Summary of Proposed Statement to the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee on the Proposed Disclosure Amendment to Rule 26(a)(1) of the Federal Rules of Civil Procedure to be Joined in by the Litigation Section of the District of Columbia Bar

The Litigation Section intends to join in a Statement to be submitted to the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee urging the rejection of the proposed disclosure amendment to Rule 26(a)(1) of the Federal Rules of Civil Procedure that would impose on parties a duty to disclose, without awaiting formal discovery requests, certain basic information.

The Statement requests that the Congress reject the proposed disclosure amendment, but approve the other changes to the discovery provisions that have been transmitted to Congress by the Supreme Court. To begin with, the Statement points out the proposal of mandatory, pre-discovery disclosure is very controversial and warrants Congressional oversight under the Rules Enabling Act.

The Statement next argues that the proposed new Rule 26(a)(1) should be stricken from the pending amendments that are before the Congress. First, an overwhelming majority opposes the mandatory, pre-discovery disclosure. Second, disclosure is inconsistent with the adversary system and the work product doctrine. Third, disclosure undermines the attorney-client privilege and injects ethical dilemmas into the attorney-client relationship. Fourth, mandatory, pre-discovery disclosure will increase motion practice and satellite litigation, promote overdisclosure, and thereby increase discovery costs, delay and abuse. Fifth, mandatory, pre-discovery disclosure may be a remedy, if at all, only in cases where discovery is not a problem under current rules.

The Statement concludes with two other points. The proposed disclosure amendment is premature in light of the Civil Justice Reform Act experiments on discovery reform. The proposed discovery amendments other than Rule 26(a)(1) should be approved and permitted to go into effect on schedule.

The Statement was prepared by the Procedural Rules Committee of the Lawyers for Civil Justice, a non-profit public interest organization. It is expected that, in addition to the Litigation Section, the following organizations will join in the Statement: the Business Roundtable Lawyers Committee, the Defense Research Institute, the National Association of Manufacturers, the Product Liability Advisory Council and the U.S. Chamber of Commerce.

LITIGATION SECTION

The District of Columbia Bar

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Carol T. Paskin Epstein, Cochair
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D.C. Bar President
Mark H. Tuohey, III
D.C. Bar President-Elect
Katherine A. Mazzaferri
D.C. Bar Executive Director

June 15, 1993

Congressman William J. Hughes
Chairman, Subcommittee on Intellectual Property
and Judicial Administration of the House Judiciary Committee
207 Cannon House Office Building
Washington, D.C. 20515

Re: Statement of the D.C. Bar's Litigation Section on the Proposed Disclosure Amendment to Rule 26(a)(1) of the Federal Rules of Civil Procedure

Dear Chairman Hughes:

Yesterday the American Association of Railroads, the American Automobile Manufacturers Association, the American Bankers Association, the Business Roundtable Lawyers Committee, the Chamber of Commerce of the United States, the Defense Research Institute, the Federation of Insurance and Corporate Counsel, the International Association of Defense Counsel, Lawyers for Civil Justice, National Association of Manufacturers and the Product Liability Advisory Council, Inc. submitted a Statement to your Subcommittee titled "Congress Should Delete Proposed Rule 26(a)(1) Mandatory Pre-Discovery Disclosure from Pending Amendments to the Federal Rules of Civil Procedure."

The Litigation Section of the District of Columbia Bar hereby joins in that Statement and supports its recommendations. We note that the views expressed in this letter represent only those of the Litigation Section and not those of the D.C. Bar or of its Board of Governors.

By way of background information, we note that the District of Columbia Bar currently has over 61,000 members. The Bar is organized into 21 specialized Sections, each of which focuses on a specific area of legal practice. One purpose of the Sections is to monitor developments in the law and to comment on timely issues within Section expertise and jurisdiction. With 2,685 members, the Litigation Section is by far the largest section of the D.C. Bar. Its members are actively involved in litigating civil cases in the federal district courts throughout the Nation and have a strong interest in the substance of the discovery rules.

Sincerely,

Daniel F. Attridge

1707 L Street, NW, Sixth Floor, Washington DC 20036-4202 202/331-4364 Sections Infoline 202/223-7729 FAX 202/828-8572

STATEMENT OF

Business Roundtable Lawyers Committee
Chamber of Commerce of the United States
National Association of Manufacturers
American Association of Railroads
American Automobile Manufacturers Association
American Bankers Association
Product Liability Advisory Council, Inc.
Defense Research Institute
Federation of Insurance and Corporate Counsel
International Association of Defense Counsel
Lawyers for Civil Justice

CONGRESS SHOULD DELETE PROPOSED RULE 26(a)(1) MANDATORY PRE-DISCOVERY DISCLOSURE FROM PENDING AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Submitted to

The Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee

for the

Hearing on Proposed Amendments to the Federal Rules of Civil Procedure

JUNE 16, 1993

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STATEMENT OF

BUSINESS ROUNDTABLE LAWYERS COMMITTEE
CHAMBER OF COMMERCE OF THE UNITED STATES
NATIONAL ASSOCIATION OF MANUFACTURERS
AMERICAN ASSOCIATION OF RAILROADS
AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION
AMERICAN BANKERS ASSOCIATION
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
DEFENSE RESEARCH INSTITUTE
FEDERATION OF INSURANCE AND CORPORATE COUNSEL
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL
LAWYERS FOR CIVIL JUSTICE

Submitted to

THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION
OF THE
HOUSE JUDICIARY COMMITTEE

for the

JUNE 16, 1993 HEARING ON PROPOSED AMENDMENTS TO
THE FEDERAL RULES OF CIVIL PROCEDURE

CONGRESS SHOULD DELETE PROPOSED RULE 26(a)(1) MANDATORY PRE-DISCOVERY DISCLOSURE FROM PENDING AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Introduction

The rulemaking committees of the Judicial Conference are to be commended for their dedicated efforts to eliminate seemingly intractable discovery problems. For the most part, we support the results of these efforts. Nonetheless, one of the recommended solutions -- adoption of the pending mandatory disclosure amendment in new Federal Rule

of Civil Procedure 26(a)(1) -- will add to discovery problems, rather than help solve them.[1] Rule 26(a)(1) creates an entirely new, pre-discovery process imposing an untested obligation on federal litigants that is likely to increase motion practice and satellite litigation, cause more contentiousness between litigants, and place additional demands on scarce judicial resources -- all results contrary to the stated purpose behind the proposed discovery amendments. Moreover, at its extremes, disclosure is sharply at odds with fundamental tenets of our adversary system of justice, and could compromise the attorney-client relationship as well as the attorney work product doctrine. Finally, the availability of automatic disclosure could have the unfortunate effect of burdening the courts with unnecessary litigation as lawsuits are commenced on speculative grounds that might not sustain discovery under current rules. This unfortunate impact could be exacerbated by the proposed changes to Rule 11 which could tempt parties into pleading with particularity wholly speculative factual assertions.[2]

"Congressional power to regulate practice and procedure in federal courts has been acknowledged by the Supreme Court since the early days of the Republic and is now assumed without question by the courts."[3] Under the Rules Enabling Act,[4] Congress is possessed of the authority, as well as the last opportunity, to decide whether proposed

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1 The text of proposed Rule 26(a)(1) is produced in Appendix A.

2 The considerations affecting proposed Rule 11 changes are discussed in comments submitted by the American Insurance Association.

3 See The Judicial Improvements Act of 1990, Report of the Senate Comm. on the Judiciary, No. 416, 101st Cong., 2d Sess. 9 (1990) (quoting H.R. Rep. No. 422, 99th Cong., 1st Sess. 5-7 (1985)).

4 28 U.S.C. § 2072.

amendments to the Federal Rules of Civil Procedure will go into effect, and if so, what their content shall be.[5] Congressional intervention in the rulemaking process, however, has been needed and exercised only on rare occasions. In particular, congressional action is contemplated and has been taken when, as now, the Judicial Conference proposes far-reaching policy changes that would fundamentally alter the civil justice system in a potentially harmful fashion or that conflict with a congressional mandate.[6]

The near universal opposition to engrafting disclosure onto a debilitated discovery process has stressed that disclosure would fundamentally and deleteriously alter basic policies that underpin our civil justice system, and that it would result in significant new obligations, costs, delays, and abuses that would potentially conflict with Congress' own plans for civil justice reform. Therefore, congressional intervention under the Rules Enabling Act is needed to strike disclosure from the proposed amendments to the rules governing discovery in the federal courts. Indeed, striking only the disclosure amendment in new Rule 26(a)(1) would be the least intrusive action Congress could take while still fulfilling its oversight obligation. The balance of the proposed amendments to the rules governing discovery should be permitted to take effect as proposed on December 1, 1993.[7] As former Chief Justice Warren Burger once remarked about the rulemaking process,

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[5] See, e.g., Hanna v. Plummer, 380 U.S. 460, 471-72 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 15 (1941); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825); see also S. Rep. No. 101-416, supra note 3, (quoting H.R. Rep. No. 422, 99th Cong., 1st Sess. 5-7 (1985)); Winifred R. Brown, Federal Judicial Center, Federal Rulemaking: Problems and Possibilities 94 (June 1981).

[6] Brown, supra note 5, at 94.

[7] As previously noted, these comments do not address proposed changes to Rule 11.

"[Rulemaking] is a joint enterprise, and while Congress has rendered us the compliment of general approval in the past, it does not mean that the Congress should accept blindly or on faith whatever we submit."[8]

I. THE CONTROVERSY SURROUNDING MANDATORY PRE-DISCOVERY DISCLOSURE SIGNALS THE NEED FOR SUBSTANTIVE CONGRESSIONAL OVERSIGHT OF THE PROPOSED AMENDMENT AS AUTHORIZED BY THE RULES ENABLING ACT.

The proposed mandatory, pre-discovery disclosure amendment engendered vigorous debate and controversy within and without the legal community while moving through the rules amendment process.[9] Described by even its proponents as "radical",[10] the controversy surrounding the disclosure process, and the near universal opposition to it from bench and bar were so great that at one point the Advisory Committee on Rules of Practice and Procedure decided to withdraw disclosure from the proposed amendments

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[8] Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary-Supplement, 93d Cong., 1st Sess. 8-9 (1973), cited in, Note, Separation of Powers and the Federal Rules of Evidence, 26 Hastings L. J. 1059, 1074 n.166 (1975).

[9] Of the roughly 264 written comments regarding disclosure that were submitted to the Judicial Conference Committees during the public comment period, 251 comments were negative. 70 individuals appeared at the two public hearings to testify against disclosure on behalf of a broad spectrum of businesses, bar associations, and public interest groups. See Appendix B for summary of comments in opposition to Rule 26(a)(1) disclosure; see Appendix C for a summary of organizations and individuals who submitted comments to the Rules Committee.

[10] Linda Mullenix, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. Rev. 795, 807 (1991) (citing cover memorandum from Professor Paul Carrington, Office of the Reporter, Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Feb. 22, 1990).

altogether.[11] Concerned several months later that withdrawal would unduly delay needed discovery reforms, the Committee opted to reinstate disclosure in modified form.[12] The modifications attempted to respond to the overriding complaint voiced by opponents that the standard for disclosure was unreasonably vague, particularly in light of notice pleading.[13] However, the ultimate version of disclosure that emerged as proposed Rule 26(a)(1) was a slightly improved reformulation of a fundamentally flawed and unworkable concept.

Following approval by the Judicial Conference, the proposed amendments were considered by the Supreme Court prior to their presentation to Congress. Normally silent as to proposed rules amendments, the Supreme Court, through the Chief Justice's transmittal letter, expressly stated that the Court had assured itself only that proper procedures were followed during the rule promulgation process, and that Congress should not "necessarily" interpret the Court's action to mean that "the Court itself would have proposed these amendments in the form submitted."[14] Indeed, Justice White, writing in

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[11] Ann Pelham, Judges Make Quite A Discovery: Litigators Erupt, Kill Plan To Reform Federal Civil Rule, Legal Times, Mar. 16, 1992, at 1.

[12] Ann Pelham, Panel Flips, OKs Discovery Reform, Legal Times, Apr. 20, 1992, at 6; see also April 8, 1992 Memorandum of Honorable Ralph K. Winter, United States Court of Appeals, Second Circuit, to Honorable Sam C. Pointer, Jr., Regarding Reconsideration of Disclosure.

[13] See April 8, 1992 Memorandum of Honorable Ralph K. Winter, supra note 12, at 3-4.

[14] April 22, 1993 Letter From Chief Justice William H. Rehnquist to Speaker of the House of Representatives Thomas S. Foley transmitting proposed amendments to the Federal Rules of Civil Procedure, reprinted in Amendments to the Federal Rules of Civil Procedure and Forms, Communication from the Chief Justice of the United States
(continued...)

a separate statement, stressed the position that "it would be a mistake for the bench, the bar, or the Congress to assume that we are duplicating the function performed by the standing committee or the Judicial Conference with respect to changes in the various rules . . . ."[15]

Three justices, Scalia, Souter, and Thomas, dissented from promulgation of the discovery amendments. They branded disclosure as an "extreme, costly, and essentially untested" departure from the norm that would undermine the adversary system and place an intolerable burden on lawyers' ethical duties, a result that is particularly objectionable because disclosure was "recommended in the face of nearly universal criticism from every conceivable sector of our judicial system."[16]

Ultimate authority over the civil rules process rests now, as it always has, with Congress. As early as 1825, Chief Justice Marshall clarified that the authority of the courts to regulate practice and procedure existed because of a delegation of authority from Congress.[17] The Supreme Court has acknowledged and reiterated this fact in modern

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[14] (...continued)
Transmitted Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. 2072, House Doc. No. 103-74, 103rd Cong., 1st Sess. (April 22, 1993) (GPO Doc. # 67-104)(hereinafter "Supreme Court Transmittal Reprint").

[15] Statement of Justice White, accompanying Order and Memorandum Transmitting Amendments To The Federal Rules of Civil Procedure, April 22, 1993, at 6, reprinted in Supreme Court Transmittal Reprint, supra note 14, at 98-103.

[16] Dissenting Statement of Justices Scalia, Souter, and Thomas accompanying Order and Memorandum Transmitting Amendments to the Federal Rules of Civil Procedure, April 22, 1993, reprinted in Supreme Court Transmittal Reprint, supra note 14, at 104-110.

[17] "Congress has expressly enabled the Courts to regulate their practice, by other laws." Wayman v. Southard, 23 U.S. (10 Wheat.) at 42.

times.[18] Moreover, when Congress made the current delegation of authority to the judicial branch with the 1934 adoption of the Rules Enabling Act, "theories of exclusive judicial power were not accepted with respect to national rulemaking. On the contrary, the language of the enabling act reflected the dominant view that the power belongs to Congress."[19]

Although Congress has intervened in the rulemaking process sparingly, those interventions have come in recent years. For example, in 1973, Congress delayed implementation of the Federal Rules of Evidence to revise the proposed amendments to the rules regarding privilege.[20] In 1974, Congress severed a number of controversial rules of criminal procedure, allowing only the balance of the proposed amendments to become effective as proposed.[21] In 1976, Congress deferred implementation of proposed habeas corpus amendments.[22] Congress modified amendments to the rules of criminal procedure

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[18] See Sibbach v. Wilson & Co., 312 U.S. at 15; Hanna v. Plummer, 380 U.S. at 471-72.

[19] Brown, supra note 5, at 38-39. The early legislative history of congressional efforts to enact the Rules Enabling Act provides insight into Congress' views.

> [T]he bill proposed will not deprive Congress of the power, if an occasion should arise, to regulate court practice, for it is not predicated upon the theory that the courts have inherent power to make rules of practice beyond the power of Congress to amend or repeal. On the contrary, Congress may revise the rules made by the Supreme Court, or by legislation may modify or entirely withdraw the delegation of power to that body.

Report of the Comm. on the Judiciary, Authorizing Supreme Court to Make and Publish Rules in Common-Law Actions 7, S. Rep. No. 69-1174, 69th Cong., 1st Sess. (1926).

[20] See Pub. L. No. 93-12, 87 Stat. 9 (1973); Pub. L. No. 93-595 (1975) (adopting modified rules of evidence).

[21] Pub. L. No. 93-361, 88 Stat. 397 (1974).

[22] Pub. L. No. 94-349, 90 Stat. 822 (1976) (deferring implementation of habeas corpus amendments).

in 1979 to ensure that the new rules were consistent with amendments Congress was making to the criminal code at that same time.[23] In 1982 Congress withheld approval of proposed amendments to Federal Rule of Civil Procedure 4,[24] and subsequently adopted its own amended version of Rule 4.[25] Congress also made technical amendments to the bankruptcy rules in 1983,[26] and the criminal rules in 1986 and 1988.[27]

In some cases Congress has modified federal practice and procedure of its own initiative, recognizing that "Congress' power to enact rules of procedure is limited only by the Constitution, and not by the Rules Enabling Act, ..."[28] The most recent and far-reaching example is the Civil Justice Reform Act, which calls for broad experimentation with court practice and procedure by federal district courts in order to identify means to decrease costs and delay in federal courts.[29] Congress also exercised its procedural authority when it enacted the Speedy Trial Act to ensure prompt prosecution of criminal cases in federal

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23 Pub. L. No. 96-42, 93 Stat. 326 (1979) (delaying implementation of criminal rules to allow modifications consistent with pending legislation).

24 Pub. L. No. 97-227, 96 Stat. 246 (1982).

25 Pub. L. No. 97-462, 96 Stat. 2527 (1983).

26 Pub. L. No. 98-91, 97 Stat. 607 (1983) (amending bankruptcy rules).

27 See, e.g., Pub. L. No. 99-570, 100 Stat. 3207-8 (1986) (amending criminal rules); Pub. L. No. 99-646, 100 Stat. 3592 (1986) (amending criminal rules); Pub. L. No. 100-690, 102 Stat. 4181 (1988) (amending criminal rules).

28 S. Rep. 416, supra note 3, at 10.

29 Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990); see also H. Rep. No. 733, 101st Cong., 2d Sess. (Sept. 21, 1990); S. Rep. No. 416, 101st Cong., 2d Sess. (Aug. 3, 1990).

courts,[30] and when it provided for consolidation of civil litigation from multiple federal courts for pretrial purposes with passage of the multidistrict litigation statute.[31] Consequently, there is ample authority and precedent to support congressional intervention now.

It is important to note that congressional intervention in the rulemaking process over the past twenty years has not denigrated the Rules Enabling Act process, and has not diminished the reputation, the excellent work product, or the integrity of the rulemaking committees of the Judicial Conference -- nor should it be allowed to. The members of the rules committees and their product reflect the hard work and dedication that committee members bring to bear on the often difficult challenges that face them. Congress has recognized that fact by targeting its interventions very narrowly, usually making only one or two very specific amendments to the pending proposals instead of undertaking wholesale revisions of the amendments in general. This minimally invasive approach is all that is necessary and appropriate here -- specifically, Congress need only excise Rule 26(a)(1) mandatory, pre-discovery disclosure relating to witnesses and documents and make certain conforming amendments -- the balance of the pending discovery amendments should be approved and implemented as promulgated. That action would permit a number of other somewhat less controversial discovery reforms to take effect December 1, 1993, including imposition of a meet and confer requirement prior to discovery, presumptive limits on the number of interrogatories and depositions, the exchange of expert reports, and other

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[30] See 18 U.S.C. § 3161 (c)(1) (1988) (criminal defendant must be tried within 70 days from filing of information or indictment, or from appearance before court).

[31] See 28 U.S.C. § 1407 (1988) (permitting consolidation of multiple lawsuits under the authority of one federal court for unified proceedings in certain lawsuits).

significant changes. In addition, striking only section 26(a)(1) preserves new 26(a)(2) and (3), which create a new disclosure provision related to expert witnesses and their testimony, and a disclosure obligation related to trial witnesses and materials.

A study of the federal courts' rulemaking process, conducted by the Federal Judicial Center in 1980, indicates that it is expected that Congress will hold hearings and conduct significant oversight when a particular proposal incites major public controversy.[32] The study also indicated that the judicial branch recognizes that congressional review is particularly appropriate when sharp policy changes are involved in the proposed rules amendments.[33] Both of these elements are present in the current situation, and in light of the judicial branch's stated expectations, intervention by Congress should not be perceived as usurping judicial authority.

The proposed disclosure process has elicited unprecedented public outcry from litigants of every stripe. Moreover, it presages a profound change in a basic policy underpinning the American civil justice system by mandating a process that is non-adversarial and in which the attorney's traditional obligation to the client is transformed into a greater obligation to the opponent and the system itself. As such, significant congressional interest and intervention with regard to the disclosure proposal would be expected, and in the view of those submitting this statement, it is imperative.

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[32] Brown, supra note 5 at 53.

[33] Id. at 94.

II. MANDATORY, PRE-DISCOVERY DISCLOSURE SHOULD BE STRICKEN FROM THE PENDING AMENDMENTS.

Mandatory, pre-discovery disclosure can be challenged on both practical and policy grounds. It is an untried, unworkable concept, particularly in complex litigation. Notwithstanding calls from the bench and bar for greater specificity in the disclosure obligation, its revised, and slightly improved formulation still includes ambiguities with which litigants will find it difficult to comply, and which courts will be required to resolve. Thus, rather than solving discovery abuse, disclosure simply adds another complication on top of an already troubled process. In many cases disclosure will require expensive pretrial activity where none would otherwise be appropriate or required. Disclosure is not supported by any empirical study of the discovery process, as numerous commentators have criticized.[34] It is at odds with the adversary system, the attorney-client relationship, and the work product doctrine. According to some, disclosure will "encourage the use of fact pleading," and "will [create] pressure to amend Rule 8(a)(2) to do away with notice pleading."[35]

For all these reasons, disclosure will cause far more discovery problems than it has the potential to solve. Indeed, if disclosure is interpreted with anything less than strict adherence to its literal text and the accompanying Committee Notes, particularly under the rapid-fire conditions that exist in discovery, it becomes far more likely to trigger the dire consequences that many have predicted.

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[34] See Mullenix, supra note 10.

[35] See Sherman L. Cohn, Notice Pleading: End of A 55-Year Experiment?, American Inns of Court Federal Practice Digest, April 1993, 17-18.

A. An Overwhelming Majority Opposes Mandatory, Pre-discovery Disclosure.

The strength and depth of the opposition to mandatory, pre-discovery disclosure cannot be overestimated. Ninety-five percent of the written public comments on disclosure submitted to the Committee on Rules of Practice and Procedure, and almost all of the public testimony at the Committee hearings in Los Angeles and Atlanta in November of 1991 and February of 1992 were in opposition to disclosure as a concept and in practice. The opposition came from all segments of the legal community, including sitting federal judges, academics, large and small businesses, trade associations, the defense bar, consumer groups, the plaintiffs' bar, bar association groups, and individual practitioners. The level of opposition should be of great concern because successful implementation of disclosure in the federal courts will depend, in large part, on the commitment and good will of those litigants and counsel who are required to use it.

B. Mandatory, Pre-discovery Disclosure Will Increase Motion Practice And Satellite Litigation, Promote Overdisclosure, And Thereby Increase Discovery Cost, Delay, and Abuse.

Instead of decreasing discovery cost, delay, and abuse, mandatory, pre-discovery disclosure is far more likely to exacerbate them. Because of uncertainty over the precise meaning of the disclosure standard, which includes the frequently litigated term "relevant" and the previously unknown phrase "set forth with particularity in the pleadings," courts may be inundated with motions to define these terms with greater certainty or to decide whether they have been satisfied in a particular case. Other motions are likely to be urged under Rule 12(e) for more definite statements of the facts in the complaint or the answer. The likelihood that motion practice will increase is great because of the severe

sanctions that could attach under Rule 37 -- including default judgment -- if the disclosure obligation is not satisfactorily met. The severity of the sanctions, in turn, may promote more satellite litigation and appeals as parties attempt to protect themselves as best they can from the harsh application of an uncertain new process.

In order to avoid sanctions and satisfy the new rule, parties are likely to engage in overdisclosure, giving the disclosure standard the broadest feasible interpretation. This not only results in unnecessary expense for the disclosing party, but it also wastes the resources of the party receiving the disclosure, who must take the trouble to sort through and analyze the material.

The ambiguity of the new disclosure standard creates an amorphous new risk for litigants. The risk exists regardless of whether a litigant discloses too much or too little, and it makes court involvement in resolving disclosure conflicts highly probable. Litigation cost, delay, and abuse is likely to increase if mandatory, pre-discovery disclosure becomes the rule.

C. Mandatory, Pre-discovery Disclosure May Be A Remedy, If At All, Only In Cases Where Discovery Is Not A Problem Under Current Rules.

A just released study, conducted under the auspices of the National Center for State Courts ("NCSC"), examined discovery in state trial courts.[36] The NCSC study can be

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[36] The major flaws in the premises behind the disclosure proposal are shown in sharp relief when it is compared to an extensive study recently conducted of discovery in the state court system, published under the auspices of the National Center for State Courts. See Susan Keilitz, Roger Hanson & Henry W.K. Daley, Is Civil Discovery in State Trial Courts Out of Control? (1993) (manuscript, publication pending) ("State Court Study I"); Susan Keilitz, Roger Hanson & Richard Semiatin, Attorneys' Views of Civil Discovery (1993) (manuscript, publication pending) ("State Court Study II"). Earlier (continued...)

understood to have identified three different levels of discovery activity in the cases examined. In one category of cases amounting to 42% of the 2,190 state cases reviewed, there was no discovery at all.[37] Consequently, there were no discovery costs or delays in these cases. In a second category, very little discovery was undertaken, and discovery worked relatively well. In the third category, involving complex cases such as product liability litigation, significant discovery was undertaken and significant discovery problems were encountered. Analyzing the likely effect of mandatory, pre-discovery disclosure on these three categories of cases, it can be concluded that at best, disclosure is potentially workable only in the second category of cases where discovery already works well. Yet disclosure would be unnecessary in those cases because there are no discovery problems to solve.

The proposed mandatory, pre-discovery disclosure process makes no allowance for those situations where no discovery is necessary or appropriate. Instead, disclosure would force parties, even in the simplest of cases, to undergo the effort and to incur the expense of making initial disclosures, unless they affirmatively stipulate around the disclosure obligation or the court so orders. The Committee Notes accompanying the proposed amendment indicate that disclosure, in essence, was intended to be "the functional equivalent" of standing interrogatories "from the court," and as such would not be unduly burdensome. However, as the recent NCSC study shows, in a significant number of cases

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[36] (...continued)
studies of federal courts support extrapolation of the state figures to the federal courts. See State Court Study I, supra, citing Connolly et al., 1978.

[37] See generally State Court Study I, supra note 36 at 8.

no interrogatories are exchanged. Consequently, in those cases where discovery normally would not take place at all, disclosure is a potential solution in search of a problem. More important in those cases, however, it is highly likely that disclosure will have precisely the opposite effect of that which was intended; that is, disclosure will increase cost, delay, and abuse instead of reducing them.

Just as clearly, disclosure will impose inordinate costs and delays in complex litigation. Complex litigation often starts with multiple parties, vaguely outlined claims and defenses, sketchy facts, and above all a great deal of uncertainty. Common sense dictates that it generally, if not always, will not be possible in complex litigation to determine what the disclosure obligation is and to whom that obligation runs. Witnesses will be unknown early in the litigation. Hundreds of thousands, or even millions, of documents may or may not be at issue depending on what the facts are and who the parties might be.

Yet under the proposed mandatory, pre-discovery disclosure process, litigants could be charged with the responsibility of knowing early on not only what is relevant in terms of witnesses and documents regarding their own case, but also understanding their opponent's position well enough to surmise what would be relevant and necessary to the opponent's case. The obligation to decipher an opponent's case early on subjects a litigant to a real risk of significant sanctions for failing to reach the same assessment of what was relevant for disclosure purposes as the sanctions judge might reach in hindsight.

Since it is not likely that a process such as disclosure could resolve the discovery problems that are sui generis to complex litigation, and since disclosure certainly will not improve cases where little or no discovery takes place, the potential utility of the proposed disclosure process must be regarded as very limited. At best, disclosure would only

have a chance of being successful in those cases where it is not needed. In the face of the myriad problems and controversies surrounding disclosure, and its minimal potential for proving effective even if it is implemented, the most appropriate course of action at the present time is to strike the mandatory, pre-discovery disclosure proposal from the pending amendments.

D. Disclosure Is Inconsistent With the Adversary System and the Work Product Doctrine.

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty . . . .[38]

The adversary nature of civil litigation in this country pervades all aspects of the civil justice system, including discovery. Under present discovery rules, a litigant is responsible for identifying and seeking that information which might be relevant to his case, and an opponent has no obligation to turn over any information unless and until it has been requested. Mandatory, pre-discovery disclosure turns this tradition on its head. It requires counsel to identify that information which might be relevant to facts pleaded in his opponent's complaint or answer, and to voluntarily provide that information to the opponent before it is requested.

Although attorneys are officers of the court, their duty to advance the client's interests is at least equally important. The proposed mandatory, pre-discovery disclosure process would be the first instance in the civil litigation context where the procedural rules would impose an ongoing, affirmative obligation on the attorney to initiate disclosure to an

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[38] Trial of Queen Caroline 8 (J. Nightengale ed. 1821) quoted in Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031, 1036 (1975).

opponent or the court of information potentially adverse to the client's interests. This is fundamentally unfair to the client, and places the attorney in a particularly problematic position. Moreover, it is a dramatic departure from the adversarial model under which each side must harness its own factual and legal weapons so that the truth will ultimately emerge from the clash of competing positions.

Before the federal rules diminish the adversarial nature of discovery in favor of disclosure, more deliberate study and debate are called for. Such a departure may have systemic implications far beyond its impact on discovery. In fact, it is difficult to rationalize departure from such a fundamental tenet of the civil justice system in favor of an untested process, such as disclosure, when there is no assurance or even evidence that disclosure will eliminate or reduce discovery problems.

Disclosure also is likely to undermine the attorney work product doctrine. Each step of the act of making a judgment as to what might be "relevant" to facts pleaded with "particularity" would be classic attorney work product. Forcing the attorney to then turn that information over to an opponent will inevitably reveal the mental impressions and legal judgments of the attorney making the disclosure. In some instances disclosure may reveal information about the attorney's theory of his own client's case, or may reveal a line of factual inquiry or legal reasoning that the opponent never would have considered on his own. The work product doctrine was intended to protect and promote inventiveness, diligence, and excellence among attorneys. The disclosure process is antithetical to these goals.

E. Disclosure Undermines The Attorney-Client Privilege and Injects Ethical Dilemmas Into The Attorney-Client Relationship.

The attorney-client privilege exists to encourage clients to fully disclose the facts to counsel. The proposed disclosure amendment, however, could damage attorney-client relationships because it requires counsel to disclose to the client's adversary what counsel has learned during his investigation, good or bad, about the client's case. Indeed, the more thorough counsel is and the more information he uncovers, the greater the potential disclosure he must make -- perhaps contrary to his client's interest.

Clients do not and should not expect their own attorney to vigorously search through their files, sometimes finding negative or self-critical information, only to dutifully -- and without a request -- turn it over to the client's adversary in litigation. Yet that is what disclosure would require, contrary to the deeply ingrained tradition whereby the attorney protects the client's confidences and the law nurtures the relationship between attorney and client in order to promote candor and trust.

The law traditionally has protected this relationship even at the expense of potentially relevant information which is either kept completely confidential under the attorney-client privilege, or may be used in the litigation subject to stringent protective orders or a court-ordered seal. Although the proposed disclosure process does not modify the attorney-client privilege directly, it will undermine essential aspects of the relationship that the privilege was created to protect and unduly complicate protecting the confidentiality of such information in litigation. Since there is no evidence that disclosure will have a beneficial effect on the pretrial process, and every indication that it will seriously

compromise attorney-client relations, mandatory, pre-discovery disclosure should not be allowed to go into effect.

III. THE PROPOSED DISCLOSURE AMENDMENT IS PREMATURE IN LIGHT OF THE CIVIL JUSTICE REFORM ACT EXPERIMENTS.

When Congress enacted the Civil Justice Reform Act ("CJRA"), it anticipated that the many experimental plans devised by the participating federal district courts would serve as examples of possible reforms for discovery while at the same time yielding empirical data, based on actual practice, regarding which reforms were effective.[39] According to a report issued by the Judicial Conference, twenty-one of the 34 "early implementation" federal district courts participating in the experiment have opted to implement pre-discovery disclosure procedures in one of several different forms.[40] Thus, delaying implementation of disclosure until these experimental plans have produced data as to whether disclosure is even a workable concept would have been an invaluable safeguard of the integrity of the civil justice reform process. In fact, Judge Sam C. Pointer, Jr., Chairman of the Advisory Committee on Civil Rules, recognized the potential value of adopting a wait-and-see attitude when the disclosure amendment initially was deferred, publicly stating that "[i]t makes more

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[39] See S. Rep. No. 416, 101st Cong., 2d Sess. 2 (1990); 136 Cong. Rec. S17575 (daily ed.) Oct. 27, 1990 (Remarks of Sen. Biden).

[40] See Judicial Conference of the United States, Civil Justice Reform Act Report: Development and Implementation of Plans By Early Implementation Districts and Pilot Courts 12 (June 1, 1992) ("CJRA Report"). At the time the Advisory Committee first adopted the disclosure concept, it had been briefly in effect in the local rules of only four district courts. See Mullenix, supra note 10, at 798 n.4.

sense to get the benefit of that [CJRA] experience before moving ahead."[41] Mandating disclosure nationwide now, as a permanent amendment to the Federal Rules of Civil Procedure, unduly interferes with the experimentation process now underway in the federal district courts.

The focus on disclosure as the primary means of achieving meaningful discovery reform inappropriately obscures the fact that many other reforms are being considered under the CJRA experimental plans, and other potentially effective discovery reforms are set forth by the Judicial Conference in the pending discovery rules amendments. These latter reforms, in and of themselves, could prove effective at reducing discovery costs and delay. As such, they should be allowed to take effect so that their efficacy can be measured and assessed prior to implementation of a radical discovery reform such as disclosure. If, after experience with the Judicial Conference's discovery reforms other than disclosure, discovery abuse and delay are not diminished, then the best variation of the CJRA experimental disclosure plans could be implemented on a trial basis to test the feasibility of disclosure on a national scale.

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[41] Ann Pelham, Irate Litigators Abort Federal Discovery Reforms, American Lawyer News Service, Mar. 23, 1992, reprinted in The Connecticut Law Tribune, page 14 (quoting Judge Sam Pointer, Jr.); see also April 8, 1992 Memorandum of Honorable Ralph K. Winter, supra note 12, at 1-2 ("Most of us continue to believe that a final [disclosure] proposal to be enacted should await experimentation under the Biden Bill.").

IV. THE PROPOSED DISCOVERY AMENDMENTS OTHER THAN RULE 26(a)(1) SHOULD BE APPROVED AND ALLOWED TO GO INTO EFFECT ON SCHEDULE.

The opposition to mandatory, pre-discovery disclosure vastly overwhelmed the opposition to the remainder of the discovery amendments to such a degree that it would be a responsible exercise of congressional oversight to permit the other discovery reforms to proceed to implementation while withdrawing Rule 26(a)(1) disclosure. Although many concerns were expressed about almost all of the proposed amendments to discovery, all but one concern, the proposed mandatory, pre-discovery disclosure process, can be put aside in the spirit of cooperation and deference to the rulemaking process as established in the Rules Enabling Act. The proposed disclosure process, however, remains so far beyond the pale that it is not possible to abandon objections to it due to the deleterious impact it is likely to have on the civil justice system, and in order, in effect, to protect its opponents' rights of appeal.

Congress should strike Rule 26(a)(1) and allow the balance of the proposed discovery amendments to become effective on December 1, 1993. Indeed, Congress has used this very technique in the past, striking only the objectionable rule or portion of a rule, and allowing the balance of the proposed amendments to go into effect as originally intended. An example of such action occurred in 1974, when Congress severed a number of controversial rules of criminal procedure, allowing only the balance of the proposed amendments to become effective as proposed.[42]

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[42] See Pub. L. No. 93-361, 88 Stat. 397 (1974).

To withhold the balance of the discovery amendments would unnecessarily denigrate the dedicated work of the Judicial Conference and its committees. Moreover, it would arbitrarily delay implementation of numerous potentially meaningful discovery reform measures. Indeed, although the criticism expressed herein toward disclosure is significant and far-reaching, it in no way should be interpreted as a criticism of the dedicated jurists, academics, and practitioners who serve as part of the Judicial Conference committees, nor as a disparagement of the energy and scholarship behind their efforts. As such, deleting Rule 26(a)(1) is an appropriately limited action that Congress can take while still faithfully carrying out its oversight function.

CONCLUSION

Mandatory, pre-discovery disclosure undoubtedly would have a profound effect on the discovery process and on the adversarial nature of the civil justice system as a whole. What is unknown, however, is whether that effect would be curative, as its proponents hope, or whether it would exacerbate existing costs and delays while causing new problems of its own, as identified herein. Almost all of those who have evaluated and commented on the disclosure proposal strongly oppose it. Further, there is no credible evidence to support the notion that mandatory, pre-discovery disclosure will reduce discovery cost, delay, and abuse.

At a minimum then, mandatory, pre-discovery disclosure should not be implemented nationwide until there is some basis in fact to demonstrate that it is necessary and that it has a realistic potential to cut discovery costs, reduce delay, and minimize abuse. If such information is to ever surface, it may do so once the results of the CJRA experiments

are available. It would therefore be prudent to wait at least until that time before taking any action to implement disclosure.

However, there is reason to believe that mandatory, pre-discovery disclosure could not work in the majority of cases under any circumstances. It deviates too much from the adversary model on which the American system is premised. It is unnecessary in those cases where discovery is not used or is used sparingly -- a sizable portion of the total caseload. Disclosure is too amorphous to accommodate the needs of complex litigation without provoking significant satellite activity, another counter-productive result. No tinkering changes and no amount of testing can overcome these substantial hurdles. In the final analysis then, disclosure should be rejected as a well-intentioned, but unworkable concept that will not fit into the federal civil justice system. Congress should strike mandatory, pre-discovery disclosure from the proposed discovery amendments to the Federal Rules of Civil Procedure and allow the balance of the discovery amendments to take effect.

APPENDIX A

TEXT OF PROPOSED AMENDMENT TO RULE 26(A)(1)

Rule 26. General Provisions Governing Discovery: Duty of Disclosure

(a) Required Disclosures: Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

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APPENDIX B

SUMMARY OF GROUNDS OF COMMENTS OPPOSING RULE 26 DISCLOSURE

(comments available as of June 1, 1993)

A total of 264 comments were reviewed to prepare this summary. They addressed the proposed amendment to Federal Rule of Civil Procedure 26 that would require disclosure of information in advance of discovery. Over ninety-five percent of the comments were in opposition to the proposed disclosure process. Ten federal district court judges commented, and eight out of the ten were opposed to disclosure. The following is a summary of the primary objections against the proposal and a tally of the percentage of commenters who raised these objections.

Specific Objections	Percent Commenting
The standard for making disclosure is too vague and ambiguous.	59
A disclosure process will spawn more satellite litigation and disputes.	52
The disclosure process will be unworkable under the notice pleading system.	51
The 30 day time limit for making disclosures after the answer is filed is too short.	45
Empirical data on disclosure is needed from the Biden bill districts before nationwide implementation.	38
Disclosure will result in much unnecessary and burdensome production of documents and information.	25
The disclosure process is inconsistent with the attorney-client relationship and will undermine the work product doctrine.	18
The disclosure process is inconsistent with the adversary system.	17
Simultaneous disclosure places an unfair burden on the defendant.	13

APPENDIX C

LIST OF SIGNATORIES TO COMMENTS TO THE JUDICIAL CONFERENCE IN OPPOSITION TO DISCLOSURE SUBMITTED BY BAR ASSOCIATIONS, BUSINESS ASSOCIATIONS, CORPORATIONS, PUBLIC INTEREST GROUPS, ATTORNEYS AND JUDGES

Bar Associations and Business Associations

Alliance of American Insurers

American Bar Association

American Board of Trial Advocates

American College of Trial Lawyers

American Corporate Counsel Association

American Institute of Certified Public Accountants

American Insurance Association

Arkansas Association of Defense Counsel

Association of American Railroads

Association of Trial Lawyers of America

Business Roundtable

State Bar of California

Central District of California Lawyer Representatives, Ninth Circuit Judicial Conference

Chamber of Commerce of the United States

Chicago Council of Lawyers

Colorado Bar Association

Connecticut Bar Association

Courts, Lawyers and the Administration of Justice Section of the District of Columbia Bar

Defense Counsel of Delaware

Federal Bar Association, Los Angeles Chapter

State Bar of Georgia

Hawaii Defense Lawyers Association

Idaho Association of Defense Counsel

Illinois Association of Defense Trial Counsel

International Association of Defense Counsel

Iowa Defense Counsel Association

Lawyers for Civil Justice

Litigation Section of the District of Columbia Bar

Los Angeles County Bar Association

Maritime Law Association of the United States

Michigan Defense Trial Counsel, Inc.

Mississippi Defense Lawyers Association

State Bar of Montana

National Association of Independent Insurers

National Association of Railroad Trial Counsel

New Jersey Defense Association

New Jersey State Bar Association

New York State Bar Association Commercial and Federal Litigation Section

Pharmaceutical Manufacturers Association

Philadelphia Bar Association

Product Liability Advisory Council

South Carolina Defense Trial Attorneys' Association

Trial Lawyers for Public Justice

Virginia Association of Defense Attorneys

Washington Defense Trial Lawyers

Washington State Trial Lawyers Association

Wichita (Kansas) Bar Association

Public Interest Groups

Alliance for Justice

American Civil Liberties Union

NAACP, Legal Defense and Educational Fund

Public Citizen Litigation Group

Corporations

American Standard Inc.

Amoco Corporation

ARCO

Bausch & Lomb Inc.

Bethlehem Steel Corporation

Bridgestone/Firestone, Inc.

Caterpillar, Inc.

Chesapeake Corporation

The Clorox Company

The Coca-Cola Company

Control Data

Corning Inc.

Cooper Tire & Rubber Company

Deere & Company

The Dow Chemical Company

Duquesne Light Company

E.I. DuPont de Nemours and Company

Eastman Kodak Company

Emerson Electric Co.

E-Systems, Inc.

FINA, Inc.

Ford Motor Company

Gates Energy Products

GenCorp

General Motors

Georgia-Pacific Corporation

Harley-Davidson, Inc.

Harris Corporation

Hershey Foods

Hughes Aircraft Company

Joy Technologies, Inc.

Lone Star Technologies

LTV Steel Company

Mazda Motor of America, Inc.

McDermott, Inc.

McGraw-Hill, Inc.

Mead

Melroe Company

Michelin Tire Corporation

Mobil Corporation

Morgan Stanley & Co.

Morton International

Murphy Oil USA, Inc.

Nalco Chemical Company

Nissan North America, Inc.

Olin Corporation

Oryx

Otis Elevator (United Technologies)

Phelps Dodge Corporation

Piper Aircraft Corporation

The Procter & Gamble Company

Ralston Purina Company

Raytheon

Sears, Roebuck and Co.

The Sherwin-Williams Company

Snap-On Tools

Sundstrand Corporation

Tenneco Inc.

The Timken Company

TRW Inc.

Union Carbide Corporation

The Uniroyal Goodrich Company

USX

Waltco Truck Equipment Co.

Washington Corporations

Zurn Industries, Inc.

Attorneys and Judges

Robert J. Albair

Arthur R. Almquist, Mehaffy & Weber

Dan H. Ball, Thompson & Mitchell

S. Paul Battaglia, Bond, Schoeneck & King

William C. Beatty, Huddleston, Bolen, Beatty, Porter & Copen

James S. Bianchi, Meyers, Bianchi & McConnell

Sheila L. Birnbaum, Skadden, Arps, Slate, Meagher & Flom

Peter K. Bleakley, Arnold & Porter

T. Mack Brabham

Hon. Albert V. Bryan, Jr., United States District Court, Eastern District of Virginia

John C. Cahalan, Dunn, Carney, Allen, Higgins & Tongue

Richard P. Campbell, Campbell & Associates

John M. Capron, Fisher & Phillips

James E. Carbine, Weinberg and Green

Gordon M. Carver III, Dunn, Kacal, Adams, Pappas & Law

Walter Cheifetz, Cheifetz, Pierce, Cochran, Kozak & Mathew

Douglas J. Chumbley, Popham Haik

F. Bosley Crowther 3rd, Crowther & Bresee

Mary Coffey, The John J. Frank Partnership

Steven J. Cologne, McInnis, Fitzgerald, Rees, Sharkey & McIntyre

James J. Crowley, Thompson, Hine and Flory

Frank J. Daily, Quarles & Brady

D. Michael Dale, Oregon Legal Services

Roy B. Dalton, Martinez & Dalton, P.A.

Michael J. Danner, Danner & Bishop

Jeffrey S. Davidson, Kirkland & Ellis

Donald H. Dawson, Jr., Plunkett & Cooney

Paul R. Devin, Peabody & Arnold

Douglas K. Dieterly, Barnes & Thornburg

Gregory J. Digel, Branch, Pike, Ganz & O'Callaghan

William L. Dorr, Harris Beach & Wilcox

Winslow Drummond, The McMath Law Firm, P.A.

Carroll E. Dubuc, Graham & James

M. Richard Dunlap, Dickie, McCamey & Chilcote

Charles R. Dunn, Dunn, Kacal, Adams, Pappas & Law

Kevin J. Dunne, Sedgwick, Detert, Moran & Arnold

Richard L. Edwards, Campbell & Associates

Dale Ellis, Knowles, King & Smith

John R. Fanone, Robert D. Kolar & Assoc.

Francis X. Ferrara, Carpenter, Bennett & Morrissey

John P. Frank, Lewis and Roca

Charles F. Freiburger, Bricker & Eckler

Gail N. Friend, Fulbright & Jaworski

Keith Gerrard, Perkins Coie

Arthur M. Glover, Jr., Hirsch, Glover, Robinson & Sheiness

Catherine A. Gofrank, Gofrank and Kelman

Hugh Q. Gottschalk, Otten, Johnson, Robinson, Neff & Ragonetti

Arthur P. Greenfield, Snell & Wilmer

Francis M. Gregory, Jr., Sutherland, Asbill & Brennan

Gregory A. Gross, Dickie, McCamey & Chilcote

Peter T. Grossi, Jr., Arnold & Porter

William D. Grubbs, Woodward, Hobson & Fulton

Harold A. Haddon, Haddon, Morgan & Foreman

Patrick J. Hagan, Kincaid, Gianunzio, Caudle & Hubert

George N. Hayes, Delaney, Wiles, Hayes, Reitman & Brubaker

Thomas M. Hayes, Jr., Hayes, Harkey, Smith, Cascio & Mullens

Jon L. Heberling, McGarvey, Heberling, Sullivan & McGarvey

Jonathan M. Hoffman, Martin, Bischoff, Templeton, Langslet & Hoffman

Hon. H. Russel Holland, United States District Court, District of Alaska

Patrick E. Hollingsworth, Davidson, Horne & Hollingsworth

Charles W. Hosack, Lukins & Annis

Allen W. Howell, Shinbaum, Thiemonge & Howell

Hunton & Williams

Chester A. Janiak, Burns & Levinson

Hon. James H. Jarvis II, United States District Court, Eastern District of Tennessee

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Brian N. Johnson, Popham Haik

Gregory P. Joseph, Fried, Frank, Harris, Shriver & Jacobson

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M. J. Keefe

Loren Kieve, Debevoise & Plimpton

Kenneth A. Kraus, Kraus & Kraus

Ernest Lane III, Lane & Striebeck, P.A.

J.D. Ledbetter, Sommers, Schwartz, Silver & Schwartz

Paul R. Leitner, Leitner, Warner, Moffitt, Williams, Dooley, Carpenter & Napolitan

Edwin L. Lowther, Jr., Wright, Lindsey & Jennings

Jack B. McCowan, Jr., Gordon & Rees

Andrew T. McKinney IV, Phillips & Akers

Richard McMillan, Jr., Crowell & Moring

John O. Miller III, White, Huseman, Pletcher & Powers

Francis H. Morrison III, Day, Berry & Howard

Ronald G. Morrison, Morrison & Leveque

Hon. J. Frederick Motz, United States District Court, District of Maryland

Arthur Nakazato, Kircher & Nakazato

Janet Napolitano, Lewis and Roca

Marc A. Nerenstone

Colvin G. Norwood, Jr., McGlinchey, Stafford, Cellini & Lang

Henry J. Oechler, Jr., Chadbourne & Parke

Michael E. Oldham, Johnson, Oldham & Angell

Godfrey P. Padberg, Padberg, McSweeney, Slater & Merz

Hon. Owen M. Panner, United States District Court, District of Oregon

Deana S. Peck, Streich Lang

Thomas M. Peters, Vandeveer Garzia, P.C.

Richard Polley, Dickie, McCamey & Chilcote

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Clifford A. Rieders, Rieders, Travis, Mussina, Humphrey & Harris

Robert S. Rosemurgy, Butch, Quinn, Rosemurgy, Jardis, Bush, Burkhart & Strom

William A. Rossbach, Rossbach & Whiston, P.C.

Susan Vogel Saladoff

Hon. Barefoot Sanders, United States District Court, Northern District of Texas

W. Joseph Schleppi, McCutchan, Druen, Haynard, Rath & Dietrich

Edward C. Schmidt, Jones, Day, Reavis & Pogue

Karl E. Seib, Jr., Patterson, Belknap, Webb & Tyler

William D. Serritella, Ross & Hardies

Roger S. Shafer

Samuel M. Shapiro

Joseph A. Sherman, Sherman, Taff & Bangert

Alan C. Stephens, Thomsen and Stephens

John D. Stephenson, Jr., Jardine, Stephenson, Blewett & Weaver, P.C.

J. Hamilton Stewart, III, Ogletree, Deakins, Nash, Smoak & Stewart

Laura D. Stith, Shook, Hardy & Bacon

Paul L. Stritmatter, Stritmatter, Kessler & McCauley

William H. Sutton, Friday, Eldredge & Clark

Michael E. Tigar, University of Texas

Thomas F. Tobin, Baker & McKenzie

Jay H. Tressler, Tressler, Soderstrom, Maloney & Priess

H. Woodruff Turner, Kirkpatrick & Lockhart

Chilton Varner, King & Spalding

George Vernon, Leng Stowell Friedman & Vernon

Robert N. Weiner, Arnold & Porter

Ronald E. Westen, Harvey, Kruse, Westen & Milan, P.C.

Tybo Alan Wilhelms, Bugbee Conkle

Shelton C. Williams, Williams & Ranney, P.C.

Anthony J. Williott, Dickie, McCamey & Chilcote

Stanley P. Wilson

James D. Wing, Fine Jacobson Schwartz Nash Block & England

Holly Winger, Cummings & Lockwood

Thomas D. Yannucci, Kirkland & Ellis

Andrew S. Zettle, Huddleston, Bolen, Beatty, Porter & Copen