deadlines).

18. See Tobias, *supra* note 17, at 25.

19. See *supra* note 5 and accompanying text; see also DONNA STIENSTRA, FEDERAL JUDICIAL CENTER, IMPLEMENTATION OF DISCLOSURE IN UNITED

revised civil justice plans, published orders, or prescribed new or amended existing local rules.²⁰ A number of non-EIDCs eschewed the federal changes, promulgated provisions that differed from that revision, or suspended the federal requirements pending additional study.²¹ A majority of the districts ultimately chose not to apply the new federal modifications.²²

The above developments engendered confusion in the federal districts. Inconsistent procedures complicated practice for federal court attorneys and parties, especially for those who litigate in more than one district. Many parties encountered problems discovering applicable procedures; determining which requirements were relevant, what they meant or when the strictures took effect; and conforming to disclosure. These complexities even prompted calls for moratoria on national rule revision until evaluation of local procedural experimentation under the CJRA was concluded.²³ By mid-1994, however, a number of districts had instituted and publicized approaches to disclosure that clarified some of the

STATES DISTRICT COURTS (1995) (affording survey of 94 districts' treatment of disclosure).

20. See Tobias, *supra* note 1, at 1614.

21. See, e.g., E.D. LA. R. 606E (amended Dec. 1, 1993 and Dec. 12, 1994); D. ME. R. 18(g); see also STIENSTRA, *supra* note 19; John F. Rooney, *Discovery Rule Lacks Uniformity, Is "Source of Confusion": Critics*, CHI. DAILY L. BULL., Apr. 23, 1994, at 17. Numerous EIDCs retained different forms of disclosure that diverge from the federal requirements or continued eschewing disclosure. See, e.g., U.S. District Court for the District of Montana, Order (Jan. 25, 1994) [hereinafter Montana Order]; U.S. District Court for the Northern District of Georgia, Order (Feb. 26, 1994).

22. See *Half of Districts Opt Out of New Civil Rules*, NAT'L L.J., Feb. 28, 1994, at 5; see also STIENSTRA, *supra* note 19; Rooney, *supra* note 21.

23. See Letter from Edwin J. Wesely, Chair, Advisory Group for the United States District Court for the Eastern District of New York, to Joseph F. Spaniol, Jr., Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Feb. 1, 1992) (on file with author); Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 856 (1993).

difficulties.²⁴

In short, this assessment of the early implementation of automatic disclosure shows that it significantly increased inconsistency in federal and state civil procedure while enhancing complexity, confusion, expense, and delay. This examination was necessarily broad, general, and national. Because greater specificity should enhance comprehension of disclosure's effectuation, the next section evaluates implementation in the Ninth Circuit. The Ninth Circuit was chosen because it is the largest circuit geographically, encompasses the greatest number of districts, and may confront more problems when courts within its purview implement a procedure like automatic disclosure.²⁵

III. IMPLEMENTATION OF AUTOMATIC DISCLOSURE IN THE NINTH CIRCUIT

A. Federal District Courts

A survey of the fifteen federal district courts in the Ninth Circuit indicates that they have adopted disclosure measures that vary substantially. These range from five districts that prescribe whole cloth the Federal Rule amendment, to a like number of districts that effectively eschew the federal disclosure requirements completely.²⁶ Practically all the remaining districts reject some significant aspect of disclosure, such as Rule 26(a)(1), which requires the disclosure of important information, or Rule 26(f), which commands lawyers and litigants to meet and confer, ostensibly

24. See Tobias, *supra* note 1, at 1614-15.

25. See Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989).

26. The five districts prescribing the Federal Rule are Alaska, Arizona, Guam, the Northern Mariana Islands, and Eastern Washington. The districts effectively eschewing it are Eastern and Southern California, Hawaii, Nevada, and Western Washington. See STIENSTRA, *supra* note 19, at 7-24.

helping them resolve disagreements.²⁷

A few of the Early Implementation District Courts that initially adopted forms of disclosure premised on the Advisory Committee's 1991 preliminary draft proposal continue to apply similar procedures.²⁸ An analogous number of EIDCs attempted to conform their disclosure requirements more closely to the Federal Rule amendment, which became effective on December 1, 1993.²⁹ Nearly half of the non-EIDCs essentially rejected the Federal Rule revision.³⁰ Most of the remaining non-EIDCs that implemented automatic disclosure relied substantially on the Federal Rule requirements.³¹

The federal districts in California and Washington, the two states that include multiple districts, also have disparate procedures.³² Perhaps most problematic, all four federal districts in California have promulgated and enforced different disclosure regimes.³³ A number of judges in the Northern District of California have even applied diverse disclosure procedures to specific categories of cases.³⁴ Moreover, judges in a few districts have

27. These districts include Central California, Hawaii, and Oregon. See STIENSTRA, *supra* note 19, at 8, 11, 16, 20.

28. These districts include Eastern California and Oregon. See STIENSTRA, *supra* note 19, at 8, 20; see also *supra* note 5 and accompanying text.

29. These districts include Alaska, Idaho, and Montana. See STIENSTRA, *supra* note 19, at 7, 11, 16.

30. These districts include Hawaii, Nevada, and Western Washington. See STIENSTRA, *supra* note 19, at 11, 16, 24.

31. These districts include Arizona, Guam, and the Northern Mariana Islands. See STIENSTRA, *supra* note 19, at 7, 11, 19.

32. See STIENSTRA, *supra* note 19, at 8-9, 24. California has Central, Eastern, Northern, and Southern Districts, while Washington has Eastern and Western Districts.

33. See STIENSTRA, *supra* note 19, at 8-9; see also note 57 *infra* and accompanying text (finding that the Second Circuit's four New York Districts have fewer discrepancies in disclosure procedures).

34. See U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 17-22

employed different disclosure requirements within their districts.³⁵

Most of the EIDCs indicated which disclosure procedures would apply by issuing general or special orders announcing their disposition,³⁶ while a few courts amended applicable local rules or civil justice expense and delay reduction plans or intimated that they would probably do so after additional study of the new federal changes.³⁷ Lawyers and litigants, especially attorneys and parties who were located outside of specific districts, may have encountered difficulty securing these orders. For instance, the Montana District circulated a Uniform Order to members of the Federal Bar in January 1994. The order was intended to tailor the court's disclosure requirements more precisely to the 1993 Federal Rule modification.³⁸ The order was also meant to be temporary, pending the receipt of recommendations for improving civil justice reform from the CJRA Advisory Group and the completion of the court's annual assessment.³⁹

The Judicial Improvements Act (JIA) of 1988 imposes an affirmative obligation on circuit judicial councils to periodically review all local procedures for consistency with the Federal Rules. The Act further authorizes the councils to abrogate or modify any conflicting requirements.⁴⁰ The 1990 CJRA correspondingly assigns

(1991); *see also* STIENSTRA, *supra* note 19, at 8-9.

35. For example, judicial officers in the divisions of the Montana District either do not apply automatic disclosure or they enforce judicial disclosure differently. *See* Carl Tobias, *Updating Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 89, 92-93 (1993); *see also* Carl Tobias, *More on Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 357, 362 (1993).

36. *See, e.g.*, U.S. District Court for the Southern District of California, General Order No. 394-E (Nov. 8, 1993); Montana Order, *supra* note 21.

37. *See, e.g.*, E.D. CAL. LOC. R. 253; D. IDAHO LOC. R. 26.1-2.

38. *See* Montana Order, *supra* note 21.

39. *See* Letter from Paul G. Hatfield, Chief Judge, U.S. District Court for the District of Montana, to members of the Federal Bar (Jan. 25, 1994); *see also* D. MONT. LOC. R. 200-205 (governing discovery that became effective on September 1, 1995).

40. *See* 28 U.S.C. §§ 322(d)(4), 2071(a), 2071(c)(1) (Supp. 1993); *see also* FED.

similar oversight duties to circuit review committees, placing fewer regulatory responsibilities on them.⁴¹ Although the Ninth Circuit Court Review Committee rigorously monitored districts' implementation of the CJRA⁴² and the Ninth Circuit Judicial Council attempted to carefully discharge its JIA responsibilities,⁴³ neither Ninth Circuit entity disapproved numerous districts' adoption of inconsistent automatic disclosure procedures.⁴⁴

Several plausible reasons explain the Ninth Circuit's inaction. First, the 1993 Federal Rule revision specifically invited districts to adopt and enforce conflicting local procedures and even to eschew totally the federal amendment.⁴⁵ Second, the CJRA's eleven statutorily-prescribed principles, guidelines, and techniques, which districts were to consider and could promulgate, and the twelfth provision empowering courts to apply any other measures that would reduce cost or delay, expressly encouraged districts to implement local requirements that departed from the Federal Rules and provisions in the United States Code.⁴⁶ Third, it is likely that

R. CIV. P. 83 (proscribing inconsistency). See generally Tobias, *supra* note 1, at 1598-99 (discussing statutory requirements and implementation).

41. See 28 U.S.C. § 474(a) (Supp. 1993); see also Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1406-09 (1992) (discussing statutory requirements and implementation of 28 U.S.C. § 474(a)).

42. See Tobias, *supra* note 41, at 1408 n.78.

43. See Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359 (1995).

44. See, e.g., Tobias, *supra* note 1, at 1618 n.88 (committee did not disapprove of inconsistent disclosure procedures); Tobias, *supra* note 43 (showing that council did not disapprove of inconsistent disclosure procedures); see also U.S. Court of Appeals for the Sixth Circuit, Minutes of the Meeting of the Judicial Council 4-5 (May 4, 1994) (voting to suspend monitoring of local procedures under the 1988 Act pending the receipt of additional guidance from Congress, the Judicial Conference, or case law as to whether the CJRA's provisions take precedence over the Federal Rules of Civil Procedure).

45. See *Amendments*, *supra* note 11, at 431-32.

46. See 28 U.S.C. § 473 (Supp. 1993).

Congress, in assigning oversight duties to committees, failed to authorize the committees to require that districts abolish or alter inconsistent procedures.⁴⁷

B. State and Territorial Courts

Review of the eleven state and territorial courts in the Ninth Circuit shows that the Alaska and Arizona state court systems are the only systems that have adopted automatic disclosure.⁴⁸ Indeed, Arizona prescribed disclosure before the Federal Rule revision became effective.⁴⁹ Procedural policymakers in that state apparently believed that discovery required such substantial reform that it was preferable to apply procedures analogous to the comparatively untested disclosure requirements included in the federal preliminary draft.⁵⁰ Arizona is also a jurisdiction that has seemingly concluded that maintaining uniform civil procedures in federal and state courts is critically important.⁵¹ The Alaska state court system seriously considered implementing a form of automatic disclosure premised on the federal model and formally adopted a disclosure procedure that became effective on July 15, 1993.⁵²

It is unclear why the remaining state and territorial court systems failed to effectuate automatic disclosure. Some jurisdictions

47. See *supra* notes 40-44 and accompanying text.

48. See ARIZ. R. CIV. P. 26.1, ALA. R. CIV. P. 26; see also Thomas A. Zlaket, *Encouraging Litigators to Be Lawyers: Arizona's New Civil Rules*, 25 ARIZ. ST. L.J. 1 (1993). California makes limited provision for disclosure. See CAL. CODE CIV. P. § 1141.11.

49. Arizona's disclosure regime became effective on July 1, 1992 under ARIZ. R. CIV. P. 26.1, while the federal regime took effect on December 1, 1993. Compare Robert D. Myers, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11 (1993) *with Amendments*, *supra* note 11, at 401.

50. See Myers, *supra* note 49, at 11-13; see also *supra* note 4 and accompanying text (discussing federal preliminary draft proposal).

51. See John P. Frank, *Local Rules*, 137 U. PA. L. REV. 2059 (1989).

52. See ALA. R. CIV. P. 26.

reached no affirmative decision to reject disclosure, while few states have indicated that they will refuse to employ disclosure. It appears that most jurisdictions assume a cautious approach to disclosure.

The position of the Montana Advisory Commission on the Civil Rules, which is the state analogue of the Federal Advisory Committee, seems typical and perhaps representative.⁵³ The Commission suggested to the Montana Supreme Court that it delay the adoption of any disclosure procedure for the state court system.⁵⁴ The Commission premised its view on virtually unanimous bar opposition to the federal revision and the amendment's highly controversial nature.⁵⁵ The Commission apparently thought that Montana should not prescribe a procedure that had yet to prove efficacious at the federal level, and that Montana could always institute disclosure if experimentation in federal districts and other states indicated that a specific disclosure mechanism was effective.⁵⁶

C. A Look at Other Circuits

This survey of automatic disclosure in the Ninth Circuit seems typical and may well be paradigmatic. An impressionistic review of most other circuits shows that districts within their purview have adopted equally disparate approaches to automatic disclosure. For example, in the Second Circuit, the four New York districts have prescribed disclosure regimes that are more compatible than those

53. Carl Tobias, *An Update on the 1993 Federal Rules Amendments and the Montana Civil Rules*, 56 MONT. L. REV. 547 (1995).

54. Telephone conversation with Randy Cox, Boone, Karlberg & Haddon, Missoula, MT, Member, Montana Advisory Commission on Civil Rules (Oct. 25, 1994).

55. Remarks of William H. Bellingham, Chair, Montana Advisory Commission on Civil Rules, to Montana Defense Trial Lawyers Continuing Legal Education Program on the 1993 Federal Amendments, Kalispell, MT (July 14, 1994); *see also* telephone conversation, *supra* note 54.

56. *See* Tobias, *supra* note 53.

prescribed in the California districts.⁵⁷ Very few state court systems have correspondingly subscribed to automatic disclosure. Maryland apparently is the only jurisdiction other than Arizona that has actually adopted and implemented disclosure.⁵⁸

IV. IMPLICATIONS OF FINDINGS REGARDING AUTOMATIC DISCLOSURE

The Federal Rule amendment imposing automatic disclosure has significantly enhanced interdistrict court disuniformity. The applicable disclosure requirements are concomitantly difficult to find, understand, and satisfy. These phenomena disadvantage all lawyers and litigants. However, the requirements particularly affect attorneys and parties, such as the Department of Justice, large corporations, and the Sierra Club, who litigate in multiple districts and are located outside specific districts.⁵⁹ Even when local procedural strictures do not mandate the retention of local counsel,⁶⁰ prudence and pragmatic factors may so dictate. For instance, lawyers who practice in the district may better appreciate how local judges will actually interpret and enforce disclosure procedures as written.⁶¹

Disclosure has increased intrastate disuniformity in the Ninth Circuit because federal districts in the two states that encompass more than one district prescribe different procedures, while only two state or territorial systems subscribe to disclosure. The erosion

57. See STIENSTRA, *supra* note 19, at 8-9, 17-18.

58. See MD. R. CIV. P. 2-403 (1994).

59. See Tobias, *supra* note 41, at 1422-27; see also Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988-89).

60. See Daniel R. Coquillette et al., *The Role of Local Rules*, 75 A.B.A. J., Jan. 1989, at 62, 64-65; see also *Frazier v. Heebe*, 482 U.S. 641 (1987).

61. Lawyers who practice in the district will better understand the local legal culture. See Herbert M. Kritzer & Frances K. Zemans, *Local Legal Culture and the Control of Litigation*, 27 LAW & SOC'Y REV. 535 (1993); see also Tobias, *supra* note 41, at 1422-27.

of uniformity complicates the efforts of attorneys to practice in both federal and state court in specific jurisdictions and enhances the complexity and expense of federal and state civil litigation.

Disuniformity also means that the Federal Rules of Civil Procedure decreasingly serve as a model for the states. This phenomenon increasingly undermines the expectations of the lawyers who drafted the 1938 Federal Rules. They anticipated that state court systems would prescribe procedures analogous to Federal requirements, thereby promoting intrastate uniformity and simplifying legal practice.⁶²

The reduced uniformity, enhanced complexity, greater uncertainty, and potential for increased cost and delay that have apparently attended automatic disclosure's application and other aspects of the CJRA's implementation have influenced forum choices in some jurisdictions.⁶³ For instance, plaintiffs' counsel prefer to pursue litigation in state court because the simpler requirements expedite resolution. Defense lawyers correspondingly choose not to remove to federal court suits out of concern about expense, delay, and complexity.

V. SUGGESTIONS FOR THE FUTURE

A. *Generic Recommendation*

The above analysis shows that the interdistrict court and intrastate disuniformity created by the automatic disclosure procedure has imposed numerous disadvantages. Most important, disclosure has complicated federal and state civil practice and has increased cost and delay. These factors lead me to proffer the

62. See Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1650-51 (1981); see also Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272-77 (1989).

63. See Carl Tobias, *Opt-Outs at the Outlaw Inn: A Report from Montana*, 14 REV. LITIG. 207, 212 (1994).

general recommendation that decisionmakers who develop and apply federal and state civil procedures attempt to implement the most uniform and simple disclosure requirements. This suggestion correspondingly prompts more specific recommendations for those policymakers.

B. Specific Suggestions for Federal Decisionmakers

1. Short-Term Recommendations

Numerous immediate actions that federal procedural decisionmakers could institute must, as a practical matter, await the conclusion of experimentation under the CJRA and its comprehensive evaluation.⁶⁴ A number of courts that are not EIDCs have been employing disclosure measures for less than two years, and relatively little implementation of disclosure in EIDCs has been rigorously assessed.⁶⁵

The RAND Corporation is presently conducting a thorough analysis of CJRA experimentation with six principles and guidelines of cost and delay reduction in ten pilot districts and ten comparison courts which the company plans to complete during mid-1996.⁶⁶ The Judicial Conference will submit to Congress a

64. Insofar as these suggestions are aimed at decisionmakers in the circuits, they rely on examples drawn from the Ninth Circuit. The recommendations are intended to apply equally to decisionmakers in other circuits who can extrapolate from the suggestions.

65. See Tobias, *supra* note 1, at 1614-16; see also *infra* note 82 and accompanying text.

66. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 105(c)(1), (2)(A)-(C), 104 Stat. 5089, 5098 (1990) (discussing the pilot districts and CJRA experimentation); see also Judicial Amendments Act of 1994, Pub. L. No. 103-420, § 4, 108 Stat. 4343, 4345 (1994), reprinted in 3 U.S.C.C.A.N. (1994) (extending deadline from mid-1995 to mid-1996). See generally Carl Tobias, *Extending the Civil Justice Reform Act of 1990* (1994), 64 U. CIN. L. REV. 105 (1995).

report and recommendations on that pilot program by the end of 1996,⁶⁷ while Congress must ultimately decide how to treat the civil justice reform effort.⁶⁸ These factors mean that the Advisory Committee could probably not propose adoption of one disclosure procedure so soon after the 1993 Federal disclosure amendment's promulgation, especially given the pragmatic political realities that require Committee deference to congressional resolution of the CJRA.

Federal procedural policymakers might institute some actions, however. Individual federal districts and judges can attempt to implement and apply the most uniform, simple disclosure regimes. For example, the federal districts in California and Washington could make disclosure requirements in the federal courts more uniform.⁶⁹ Judges in the Northern District of California might correspondingly prescribe fewer disclosure systems, although their efforts may constitute a valuable attempt to experiment with the procedure in different contexts.⁷⁰

67. See Judicial Improvements Act of 1990, § 105(c), *supra* note 66, at 5098; see also Judicial Amendments Act of 1994, § 4, *supra* note 66, at 4345 (extending deadline from end of 1995 to end of 1996). The Conference must also submit to Congress a report on the demonstration districts by the end of 1995. See Judicial Improvements Act of 1990, §104(d) *supra* note 66, at 5097. Congress has extended the date until the end of 1996. See S. REP. NO. 464, 104th Cong., 1st Sess. (1995). Neither the Conference's two reports nor the RAND study focus on or rigorously evaluate disclosure. All three accord disclosure some consideration, while annual assessments of experimentation in the districts examine disclosure. These efforts, therefore, may support tentative conclusions regarding disclosure's efficacy.

68. See Judicial Improvements Act of 1990, § 105(b) *supra* note 66, at 5097-98.

69. See *supra* notes 32-34 and accompanying text. I recognize that differing local legal cultures in the districts may suggest the propriety of diverse disclosure procedures. I also do not underestimate the importance of Article III judges' independence as a potential obstacle to changes such as the ones that I suggest.

70. See *supra* note 34 and accompanying text. The need for change may also be a function of judges' and lawyers' tolerance for experimentation and inconsistency, both of which have traditionally been rather high in this district

A general improvement that many federal districts and judges can easily effectuate is to increase the accessibility of the applicable disclosure requirements. For instance, courts and judges could include more disclosure procedures in local rules, or at least explore ways of effectively communicating the strictures' application to federal court practitioners and litigants.

The circuit judicial councils and circuit review committees might promote the adoption of uniform disclosure measures by abrogating or changing inconsistent local disclosure requirements or urging federal districts or judges to abolish or modify them.⁷¹ However, the councils and committees may be justifiably reluctant to exercise power that appears to be regulatory or to infringe on federal judges' prerogatives, particularly when the CJRA and the 1993 federal disclosure amendment seem to authorize inconsistency.⁷²

The national rule revisors, especially the Advisory Committee, should begin searching for a single automatic disclosure procedure that can be included in the Federal Rule as soon as the ongoing application and analysis of the multitude of disclosure mechanisms currently receiving experimentation indicate that one technique is superior. The Committee might draw specifically on the annual assessments that numerous districts have prepared.⁷³

which enjoys a laudable reputation for experimentation. *See, e.g.*, U.S. DIST. CT. R., N.D. CAL., CIV. L.R. 235-37, available in WL CA Rules; *see also* Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 773-79 (1981).

71. *See supra* notes 40-41 and accompanying text.

72. *See supra* notes 45-47 and accompanying text.

73. For example, nearly all of the EIDCs have performed at least one annual assessment. *See, e.g.*, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ANNUAL ASSESSMENT OF THE CONDITION OF THE COURT'S DOCKET, 1993 WL 52 4466 (C.J.R.A.); U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, ANNUAL ASSESSMENT OF CIVIL AND CRIMINAL DOCKET, 1993 WL 319599 (C.J.R.A.); *see also* 28 U.S.C. § 475 (Supp. 1993) (prescribing annual assessments).

Definitive conclusions regarding disclosure's effectiveness are difficult to posit at this juncture. Nevertheless, it now appears that the Southern District of Illinois "procedure," requiring litigants to divulge the identify of persons "reasonably likely to have information that bears significantly on the claims and defenses," has worked well.⁷⁴ The Montana District initially prescribed disclosure strictures that were intentionally more rigorous than the federal preliminary draft proposal, mandating, for example, that parties reveal the factual premise and legal theory of every claim.⁷⁵ This procedure seems to function smoothly in comparatively simple, routine suits and when the disclosure has been general.⁷⁶

The Judicial Conference should similarly attempt to delineate one preferable disclosure approach as it continues work on its report and recommendation to Congress, which will rely significantly on the RAND Corporation findings.⁷⁷ The Conference should collect, analyze, and synthesize all relevant information on disclosure's application and evaluation. The annual assessments performed in EIDCs that adopted disclosure should be a helpful source.

Although it is difficult to reach conclusive determinations respecting disclosure's efficacy, educated predictions can be premised on experimentation and analysis to date. This material suggests that the Conference will recommend national adoption of

74. See U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN 11, 1991 WL 525127 (C.J.R.A.); see also Rooney, *supra* note 21, at 17.

75. See U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA, *supra* note 5, at 16-17 (1991); see also Carl Tobias, *More on Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 357, 363 (1993); *supra* notes 29, 38-39 and accompanying text.

76. See Tobias, *supra* note 75, at 363. Unfortunately, discovery poses the greatest difficulty and requires the most effective reform in complex cases. See Winter, *supra* note 1, at 268.

77. See Tobias, *supra* note 66, at 20; see also *supra* notes 66-67 and accompanying text.

the disclosure procedure that has proved most effective at that time.⁷⁸ If the data assembled, evaluated, and synthesized between now and the date when the Conference must report to Congress is inconclusive, the Conference should consider developing other alternatives, such as limited additional testing of those disclosure mechanisms that seem most efficacious.⁷⁹

Congress can continue planning for the Judicial Conference's submission of the report and recommendation in anticipation of legislative decisionmaking relating to the CJRA. However, Congress may need to await the results of the RAND study and the Conference report and recommendation before it can meaningfully treat disclosure. For instance, the above examination indicated that the Conference would probably propose nationwide prescription of a single disclosure procedure.⁸⁰ Should the information that subsequently becomes available suggest the propriety of this approach, Congress should ratify it. If the material indicates otherwise or is less clear, thereby leading the Conference to different conclusions, the Congress should examine additional courses of action, including selective, future experimentation with promising disclosure techniques.

Congress might also consider measures that it can immediately institute to increase automatic disclosure's uniformity and simplicity, although Congress apparently has few such options. Congress should forgo the revival of the legislation that would have omitted disclosure from the 1993 Federal Rules amendments.⁸¹ Revitalization is inadvisable and would prove counterproductive principally because it will disrupt ongoing experimentation before more definitive conclusions regarding disclosure's effectiveness can be formulated.

78. See also Judicial Improvements Act of 1990, § 105(c), *supra* note 66, at 5098 (prescribing similar process for Conference recommendation).

79. See *supra* note 78; see also Tobias, *supra* note 1, at 1627-28.

80. See *supra* note 78 and accompanying text.

81. See *supra* notes 14-24 and accompanying text.

Finally, all procedural decisionmakers should explore ways of rigorously evaluating experimentation with automatic disclosure. Numerous annual assessments have discussed disclosure, but few analyses have been particularly stringent, and a number have yielded inconclusive results respecting efficacy.⁸² The RAND study has not emphasized disclosure, and some of the pilot and comparison districts are not even applying the mechanism.⁸³ The Congress or the Judicial Conference might commission RAND to expand its evaluation, thereby focusing more specifically on disclosure, or the Conference could charge the Federal Judicial Center to perform an assessment of disclosure.

2. Long-Term Recommendations

Several long-term suggestions can be derived from the experimentation with automatic disclosure, although most of the recommendations are not specific to that procedure. Federal districts and individual judges must be attentive to the complications of procedural inconsistency that disclosure exemplifies. For example, the courts and judges should abrogate all conflicting local procedures, embody the maximum number of remaining requirements in local rules, and commit to writing every local procedure.⁸⁴ Circuit judicial councils should systematically discharge their duties to periodically review, abolish, or alter any local procedures deemed inconsistent.⁸⁵ This suggestion realistically

82. The first assertion is premised on my review of most of the assessments. Examples of inconclusive results appear in ANNUAL REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA 6-8 (June 1993); REPORT ON THE IMPACT OF THE COST AND DELAY REDUCTION PLAN ADOPTED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS 13-17 (Apr. 6, 1993), 1993 WL 468314 (C.J.R.A.).

83. See *supra* note 66.

84. See Tobias, *supra* note 1, at 1626-28; Tobias, *supra* note 63, nn.217-18.

85. See *supra* note 40 and accompanying text.

applies to council review of procedures prescribed under the CJRA only after the CJRA has sunset and to disclosure only in the long-term.⁸⁶

The national rule revisors, particularly the Advisory Committee, should attempt to reinstitute a national uniform procedural system. Significant to the achievement of this objective will be the substitution of a proposed 1991 revision to Rule 83, which was retracted in deference to civil justice reform experimentation, for the local option provision that automatic disclosure specifically illustrates.⁸⁷

The national revision entities must also be more cautious about developing controversial Federal Rules amendments such as automatic disclosure. The disclosure experience indicates that state court policymakers will be reluctant to adopt similar measures until they exhibit promise. The national rule revisors should prescribe procedural changes only after thorough experimentation and rigorous evaluation through empirical data collection that shows that the mechanisms are efficacious.⁸⁸ The national entities should correspondingly create a more effective vehicle for conducting experimentation that could be premised on the recently withdrawn

86. For explanations of why the suggestion only applies to disclosure in the long-term, see *supra* notes 46-47 and accompanying text (explaining why suggestion only applies to councils after CJRA sunsets). Numerous councils may also require congressional funding to implement this aspect of the 1988 JIA. See Tobias, *supra* note 43, at 364.

87. The proposal empowered districts with Judicial Conference approval to adopt for not greater than five years experimental local rules which contravene Federal Rules. See Judicial Conference of the U.S. Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, reprinted in 137 F.R.D. 53, 152 (1991); see also Tobias, *supra* note 1, at 1630-32; Bell et al., *supra* note 2, at 35-39. *But see* Winter, *supra* note 1, at 269.

88. See Tobias, *supra* note 1, at 1630-32; see also Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-28 (1989).

proposal to amend Rule 83.⁸⁹

C. *Specific Suggestions for State Decisionmakers*

State court procedural decisionmakers considering disclosure apparently have few tenable options.⁹⁰ For example, the policymakers can adopt the controversial federal disclosure provision that has not yet proved efficacious, prescribe no disclosure procedure, or experiment with disclosure measures that depart from the federal requirements. The two latter alternatives would increase intrastate disuniformity, except in jurisdictions that model their disclosure requirements on those of the federal districts located therein.

Some state court systems may want to undertake experimentation with disclosure. These jurisdictions should survey the different procedures being applied throughout the federal system, assess their own local legal cultures, and ascertain which measures promise to be most effective. The states should also remember the disclosure procedures applied by the federal districts in the jurisdiction and attempt to conform state requirements closely to the federal strictures. States that are uncertain about those disclosure procedures that will be most efficacious could prescribe selective experimentation in specific local courts or by particular case types.⁹¹ States should also institute rigorous evaluation of any experimentation initiated so that the best mechanisms can ultimately be identified.⁹²

89. See Tobias, *supra* note 1, at 1630-32. See generally A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67.

90. Because they have so few choices, I have combined short- and long-term suggestions.

91. For instance, experimentation with disclosure might be more appropriate in urban or rural districts or in simple or complex cases.

92. See *supra* note 82 and accompanying text; see also *supra* note 65 and

VI. CONCLUSION

This study of automatic disclosure in the Ninth Circuit indicates that the procedure promoted interdistrict court and intrastate disuniformity. Institutions and individuals, such as Congress, the Federal Advisory Committee, federal districts and judges, and state judges who are responsible for maintaining civil procedures that are uniform and simple, must now act expeditiously and effectively to limit the disuniformity that disclosure is fostering.

accompanying text. Federal and state procedural decisionmakers should probably employ federal-state judicial councils as vehicles for cooperating and for increasing intrastate uniformity of disclosure and other civil procedures.