Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules

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Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules

Lauren K. Robel*

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I. Introduction

Hypothetical Rule 1. Scope and Purpose of Rules
These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. Except to the extent otherwise stipulated or directed by order or local rule, [t]hey shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

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This Article examines a much-exploited aspect of Rule 26: Its explicit authorization for both federal district courts and practitioners to abrogate its provisions either wholesale by local rule or on a case-by-case basis. While this aspect of Rule 26 bears some resemblance to other Rules, it is unprecedented in authorizing each federal district court to excuse all attorneys within the court's jurisdiction from many of the obligations Rule 26 imposes, particularly that of mandatory early disclosure.

1. FED. R. CIV. P. 26. The Federal Judicial Center estimates that 52 of the 94 federal district courts have used the authority given in Rule 26(a)(1) to "opt out" of mandatory disclosure requirements, although 16 of these districts require disclosure through other local rules and orders or through the Civil Justice Expense and Delay Reduction Plan. Donna Stienstra, Summary of Actions Taken by Federal District Courts in Response to Recent Amendments to Federal Rule of Procedure 26, 154 F.R.D. LVII, LXIV (1994). The author concludes, "At this time few of the fifteen largest districts, as measured by number of judgeships, are fully implementing Rule 26(a)." Id. Other observers state that as of October 1, 1994, "only 19 of the 94 federal districts, representing just 19 percent of the federal courts' 1993 caseload, had fully implemented Rule 26(a)(1)." Randall Samborn, Districts' Discovery Rules Differ, NAT'L L.J., Nov. 14, 1994, at A1, A25 (citing research by Alfred W. Cortese Jr. and Kathleen L. Blaner).

2. FED. R. CIV. P. 26(a)(1) (requiring initial disclosures "[e]xcept to the extent otherwise stipulated or directed by order or local rule"); id. 26(f) (requiring a meeting of the parties "[e]xcept in actions exempted by local rule or when otherwise ordered"). The Advisory Committee's Notes to Rule 26(a) also state that "[t]he enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request." Id. 26(a) Advisory Committee's Notes.

3. For example, Rule 29, expanded in 1993, is superficially comparable to Rule 26 in that it permits lawyers to modify the formalities associated with depositions and to stipulate to departures from other discovery procedures. Id. 29. Likewise, Rule 16(b) is superficially comparable to Rule 26 in that it allows courts to identify categories of cases and then excuse the cases from obligations imposed by that Rule. Id. 16(b).

4. Rule 26(a)(1) is not the only part of amended Rule 26 that allows "local options." Rule 26(a)(2), which addresses expert disclosure, allows the court to vary the requirements by order in individual cases, although apparently not by local rule. Id. 26(a)(2). Rule 26(b)(2), on the other hand, specifically allows courts to vary by local rule the limits on interrogatories and depositions imposed by the Federal Rules. Id. 26(b)(2). Rule 26(a)(4) also allows courts to excuse litigants by local rule from the requirement of filing disclosure materials. Id. 26(a)(4). Furthermore, Rule 26(f) allows courts to exempt categories of cases by local rule from the meet-and-confer requirement of that section. Id. 26(f). And finally, Rule 26(d) allows courts to use
Historically, a set of uncontroversial principles guiding procedural decisionmaking would certainly have included the goal of uniformity in national procedure. While many recent articles demonstrate the gap between uniformity as a goal and a practice, I nevertheless find startling the explicit rejection of the uniformity principle in the text of a civil rule regulating lawyers' work. I find this abandonment especially surprising with respect to Rule 26(a)(1) because it suggests a lack of commitment by the Advisory Committee to a controversial rule and because it represents starkly the lack of consensus about even the most fundamental aims of our procedural system.

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5. As Professor Shapiro has noted, "While there is no doubt of the importance attached to the development of rules of nationwide application in the federal courts, there was some question, at least at the outset, about how comprehensive these rules should be." David L. Shapiro, Federal Rule 16: A Look at the Theory and Practice of Rulemaking, 137 U. PA. L. REV. 1969, 1973 n.7 (1989). Judge Weinstein has argued that "the drafters of the Rules did not deify uniformity"; rather, he believed that the drafters "employed uniformity and simplicity as tools to cultivate smooth substance-oriented litigation," and noted that there were "numerous permissions for local imagination" in the original rules. Jack B. Weinstein, After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised? 137 U. PA. L. REV. 1901, 1911 (1989). But the local permissions that Judge Weinstein cited, id., are not comparable to current Rule 26: Rule 40, which permits local scheduling systems, closely resembles Rule 16, which allows local courts to determine which cases will receive serious management efforts. Both of these Rules primarily concern docket management, not regulation of attorney practice.


7. Many proceduralists have noted that civil procedure stands on shaky normative ground these days. See, e.g., Jeffrey W. Stempel, New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform, 59 BROOK. L. REV. 659, 759 (1993) (concluding that consensus in the Federal Rules has crumbled); Gene R. Shreve, Civil Procedure: Other Disciplines, Globalization, and Simple Gifts, 92 MICH. L. REV. 1401, 1407 (1994) (noting that many civil procedure scholars have questioned whether they can agree on the nature and direction of civil procedure).
In this Article, I examine the Advisory Committee’s justification for allowing local courts to reject a national procedural rule. Although I acknowledge the validity of some of the Committee’s concerns, I recommend a more cautious and nationally-uniform solution. We need a deeper understanding of when, if ever, such “local option rules” are appropriate and what we can expect them to accomplish. Ultimately, we can only achieve this understanding by acquiring a coherent vision of the goals of our national procedural system.

II. Advisory Committee Justification for Optional Rules

The Advisory Committee’s Notes advance a number of explanations for allowing local courts to “exempt all or particular types of cases from these disclosure requirements or to modify the nature of the information to be disclosed.”

First, the Advisory Committee suggests that mandatory disclosure might be inefficient in particular categories of cases. Thus, it invites courts to identify classes of cases “in which discovery would not be appropriate or would be unlikely.” The Committee points to social security review and government collection cases as examples of these classes of cases.

The suggestion that courts can locally identify categories of cases for which abbreviated procedures suffice is not unique to Rule 26. For example, Rule 16(b) allows local courts to identify case categories for exemption from the scheduling order requirement, just as Rule 26 permits local courts to identify categories of cases in which the cost of compliance with an across-the-board disclosure requirement would outweigh the benefits.

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8. FED. R. CIV. P. 26(a)(1) Advisory Committee’s Notes. I will not discuss the Rule’s authorization for judges and litigants to tailor the disclosure requirements to the needs of the individual cases; I do not view this aspect of Rule 26 as a dramatic departure from previous discovery practice. See, e.g., id. 29 (allowing party stipulations to modifications of discovery practices).
9. Id. 26(a)(1) Advisory Committee’s Notes.
10. Id.
11. Id.
12. Id. 16(b).
13. FED. R. CIV. P. 26(a)(1); id. Advisory Committee’s Notes.
The decision to leave the selection of case categories to local courts is "a curious provision"14 in light of both past experiences with Rule 16(b) and the differences between management and discovery. After examining local rules that exempt case categories under Rule 16(b), I am unconvinced that local identification of categories under that Rule is necessary. Most courts agree about exempted case categories under Rule 16(b)15 and the exceptions to this consensus are not obvious candidates for exclusion under the Advisory Committee's rationale of exempting cases based on simplicity of issues.16 Nor do all courts share the Advisory Committee's reasoning for exclusion. For instance, one court implemented broad rules that categorically exclude complex cases.17

Experience under Rule 16 suggests two lessons for Rule 26. First, even with some guidance on operative principles for exclusion under Rule 16(b), courts can make idiosyncratic choices that may well reduce the usefulness of the Rule. Thus, the bare-bones cost-benefit analysis suggested in the Advisory Committee's Notes to Rule 26 is unlikely to ensure that local courts will be able to identify those categories of cases—if they exist—that do not require discovery.18 Second, the consensus that eventually developed under Rule 16(b) suggests that the Committee itself could identify categories for exclusion on a principled basis rather than leaving category selection

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14. ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 22 (describing Rule 16(b)'s authorization for local courts to exempt categories of cases from the scheduling order requirement). Professor Miller, the Reporter for the Advisory Committee for Civil Rules at the time of the 1983 amendments, noted that "[w]e anticipate that prisoner petitions, odometer cases, and certain social security cases will be the exempted categories, and there may be differences from district to district as to what is exempted." Id. at 23.

15. For instance, actions by pro se litigants, social security appeals, prisoner petitions, and forfeiture actions have all been popular categories for exemptions.

16. For instance, one court exempts "environmental matters" from pretrial procedures under Rule 16. N.D. ILL. R. 5.00(xi); another court exempts employment discrimination cases, S.D. GA. R. 8.2(c); and another court exempts ERISA cases, E.D. PA. R. 47(6). The only exemption that really appears to reflect some oddity in local conditions is the District of Alaska's provision exempting "cases filed in the District other than Anchorage in which travel by the Court to those locations within the time limit set is not feasible or possible." ALASKA R. 9(c)(11).

17. ALASKA R. 9(c)(9) (noting that "exceptionally complex" cases are exempted from scheduling conferences and orders).

18. FED. R. CIV. P. 26 Advisory Committee's Notes.
to the individual court. If the Committee's understanding of the needs of Social Security cases leads it to believe those cases should be excluded from mandatory disclosure requirements, as suggested in the Notes, 19 why should it make any difference whether the case is filed in Maryland or in Georgia? Facing this issue at the national level, rather than leaving it to local courts, would increase the likelihood that the problems of cost and delay that the Rule was intended to alleviate would be addressed in a coherent fashion by a group with the broad perspective and the resources to determine prudently which kinds of cases would not benefit from early disclosure. It is unclear how local courts are supposed to identify these categories, or why they should be required to do so.20

My skepticism regarding local courts' ability to make these determinations on a consistent basis is compounded by the differences between discovery and scheduling. Discovery, and mandatory disclosure in particular, differs from scheduling in its greater potential to impose costs on litigants. It is disturbing that local courts must identify categories of litigants who will be spared these potential costs with no more guidance than a statement about cost-benefit calculations. 21 Mandatory disclosure may decrease costs, as its proponents hope, 22 or it may increase costs, as its critics fear. 23 But I see no basis for allowing local autonomy on the

19. Id.

20. If the Advisory Committee's rationale for leaving the question of Rule 16(b) case exemptions to local courts was that local judges can best determine where to allocate their resources, leaving this decision to the district courts might make sense, although one would then be concerned about how judges make these resource-allocation choices on a class-based basis. Without more guidance from the Advisory Committee on what factors to consider in allocating those resources, however, the Rule still produces idiosyncratic decisions at the local level.


question of which categories of litigants will ultimately discover the truth.24

The complexity of the case also affects discovery differently than it affects scheduling. The Advisory Committee's Notes to Rule 26(a)(1) suggest that in permitting local courts to identify categories for exclusion the Committee was again considering only the simple case.25 So while the disclosure requirements seem tailored for the simple case, critics claim that the requirements are the most problematic in the complex case.26 Yet one court attempting to identify case categories did so for inclusion in disclosure requirements rather than exclusion; that court chose medical malpractice,

24. One might argue that given the disagreements on basic points about the consequences of the Rule between proponents and critics of mandatory disclosure, the opt-out procedure is a good compromise allowing for experimentation that may prove the truth or falsity of many of the disparate claims. Even if one holds high hopes for empirical evaluations of procedural proposals, see, e.g., Laurens Walker, A Comprehensive Reform for Federal Civil Rulemaking, 61 GEO. WASH. L. REV. 455 (1993) (arguing for empirical testing of proposed rules), we should not be hopeful of resolving basic empirical questions through the nationwide experiment imposed by Rule 26(a)(1). Mandatory disclosure has been implemented in too many varieties, with differing levels of judicial commitment to the schemes adopted, and with no mechanism to gather useful information about the rule's operation. For a proposal to examine the rule empirically, see Carl Tobias, In Defense of Experimentation with Automatic Disclosure, 27 GEO. L.REV. 665 (1993).

25. "It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely." FED. R. CIV. P. 26(a)(1) Advisory Committee's Notes; see also Schwarzer, supra note 22, at 657 ("It is in the universe of the routine cases where disclosure is intended to have its principal effect."). The simplicity of the case also guides the application of Rule 16(b). See supra notes 15-16 and accompanying text (discussing the effect of case complexity under Rule 16(b) and giving samples).

personal injury, employment discrimination, and civil RICO\textsuperscript{27} claims,\textsuperscript{28} all of which can be quite complex.

In addition to allowing courts to excuse categories of cases from mandatory disclosure, Rule 26 permits courts to reject the disclosure requirements altogether.\textsuperscript{29} The Committee justifies this provision by noting the need to accommodate different disclosure requirements adopted by some courts as part of their Civil Justice Expense and Delay Reduction Plans\textsuperscript{30} under the Civil Justice Reform Act (CJRA).\textsuperscript{31} The exemption is ironic, for while many courts adopted disclosure provisions in their Plans, the majority modeled their provisions after a version of the disclosure requirement that was advanced, and later rejected, by the Advisory Committee.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{28} D. DEL. R. 26.2(a).
\item \textsuperscript{29} FED. R. CIV. P. 26(a)(1).
\item \textsuperscript{30} Id. 26 Advisory Committee's Notes.
\item \textsuperscript{32} The early version of the Rule is found in Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53, 87-99 (1991). Professor Tobias notes that after strenuous criticism of the proposal during the comment period, the Advisory Committee abandoned the proposal. Carl Tobias, Collision Course in Federal Civil Discovery, 145 F.R.D. 139, 140-41 (1993). The Committee then changed course again and revived the proposal in amended form. Id. at 142. However, by the time the final version of the Rule 26 disclosure requirements were adopted, many courts had already adopted Civil Justice Expense and Delay Reduction Plans in order to comply with one of the early deadlines in the CJRA. Id. Professor Tobias continues as follows:

\begin{quote}
Most of the districts adopted procedures covering compulsory prediscovery disclosure which diverge from the [ultimately adopted] Federal Rules proposal. . . . The principal reason why many courts promulgated procedures which conflict with the new proposal is that the districts modeled their procedures on the now-superseded articulation requiring disclosure of information and witnesses bearing significantly on claims or defenses [which] . . . was the subject of public comment when [those districts] were finalizing their civil justice plans in late 1991.
\end{quote}

Id. at 144.

In fact, all districts received a memorandum from the Federal Judicial Center suggesting that, as part of the CJIRA plan, the districts adopt a local rule based on the earlier Rule 26 proposal. FEDERAL JUDICIAL CENTER, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT OF 1990 16 (1991).
the exemption exists to protect courts that adopted a provision that the Committee itself rejected.

However, it is not obvious that the CJRA ever authorized courts to adopt mandatory disclosure provisions. That statute authorizes "encourag[ing] cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."\textsuperscript{33} To consider this language authority to create mandatory discovery devices conflicts with the statute's language, which encourages voluntary efforts.\textsuperscript{34} I have argued elsewhere that the CJRA was generally not intended to supersede the Federal Rules of Civil Procedure and that mandatory disclosure is a dramatic departure from the Rules' previous structure of attorney-initiated discovery.\textsuperscript{35} Thus, I do not believe that the accommodation in Rule 26(a)(1) was required.\textsuperscript{36}

\textsuperscript{33} 28 U.S.C. § 473(a)(4) (emphasis added). Given the controversy that mandatory disclosure generated when advanced by the Advisory Committee, one might expect some mention of it in the legislative history of the CJRA. The legislative history does not suggest, however, that anyone believed the CJRA conferred authority to implement such mandatory provisions. The Senate Report calls § 473(a)(4) "self-explanatory," stating blandly that "the more voluntary and cooperative the discovery process can be made to be, the fewer costs will be incurred by all parties." S. REP. No. 416, 101st Cong., 2d Sess. 56-57 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6845-46.

\textsuperscript{34} For a more thorough discussion of the CJRA's authorizing provisions in the context of disclosures, see Lauren K. Robel, Fractured Procedure: The Civil Justice Reform Act of 1990, 46 STAN. L. REV. 1447, 1457 (1994).

\textsuperscript{35} For an extended argument that the catch-all provision in the legislation does not authorize procedural innovations in conflict with the Federal Rules, see id. at 1464-70.

\textsuperscript{36} Edwin Weseley recently addressed the question of the relationship between the CJRA and the Federal Rules of Civil Procedure, concluding that the "CJRA trumps the FRCP to the extent the CJRA specifically deals with a particular matter." Edwin J. Weseley, The Civil Justice Reform Act; The Rules Enabling Act; The Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83—What Trumps What? 154 F.R.D. 563, 574 (1994). I agree. However, the CJRA grants very limited and sparing authority to deviate from the Federal Rules, and then only in carefully delineated cases. See generally Robel, supra note 34, at 1452-54 (noting CJRA authorization for two minor certification requirements not found in the Federal Rules of Civil Procedure at the time the legislation was passed). Thus, a national rule requiring mandatory disclosure would, in fact, "trump" contrary provisions in CJRA Plans, since those plan provisions were never clearly authorized by the CJRA in the first place.
Be that as it may, the Advisory Committee does not limit its permission to abrogate Rule 26(a)(1) to districts with alternative disclosure requirements in place under the CJRA;\(^{37}\) furthermore, the power to “opt out” of the mandatory disclosure provisions has not been used only by those districts.\(^{38}\) The Committee advances no explanation for allowing courts without alternative provisions to reject the Rule.\(^{39}\) Courts are presumably free to reject Rule 26 for any reason at all.

Providing local courts with independence on the issue of compliance with mandatory disclosure raises serious problems of fairness and administration. District-wide exemptions allow litigation advantages and costs to be unevenly distributed based solely on where filing is available in any given case. While it is certainly true that there are always advantages to filing or defending a lawsuit in one place rather than another, one goal of the federal procedural system ought to be to eliminate regional procedural differences as sources of strategic advantage. Moreover, attorney uncertainty about responsibilities under this decentralized system has never been higher.\(^{40}\) Different districts within the same state follow different rules on basic discovery obligations,\(^{41}\) and variants—often trivial variants—of the disclosure requirements abound.\(^{42}\) Within this confusing patchwork, sanctions for failure

\(^{37}\) FED. R. CIV. P. 26(a)(1) Advisory Committee’s Notes.

\(^{38}\) Stienstra, supra note 1, at LXIV (noting that of the 52 courts that have rejected Rule 26(a)(1), “sixteen require disclosure through local rules or orders or the CJRA plan”).

\(^{39}\) FED. R. CIV. P. 26 Advisory Committee’s Notes.

\(^{40}\) “Now, a year [after enactment of the new discovery rules], many lawyers and federal judges are still trying to figure out which set of rules applies and how they operate from one district to another.” Samborn, supra note 1, at A25.

\(^{41}\) See, e.g., Stienstra, supra note 1, at LXVIII (noting that the Northern and Southern Districts of Indiana are operating under different disclosure regimes, as are the Northern and Southern Districts of Illinois).

\(^{42}\) Id. Moreover, the courts have not been particularly careful in adopting opt-out rules. Many courts have opted out of provisions of Rule 26 that contain no language authorizing courts to do so. See id. at LXV-LXXVI (listing thirty courts that have rejected not only mandatory disclosure, but also disclosure of expert testimony under Rule 26(a)(2), or pretrial disclosures under Rule 26(a)(3), or both). There is no language in Rules 26(a)(2) or (3) suggesting that local court have the power to opt out of those Rules.
to comply with disclosure obligations are quite stiff and include such measures as the suppression of evidence.\textsuperscript{43}

Thus, whether one agrees or disagrees with the wisdom of mandatory disclosure, there is little systemic benefit to be gained by allowing local decisions about whether to require compliance with Rule 26. Local independence increases uncertainty and creates opportunities for procedural gamesmanship without providing corresponding benefits for the goal of deciding cases on their merits.

III. When Are Local Options Appropriate?

Given the attention focused on discouraging local deviations from the Federal Rules of Civil Procedure in the last ten years,\textsuperscript{44} and given the problems with the procedural variations spawned by Rule 26, is it ever appropriate to permit local courts to abrogate a national procedural rule?

Advocates for uniform procedure argue that a unified system decreases litigation costs and improves access to courts by allowing attorneys to master one body of procedural law. Uniformity also reduces surprise and encourages deciding cases on their merits.\textsuperscript{45} As a general matter, it is difficult to argue that the advocates of such a position are wrong. Moreover, most procedural rules implement value choices of consequence to the participants in a lawsuit; witness

\textsuperscript{43} Fed. R. Civ. P. 37(c)(1) (explaining that a party "shall not . . . be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed"). Additionally, the court may impose other sanctions for failure to disclose, including reasonable expenses, attorney's fees, and the informing of the jury of "the failure to make the disclosure." Id.


\textsuperscript{45} See generally, Subrin, supra note 6, at 2001 ("When the proponents of the Enabling Act and the Federal Rules talked and wrote about uniformity they either explicitly or implicitly utilized several interconnected themes: efficiency, professionalization, federalism or nationalism, effective law application, power, and politics."). In recounting the arguments for uniform federal procedure in the pre-Enabling Act period, Subrin notes that for proponents of uniform procedure, "[l]ack of uniformity exemplified lack of simplicity," which in turn made litigation outcomes turn on procedural niceties rather than the justice of the cause. Id. at 2005.
the tremendous battle regarding mandatory disclosure, fought over disagreements about the nature of a lawyer's duty to her client, the amount of "adversariness" that is optimal in our system, and the best way to uncover the truth in a contested matter.46 Therefore, answering the question of whether local option rules are justified requires a sensitive evaluation of the underpinnings and goals of a particular rule in the context of the system in which it appears. We need to explore aspects of the system that might result in defensible justifications for local variation, such as whether differences in geography or conditions of court congestion should affect a rule's application.47 Furthermore, we must explore suggestions that some procedural issues that are currently viewed as systemic problems may actually be limited to certain areas or linked to local legal cultures in ways that might justify local variations.48

46. As Professor Bone has stated,

It is conceivable that some procedural rules, such as Rule 11, might be designed not only to alter payoffs but also to change more basic preferences, values, or beliefs so as to encourage lawyers to consider social costs when making litigation decisions. . . . Furthermore, some procedural rules may be justified primarily on the basis of nonconsequentialist values. For example, a rule, such as a class action notice provision, that facilitates opportunities to participate in litigation may be based on a fairness norm.


47. I have suggested elsewhere that the range of local conditions, from "congested and overworked urban courts through the relative quiet of rural courts, offers the most defensible reason for local variation." Robel, Fractured Procedure, supra note 34, at 1483-84. But I argued that "[v]ariation in local conditions . . . has little to do with the concerns that result in procedural rulemaking. Rather, it is the stuff of docket management—how to move cases smoothly from filing to dispositions, to schedule trials, and to monitor service under chaotic or calm conditions." Id. at 1484.

48. Id. (suggesting that we should explore whether "our national obsession with discovery control ought to focus primarily on the relatively few jurisdictions where discovery abuse has proved a problem").
Additionally, if we delegate procedural decisionmaking to local rules groups, we need to consider their composition and incentives.49

We also need to secure a clear grasp of what we will achieve through local variation within a given rule. Beyond protecting existing variation, for instance, it is difficult to see what purposes were served by allowing local courts to reject Rule 26(a)(1). The Committee’s rationale for the Rule—decreasing costs and improving the exchange of information with the goal of simplifying the process of achieving just results—militates against making Rule 26 a candidate for local rejection. If the Committee believes that these benefits will follow from mandatory disclosure, why should they be withheld from litigants in many parts of the federal system simply because some judges and local rules committees disagree with that judgment?

IV. Conclusion

Perhaps the goal of national uniformity has become so compromised that its continued pursuit is pragmatically unsound. If that is the case, however, we must proceed carefully to ensure that permission to create local procedures does not become transformed into a license for local compromising of important procedural values. If the rulemakers fail to adequately consider the Rules’ underlying context and values, the hypothetical rule with which I began this Article may become a reality.

49. See, e.g., Lauren K. Robel, Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990, 59 BROOK. L. REV. 879, 884-85 (1993) (noting that local advisory groups raise the possibility of “a return to the era when local bars controlled local courts, not only through direct barriers to foreign entry, but through the arcane nature of local procedure and practice,” and reporting on the composition of advisory groups under the CJRA).