Four Years of Experience with Rule 26(A)(1): The Rule is Alive and Well

Robert E. Oliphant

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FOUR YEARS OF EXPERIENCE WITH RULE 26(A)(1):
THE RULE IS ALIVE AND WELL

Robert E. Oliphant†

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I. INTRODUCTION

Rule 26(a)(1) is one of several new Federal Rules of Civil Procedure that became effective December 1, 1993. It remains one of the most controversial of the 1993 changes.

The 1993 changes to the Federal Rules of Civil Procedure were the product of a Congressional decision made three years earlier, in response to a perceived need to reform the discovery procedures used in the federal system. Many considered the existing procedures inefficient, excessively costly, and unnecessarily adversarial. ¹

As a prelude to reform, Congress enacted the Civil Justice Reform Act ("CJRA") in 1990.² The CJRA authorized courts to establish a series of pilot programs in several federal districts, some of which began almost immediately after the authorization. The programs were intended to experiment with projects that would "facilitate deliberate adjudication of civil cases on the merits [and] monitor discovery."³

After less than three years of experimentation, the United States Supreme Court perceived a need for change. In April 1993, the Supreme Court submitted to Congress several proposed amendments to the Federal Rules of Civil Procedure. These proposals became effective December 1, 1993.⁴ The changes were intended to encourage greater candor during the early stages of a dispute and, consequently, provide a more efficient federal judicial

1. See Fed. R. Civ. P. 26(a)(1) advisory committee's note, reprinted in 146 F.R.D. 627, 628-29 (stating the purpose of the revision is to accelerate the discovery process while reducing the paperwork involved in making discovery requests). Professor Sorenson suggested that "[r]eform efforts, largely spurred by concerns that litigation associated costs have become so excessive that they threaten the very health of the national economy..." Charles W. Sorenson, Jr., Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?" 46 HASTINGS L.J. 679, 682 (1995).


4. Rule 26(a)(1), along with other amendments to the Federal Rules of Civil Procedure, was approved by the Advisory Committee on Civil Rules, the Standing Committee on Practice and Procedure, the Judicial Conference of the United States, and adopted by the Supreme Court. All of the proposed changes were transmitted to Congress on April 22, 1993 and became effective December 1, 1993, when Congress failed to take any contrary action. See 28 U.S.C. § 2072 (1994); Amendments to the Federal Rules of Civil Procedure and Forms, 146 F.R.D. 401 (April 22, 1993).
Among the many changes was Rule 26(a)(1). The Rule requires that parties to a lawsuit voluntarily exchange certain information at the outset of litigation. Controversy, however, surrounded Rule 26(a)(1). As a result, the drafters allowed each federal district court, by local rule or order, to exempt itself from coverage in all cases or categories of cases in which the Rule was involved. Minnesota declined this option. Instead, it is among a minority of federal districts that chose to implement the Rule. The Rule contains another exemption.

5. The Federal Rules Advisory Committee indicated the primary purpose of the changes was to “accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information.” FED. R. CIV. P. 26 advisory committee’s notes, reprinted in 146 F.R.D. 627, 627-28 (1993).

6. FED. R. CIV. P. 26(a)(1) provides:
(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 particularly 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.

7. Rule 26(a)(1) provides that automatic disclosure applies “except to the extent otherwise . . . directed by court order or local rule.” Id.

8. In 1994, Rule 26(a)(1) had been rejected by at least 52 federal courts. See Donna Stienstra & William G. Young, Implementation of Disclosures in Federal District Courts, with Specific Attention to Courts’ Responses to Selected Amendments to Federal Rule of Civil Procedure 26, C921 ALI-ABA 765, 776 (1994). A study conducted by the Federal Judicial Center also indicated that 52 districts had opted out of Rule 26(a)(1), while 37 had adopted the Rule. See Edward D. Cavanaugh, Mandatory
provision, which essentially allows lawyers to "opt out" of its coverage by stipulation. Part II of this Article contains an explanation of this option.

Part II of this Article also contains a brief description of the background, nature, and scope of the Rule. In Part III, this Article discusses the controversy that surrounded the mandatory disclosure provision. Part IV assesses the impact of Rule 26(a)(1) in the District of Minnesota four years after its promulgation. Part V responds to many of the claims made by the critics of the Rule in an effort to block its adoption. It does so by analyzing two surveys provided to the Minnesota bench and bar regarding Rule 26(a)(1).

Finally, Part VI provides answers to many of the preexisting and current questions surrounding Rule 26(a)(1). For example, it is clear that Rule 26(a)(1) did not generate confusion or throw the existing judicial system into a chaotic state, as some critics had forecast. The Rule has proved manageable and, in general, appears to be working well in the District of Minnesota. There is evidence that the Rule has made a positive impact on the practice of law within this district.

The data upon which this Article is based comes from two sources. The first is an attorney and litigant survey commissioned by the Civil Justice Reform Act Advisory Group for the District of Minnesota in 1996. The second is a survey of the federal judges and judicial magistrates in the District of Minnesota conducted by the author during November and December of 1997. The author expresses his appreciation for the cooperation of the Minnesota judiciary in this effort.

II. NATURE AND SCOPE OF RULE 26(A)(1)

Rule 26(a)(1) contains a surprising number of technical requirements and definitions. This section of the Article summarily outlines those requirements and definitions.

Disclosure's Voluntary Reality, LEGAL TIMES, Nov. 21, 1994, at 15.
9. Rule 26(a)(1) provides that automatic disclosure applies "[e]xcept to the extent otherwise stipulated ..." Id.
10. For a critical commentary regarding the changes to the Federal Rules of Civil Procedure, see Ralph K. Winter, In Defense of Discovery Reform, 58 BROOK. L. REV. 263 (1992). Some committee members and Federal Circuit Judge Winter described the amendments as "barely non-trivial" or "incremental," claiming that they "require disclosure of nothing that is not mandatory under the present rules." See id. at 271. For a more detailed historical sketch of the changes leading up to new Rule 26(a)(1), see Sorenson, supra note 1, at 690-720.
A. Automatic Disclosure

Rule 26(a)(1) requires automatic disclosure of certain information that was previously produced only when lawyers made formal discovery requests.\(^{11}\) The automatic disclosure provisions are linked to Rule 26(f), which is a provision that mandates a pre-discovery meeting between the parties' lawyers before a scheduling conference is held or a scheduling order is due under Rule 16(b).

B. Timing

Automatic disclosures must be made at or within ten days after the mandatory Rule 26(f) meeting, which must occur no later than fourteen days before the Rule 16(b) order is entered.\(^{12}\) During the Rule 26(f) meeting, the attorneys for each party must clarify issues related to the automatic disclosures, and they must prepare a disclosure and discovery plan to submit to the court before the Rule 16(b) order is entered.\(^{13}\) Final adjustments to the Rule 26(a)(1) disclosures may be made by the judge during the Rule 16(b) conference.\(^{14}\)

C. Purpose

Three reasons are usually provided to support the mandatory discovery provisions found in Rule 26(a)(1). First, early discovery "help[s] focus the discovery that is needed by the parties, and facilitate their preparation for trial or settlement."\(^{15}\) Second, early discovery provides the parties to the litigation with a reasonable basis upon which to decide the need for depositions. It also gives the parties an opportunity to identify which, if any, documents may be necessary to the lawsuit. Third, the early discovery mandate provides an opportunity for the parties to share information. This mandate intends to help the parties frame their subsequent document requests in a manner "likely to avoid squabbles."\(^{16}\)

The Rule is designed to accelerate the exchange of basic information about a dispute and eliminate some of the usual paper-

\(^{11}\) See supra note 5.
\(^{12}\) FED. R. CIV. P. 26(a)(1) & 26(f).
\(^{13}\) FED. R. CIV. P. 26(f).
\(^{14}\) FED. R. CIV. P. 16(b)(4).
\(^{15}\) FED. R. CIV. P. 26(a)(1) advisory committee's note, reprinted in 146 F.R.D. at 629-30.
\(^{16}\) Id. at 630.
work involved in requesting such information. The Advisory Committee responsible for the Rule observed that it should be applied "with common sense in light of the principles of Rule 1 of the Federal Rules of Civil Procedure."\(^{17}\)

D. Reasonable Inquiry

Before providing Rule 26(a)(1) disclosures, a party must make a "reasonable inquiry."\(^{18}\) What constitutes a "reasonable inquiry" depends on the circumstances of each case. Consideration must be given to the following factors: (1) the complexity and number of issues alleged with particularity in the pleadings; (2) the location, number and availability of the witnesses and documents; (3) the amount of time the party has to conduct the inquiry; and (4) the extent of the working relationship between the disclosing party and the party's lawyer, particularly in handling similar litigation.\(^{19}\) It is clear that the Rule does not "require an exhaustive investigation at this early stage of a legal dispute."\(^{20}\)

A party cannot postpone providing information it possesses either because it has not completed its investigation, or because the other party has not completed its disclosures.\(^{21}\) There is, of course, a duty to supplement initial disclosure at "appropriate intervals" if information disclosed is materially incomplete or incorrect.\(^{22}\)

E. Witnesses

The disclosing party must automatically disclose all witnesses who possess discoverable information relevant to the disputed facts that are alleged with particularity in the pleadings. This is always required "whether or not their testimony will be supportive of the position of the disclosing party."\(^{23}\) The advantage of such a provision to the judicial system is obvious.

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17. Id. at 681. Rule 1 states in relevant part, "these rules govern the procedure in the United States district courts ... and shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.
18. FED. R. CIV. P. 26(g)(1).
19. See FED. R. CIV. P. 26(a)(1) advisory committee's note.
20. Id.
22. FED. R. CIV. P. 26(e).
23. FED. R. CIV. P. 26(a)(1)(A) advisory committee's note.
F. Documents

Subsection (a)(1)(B) requires that the parties disclose copies or descriptions of relevant documents in their custody or control. Parties must provide the nature and location of potentially relevant documents and records so opposing parties can make an informed decision concerning which of the listed documents might need to be examined. Document information should be provided in a fashion that will avoid subsequent disagreements over the words or descriptions used. Furthermore, all relevant documents should be disclosed regardless of whether or not they support the disclosing party's case.

G. Computing Damages

Subsection (a)(1)(C) requires that a party disclose the computation of all claimed damages and make available for inspection or copying all supporting discoverable documentation regarding damages. A party does not, of course, have to disclose a calculation of damages if this can only be accomplished by using information that is in the possession of the adversary.

H. Insurance Policies

Subsection (a)(1)(D) requires a party to automatically provide copies of insurance policies or allow the other parties to inspect the policies. Unlike subsection (a)(1)(B), both subsection (a)(1)(C) and (D) require the actual production of documents and not merely a description of the documents and their location.

I. Form

Rule 26(a) disclosures must be made in writing, served on the

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25. See id. advisory committee's note.
26. See id.
27. See Fed. R. Civ. P. 26(a)(1)(C). The supporting information must be made available as though a request had been made under Rule 34. See id. advisory committee's note. The obligation only applies to information that is not privileged or protected as work product. See id. Further, as with all disclosures required under Rule 26(a), the scope is limited to information reasonably available to the party at this early stage of the proceeding. See id.
other parties, and filed with the court. The disclosures must be signed by the party's lawyer or, if unrepresented, by the pro se party herself.

By signing the disclosures, the attorney or the pro se party is certifying that the disclosure is complete and correct as of the time made.

**J. Modifying or Suspending**

The disclosure obligations contained in Rule 26(a)(1) can be modified or suspended by stipulation of the parties, court order, or local rule. Consequently, parties may agree to waive or modify disclosures, and judges may modify or suspend the disclosure requirement on a case-by-case basis.

**III. MANDATORY DISCLOSURE**

The mandatory disclosure provisions of Rule 26(a)(1) were controversial. These provisions, however, received strong support from the Federal Judicial Center. The Federal Judicial Center ultimately was successful in urging adoption of the amendments both before the Supreme Court and Congress even though a large segment of the bench and bar vigorously and vocally stood against their adoption. Of the 264 written submissions to the Judicial Center on the proposed rule amendments, 251 reportedly opposed the amendments. When the Court transmitted the proposed amendments to Congress, Associate Justice Scalia appended a dissenting opinion sharply criticizing the disclosure requirements of Rule 26(a)(1). Justice Scalia, who was joined by Justices Souter and Thomas, characterized the proposed rule changes as "potentially disastrous,"

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and stated that they were likely to increase, rather than diminish, the discovery burdens of the district courts. He charged that the disclosure mechanism undermined the traditional adversary method of civil litigation to the extent that it required counsel to do work on behalf of their opponents. Moreover, he argued that the discovery changes were "premature" in light of the Civil Justice Reform Act of 1990, which required that each federal district court craft a Delay and Expense Reduction Plan.

Other legal luminaries, such as former United States Attorney General Griffin Bell, weighed in against the disclosure provisions. He contended that mandatory disclosure "will not correct the dysfunction [within the civil justice discovery system], nor will it somehow transform the system into a model of cooperation."

Critics charged that the Rule clashed with Rule 8 of the Federal Rules of Civil Procedure. To support their claim, they cited

38. Id. at 510 (Scalia, J., dissenting).
39. Id.
42. See, e.g., Griffin B. Bell et al., Automatic Disclosure in Discovery—The Rush to Reform, 27 GA. L. REV. 1, 3 (1992) (stating that many trial judges, litigants, and lawyers opposed the 1990 proposal of the Advisory Committee to include provisions for automatic disclosure in the Federal Rules and suggested the proposal be modified or withdrawn); Linda S. Mullenix, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. REV. 795, 822-28 (1991) (outlining criticisms made by public interest lawyers of an earlier draft of the amendments); Administration Opposes New Disclosure Rule, NAT'L L.J., July 26, 1993, at 5 (indicating that the ABA Board of Governors was opposed to the Rule 26(a) (1) automatic disclosure provision); Federal Courts, ABA Denounces New Discovery Rule; Urges Congress to Reject Amendments, DAILY REPORT FOR EXECUTIVES; REGULATION, ECONOMICS AND LAW (BNA) Section A, Aug. 16, 1993, at 156.
43. Bell, supra note 42, at 3. Bell's article is cited by Justice Scalia in his dissent to the Rule 26 amendments. See also Virginia E. Hench, Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules and Amendments and the Just, Speedy and Inexpensive Determination of Every Action, 67 TEMP. L. REV. 179, 209 (1994) (stating that "[b]esides adding another layer to the existing discovery structure, the 1993 amended rules, like their predecessors, leave untouched (and may even encourage) such common discovery abuses as over-response to legitimate discovery requests, evasive or misleading responses, frivolous objections to requests for discovery, and failure to respond, which have frequently been directed by the party with greater resources against the party with fewer resources")
the language found in Rule 8 of the Federal Rules, which indicates that a pleader need only make a "short and plain statement of the claim showing that the pleader is entitled to relief." They argued that the Rule 26 mandatory disclosure provisions were philosophically contrary to Rule 8 because Rule 26 requires disclosure of information based upon facts that are "alleged with particularity in the pleadings." Eventually, they said, the impact of Rule 26 would lead to an end of notice pleading, as we know it today.

Cost was often at the forefront of the proposed rule changes debate. Many claimed that the proposed changes would require lawyers to make massive and expensive disclosures initially or risk sanctions from the court. As a consequence, went the argument, the costs associated with this early mandatory discovery would increase the client’s litigation bill.

Some complained that the courts are too lenient with parties, particularly defendants, who already failed to comply with existing rules. The implication was that defendants could not be forced to cooperate in turning over information required by the Rules. Furthermore, it was claimed that defendants would "get away with it" because of the judiciary’s existing lax attitude.

Battle-hardened trial lawyers sparred over whether defendants or plaintiffs received the greatest advantage under the proposed Rule. Defense lawyers were convinced that Rule 26 automatically provided plaintiffs with the advantage. They rested their argument on a belief that plaintiffs carefully prepare their cases before filing a complaint. Therefore, the additional preparation time provided under the proposed changes, they argued, affords the Plaintiff an advantage because he or she can spend months drafting and investigating a claim before preparing and serving a complaint. A defendant, in contrast, has far less time to investigate and prepare because of the limitations placed on providing a response by the Federal Rules. Even more, other disclosures were criticized because they would unnecessarily increase overall costs due to the additional time the mandated discovery requirements placed on at-


45. See FED. R. CIV. P. 8(a).
48. See id.
A few weak voices claimed that Rule 26(a)(1) was inconsistent with the formal operation of the work product doctrine and inimical to its primary purpose of encouraging attorney preparation. However, support for this proposition was slight. There were also claims that the Rule violated ethical duties to the client, but the arguments were not seriously pursued.

It was against this backdrop of criticism and pessimism that the Rules were adopted. This Article is written against the same backdrop. As the Rule went into effect in several districts across the nation, it became clear that many, if not most, of the fears expressed by the opponents were unfounded.

IV. THE DISTRICT OF MINNESOTA'S RESPONSE TO THE NEW RULE

The Federal District Court of Minnesota responded to the new discovery rules shortly after Rule 26(a)(1) was promulgated. This initial response came in a memorandum sent by former Chief Judge Diana Murphy to the judges and magistrates in the District. She stated that the new rule changes "clearly apply to all proceedings commenced on or after December 1, 1993, and they apply to all pending proceedings, 'insofar as just and practicable.'" The question of continued applicability was then referred to the Local Federal District Court Rules Committee to review and recommend whether the District should "opt out" of any of the revisions.

The Local Rules Committee met and considered whether to opt out of the Rule 26 pre-disclosure mandatory disclosure requirements. It concluded that the Federal District Court of Minne-

49. See, e.g., Janet Cooper Alexander, Judges' Self-Interest and Procedural Rules: Comment on Macey, 23 J. LEGAL STUD. 647, 656 (1994) (guessing at what should be disclosed results in breach of a lawyer's ethical obligations to his or her clients); Alfred W. Cortese, Jr., & Kathleen L. Blaner, Civil Justice Reform in America: A Question of Parity with Our International Rivals, 13 U. PA. J. INT'L BUS. L. 1, 45-46 (1992) (stating that disclosure forces lawyer to do opponent's work); See also Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 507, 511 (April 22, 1993) (Scalia, J., dissenting). The obligation to disclose damaging information in context requiring application of considerable judgment "would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side." Id. "Requiring a lawyer to make a judgment as to what information is 'relevant to disputed facts' plainly requires him to use his professional skills in the service of the adversary." Id.

50. Memorandum from former Chief Judge Diana Murphy on the changes to Rule 26(a)(1) to the judges and magistrates of the Federal District Court of Minnesota (1993) (on file with author).
sota had largely been operating under the amended Federal Rules "without reported controversy or complications." Therefore, it recommended that the District adopt the Rule while exempting only certain categories of cases from it.

In response to the Committee recommendations, the District Court adopted Rule 26(a)(1) with the recommended reservations. The reservations exempted from application of Rule 26(a)(1) include: (1) litigants involved in class actions under Rule 23; (2) pro se prisoner and other pro se litigants; (3) cases consolidated with a case in which the parties have already met as required under Rule 26(f) or in which a scheduling order under Rule 16(b) has been entered; (4) cases transferred to the Court under 28 U.S.C. Section 1407 or consolidated with cases so transferred; (5) cases subject to potential transfer to another Court under 28 U.S.C. Section 1407; and (6) cases transferred or removed to the Court more than thirty days after commencement of the case.

The District adopted Rule 26 with minor reservations. Yet, it was concerned about the long-term impact of the Rule on practice in the District and was uneasy about the unanswered charges made by its critics.

V. THE DISTRICT'S ATTORNEY AND LITIGANT SURVEY

The District's Attorney and Litigant Survey has its roots in a decision made in August 1993, when the United States District Court for the District of Minnesota adopted a Civil Expense and Delay Reduction Plan as directed by the Civil Justice Reform Act of 1990 ("CJRA"). In response to the CJRA and as required by 28

51. 1996 ATTORNEY AND LITIGANT SURVEY PROJECT 33 [hereinafter MINNESOTA SURVEY].

52. See D. MINN. R. CIV. P. 26.1(a)(1)(A)-(G). The Committee supporters of the Rule suggested that the timely exchange of detailed reports would discourage parties from "bluffing" about their claims or defenses until the eleventh hour. Moreover, the exchange of detailed expert reports would encourage more prompt settlements. Opponents expressed concern that the Rule would significantly and needlessly increase the cost of discovery for a substantial proportion of lawsuits by requiring both a detailed report and a subsequent expert deposition. Opponents also argued that the Rule made it more difficult to find persons willing to act as experts. See id.

53. See id. The Local Rules Committee determined that Rule 26 required more technical knowledge than that possessed by a pro se party or a prisoner. In class action cases, the Local Committee noted that the Rule might unnecessarily complicate an already complicated proceeding. See id.

54. MINNESOTA SURVEY, supra note 51, at 1. This Article has not incorporated
U.S.C. Section 475, a CJRA Advisory Group was assembled to conduct an assessment of the CJRA Plan for the District. The Group consisted of members of the bar and the public, all of whom were appointed by the District Court. The Advisory Group intended to determine what, if any, additional action would reduce cost and delay in civil litigation and improve management practices of the court. It was a part of this undertaking that the District initiated a survey project in 1995-96 to determine the impact of the new rules.

The survey was sent to a random selection of attorneys who represented clients in cases filed after August 1993 and closed during the period of June 1, 1994 to March 18, 1996. The survey instrument for this project was a mailed, self-addressed questionnaire. Questionnaires were sent to 900 attorneys with a total response rate of 74 percent.

The survey requested a broad range of responses, covering almost all of the various new rule provisions. The preparation of this Article, however, focused on using data related specifically to Rule 26(a)(1).

A. Should the District "Opt" Out of Rule 26(a)(1)?

The survey asked the lawyer respondents practicing in the District to provide their opinion about opting out of the mandatory disclosure requirements. Not surprisingly, this question elicited the strongest emotions from the lawyer respondents. The survey's Reporter noted that this particular question had many comments written in the margin either in favor or against the disclosures.

55. See id.
56. See id. The scope of the survey was much broader than the scope of this article because the survey attempted to assess the impact of all the 1993 Rule changes.
57. See id.
58. The survey instrument was designed by Anderson, Niebuhr and Associates, an independent survey firm based in Minneapolis, Minnesota. This type of instrument was selected because of its ability to capture opinions from a larger population than telephone interviews or focus groups. See id.
59. See id. The survey was sent to a random selection of attorneys who represented clients in cases filed after August, 1993 and closed between June, 1994, and March 18, 1996.
60. MINNESOTA SURVEY, supra note 51, at 33.
61. See id. at 11. Dean Harry Haynsworth, William Mitchell College of Law, St. Paul, Minnesota, was the reporter for the project.
The graph in Figure 1 shows the number of lawyer responses to this question and the strength of the lawyer's opinion to "opt out" or not. Obviously, after four years of experience with the Rule, no consensus exists among the respondents regarding the efficacy of opting out. Slightly more than half the respondents were either neutral or believed the District should not "opt out" of the Rule.

The survey instrument attempted to gain additional insight from the responses by separating the "opt out" question into two tables. The first table, Figure 2, assessed the strength of an individual's response to the "opt out" question by grouping the lawyer respondents by "number of cases filed." The second table, Figure 3, grouped the lawyer respondents' reactions to the "opt out" question according to years of experience. Both of these tables are reproduced below.

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Figure 1: The District Should Opt Out of the FRCP 26(A) Requirements

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62. See id. at 33.
According to Figure 2, lawyers who have filed the largest number of cases in the District (fifty-one and above) comprise the group that most strongly believes the District should not “opt out.” Seventy-six percent of the lawyers in that group indicated approval of the Rule while fifty-four percent of lawyers who have handled twenty-one to thirty cases believe the District should “opt out.” There is not an immediate explanation for the apparent disagreement between these groups. However, it is possible that the lawyers handling the largest caseloads in the District have concluded from their extensive experience with the Rule that it is a useful tool in the early stages of the dispute resolution process.

The following table shows the breakdown of responses from lawyer respondents by years of experience.\(^6^4\)

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|c|c|c|}
\hline
Civil cases filed since August 1993 & Number of Attorneys & The District Court should opt-out of the FRCP 26(a) initial pre-discovery mandatory disclosure requirements &  \\
& & Strongly Agree & Agree & Neutral & Disagree & Strongly Disagree \\
\hline
1-5 cases & 275 & 19\% & 28\% & 19\% & 24\% & 10\% \\
6-10 cases & 138 & 19\% & 23\% & 17\% & 21\% & 9\% \\
11-15 cases & 53 & 26\% & 15\% & 19\% & 21\% & 19\% \\
16-20 cases & 26 & 27\% & 23\% & 8\% & 31\% & 12\% \\
21-30 cases & 13 & 31\% & 23\% & 8\% & 39\% & -0- \\
31-40 cases & 3 & -0- & 33\% & -0- & 33\% & 33\% \\
41-50 cases & 6 & 17\% & 33\% & 17\% & -0- & 33\% \\
51 and above & 8 & -0- & 25\% & 0\% & 38\% & 38\% \\
\hline
\end{tabular}
\end{table}

\(^6^3\). \textit{See id.} at 34.  
\(^6^4\). \textit{See id.} at 35.
In general, it appears that the more years a lawyer has practiced in the District, the greater the opposition to Rule 26. Forty-eight percent of the lawyers with one to five years of experience in the District favored retaining the mandatory provisions in Rule 26(a). However, sixty-four percent of those lawyers with thirty-one to thirty-five years in the District held a belief that the District should “opt out.” A number of possibilities exist to explain this result.

It may be that those lawyers supporting the Rule are fairly recent law school graduates. In their more recent law school training, these lawyers almost certainly have been exposed to a variety of dispute resolution models other than the traditional adversarial one, i.e., mediation and arbitration. It is just as probable that the

65. See, e.g., Carrie Menkel-Meadow, To Solve Problems, Not Make Them: Integrat-
more-experienced lawyers were trained in an academic setting that relied almost exclusively upon the traditional adversarial model of dispute resolution. Rule 26(a)(1) requires an attitude of cooperation and a spirit of conciliation. Therefore, it is fair to assume that it would find greater acceptance from a group whose training was more philosophically in tune with the Rule than those law school graduates who received training twenty or more years ago.66

There are other conceivable explanations for the differing reactions to the Rule. Possibly, the more experienced lawyers find that cooperation "just doesn't work" because the adversary perceives cooperation as weakness and attempts to take an unfair advantage. As a result, cooperation and conciliation increase rather than decrease the problems in resolving a case. It is just too risky. Another explanation is that the opponents have become very familiar with the existing system and are generally opposed to any significant change.

Overall, forty-eight percent of the respondents believe that the District should "opt out" of the Rule. The 1996 survey report notes that "[n]o other question in this survey had such an even distribution of responses across the scale."67

Figure 4: The Initial Pre-discovery Disclosure Required by Rule 26(a) (Cost)

<table>
<thead>
<tr>
<th>Cost</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increased</td>
<td>43%</td>
</tr>
<tr>
<td>No Effect</td>
<td>25%</td>
</tr>
<tr>
<td>Decreased</td>
<td>26%</td>
</tr>
<tr>
<td>No Opinion</td>
<td>10%</td>
</tr>
</tbody>
</table>

66. Unfortunately, the data from the survey did not collect responses by law school graduate date.

67. MINNESOTA SURVEY, supra note 51, at 33.
B. Has The Rule Increased Costs?

As the above chart indicates, forty-three percent of the lawyers responding to this question in the survey concluded that the disclosures required by Rule 26(a) have increased costs. Twenty-six percent of the respondents believed the Rule has decreased litigation costs while another one-quarter believed it had no effect on cost. Unfortunately, no data exists to explain the claimed cost increase. Furthermore, there is no data that indicates how much the costs actually increased. One suspects that increased costs may be associated with lawyer attitude, but the data does not support that suspicion.

Figure 5: The Initial Pre-Discovery Disclosures Required by Rule 26(a) (Time)

C. Has the New Rule Increased the Time and Cost to Dispose of a Case?

As the above chart indicates, thirty-five percent of the lawyers believe that disposition time has been decreased, and only fifteen

68. See id. at 11. One respondent stated that “[d]efendants are not disclosing adequately.” Another said “I have yet to see anyone comply with the new rules concerning disclosure and discovery of expert testimony.” Id. at 12. A third stated that “[t]he Rule 26(a) mandatory disclosure requirements, while requiring extra work, do not produce productive information and result in increased cost because of increased numbers of motions to compel and early discovery disputes!!” Id. A fourth observed that such a rule “gives an advantage to ‘disagreeable’ counsel at expense of clients.” Id. On a positive note, one respondent said that “[a]s an intellectual property lawyer I practice all over the country in the federal courts and I have sought to convince opposing counsel to follow new 26 even if the court has opted out.” Id.

69. See Richard Delgado, Rodrigo’s Thirteenth Chronicle: Legal Formalism and Law’s Discontents, 95 MICH. L. REV. 1105, 1122-23 (stating that focusing in law school on borderline cases fosters a litigator’s mentality.)

70. MINNESOTA SURVEY, supra note 51, at 11.
percent of the respondents believe the Rule has increased disposition time. These responses are interesting because they fail to support the cost data discussed earlier. One would expect that if forty-three percent of the respondents believe the Rule has increased their costs, then the increased cost would be reflected in longer disposition time. Surprisingly, however, there is no such correlation.

VI. THE JUDICIAL SURVEY

In November and December of 1997, a survey of sitting judges and magistrates in the Minnesota District was undertaken. The survey instrument was a mailed, self-administered questionnaire with a total of eighteen questions. The questions were written with a variety of scales to measure the attitudes and perceptions of the judiciary. Nine members of the judiciary completed the survey.

Participation in the survey was voluntary and individual responses were promised anonymity. Retired judges and judicial magistrates were not included in the survey.

A. Should the District “Opt Out”?

There was little disagreement among the bench on this question. While forty-eight percent of the lawyer respondents believed the District should “opt out” of the Rule, only one of nine members of the judiciary responding to the question believed that the District should “opt out” of the Rule. \(^{71}\) It is relatively clear that the weight of experience in the District lies on the side of continuing with the Rule.

B. Has Rule 26(a) Promoted Early Settlements?

Unfortunately, the lawyers who were surveyed were not asked this question. It would have been helpful to compare their responses to those of the judiciary.

The survey data indicates that the judiciary perceives that Rule 26(a) has allowed parties to accelerate their evaluation of the case,

\(^{71}\) In your opinion, and given your experience up to December 1, 1997, with the Rule, this district should have "opted out" of Rule 26(a)

<table>
<thead>
<tr>
<th>Strongly Agree</th>
<th>5 4 3 2 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly disagree</td>
<td>Strongly disagree</td>
</tr>
<tr>
<td>Responses: 0 1 0 5 3</td>
<td></td>
</tr>
<tr>
<td>AVERAGE: 1.88</td>
<td></td>
</tr>
</tbody>
</table>
and that it has promoted earlier settlements.\footnote{72} This perception, if reflective of reality, strongly suggests that the Rule has moved the District toward more efficient disposition of cases.

C. Has the Rule Had a General Positive Effect on Litigation?

This question was also not directed to the lawyer respondents. However, the District judges responding to it believed that Rule 26(a) has had a positive impact on litigation in the District.\footnote{73} Furthermore, they believe that its overall impact has improved the quality of justice in the District.\footnote{74}

D. Speedy Evaluation?

The judges and magistrates also believed that the Rule has enabled lawyers to more speedily evaluate their cases and avoid wasteful activity.\footnote{75}

VII. CONCLUSION

It is clear that the opponents of Rule 26(a) were overly pessimistic in their forecasts. The two studies in this District, for example, fail to seriously support the suggestions made by Justices Scalia, Thomas, and Souter that the 1993 changes are “potentially disastrous.”\footnote{76} To the contrary, the surveys support the conclusion that

\begin{itemize}
\item \footnote{72} In your opinion, Rule 26(a) has allowed parties to speed up their evaluation of the case and thereby promoted earlier settlements.
\begin{itemize}
\item Strongly Agree: 5 4 3 2 1
\item Responses: 1 7 1 0 0
\item Average: 4.0
\end{itemize}

\item \footnote{73} In your opinion, the new provisions of Rule 26(a) have had a positive impact on litigation in this circuit because it has resulted in earlier settlements.
\begin{itemize}
\item Strongly Agree: 5 4 3 2 1
\item Responses: 1 5 2 1 0
\item Average: 3.66
\end{itemize}

\item \footnote{74} In your opinion, overall impact of Rule 26(a) has been to improve the quality of justice in this district.
\begin{itemize}
\item Strongly Agree: 5 4 3 2 1
\item Responses: 2 5 2 0 0
\item Average: 4.0
\end{itemize}

\item \footnote{75} In your opinion, Rule 26(a) has allowed parties to speed up their evaluation of the case and thereby promoted earlier settlements.
\begin{itemize}
\item Strongly Agree: 5 4 3 2 1
\item Responses: 1 7 1 0 0
\item Average: 4.0
\end{itemize}

\item \footnote{76} See supra note 38.
\end{itemize}
after four years of experience the Rule is working well, although not perfectly, in this District.

The experience of the judiciary in this District has led its members to almost unanimously support the Rule. The Local Rules Committee has reported that Rule 26 is operating “without reported controversy or complications.”

No evidence has emerged to support a view that the traditional adversarial process in the District has been undermined or that Rule 26(a) has caused counsel to do work on behalf of their opponents. Likewise, there is no evidence suggesting that the Rule has had an adverse impact on the “notice” philosophy contained in Rule 8 of the Federal Rules of Civil Procedure or that unanticipated “massive and expensive disclosures” were the result. There is no evidence to support the claims that the Rule has resulted in an improper invasion of the Work Product Doctrine.

Members of the judiciary are the Rule’s strongest supporters and firmly believe that the Rule is fostering more efficient disposition of cases and has improved the quality of justice in the District. It would be hard to find a healthier endorsement of a controversial rule than that coming from the judiciary.

There is a clear division between the lawyers with a great deal of experience in the District and those with five years or less, which may be the result of several factors. First, the less-experienced group of lawyer respondents likely consists of more female lawyers who may view conciliation and cooperation with greater favor than male respondents who have twenty-plus years of experience with the adversarial method. Second, the less-experienced group of lawyer respondents may have been exposed to alternative dispute resolution in their law school training, which may account for their positive reaction to Rule 26(a). Third, the more-experienced group may be adhering to the traditional approach to problem solving because they are familiar with it and prefer no change.

Unfortunately, the lawyer survey data did not control for gender, date of graduation from law school, or ask any information about law school training. Future assessments, if made, should attempt to collect this information.

The result of the lawyer survey regarding litigation costs is puzzling and needs further exploration. One would expect a correla-

77. See id.
78. See supra note 51 and accompanying text.
79. Id.
tion in the lawyer responses that would link the increased costs, which were reported by forty-three percent of the respondents, with increased disposition time. However, with only fifteen percent of the lawyer respondents reporting that Rule 26(a) has increased the disposition time, there is no correlation.

The formulation and response to the cost question in the lawyer survey is also not as helpful as one would hope because it fails to collect data on how much the Rule may have increased costs among those lawyers reporting an increase. Finally, while the Rule may not have transformed the system "into a model of cooperation," there is evidence that it has had the effect of encouraging cooperative behavior among lawyers in the District.

The District should consider concentrating its efforts to foster cooperation and conciliation in the use and application of Rule 26 among the new lawyers practicing in the District. Programs should include discussions of the technical requirements of Rule 26(a) and the District's philosophical commitment to cooperation and conciliation among lawyers practicing within it.

The experience in the Minnesota District after four years provides hope and support to other Districts in the United States that are considering implementing Rule 26, either in whole or in part. This District has benefited from the Rule and apparently intends to benefit even more from it in the future. The wall of negativity erected by the opponents of this Rule has fallen in light of the last four years of experience.

See supra note 43.