

1-1994

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Recommended Citation

46 Fla. L. Rev. 115 (1994)

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DISCOVERY IN THE REAL WORLD

*Minna J. Kotkin**

I must practice law in a different world. Certainly, the descriptions of the discovery process¹ offered by these distinguished panelists bear little resemblance to my day-to-day experience at Brooklyn Law School (BLS), where I direct a federal litigation clinical program, specializing in employment discrimination.² Each panelist has suggested, albeit for different reasons, that changes in the discovery rules³ will have little practical ef-

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

2. The Federal Litigation Clinic at Brooklyn Law School is designed to provide students with a closely supervised experience in the representation of litigants in the federal court system. The students represent plaintiffs in employment discrimination and other civil rights matters, and claims for disability benefits.

3. The Judicial Conference of the United States sent the proposed amendments to the Federal Rules of Civil Procedure to the Supreme Court on November 27, 1992. See Memorandum from L. Ralph Mecham, Director, Administrative Office of the United States Courts, to the Chief Justice of the United States and the Associate Justices of the Supreme Court (Nov. 27, 1992), in H.R. DOC. NO. 74, 103d Cong., 1st Sess. 98 (1993), *reprinted in* AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401, 514 (1993) [hereinafter AMENDMENTS]. This proposal included changes to several Rules, including Rules 16, 26, 30, 31 and 33. *Id.* The Supreme Court forwarded the proposed amendments to Congress on April 22, 1993. See Letter from William H. Rehnquist, Chief Justice of the United States Supreme Court, to Thomas S. Foley, Speaker of the House of Representatives (Apr. 22, 1993), AMENDMENTS, *supra*, at 403. The Supreme Court is empowered to develop rules of procedure for the district courts. 28 U.S.C. § 2072 (1988 & Supp. V 1993). Congress failed to either modify or block the proposed changes, so the amendments became effective on December 1, 1993. See AMENDMENTS, *supra*, at 401. For the full text of the amended rules and the advisory committee notes, see PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, AMENDMENTS, *supra*, at 535. Most notable among the amendments was the change to Rule 26, requiring parties to voluntarily provide information relevant to the allegations set forth in the pleadings. See FED. R. CIV. P. 26. The mandated disclosure of witnesses, documents, calculations of damages, and other relevant information has generated substantial controversy. See Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 39-46 (1992). In addition, parties are required to meet after the complaint is filed to set forth a discovery plan. FED. R. CIV. P. 26(f). This plan is then used to create the scheduling order required under Rule 16. For a comprehensive summary of the new rules, see Rochelle C. Dreyfuss, *The What and Why of the New Discovery Rules*, 46 FLA. L. REV. 9, 10-14 (1994).

fect.⁴ Abuses are on the decline in any event.⁵ Whether the new rules are opted into or out of, practice will be controlled by economics and individual judges' predilections. I want to suggest here, from the viewpoint of a plaintiff's civil rights lawyer, that rules have significance. The movement toward informal, ad hoc resolution of discovery issues and abuses inures to the benefit of the defendant's bar, and contributes significantly to the already substantial difficulties that individual litigants face in prosecuting civil rights claims.⁶

Let me summarize briefly my colleagues' positions on two critical elements of the new rules: mandatory disclosure, and limitations on depositions and interrogatories. Judge Bertelsman, while acknowledging that Kentucky is not New York, believes that mandatory disclosure is indeed an effective tool in expediting litigation.⁷ From his experiment with it, he concludes that neither privilege nor particularity issues stand in the way of its general implementation.⁸ In his view, the net result is a substantial decrease in discovery motions, largely attributable to the early first meeting, supervised by a judge who clearly means business.⁹

Judge Barrington D. Parker, a former corporate litigator who practiced in the New York City federal courts, as I do, surprisingly echoes Judge Bertelsman's views.¹⁰ He recounts how these courts, even before the Biden Bill¹¹ and the rules amendments, addressed discovery abuse

4. See Colloquy, *Changing the Rules of Pretrial Fact Disclosure—What's Disclosed About Litigation and the Legal Profession?* (Jan. 7, 1994) [hereinafter Colloquy] (transcript on file with the *Florida Law Review*) (containing the panelist's statements on the changes in the discovery rules).

5. Randall Samborn, *Fuel Reform Opposition Reports: Little Discovery Abuse*, NAT'L L.J., May 31, 1993, at 3 (describing a study performed by the National Center for State Courts that found no formal discovery was filed in 42% of cases it examined, versus 48% in a 1978 Federal Judicial Center study).

6. See *infra* notes 48-53 and accompanying text.

7. See William O. Bertelsman, *The 1994 Annual Meeting of the Association of American Law Schools: Changing the Rules of Pretrial Fact Disclosure*, 46 FLA. L. REV. 105, 111-12 (1994); Colloquy, *supra* note 4, at 3.

8. See Bertelsman, *supra* note 7, at 111; Colloquy, *supra* note 4, at 3.

9. See Bertelsman, *supra* note 7, at 111; Colloquy, *supra* note 4, at 3.

10. Judge Parker was appointed to the United States District Court for the Southern District of New York in 1994.

11. The Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (Supp. V 1993), was signed into law on December 1, 1990, as part of the Judicial Improvements Act of 1990. See Pub. L. No. 101-650, 104 Stat. 5089 (1990). The Biden Bill requires each of the 94 district courts in the federal court system to name an Advisory Group to study the causes of unnecessary delays and expenses in civil litigation. 28 U.S.C. § 472 (Supp. V 1993). After reviewing the report from the Advisory Group, the district court must implement a civil expense and delay reduction plan. *Id.* The plan must consider, and may include, the following: differential treatment of cases which tailors the level of judicial management to the needs of the case, early control of the pretrial process by the judicial officer, encouragement of cost-effective discovery through the voluntary exchange of information, and referral of cases to alternative dispute resolution. 28 U.S.C. § 473 (Supp. V 1993). The Act required all district courts to implement such a plan by December 1, 1993. See 28 U.S.C. § 471 (Supp. V 1993).

through local and individual judges' rules. These rules limited interrogatories and depositions, and provided easy access to decisionmakers for the resolution of disputes.¹² As a result, discovery wars and extensive motion practice were all but eliminated.¹³ Apparently, New York is not so far removed from Kentucky. Parker attributes the improved discovery climate not so much to the effect of rules, however, but to the free market.¹⁴ "Clients got tired of paying lawyer bills," he comments.¹⁵ They questioned the utility of discovery battles, and indeed of litigation in general, compared to alternative dispute resolution mechanisms.¹⁶ The marketplace began to value the problem-solver over the combative litigator, and economic incentives succeeded in changing lawyer behavior.¹⁷

Bill Lann Lee, a civil rights litigator with the NAACP Legal Defense Fund in California, joins in the view that the rules amendments make little difference.¹⁸ For example, status conferences and discovery limitations are already widely used.¹⁹ As the only representative of the plaintiff's bar, Lee does not have quite the same rosy perspective on the discovery process as his copanelists, however. While the Legal Defense Fund was in the forefront of support for the amendments, Lee suggests that the civil rights bar's position was more a response to the defense bar's opposition: what the defense bar opposes must be good for us.²⁰ Lee notes that as a result of interrogatory limitations,²¹ the discovery abuses have shifted to the deposition setting, with defendants engaging in more and longer examinations.²² Judges are reluctant to uphold restrictions on the number of depositions when parties list twenty potential witnesses.²³ Depositions, of course, are the most costly form of discovery, and highlight the not uncommon disparity in resources between plaintiff and defendant.²⁴ Lee also makes the point that only the defense bar has the time and resources to participate in the judicial committees that shape the local rules, and to provide input into decisions such as opting out of the new amendments.²⁵

12. See Colloquy, *supra* note 4, at 4-5.

13. *Id.* at 5.

14. *Id.*

15. *Id.*

16. *Id.* at 5-6.

17. *Id.* at 6.

18. *Id.* at 6-8.

19. *Id.* at 6-7.

20. *Id.* at 8.

21. See FED. R. CIV. P. 33(a) (limiting interrogatories to 25 except with leave of the court or with written stipulation).

22. See Colloquy, *supra* note 4, at 7.

23. *Id.*

24. *Id.*

25. *Id.* at 9. The new Rules include provisions which allow local districts to opt out of many of the discovery provisions. See, e.g., FED. R. CIV. P. 26(a)(1) (providing for mandatory pretrial disclo-

To the extent the amendments attempt to level the playing field, the opt-out movement, spearheaded by the defense bar, is preventing such an equalization.²⁶

Federal Judge Norma Shapiro, of the Eastern District of Pennsylvania, is also not sanguine about the impact of the amendments. Her concern is that some judges, and perhaps most lawyers, pay so little attention to the rules that they no longer represent a common understanding of proper discovery practice.²⁷ Frequent rule changes contribute to the failure of consensus: the Biden Bill experiments were not even seriously evaluated before the most recent amendments were adopted.²⁸ The current opt-out trend demonstrates that amendments without consensus will not effectuate discovery reform, but create only further "balkanization" of procedure.²⁹ She suggests that the "crisis" in civil justice could best be addressed through the individual initiative of "managerial" judges who keep the parties in line, and by filling district court judicial vacancies.³⁰

How does my experience differ? I do not represent the corporate parties to whom Parker refers, although I frequently appear against them. Nor am I involved in the law reform class actions that occupy the Legal Defense Fund. In my clinical program, we are lawyers of last resort. Our docket is primarily composed of employment discrimination actions—race, sex and age—originally filed pro se. These are the cases that, according to some, clog the courts and prevent the resolution of serious disputes.³¹ But for our clients at least, most of these suits end in favorable settlements or verdicts. The program was established almost ten years ago, with one of its avowed purposes to assist the Southern and Eastern Districts of New York with the problems posed by unrepresented litigants. Our clients share a common trait: they are persistent. Typically, they have been terminated

sure "[e]xcept to the extent otherwise stipulated or directed by order or local rule"); FED. R. CIV. P. 26(b)(2) (stating that "[b]y order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories"). According to the Federal Judicial Center, as of February 1994, 32 district courts have adopted Rule 26(a)(1), 31 have adopted a modified version, 23 have opted out of the rule, and 8 allow mandatory disclosure when ordered by the judge. See Mark Hansen, *Early Discovery Hits Snag*, A.B.A. J., May 1994, at 35.

26. Colloquy, *supra* note 4, at 9.

27. *Id.* at 10.

28. *Id.* at 12. The Biden Bill calls for a report from the Judicial Conference to Congress by December 31, 1995, comparing the experience of ten districts currently experimenting with the proposed modifications to ten districts in which the modifications were discretionary, in order to determine which costs and delays were most significantly reduced as a result of the program. Civil Justice Reform Act, Pub. L. No. 101-650, § 105(c)(1), 104 Stat. 5089, 5098 (1990).

29. Colloquy, *supra* note 4, at 12-13.

30. *Id.*

31. See Randy M. Mastro, *The Myth of the Litigation Explosion*, 60 *FORD. L. REV.* 199, 216 n.98 (1991) (reviewing WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991)).

from jobs for reasons they firmly believe are discriminatory. They have spent years exhausting their administrative remedies because they had no way of knowing that they could go to federal court six months after filing a complaint with the EEOC, simply by requesting a "right to sue" letter.³² When they finally find their way to the federal courthouse and seek in forma pauperis status, the assigned judge makes a determination, from the face of the complaint, whether the action is sufficiently meritorious to warrant the appointment of pro bono counsel.³³ Even then, we do not accept every action referred to the clinic by the courts. We take seriously our obligations under Rule 11.³⁴ We ensure that an action is not frivolous in law or in fact before accepting a potential client.³⁵ Typically, we are not the first lawyers our clients have consulted. They have made numerous efforts to obtain private counsel. The conversations about their cases usually begin and end, however, with a request for a five or ten thousand dollar retainer.³⁶

From this perspective, discovery reform has a different look. I will consider discovery practice from both a pre- and post-amendment viewpoint. As Parker and Lee suggest, there have been significant changes in discovery practice in the twenty years I have been litigating in both private and public law settings.³⁷ When I began my career in a large New York firm, associates were kept well occupied drafting sets of interrogatories numbering in the hundreds, creating the cleverest objections to the similar sets served by adversaries, and making and responding to the inevitable Rule 37 motions to compel answers.³⁸ Each motion required a

32. 29 C.F.R. § 1601.28(a) (1993).

33. Procedures governing the appointment of attorneys in *pro se* civil actions are set forth in 28 U.S.C. § 1915(d) (1988) (stating that a court may request counsel for an in forma pauperis litigant, or dismiss the case if it is found to be frivolous or malicious).

34. Rule 11 authorizes sanctions against any party who fails to predicate claims, defenses, and factual contentions on knowledge, information, or belief formed after a reasonable inquiry. FED. R. CIV. P. 11(b)-(c).

35. An interview is conducted with each new client referred by the court to the BLS Federal Litigation Clinic. After the interview, clinic students perform the initial legal research and factual investigation, which includes reviewing the available documents and contacting potential witnesses. The students discuss their findings with the supervising attorney and determine whether to accept the case.

36. Many lawyers will not represent plaintiffs in employment discrimination cases because it is difficult to determine whether the case will result in a favorable judgment or settlement. In addition, discovery in these cases can be extremely time consuming and may depend on the quality of the investigative work done by the administrative agency. See Theodore Eisenberg & Stuart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 694 (1987) ("The average constitutional tort case spends more time on the docket than the average non-civil rights case, is more likely to generate discovery, more likely to require a hearing, and at least as likely to reach trial . . . [and] constitutional tort plaintiffs are less likely to succeed than other plaintiffs."); Eric Schnapper, *Advocates Deterred by Fee Issues*, NAT'L L.J., Mar. 28, 1994, at C1.

37. See *supra* text accompanying notes 4-26.

38. See FED. R. CIV. P. 37(a) (allowing parties to apply for an order compelling discovery or

memorandum of law, and written decisions in these premagistrate days were the norm, although it was not uncommon to wait months for them. I have not made or responded to a Rule 37 motion in more than ten years. Discovery reform has all but done away with Rule 37.³⁹

Indeed, whether it was the clients, as Parker suggests,⁴⁰ or the courts that first got fed up with this process, the judges put a stop to it. On a national level, Rule 16 established the requirement of scheduling conferences.⁴¹ In New York, local rules limited the scope if not the number of interrogatories;⁴² rules mandated that answers be provided even if part of an interrogatory was objectionable and that privileged documents and statements be specifically identified;⁴³ and required the parties to confer before seeking judicial intervention.⁴⁴ If intervention was still necessary, a party had to notify the court by telephone or a letter of not more than three pages.⁴⁵ Usually, the magistrate judge assigned for all discovery purposes would then resolve the issues orally at a discovery conference.⁴⁶ The explicit assumption of the local rules was that discovery is better accomplished through the use of depositions.⁴⁷ Because of such provisions,

disclosure).

39. See FED. R. CIV. P. 26(f) advisory committee's note (noting that subdivision (f) of Rule 26, requiring parties to meet prior to the scheduling conference to arrange for required disclosures and develop a discovery plan, was "added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rule 26(c) and 37(a)").

40. See *supra* text accompanying notes 12-17.

41. FED. R. CIV. P. 16. Rule 16 was amended for the first time in 1983. See Fed. R. Civ. P. 16 advisory committee's note, 28 U.S.C. app. (Supp. I 1983). The amendment requires the court to issue a scheduling order and assume a more active role in case management early in the litigation process. See Fed. R. Civ. P. 16(b) & advisory committee's note, 28 U.S.C. app. (Supp. I 1983); Charles A. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525, 527 (1991).

42. In the Southern District of New York interrogatories are

restricted to those seeking names of witnesses with knowledge or information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence, or information of a similar nature.

S.D.N.Y. LOCAL R. CIV. P. 46(a). In the Eastern District of New York interrogatories are presumptively limited to 15 in the absence of an agreement between the parties or a court order. Civil Justice Expense and Delay Reduction Plan, E.D.N.Y. LOCAL R. CIV. P. app. E, at II(c)(1).

43. See S.D.N.Y. LOCAL R. CIV. P. 46(d), (e)(2)(i); Standing Orders of the Court on Effective Discovery in Civil Cases, E.D.N.Y. LOCAL R. CIV. P. app. B, at 17, 21(a)(1).

44. See Standing Orders of the Court on Effective Discovery in Civil Cases, E.D.N.Y. LOCAL R. CIV. P. app. B, at 6(a).

45. E.D.N.Y. LOCAL R. CIV. P. app. B, at 6(b)(ii).

46. The decision of the judge or magistrate must be recorded in writing, however, "[s]uch written order may take the form of an oral order read into the record of a disposition or other proceeding, a hand-written memorandum, a hand-written marginal notation on a letter or other document, or any other form the court deems appropriate." E.D.N.Y. LOCAL R. CIV. P. app. B, at 6(c).

47. See S.D.N.Y. LOCAL R. CIV. P. 46(a), (b) (restricting the subject matter of interrogatories,

the written discovery process was vastly streamlined, client bills were reduced, and lawyers now reasonably respond to both interrogatories and document requests. If they do not, the magistrate judge will fix the problem. The waste and inefficiency of formal motion practice has been eliminated.

Perhaps this is how the process works between corporate lawyers in Parker's practice, and perhaps this is how all lawyers behave in Judges Bertelman's and Shapiro's courtrooms. In my experience, however, this is not how most corporate defense lawyers address discovery in employment discrimination actions. From the plaintiff's viewpoint, responding to discovery has never been problematic. As Lee notes, plaintiffs have few documents and no hesitation about turning them over.⁴⁸ Beyond the plaintiff's testimony, however, proof of discrimination often must come from the employer's files: for example, a comparative sample of similarly situated employees, documents reflecting other complaints of discrimination, and material detailing how the defendant addressed the plaintiff's concerns before termination.⁴⁹

It is the search for this information that forms the basis of plaintiff's written discovery requests, and it is almost always resisted by defendants. An astonishingly similar pattern occurs. After being served with a first set of written discovery requests which are limited by local rules largely to the identification of documents and witnesses,⁵⁰ defendants will request a month's extension. These extensions are typically granted by the court, if not by counsel. Next, the defendant will respond with objections to the requests, based on relevance and the privacy rights of other employees. The only significant information turned over comes from documents that directly relate to the plaintiff—usually a personnel file. Then begins the "conferring" process, often characterized by phone-tag, promises to "get back to you," negotiations about confidentiality orders, claims of extensive

and further requiring a party desiring additional information to demonstrate that any such interrogatories are "a more practical method of obtaining the information sought than a request for production or a deposition"); Civil Justice Expense and Delay Reduction Plan, E.D.N.Y. LOCAL R. CIV. P. app. E, at II(c)(1), (2) (presumptively limiting the number of interrogatories to 15, and the number of depositions to 10 per side, in the absence of an agreement between the parties).

48. See Colloquy, *supra* note 4, at 8.

49. See, e.g., *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 660 n.19 (11th Cir. 1993) (illustrating how employers' files can contain information critical to the discovery and effective prosecution of an employment discrimination claim). The Supreme Court has noted that plaintiffs in Title VII actions have at their disposal the "liberal civil discovery rules" to obtain "broad access to employers' records in an effort to document their claims." *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989).

50. See, e.g., S.D.N.Y. LOCAL R. CIV. P. 46(a) (requiring that only interrogatories seeking the names of witnesses and the general description of documents will be permitted at the commencement of discovery).

searches for supposedly nonexistent documents, inability to retrieve information by the category sought, exchange of letters, and misunderstandings about agreements reached. What is most striking about this process is its indeterminacy: when should the conferring end? The early approach to a magistrate judge is met with the defendant's not-unpersuasive plea that the defendant is still searching for the requested information, and the parties are still negotiating. Playing out this process quickly eats up the discovery period that was set in the scheduling order. Meanwhile the defendant, having gotten the plaintiff's documents and witnesses' names early on, can proceed unencumbered to complete discovery.

At some point, the plaintiff is left with two choices: to give up and proceed with depositions, or to seek a discovery conference. The former often seems the more expedient choice, and indeed, the local rules contemplate that course by expressing a clear preference in favor of oral discovery.⁵¹ The problem with depositions, putting aside the question of expense alluded to by Lee,⁵² is that corporate executives are often conveniently unaware of the huge amount of information which is necessary for plaintiffs to successfully prosecute an employment discrimination action, such as statistical data, methods of recordkeeping, and the identity of similarly situated employees. In fact, these depositions often lead plaintiff's counsel to believe that the plaintiff was the only minority/female/older employee ever terminated by the defendant. I do not mean to suggest that these deponents are less than truthful; they simply take to heart their counsel's instruction not to guess or speculate. While it is in the plaintiff's interest to give the fullest account of the facts, it is in the defendant's interest to recall as little information as possible, beyond the circumstances of the termination. Another problem is that a deponent's answers do not necessarily bind the corporation. Simply determining who was responsible for a termination decision is not easily accomplished.⁵³ It is not unusual to hear testimony from several executives, each placing responsibility on the others.

Often the better choice is to pursue interrogatory answers through a discovery conference. It is here, however, that the ramifications of informal discovery dispute resolution become apparent. In employment discrimination litigation, the same discovery issues arise again and again: the relevance and burden of production of statistical data in actions other than

51. See S.D.N.Y. LOCAL R. CIV. P. 46(a), (b) (requiring that interrogatories seeking anything other than the names of witnesses or the descriptions of documents be served only if they are more expedient than a request for production or a deposition).

52. See *supra* text accompanying note 24.

53. See, e.g., *Patowich v. Chemical Bank*, 470 N.Y.S.2d 599, 604-05, *aff'd*, 473 N.E.2d 11 (1984) (finding that a bank vice-president carried out personnel decisions made by others).

class actions,⁵⁴ of other employees' personnel files,⁵⁵ and of other complaints of discrimination.⁵⁶ I have argued these issues before most of the magistrate judges in the Southern and Eastern Districts of New York, usually with success. However, these magistrates either make their decisions orally, often resulting in another round of confusion about the exact scope of the ruling, or by brief written order, also often subject to interpretation.

Why is it necessary that this ritual be repeated in every action? Because there is no precedent upon which to rely. The virtual disappearance of Rule 37 motions put an end to published discovery decisions.⁵⁷ I came upon this realization when I noticed that my letters to the court on discovery disputes were citing cases decided exclusively in the 1970s. Thus, my major recommendation for discovery reform is the return to written decisions. Written decisions would not only aid the judiciary in resolving these disputes, but would lessen the need for the parties to seek judicial intervention. The citation in a written decision of a recent, local, case that is on point could rapidly conclude the discussion between the parties as to the relevance of a particular category of information. This is not to say that formal motions should be required; the letter format seems sufficient to set out the issues. But a body of precedent would, in my view, do more to expedite discovery than any of the reforms contemplated by the Biden Bill or the new amendments.⁵⁸

As should be clear from the above, mandatory disclosure will do little to address the problems faced by plaintiffs. In an employment case, no self-respecting defense counsel today would do more than produce the plaintiff's personnel file. To make mandatory disclosure of some use, there must be a shared understanding of "documents [and] data compilations . . . that are relevant to disputed facts."⁵⁹ Given the dearth of precedent, I believe there is no such common basis. Were it to be well established, for example, that other complaints of discrimination in a particular job category or department are relevant and not overly burdensome to produce, mandatory disclosure would have meaning.

54. See, e.g., *Taggart v. Time Inc.*, 924 F.2d 43, 46 (2d Cir. 1991) (holding that "[t]he inference of discrimination may be shown by direct evidence, statistical evidence, or circumstantial evidence").

55. See, e.g., *Jackson v. Harvard Univ.*, 111 F.R.D. 472, 474 (D. Mass. 1986) (denying discovery of personnel files where the information sought was not relevant to the plaintiff's cause of action); *Petz v. Ethan Allen, Inc.*, 113 F.R.D. 494, 497 (D. Conn. 1985) (holding that discovery of employee personnel files must be limited to protect the affected individuals' dignity and privacy).

56. See, e.g., *Lieberman v. Gant*, 630 F.2d 60, 68-69 (2d Cir. 1980); *Siskonen v. Stanadyne, Inc.*, 124 F.R.D. 610, 612 (W.D. Mich. 1989); *Jackson*, 111 F.R.D. at 476.

57. See *supra* notes 38-39 and accompanying text.

58. See *supra* note 3.

59. See FED. R. CIV. P. 26(a)(1)(B).

The Rule 16 scheduling conference, following the newly required meeting of the parties,⁶⁰ might be beneficial if the judiciary would take the time to address the appropriate scope of discovery. Judges, however, are notably and perhaps appropriately reluctant to decide discovery issues in a vacuum. Plaintiff's request for a ruling on the discoverability of certain categories of information at the scheduling conference stage will be met with defendant's claim that a decision is premature, absent an inquiry into the burden of production and availability of the data. Without a body of precedent, most judges will agree with the defendant. Under current Rule 16 practice, the major function of these conferences is to set early discovery cut-off dates that presume cooperation of the parties.⁶¹ When the written discovery process breaks down, however, it is the plaintiff that suffers under these time limits, and then incurs the court's disapproval by requesting extensions. Scheduling orders would be of greater utility if they included deadlines for the submission of all disputes concerning written discovery. Such an approach would force closure of the "conferring" process.

With regard to interrogatory and deposition limitations, these rarely have great significance for the individual plaintiff. It is worth noting, however, that interrogatory limitations do favor the party who can more easily finance extensive depositions—usually the defendant. Judges should take this into account in considering "what changes should be made in the limitations on discovery" as required by new Rule 26(f).⁶²

CONCLUSION

While framed in the context of employment discrimination actions, this analysis of discovery applies to a good portion of the federal court docket. The particular areas of conflict are different in the prisoner's action, the police brutality case, and other individual civil rights matters; the absence of precedent on recurring discovery issues, however, creates the same problems. Moreover, as Lee notes,⁶³ these individual actions are the civil rights cases of today. For any number of reasons, class action civil

60. See FED. R. CIV. P. 26(f) (requiring the parties to meet and develop a disclosure plan at least 14 days prior to the Rule 16(b) scheduling conference).

61. See FED. R. CIV. P. 16 advisory committee's note. Except in actions exempted by local rule or otherwise ordered, FED. R. CIV. P. 26(f) requires the parties to meet before the scheduling conference to discuss the basis of their claims and defenses, and to develop a proposed discovery plan. See FED. R. CIV. P. 26(f) advisory committee's notes (stating that "[t]he litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan").

62. See FED. R. CIV. P. 26(f)(3) (permitting parties to meet and agree to changes in the limitations on discovery imposed by either the Federal Rules or local rules, or to agree to additional limitations).

63. See Colloquy, *supra* note 4, at 7.

rights litigation is no longer a major part of the federal caseload.⁶⁴

To the extent that discovery problems in corporate and commercial litigation have been solved, as suggested by the panel, it may be that special rules are required for civil rights actions. Proposals for tiered systems, however, do not address what I view as the central problem—the movement toward ad hoc resolution of disputes. These proposals generally divide cases between simple and complex, and impose discovery and time limitations accordingly.⁶⁵ Unfortunately, individual civil rights actions do not fall neatly into either category. They present the particular problem of proving an intent to discriminate or to harm in a way that our society condemns. That intent is difficult to discern even in cases with the simplest of facts. It is not more interrogatories or more depositions that are needed. Instead, the plaintiffs bar needs the opportunity to conduct discovery without fighting the same battles over and over again. Amendments to the rules that continue the trend toward ad hoc resolution do not address, and only exacerbate, the underlying cause of discovery disputes.

64. See generally Eisenberg & Schwab, *supra* note 36 (presenting numerical findings of statistical analysis of cases involving constitutional torts).

65. Many commentators believe that separate litigation tracks are needed for cases which vary in scope or factual and legal complexity. See Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716-17 (1988) (discussing the need for special rules in civil rights and complex cases); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2042 n.224 (1989). In addition, the Civil Justice Reform Act requires “advisory groups and courts to consider implementing a system of differentiated case management . . . for various types of cases.” See Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Peaceful Co-Existence?*, C842 ALI-ABA 27, 40-41 (1993).

