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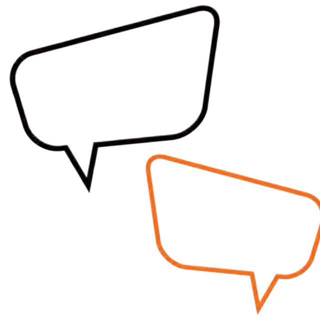

Rethinking mandatory disclosure

IN 1991, the Advisory Committee on Civil Rules published for public comment proposed amendments to FRCP 26(a)(1) that would mandate disclosure of documents and tangible things that "significantly bear on any claim or defense." The committee revised the proposal in light of the firestorm of public comments it received, which criticized the proposal for, among other things, vagueness. The revised language required disclosure of documents and things that were "relevant to disputed facts alleged with particularity in the pleadings." The Standing Rules Committee approved the recommendation. But the ultimate amendment adopted by the Judicial Conference at its September 1992 session provided courts a wide escape hatch, allowing them to opt out of the provision. The provision was last amended in 2000 to close the hatch, mandating uniform, but more limited, disclosure requirements.

Following the Duke Civil Litigation Review Conference in May 2010, a group of plaintiff and defense lawyers experienced in employment litigation developed initial discovery protocols for employment discrimination actions, which specified and broadened items that must be disclosed under FRCP 26(a)(1). Early experience with the discovery protocols has been favorable, raising the question whether the concept of expanded mandatory disclosures should be used in other types of cases. Here, attorney **MICHAEL LYNN** of the Dallas law firm of Lynn Pinker Cox Hurst LLP and Judge **ANDREW HURWITZ** of the U.S. Court of Appeals for the Ninth Circuit address the pros and cons of expanding mandatory disclosures early in litigation.

DOES REQUIRING A LAWYER TO DISCLOSE UNFAVORABLE INFORMATION AT THE BEGINNING OF LITIGATION RUN AFOUL OF THE ADVERSARIAL SYSTEM?

LYNN: Yes. The putative responding lawyer, complying with initial-disclosure rules, will find herself "imagining" the worst-case allegations at the beginning of the case, not the case that most likely will be tried after it is litigated and developed. Trying to define "relevancy" to this imagined and broadly defined case compels the responding lawyer to seek documents from her client that may well not have to be disclosed if the case were litigated and narrowed. For example, consider a case in which the plaintiff alleges the misuse of trade secrets and confidential documents. Under the proposed disclosure rule, the responding lawyer must assume a broad definition of the relevant trade secret or confidential information, and disclose the client's information related to that material, though no clear definition has arisen from the litigation. During initial interviews with the client, the responding lawyer may learn of documents taken by the plaintiff's former employee, but those documents are likely not what the accusing party is referencing, based upon the general nature of the allegations in its initial pleading. Once those documents are identified, however, there can be little doubt that amended allegations will conform to the newly produced evidence, even if that is not what the case was about initially. In this way, the responding lawyer will be short-circuiting the adversarial process — and indeed, subverting it — to help her adversary develop a case that it never asserted in the first place.

Or consider an employment case where the plaintiff alleges sexual harassment. Is the responding lawyer required to elicit information from his client of other "affairs," and turn that material over to the other side, when it is unlikely that such information is even relevant, much less admissible?

In short, initial disclosures of the kind and scope of those suggested turn the responding lawyer into an imaginary lawyer for the other side and, in the process, turns the adversarial system on its head. While invoking "efficiency" as their goal, proponents of such disclosures short-circuit the adversarial give-and-take that is necessary to come to the proper balance between relevancy and disclosure. Hence, I do believe the full initial-disclosure rule does impinge upon the adversarial system.

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HURWITZ: This train left the station in 1938 when the original Federal Rules of Civil Procedure were adopted. The discovery rules in effect since then have required the lawyer and the client to disclose unfavorable relevant information to an opponent at *some* point during the litigation. It is not at all clear how the adversary system would be impacted any differently if the disclosure were made early on, or only after party-initiated discovery requests.

The real objection to early mandatory-disclosure requirements seems to rest on the notion that the adversary system requires your opponent to *ask* for specific information before a party has an obligation to provide it. But mandatory disclosure poses no more burden than traditional discovery requests from an opponent seeking all information relevant to its specific claims or defenses. Indeed, the burden is lowered: Neither side must spend time drafting interrogatories and requests for production and then drafting objections before conferring about what really is at stake. Requiring early disclosure simply facilitates attention to the case, and identification of relevant information, in the absence of discovery requests.

REQUIRING EARLY DISCLOSURE SIMPLY FACILITATES ATTENTION TO THE CASE, AND IDENTIFICATION OF RELEVANT INFORMATION, IN THE ABSENCE OF DISCOVERY REQUESTS.

The ABA Litigation Section and others have devoted much attention in recent years to the virtual disappearance of civil trials in the federal and most state systems. The causes are complex, but one clear consequence of this phenomenon is that some lawyers now view discovery as the only opportunity to exhibit adversarial skills — each discovery request is fly-specked and objected to on the one hand and on the other sometimes designed to oppress rather than advance the litigation. Although understandable, this development is not to be applauded, nor does it represent a proper use of the adversary system. Thoughtfully designed mandatory-discovery systems actually advance the system by making important information available early at a lower cost to both parties in the great majority of cases that settle and by advancing trial preparation in those that do not. Nothing in mandatory disclosure prevents subsequent vigorous advocacy before the court or a jury.

TO WHAT EXTENT WILL SUCH AN AMENDMENT INTERFERE WITH ATTORNEY-CLIENT RELATIONS?

LYNN: Expansive initial-disclosure obligations turn the responding lawyer into the

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lawyer for the other side. Incomplete or conclusory pleading means, as explained above, that the responding lawyer must imagine the worst case that may be tried against her client. In doing so, the relationship between the client and the lawyer is profoundly affected. The process of imagining the adversary's claim, and seeking all documents related to that imagined claim, rather than working to limit the scope of discovery, immediately puts the responding lawyer into the uncomfortable role of becoming the imaginary prosecutor of her own client. That role interferes with the attorney-client relationship in many ways and in the most extreme circumstances infringes upon the attorney-client privilege itself.

Let us assume, for example, that the other side has alleged a punitive-damage case. In the initial interview to determine the scope of disclosures, the responding attorney must assume that the adversary's very weak tort claim survives until trial, and hence that the punitive-damage claims and the attendant discovery survive with it. Should the responding lawyer then produce net wealth information, or information related to similar incidents in other jurisdictions, or even unfiled investigations of a governmental body that the responding lawyer becomes aware of? These are matters where the party and its lawyers should be shoulder to shoulder, narrowing the discovery to proper topics, not expanding it or arguing for disclosure. The initial-disclosure process fundamentally taints the attorney-client relationship at its very outset and at its most fragile point, and the lawyer, required by the rules of professional responsibility to be a zealous advocate, becomes an unwilling participant in a charade to imagine her adversary's claims.

HURWITZ: Mandatory-disclosure requirements pose no more danger to attorney-client relations than traditional party-initiated discovery. Under either system, the lawyer is obligated to make clear to the client their joint obligations under the Federal Rules of Civil Procedure or the applicable state rules to supply reasonable discovery to an opponent and their entitlement to receive the same in return. The only differences between the systems are when the information must be provided and whether the other party must navigate its way through discovery requests and objections before this occurs. No mandatory-disclosure system overrides either attorney-client privilege or work-product protections.

Indeed, mandatory disclosure should routinely be accompanied by an order under Federal Rule of Evidence 502(d) guarding against inadvertent waiver of those privileges in connection with production of information in discovery. Rule 502 was expressly designed to free parties from the concern that providing discovery in the age of digitally stored information might somehow lead to a waiver of traditional protections of attorney-client relations. It should be part of every lawyer's arsenal, even in cases not involving mandatory disclosure requirements. It is inconceivable that competent counsel would not take advantage of Rule 502(d) and its various state counterparts even in the absence of mandatory disclosure, but under mandatory-disclosure systems it allows the production of information after a preliminary privilege review without the fear that somehow a missed document will be deemed as waiving the privilege forever.

THE ADVISORY COMMITTEE WAS CONCERNED THAT MANDATING INITIAL DISCLOSURES OF ALL "RELEVANT" INFORMATION WOULD BE BURDENSOME AND WASTEFUL. IT STRUGGLED WITH LANGUAGE LIMITING THE SCOPE OF DISCLOSURES FIRST TO MATTER THAT "SIGNIFICANTLY BEARS ON CLAIMS OR DEFENSES" AND LATER TO "DISPUTED FACTS PLEADED WITH PARTICULARITY." IN BOTH INSTANCES, THE LANGUAGE WAS CRITICIZED AS VAGUE. WHAT LIMITS SHOULD BE IMPOSED ON THE INFORMATION REQUIRED TO BE INITIALLY DISCLOSED?

LYNN: Perhaps specific factual material, such as insurance or indemnity agreements, which may bear on the ability to recover in a case, should be produced. Likewise, there is an argument for disclosure of specific information that may identify potential parties and fact witnesses, as well as basic

> IN PRACTICE, PROPORTIONALITY COULD BECOME THE SUBJECTIVE "OUT" FOR ALMOST ALL PRODUCTION, LEAVING A BARE MINIMUM THAT HOPEFULLY WILL SATISFY A TRIBUNAL WHO MAY BE ASKED TO JUDGE THIS SUBJECTIVE JUDGMENT IN MOTIONS TO COMPEL AND IN SANCTIONS.

> THE PROPORTIONALITY LANGUAGE IN THE REVISED VERSION OF FRCP 26 . . . IS BUT ANOTHER WAY OF EXPRESSING THE RULE'S LONGSTANDING REQUIREMENT OF "REASONABLENESS." EARLY AND CONTINUED COOPERATION AMONG THE PARTIES AND SEEKING JUDICIAL GUIDANCE IN THE EVENT OF DISPUTES ARE FEATURES OF MANDATORY-DISCLOSURE SYSTEMS.

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legal contentions. But in no event should a responding lawyer have to determine the relevance of a claim and the documents that may be related to a claim before that claim can be defined more precisely in the litigation.

HURWITZ: Criticism of the "vagueness" of the language of proposed mandatory disclosure rules is a red herring. All mandatory disclosure takes place against the backdrop of the permissible scope of discovery. The federal rule governing that scope, FRCP 26(b)(1), now provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case," considering a number of relevant factors. Mandatory disclosure imposes no greater burdens on parties than those already in FRCP 26(b)(1). Whether under mandatory disclosure or traditional party-based discovery, the parties and the court will have to sort out what information is discoverable and what is not. Mandatory disclosure simply gives each party the responsibility of making that determination with respect to information in its control at the outset, rather than deferring the analysis until formal discovery requests are received.

FRCP 26(a)(1) already requires mandatory disclosure of at least some information relating to each party's claims or defenses, and no one doubts that a party can easily determine what information is relevant to its own case. Thus, the real fear of opponents of mandatory disclosure seems to be that no lawyer can possibly tell what information is really "relevant" to the claims or defenses of the opposing party, and therefore will be required to disclose everything imaginable. Nonsense. Every competent lawyer routinely determines at the outset of every case what information their client has that is subject to discovery under FRCP 26(b)(1) and takes steps to ensure that such information is preserved. Thus, it poses no greater burden on the lawyer than waiting for the other side inevitably to ask for that information.

Moreover, mandatory disclosure does not demand full and complete knowledge of the case at the outset. FRCP 26(a)(1)(E) states that a party must "make its initial disclosures based on information *then reasonably available to it*." This reasonableness standard recognizes that parties may not know of all relevant information at the start of the case — additional information likely will become apparent as the case progresses. To accommodate this possibility, FRCP 26(e) permits supplementation over time. Thus, counsel need not fear that a reasonable omission in the initial disclosure somehow violates the rules.

The Arizona experience with mandatory disclosure is instructive. Arizona Rule of Civil Procedure 26.1(a)(9) requires early disclosure of reasonably available information "relevant to the subject matter of the action," including "all documents which appear reasonably calculated to lead to the discovery of admissible evidence." [*Editor's note:* Dec. 1, 2015, amendments to FRCP 26(b)(1) deleted language "reasonably calculated to lead to discovery of admissible evidence.'] Experienced trial lawyers in Arizona — on both sides of the aisle — overwhelmingly indicated in a 2008 poll by the Institute for the Advancement of the American Legal System that they favor the state's mandatory system to the traditional system of requesting information and then sorting out objections. Why? First, a core, if not all, of the relevant information is produced or identified promptly without the need for discovery requests. Second, counsel can then confer — and involve the court if necessary — to discuss what is being produced and what is not. Third, targeted discovery requests can then be served, aimed at specific sources of information. Fourth, and most important, counsel need not worry whether their interrogatory requests or requests for production have been perfectly drafted or that their opponent can cleverly interpret them to not cover important information; the backdrop is that the other side has a continuing obligation to produce relevant information. From the court's perspective, if the case proceeds to trial, there is no need to parse the discovery requests and responses to determine whether a newly produced piece of relevant information was properly requested by the other side; the presumption is that it was.

Other states are following suit. In 2012, Colorado implemented a pilot program for business cases. Among other changes, the program required robust initial disclosures of information beneficial and harmful to a party's case. A 2014 evaluation of the program by the Institute for Advancement of the American Legal System found shorter case disposition times, reduced motion practice, and more proportional discovery. Most of the changes from the pilot program, including the robust initial disclosures, have now been incorporated into Colorado's rules of civil procedure.

Texas, Nevada, and Alaska have also adopted vigorous initial-disclosure requirements, requiring that parties produce helpful and harmful information to an opponent. The Conference of State Chief Justices is considering case management recommendations that include mandatory disclosures of essential information.

SHOULD "PROPORTIONALITY" BE A FACTOR IN CONSIDERING WHAT TO INITIALLY DISCLOSE?

LYNN: If such disclosure is required, then proportionality ought to be considered. But, because proportionality assumes that there is another variable against which relevancy should be measured, the responding lawyer is caught in a subjective maze. She is asked first to imagine the worst-case scenario and what may be relevant to it and then to judge the burden of discovery against that imaginary yardstick.

In practice, proportionality could become the subjective "out" for almost all production, leaving a bare minimum that hopefully will satisfy a tribunal who may be asked to judge this subjective judgment in motions to compel and in sanctions. The lawyer is subject to the risk of guessing wrong, and that is profoundly unfair to the trial lawyer and grants too much power to the tribunal in what is supposed to be an adversarial system. While I trust many judges to make the correct decision on initial-disclosure issues, I should not have to rely upon mere trust in my practice. The brilliance of the adversary system is that the responding lawyer is invited to help shape the scope of discovery but does not make the decision of the breadth of discovery in an environment in which she must always assume the worst-case scenario when she is before an arbitrary or inexperienced tribunal and risking sanctions for guessing wrong. We are advocates only and should ▸

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not be compelled to become an unwilling judge in the process.

HURWITZ: Of course. The proportionality language in the revised version of FRCP 26, as Judge David Campbell [former chair of the Advisory Committee on Civil Rules] has stressed, is but another way of expressing the Rule's longstanding requirement of "reasonableness." Early and continued cooperation among the parties and seeking judicial guidance in the event of disputes are features of mandatory-disclosure systems, just as in traditional discovery regimes. And mandatory-disclosure requirements, just like any other feature of the discovery rules, are subject to modification on the parties' agreement or on showing of good cause to the court. Routine professional cooperation, an early Rule 16 conference, or if necessary, motions for protective orders, also guard against imposing costs disproportionate to the issues in the case in the mandatory-disclosure context.

WOULD EXPANDING THE INITIAL-DISCLOSURE DUTY INCREASE OVERALL DISCOVERY COSTS?

LYNN: If that duty means full initial disclosure as we now face in the Eastern District of Texas, then yes, it will increase discovery costs. Discovery costs will increase because the issues of relevancy are all but impossible to develop and define in the face of conclusory initial pleadings. The responding party will have little choice but to guess what a tribunal judging her production will say when faced with an initial production. Will a limited production, where the producing lawyer realistically attempts to limit the discovery to what should be relevant, be penalized? How far into the past must she search for relevant documents? Or, will a broad production feed opposing lawyers new material for amended pleadings against her client?

Further, with full initial production there is clearly an institutional breakdown of the federal rules' limitations on electronic discovery. Should the responding lawyer develop search terms and produce emails and attachments that cover the top 5, 10, or 100 most likely witnesses in responding to an initial production? And over what period should the searches cover? And what happens when her opponent chooses a much less robust set of search terms and many fewer witnesses? Who is correct, and should these initial decisions be made in the face of potential sanctions?

The fundamental problem with initial disclosures is that there are no clear guidelines for a tribunal to determine who is right — much less for the lawyer, who must justify her actions to that tribunal, to argue what is right. The lawyer becomes the unwilling servant of the court, rather than an advocate, and in doing so, too much power is vested in the tribunal, who in some cases has not litigated in the commercial arena in years and has little understanding of the impact even small changes in a discovery program can have on costs.

HURWITZ: To the contrary, in the ordinary case, costs are reduced, because parties are largely freed of the obligation to serve and respond to written discovery requests. The scope of permissible discovery is not expanded by initial-disclosure duties, only the timing.

Moreover, nothing about the mandatory-disclosure regime requires the adoption of "one-size-fits-all" rules. The court always has the ability to modify disclosure obligations in a specific case, just as it supervises traditional discovery. Specialized repetitive litigation, for example, can greatly benefit from mandatory-disclosure rules designed with the aid of experienced counsel.

A pilot program is now under way under the aegis of the Advisory Committee on Civil Rules, involving about 60 federal district court judges around the country. The pilot requires substantial initial disclosures in employment discrimination cases. Those cases almost always involve certain types of relevant information, such as the identities of the managers who made the relevant employment decisions, the employee's file, internal communications about the employee, the employee's earning history, and efforts the employee has made since termination to find employment. In the past, both sides were required to serve discovery requests to obtain this information, but under the pilot program they receive it early in the litigation without asking for it. This not only reduces the costs of discovery, but facilitates settlement, which is how most civil cases end. A recent study of the pilot program by the Federal Judicial Center found that it reduced discovery motions by up to 50 percent. Judges who use the enhanced disclosures report that they see fewer discovery disagreements. [*Editor's note:* Initial discovery protocols for employment cases alleging adverse action posted at www.fjc.gov/public/pdf.nsf/lookup/discempl.pdf/$file/discempl.pdf.] Again, the Arizona experience is also instructive. In medical malpractice cases, Arizona Rule of Civil Procedure 26.2 requires both parties to provide complete records of the plaintiffs' medical history to opponents without the need for discovery requests; court-approved nonuniform interrogatories can then be served, and document discovery is otherwise quite limited. Counsel reaction — on both sides of the case — to this specialized mandatory-disclosure rule has been enthusiastic, perhaps because the disclosure requirements were adopted by the Arizona Supreme Court only after involving those lawyers in the design.

WHAT SANCTIONS WOULD BE IMPOSED FOR FAILURE TO COMPLY WITH THE DUTY TO PROVIDE BROAD INITIAL MANDATORY DISCLOSURES?

LYNN: The uncertainty of initial production unimpeded by clear requests for production is further compounded by the uncertainty of what a tribunal may or may not do when faced with completely different views of relevancy and proportionality. One judge may see a lawyer as "obstructionist" for viewing the pleadings too narrowly, while another judge may view the pleadings as so conclusory that there should be little if any disclosure. The trial lawyer is left with very little help but the subjective opinion of local counsel. The trial lawyer faced with such uncertainty may err in providing too much information in the initial disclosure, but more likely will produce what looks like a great deal of information in hopes that such a large and unfocused production will achieve twin purposes: avoiding even the most difficult judge, but also not giving away potentially dangerous documents that may turn out to be wholly irrelevant. Any thoughts that initial disclosures will somehow limit "gamesmanship"

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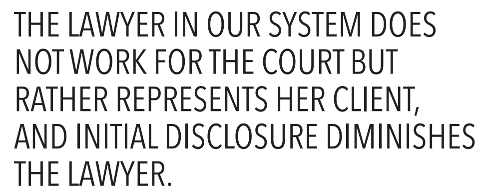
in discovery and trial practice simply do not sufficiently appreciate the creativity the bar attracts. And such a procedure, as outlined above, is unfair to the lawyer and, at the risk of repeating myself, gives too much power to the tribunal. The lawyer in our system does not work for the court but rather represents her client, and initial disclosure diminishes the lawyer.



HURWITZ: The existing sanction provisions in FRCP 37 and its state counterparts are perfectly compatible with mandatory-disclosure systems. What sanction is appropriate under any circumstance remains a question left to the discretion of the trial judge. Mandatory disclosure is no more of a "gotcha" than traditional systems. Just as discovery sanctions are not imposed under traditional disclosure systems against a party that has acted reasonably under the circumstances, judges overseeing discovery in mandatory-disclosure systems recognize that not every piece of information will be produced at the outset; the issue is whether counsel has acted reasonably, taking into account the continuing duty to supplement.

Even under mandatory-disclosure systems, discovery is an ongoing process. Trial judges recognize this, and sanctions are rare except when information is withheld entirely or until very late stages of the litigation. Because all courts now require that counsel meet and confer before sanctions are sought, the overwhelming majority of cases of late disclosure do not result in sanctions.

CONCLUSIONS

LYNN: Complete and full initial disclosure will do nothing to reduce the cost of litigation and most likely will increase it. What the discovery process needs is not less judicial intervention but more. Vigorous and clear-minded management of the kind and scope of discovery at an early stage of litigation will do more to reduce the cost of litigation than any other single proposal. Initial disclosure, as presently proposed, is a clear abdication of our courts' obligation to get their hands a little dirty actually making the tough calls early in a case. Yes, I know that issues of relevancy and proportionality are difficult in the face of notice pleading. But they do not become any easier by shifting that burden to the litigants. Initial disclosures distance the court from the give-and-take at the beginning of a case that helps define the order and significance of the discovery effort. Simply relying upon the litigants to define an imaginary case and then produce documents relevant to it is asking for trouble and expense, and does not take into consideration the difficulties the trial lawyer faces in planning the scope and details of a discovery program. In the end, full initial disclosure becomes more an attempt to avoid the critical role that the litigation process plays in narrowing the issues than an effective tool to reduce litigation expense. That process, when well managed by a strong, able judge and good, experienced counsel, provides a process to work out differences about relevancy, timing, and scope, and ultimately that hard work leads to a reduction in the cost of litigation and an increase in the effectiveness of litigation as a tool to resolve our disputes.

HURWITZ: The bench and the bar all seem to agree on one thing: Our current discovery system is not working well. It is expensive, inefficient, and requires extensive court supervision. The American College of Trial Lawyers, the Civil Rules Advisory Committee, and the Duke Conference have provided thoughtful responses to some of the problems, but difficulties persist.

Mandatory-disclosure systems are part of the solution. They start from an unassailable premise: Each party in a traditional discovery system is entitled to production under FRCP 26(b) or its state counterparts of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Thus, if properly designed discovery requests are served, sooner or later each party will receive the information covered by mandatory-disclosure rules. So, why not jump start the process?

The mandatory-disclosure process is no more rigid than the traditional approach. Lawyers can and should confer, and they often decide to stage disclosures, facilitating early dispositive motions and then producing further information only after those motions are decided. The court can also prevent undue burden on either side, recognizing its obligation to ensure reasonableness and proportionality. At base, these systems only require of a lawyer what FRCP 26(b) requires anyway — identify and produce documents within the scope of proper discovery.

The instinctive rejection of mandatory disclosure is tied in some lawyers' minds to the notion that "I have no obligation to help the other side." But, thankfully, the 1938 rules rejected that argument. Properly designed mandatory disclosure requirements reduce discovery burdens on parties and counsel. They have been successful in the states and in pilot programs in federal court, and already have been incorporated in part into FRCP 26(a)(1). Mandatory disclosure is not a magic bullet, but, like other recent reforms to our imperfect system of civil discovery, it is a step forward.

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