

**Survey of Bankruptcy Judges
Regarding Use of Rule 7026 Mandatory Disclosure
in Adversary Proceedings**

Submitted to the Advisory Committee on Bankruptcy Rules

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Survey of Bankruptcy Judges Regarding Use of Rule 7026 Mandatory Disclosure in Adversary Proceedings

Brief Overview of Findings

Judges' responses to the questionnaire suggest certain categories of adversary proceedings (AP) that the Advisory Committee may wish to recommend for presumptive exemption from the mandatory disclosure requirements of Rule 26 (mandatory disclosures), but with clearly stated exceptions. From the questionnaire responses, the following are examples of AP categories that the Committee might want to consider for presumptive exemption, or for presumptive exemption with exceptions:

- Approval of sale of property of the estate and of a co-owner;
- §542 – turnover of property;
- Injunctive relief – reinstatement of stay; and
- §523(a)(5) - support/alimony.

Judges' responses suggest that the Committee may not want to recommend certain other AP categories for presumptive exemption from mandatory disclosures, with some exceptions. Examples of these AP categories include the following:

- §548 - fraudulent conveyance;
- Subordination of claim;
- §547 - preference;
- Determination of removed cause of action;
- Objection/revocation of discharge;
- Revocation of confirmation; and
- Declaratory judgment.

Introduction

Rule 26 of the Federal Rules of Civil Procedure requires each party to disclose to the other, at specified time intervals, a variety of information about their case. These mandatory disclosures are covered by Rule 26: (a)(1) initial disclosure, (a)(2) expert testimony disclosure, and (a)(3) pretrial disclosure. Civil Rule 26 is made applicable to adversary proceedings (APs) in bankruptcy by Rule 7026 of the Federal Rules of Bankruptcy Procedure. Rule 26 is Appendix 1.

The Advisory Committee on Bankruptcy Rules asked the Federal Judicial Center to survey bankruptcy judges about whether the Committee should recommend an amendment to Bankr. Rule 7026 to exempt certain categories of APs from the mandatory disclosure requirements of Rule 26.

Background

In September 2003, the Judicial Conference approved and forwarded to the Supreme Court the Advisory Committee's proposed amendment to Bankruptcy Rule 9014, to exempt contested matters from the mandatory disclosure requirements of Civil Rule 26 (Bankr. R. 7026). The Standing Committee explained that "[c]ontested matters often involve time-sensitive matters [that] typically are resolved well before the time when disclosure is required under Rule 26, rendering the mandatory disclosure provisions ineffective and counterproductive. The mandatory disclosure requirements, however, continue to apply to adversary proceedings"¹

However, in a September 18, 2002 memorandum to the Committee, the Reporter, Professor Jeffrey Morris, queried whether some AP categories also should be exempt from Rule 26 mandatory disclosures. He asked whether the Committee should propose an amendment to the Bankruptcy Rules to provide for any such exemption. He stated that many bankruptcy practitioners believe that certain AP categories generally conclude before the expiration of due dates set forth in Rule 26(a) and 26(f), rendering these requirements meaningless in certain AP categories. He suggested that the Center conduct research to determine whether data can be found to support, refute, or shed some additional light on these propositions. The Reporter's memorandum is Appendix 2.

At the October 2002 Committee meeting, Judge A. Thomas Small, the chair, asked us to undertake this research. At the Committee's April 2003 meeting, we reported it was not feasible to gather the information needed from existing AO or FJC electronic databases. Judge Small asked us to explore whether relevant information was accessible electronically and, if not, to develop a proposal for obtaining it through a survey.

We had reviewed a random sample of electronic docket sheets for closed APs, and found that the docket sheets did not provide reliable information as to whether mandatory disclosure had taken place. This was true even in APs where the time between filing and disposition was over a year. The docket sheets only occasionally made reference to mandatory disclosure and only rarely included an entry signifying the occurrence of disclosure. We therefore concluded that a survey could better meet the research objectives described in the Reporter's September 2002 memorandum.²

¹ Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Judicial Conference of the United States, September 2003 at 5.

² See *Preliminary Research Design: Should Certain Types of Adversary Proceedings Be Exempt, under the Bankruptcy Rules, from Civil Rule 26 Mandatory Disclosure Requirements?* *infra* Appendix 3, page 3.

Purpose of the Survey

The purpose of the survey was to obtain bankruptcy judge views and comments on specific questions, related to the following issues:

- whether some categories of APs should be exempt from Rule 26 mandatory disclosure requirements and, more specifically,
- whether applying Rule 26(a) to certain categories of AP's is meaningless-- because many, if not most, of these matters conclude before the mandatory disclosure due dates or because certain categories of APs involve little or no exchange of information or discovery.

More particularly, the survey was designed to find out:

- whether the mandatory disclosure requirements of Rule 26 are having an impact (that is apparent to the bankruptcy judge) on disclosure or exchange of information in APs;
- what AP categories, if any, do bankruptcy judges believe should be exempt from Rule 26(a) and 26(f) provisions;
- what AP categories, if any, do bankruptcy judges believe should **not** be exempt from these provisions;
- whether attorneys have voluntarily complied with the provisions;
- whether judges are actively enforcing the provisions; and
- why might or might not judges actively pursue party compliance with the disclosure requirements for certain or all AP categories.

Survey Design

At its September 19, 2003 meeting, the Committee considered our survey design (included as Appendix 3, without attachments). We recommended against surveying only a sample of bankruptcy judges. Although a sample might have given us sufficient information, surveying all bankruptcy judges would provide all bankruptcy judges with notice of the issues related to Rule 26 that the Committee is considering and give each judge an opportunity to contribute to the debate.

At the same meeting, the Committee agreed that we should survey all bankruptcy judges, rather than a sample, and that we should conduct the survey online. The Committee Chair asked Bankruptcy Judge Christopher M. Klein to serve as an advisor to the project.

Survey Administration (On-line Questionnaire)

On January 21, 2004, we sent all bankruptcy judges an email (Appendix 4) in which Judge Small asked them to complete the on-line questionnaire (Appendix 5) by DATE. The email identified the Intranet (DCN) address where the judges could respond to the questionnaire online. It also gave judges the option of printing the questionnaire and responding on paper, although very few

judges took that option. We emailed a follow-up reminder on February 4, 2004, asking judges to respond no later than February 13, 2004.

As specified in the survey design, judges' responses were made anonymously. We report them only in aggregate form.

Response Rate

As of February 25, 2004, we had received 125 (or 133) responses for a response rate of about 36% or 38%, depending on whether we count the response of a judge who responded on behalf of himself and eight colleagues as one response or nine responses. Given the nature of the questionnaire, this response rate is reasonably good.

Some judges may not have responded because they were reluctant to state that they were not following or enforcing the overall scope of the national rule, even though responses were anonymous. On the other hand, some judges have been very open with us that judges in their district do not follow the disclosure provisions of Rule 26 as amended in 2000. A number of the respondents indicated that their court has a local rule that exempts all adversary proceedings from the disclosure requirements.

In addition, some judges may not have responded because they do not have a sufficiently updated version of a Web browser to allow completing the questionnaire on line or printing the questionnaire from the Web. However, only a small number of judges requested a faxed or hard copy of the questionnaire.

Findings

Whether AP involves little or no discovery (Question 2)

In this section, we present the findings for Question 2 of the survey questionnaire. We identify the AP categories where judges indicated that there is little or no discovery. In the next section, we look at the timing of the mandatory disclosure due dates of Rule 26 and whether those due dates come before or after the AP is resolved (Question 1).

In Question 2, we listed sixteen AP categories and asked the judges to indicate which of the categories generally involve little or no discovery. The judges could also specify AP categories other than the listed sixteen, and they could indicate if they thought no AP category generally involves little or no discovery. See Table 1 and Chart 1.

About half the respondents indicated that three types of adversaries involve little or no discovery:

- §542 – turnover of property (57%);
- approval of sale of property of the estate and of a co-owner (56%), and
- injunctive relief – reinstatement of the stay (45%).

Note in the next section that we found a relatively high number of respondents also selected these same three categories in response to parts of Question 1.

Table 1 (Responses to Question 2)

Question 2: In your experience, what categories of APs generally involve little or no discovery? Please click all that apply.

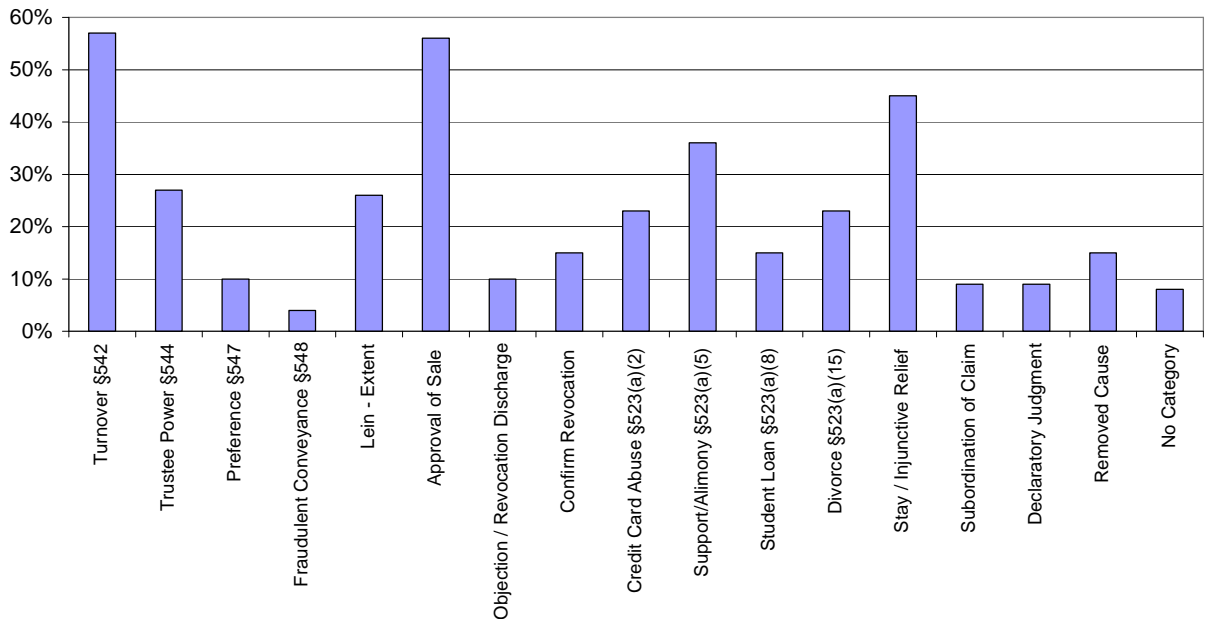
Adversary Proceedings Categories	Percent of Respondents(n=124) selecting the given AP category:
§542 - turnover of property	57%
§544 - powers of trustee	27%
§547 - preference	10%
§548 - fraudulent conveyance	4%
Validity, priority or extent of lien	26%
Approval of sale of property of the estate and of a co-owner	56%
Objection/revocation of discharge	10%
Revocation of confirmation	15%
§523(a)(2) - credit card abuse/false pretenses	23%
§523(a)(5) - support/alimony	36%
§523(a)(8) - student loan	15%
§523(a)(15) - divorce/separation property settlement/deed	23%
Injunctive relief - reinstatement of stay	45%
Subordination of claim	9%
Declaratory judgment	9%
Determination of removed cause of action	15%
Other AP categories or comments offered by respondents: <ul style="list-style-type: none"> • TRO's • No general rule. AP's can run full spectrum from no discovery to lots. • Smaller, routine cases generally get resolved without formal discovery or with very informal disclosure of documents. • Claims litigation (2 responses). • Most APs settle prior to trial; court doesn't know amount of discovery. 	4%
No category of AP generally involves little or no discovery	8%

About a quarter to a third of respondents thought five other of the sixteen categories involve little or no discovery. Few respondents (4% - 15%) thought the remaining eight categories involve little or no discovery. That is, they thought it was more typical for these AP categories to require discovery.

Please note that, in Question 2, we specified that we were asking each responding judge to answer from “your experience.” We did not intend for respondents, when selecting among the AP categories, to speculate on what happens generally in their court or in bankruptcy courts across the country.

Chart 1 (Responses to Question 2)

Question 2: % of respondents indicating that AP generally involves little or no discovery



Whether AP is generally resolved before disclosure due date (Question 1)

In Question 1, we listed the same sixteen AP categories and asked judges which are generally resolved before the respective due date for mandatory disclosure under Rule 26(a)(1), (a)(2) and (a)(3). The due dates are:

Rule §	Type of Disclosure	Due Date for Disclosure (unless court modifies)
26(a)(1)	initial disclosure (likely discoverable persons, documents, etc.)	14 days after Rule 26(f) conference
26(a)(2)	expert testimony	90 days before trial or (if solely for contradiction or rebuttal) 30 days after other party's disclosure
26(a)(3)	pretrial disclosure (witnesses, exhibits, etc.)	30 days before trial

The judges could also specify other AP categories or they could indicate that no AP category was resolved prior to the due date. We stated we were asking each judge to answer from “your experience.” See Table 2 and Chart 2.

Table 2 (Responses to Question 1)

Question 1: In your experience, what categories of APs are generally resolved before the due date for mandatory disclosure requirements under Rule 26? For each AP in the list below please click the box if the AP is generally resolved before the due date for 26(a)(1) - 26(a)(3) disclosures.

Adversary Proceedings Categories:	Percent of Respondents (n=124) selecting the given AP category:		
	26(a)(1)	26(a)(2)	26(a)(3)
§542 - turnover of property	27%	35%	36%
§544 - powers of trustee	13%	27%	27%
§547 - preference	10%	25%	35%
§548 - fraudulent conveyance	3%	18%	27%
Validity, priority or extent of lien	14%	23%	27%
Approval of sale of property of the estate and of a co-owner	25%	28%	32%
Objection/revocation of discharge	5%	13%	19%
Revocation of confirmation	5%	11%	17%
§523(a)(2) - credit card abuse/false pretenses	13%	28%	32%
§523(a)(5) - support/alimony	10%	15%	23%
§523(a)(8) - student loan	4%	15%	19%
§523(a)(15) - divorce/separation property settlement/decrees	6%	13%	18%
Injunctive relief - reinstatement of stay	30%	25%	25%
Subordination of claim	4%	9%	14%
Declaratory judgment	4%	11%	17%
Determination of removed cause of action	4%	10%	16%
Other AP categories or comments offered by respondents: 26(a)(1)-(3): All APs exempt by local rule; Emergency proceedings. One judge never had a mandatory disclosure issue or question raised. 26(a)(1): No general rule. Early settlements are probably soon after 26(a)(1) disclosures. Routine preference actions frequently resolve quickly, but not necessarily within 14 days. 26(a)(2): Objections to claims and responses. 26(a)(3): Claim litigation.	4%	4%	4%
No category of AP is generally resolved before the due date	15%	14%	12%

Initial disclosures, Rule 26(a)(1):

The judges' responses suggest that few, if any, types of adversary proceedings, are typically resolved before the due date for Rule 26(a)(1) disclosures. At the high end, three AP categories were selected by only a quarter to approximately a third of the responding judges:

- injunctive relief – reinstatement of stay;
- §542 – turnover of property; and
- approval of sale of property of the estate and of a co-owner.

Beyond those three categories, the percentages drop off -- as the first percentage column of Table 2 shows. For example, at the low end, eight of the sixteen listed AP categories were selected by 6% or fewer of the respondents:

- §548 - fraudulent conveyance;
- Objection/revocation of discharge;
- Revocation of confirmation;
- §523(a)(8) - student loan;
- §523(a)(15) - divorce/separation property settlement/decreed;
- Subordination of claim;
- Declaratory judgment, and
- Determination of removed cause of action.

Disclosure of expert testimony, Rule 26(a)(2):

For each AP category in Table 2, the percentage of judges indicating that the AP category was typically resolved before the Rule 26(a)(2) due date (second percentage column) is higher than the percentage indicating that the category was typically resolved before the due date for Rule 26(a)(1) disclosures (first percentage column). There is one exception: injunctive relief – reinstatement of the stay. Even so, the pattern of responses suggests that judges think few, if any, categories of adversary proceedings are typically resolved before the 26(a)(2) due date. On that point, at the low end, eight of the sixteen AP categories were selected by only 15% or fewer of the respondents.

At the high end, six categories were selected by a quarter to about a third of the judges, with the most commonly selected categories being:

- §542 – turnover of property (35%);
- approval of sale of property of the estate and of a co-owner (28%);
- §523(a)(2) - credit card abuse/false pretenses (28%); and
- §544 - powers of trustee (27%).

Pretrial disclosures, Rule 26(a)(3):

For most AP categories, the percentage of judges indicating the category was typically resolved before the Rule 26(a)(3) disclosure due date was higher than the comparable percentage for Rule 26(a)(1) or (a)(2) disclosures.

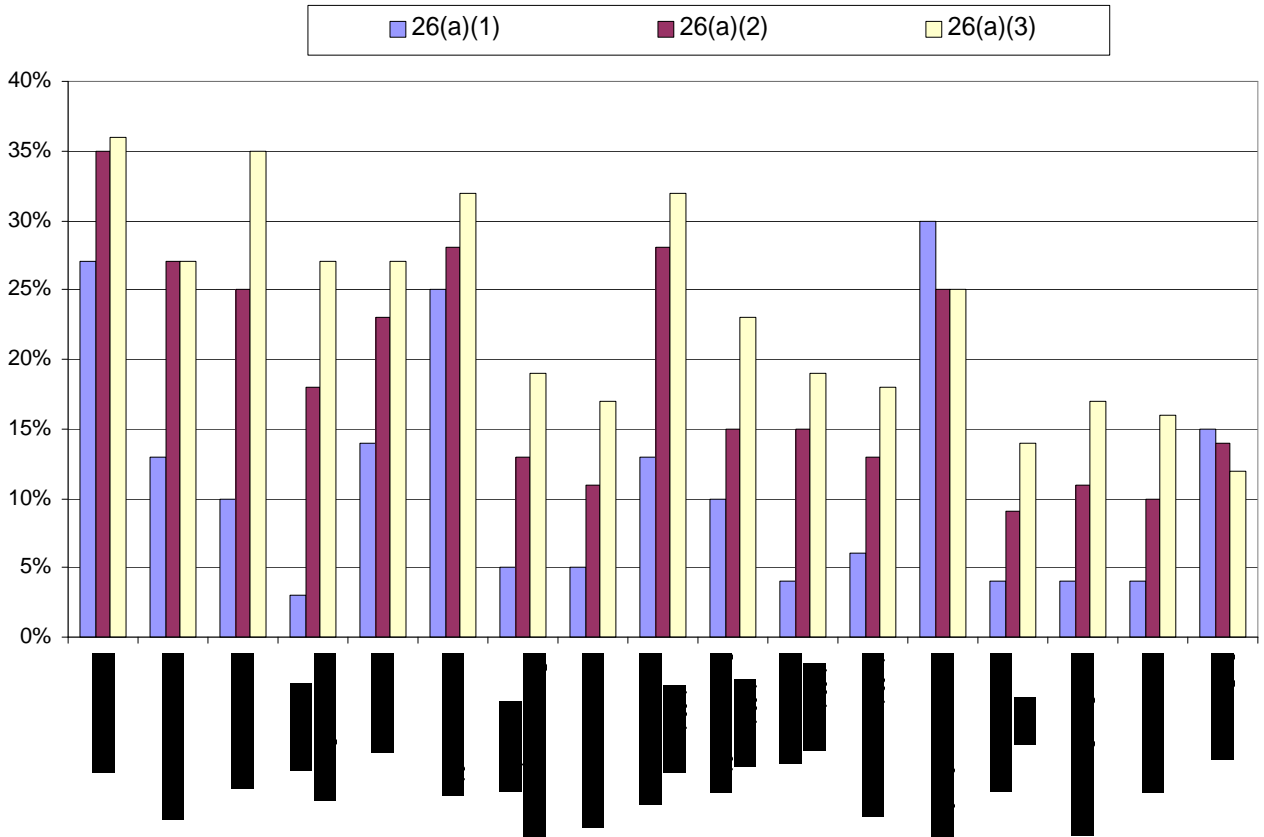
At the high end, eight categories were selected by 25 to 35 percent of the respondents as being typically resolved before the due date for Rule 26(a)(3) disclosures. Among these eight, the most commonly selected categories are:

- §542 – turnover of property (36%);
- §547 – preference (35%);
- approval of sale of estate/co-owner property (32%);
- §523(a)(2) - credit card abuse/false pretenses (32%).

No listed category was selected by fewer than 14% of the respondents.

Chart 2 (Responses to Question 1)

Question 1: % of respondents indicating that AP is generally resolved before Rule 26(a) disclosure due date



Whether court ordered that disclosure is inappropriate in AP (Question 3)

For each of the sixteen listed categories, Question 3 asked judges to indicate whether they generally, by court order, find that certain or all Rule 26 mandatory disclosures are not appropriate in the circumstances of the action. Again, the question provided space for judges to comment on unlisted AP types, or to indicate that they entered such orders generally in no AP category. See Table 3 and Chart 3.

Table 3

Question 3: For which categories of APs do you generally, by court order, find that certain or all Rule 26 mandatory disclosures requirements are not appropriate in the circumstances of the action? Please click all that apply.

Adversary Proceedings Categories:	% of Respondents (n=124) selecting the given AP category:
§542 - turnover of property	23%
§544 - powers of trustee	17%
§547 - preference	11%
§548 - fraudulent conveyance	8%
Validity, priority or extent of lien	14%
Approval of sale of property of the estate and of a co-owner	23%
Objection/revocation of discharge	8%
Revocation of confirmation	11%
§523(a)(2) - credit card abuse/false pretenses	15%
§523(a)(5) - support/alimony	15%
§523(a)(8) - student loan	13%
§523(a)(15) - divorce/separation property settlement/decree	14%
Injunctive relief - reinstatement of stay	22%
Subordination of claim	8%
Declaratory judgment	8%
Determination of removed cause of action	10%
Other AP categories or comments offered by respondents:	5%
<ul style="list-style-type: none"> • By local rule and practice we do not enforce Rule 26. • Matters involving less than \$15,000. • We only make parties meet the requirements of Rule 26(a)(1)-(3) by court order; otherwise all APs are exempt. • All AP's are exempted. • The court is not asked to enter such an order. • One judge has never had a mandatory disclosure question or issue raised. 	
No category of AP generally requires such an order	40%

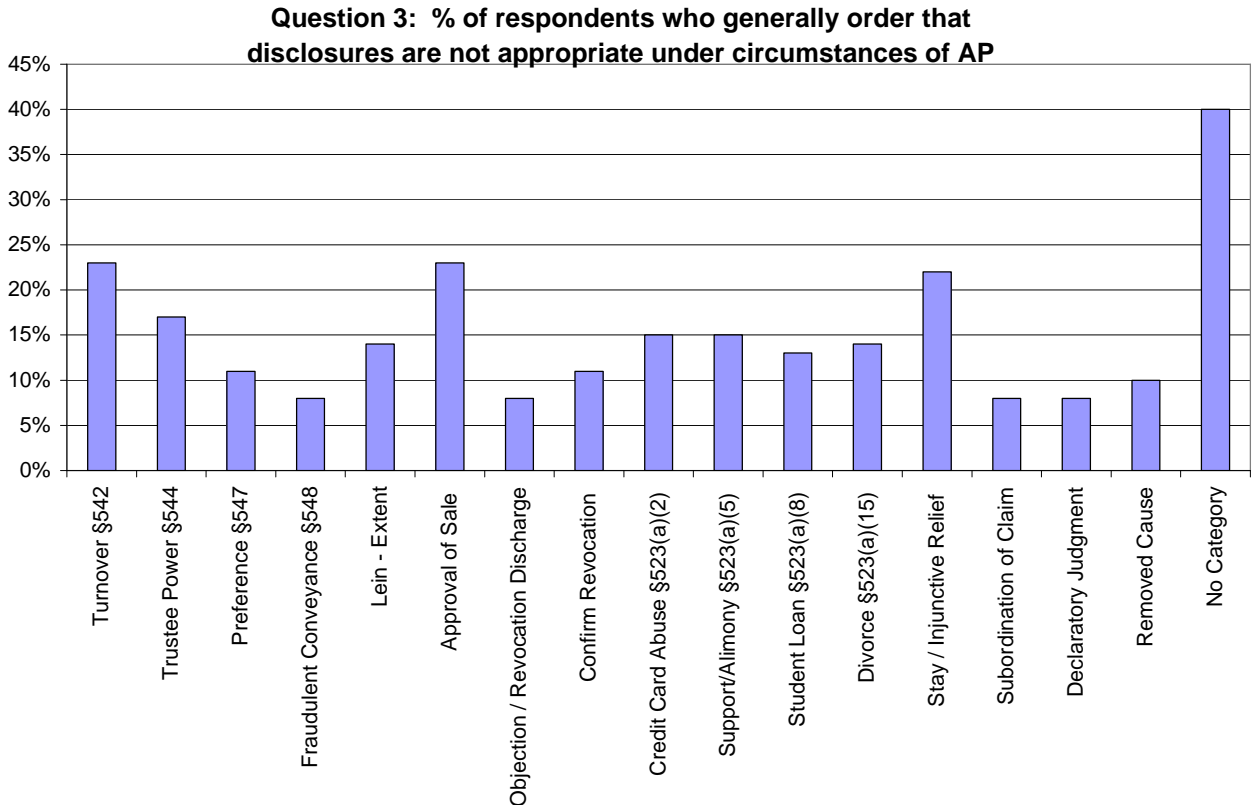
Forty percent of the respondents agreed with the following: No AP category generally requires a court order that states certain or all Rule 26 mandatory disclosure requirements are inappropriate in the circumstances of the action. Overall, responses show that 23% or fewer of responding judges generally order that certain mandatory disclosures are inappropriate under the circumstances for certain AP categories.

Responses show that thirteen of the sixteen listed categories were selected by only 8% to 17% of the respondents. The other three categories are the ones the judges selected the most:

- §542 – turnover of property (23%);
- approval of sale of property of the estate and of a co-owner (23%); and
- injunctive relief – reinstatement of stay (22%).

Recall that a relatively high percentage of respondents also identified these three categories in parts of Question 1 and in Question 2.

Chart 3



Whether all affected parties generally stipulate to exemption (Question 4)

Question 4 asked judges to indicate, for each of the sixteen categories of APs, whether all affected parties generally stipulate that the parties will not engage in certain or all Rule 26 mandatory disclosures. Again, the question provided space for comment on unlisted categories of AP, and to indicate if no category met the criteria. Table 4 and Chart 4 summarize the responses.

Table 4

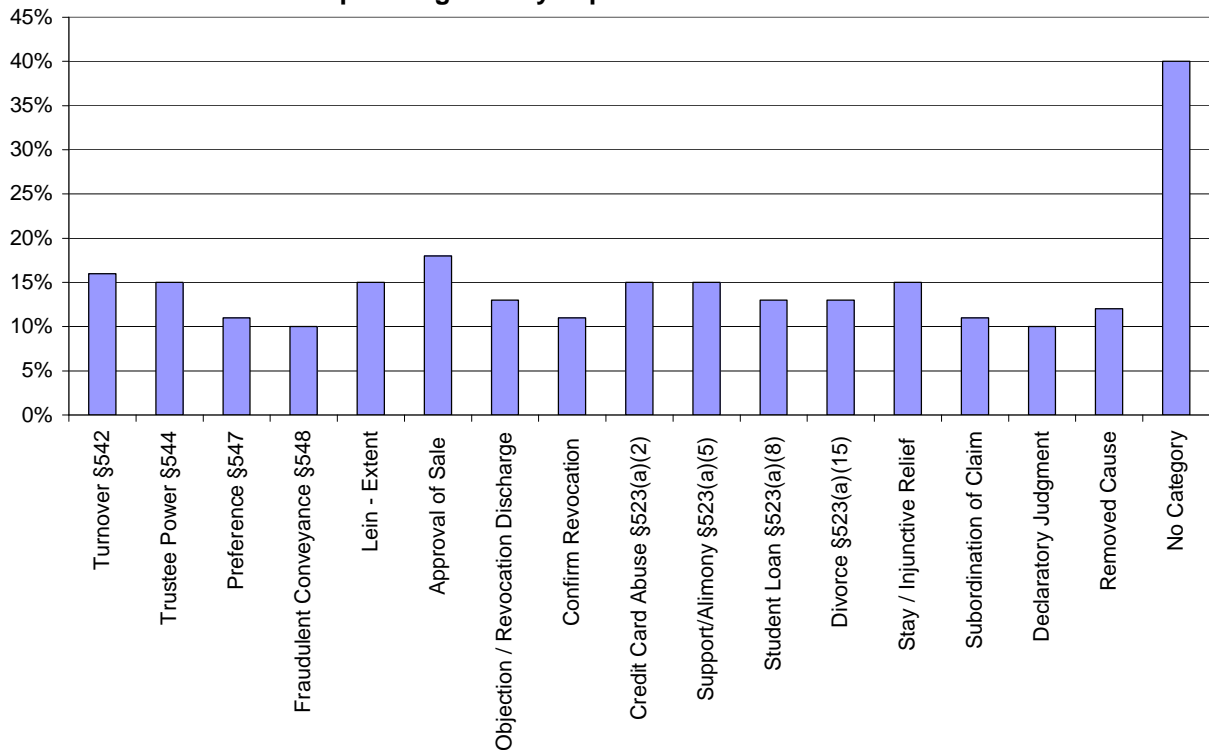
Question 4. In your experience, for which categories of APs do all affected parties generally stipulate that the parties will not engage in certain or all Rule 26 mandatory disclosure requirements? Please click all that apply.

Adversary Proceedings:	Percent of Respondents (n=124) selecting the given AP category:
§542 - turnover of property	16%
§544 - powers of trustee	15%
§547 - preference	11%
§548 - fraudulent conveyance	10%
Validity, priority or extent of lien	15%
Approval of sale of property of the estate and of a co-owner	18%
Objection/revocation of discharge	13%
Revocation of confirmation	11%
§523(a)(2) - credit card abuse/false pretenses	15%
§523(a)(5) - support/alimony	15%
§523(a)(8) - student loan	13%
§523(a)(15) - divorce/separation property settlement/deed	13%
Injunctive relief - reinstatement of stay	15%
Subordination of claim	11%
Declaratory judgment	10%
Determination of removed cause of action	12%
Other AP categories or comments offered by respondents:	7%
<ul style="list-style-type: none"> • No stipulation is necessary. "We" do not enforce Rule 26. (3 responses) • Two judges did not know whether any parties so stipulate. • While the parties may often agree that the disclosures are not needed, there is no general rule in this regard. It is more common for them to want more time to do the disclosures, rather than to dispense with them altogether. • Court sets own deadlines at initial pre-trial conference. • Almost all parties to all APs before one judge have informally so stipulated. • There is no category of AP for which the parties stipulate. 	
No category of AP is generally made exempt from mandatory disclosure requirements by parties' stipulation	40%

Overall, the responses suggest that all affected parties generally do not stipulate that the parties will not engage in certain or all Rule 26 mandatory disclosures. Forty percent of the respondents agreed with the following statement: “No category of AP is generally made exempt from mandatory disclosure requirements by parties’ stipulation.” Moreover, all sixteen categories of adversary proceedings were identified as generally involving such a stipulation by only 10% to 18% respondents.

Chart 4

Question 4: % of respondents indicating that all affected parties generally stipulate to limited or no disclosure in AP



Whether mandatory disclosures are implicitly disregarded (Question 5)

Question 5 asked judges to indicate for each of sixteen AP categories whether Rule 26 mandatory disclosure requirements are “honored in the breach” (or, said another way, implicitly disregarded) by lawyers or by one or more judges(s) of the respondent’s court. Again, the question provided space for comments on unlisted AP and to indicate that no category of AP met the criteria. See Table 5 and Chart 5.

Compared to Questions 1, 2, and 3, responses to this question were not as variable across AP categories. For the sixteen categories, 31% to 44% of respondents indicated that *lawyers* implicitly disregarded the disclosure

requirements. In comparison, 21% to 30% indicated that *judges in their district* implicitly disregarded them across the sixteen categories. For each category, a greater percentage of respondents indicated that lawyers implicitly disregarded the requirements than indicated that judges implicitly disregarded them.

About a fifth of the respondents agreed with the following statement: the mandatory disclosure requirements are not honored in the breach or implicitly disregarded by the parties (19%) or judge(s) (20%), respectively, for any category of AP.

Table 5

Question 5. For which categories of APs is the Rule 26 mandatory disclosure requirements honored in the breach or implicitly disregarded by parties' lawyers or one or more judges(s) of your court? Please click all that apply.

Adversary Proceedings Categories:	% of Respondents (n=124) selecting given AP category:	
	parties' lawyers	judge(s) of court
§542 - turnover of property	44%	29%
§544 - powers of trustee	38%	27%
§547 - preference	36%	25%
§548 - fraudulent conveyance	35%	25%
Validity, priority or extent of lien	38%	26%
Approval of sale of property of the estate and of a co-owner	42%	30%
Objection/revocation of discharge	34%	23%
Revocation of confirmation	31%	23%
§523(a)(2) - credit card abuse/false pretenses	41%	27%
§523(a)(5) - support/alimony	43%	29%
§523(a)(8) - student loan	35%	24%
§523(a)(15) - divorce/separation property settlement/decree	39%	27%
Injunctive relief - reinstatement of stay	41%	28%
Subordination of claim	34%	24%
Declaratory judgment	32%	24%
Determination of removed cause of action	30%	21%

Other AP categories or comments offered by respondents: 8% 6%

Re: lawyers & judges:

- Because of our local rule, Rule 26 does not apply to APs (2 respondents).
- One judge allows parties to stipulate that mandatory disclosure rule does not apply.
- No compliance required nor do I expect done in contested matters.
- Emergency or expedited matters.
- One judge does not monitor whether disclosures made. Discovery disputes very rare. No one ever complained opponent failed to make required disclosures.

Table 5 (continued)

Adversary Proceedings Categories:	% of Respondents (n=124) selecting given AP category:	
	parties' lawyers	judge(s) of court

Re: lawyers:

- All are exempt by court order.
- All above APs honored in breach on frequent basis, but not with court sanction.
- Most likely in small cases (99%), the requirements are ignored. You'll have to ask the attorneys.
- Mandatory disclosure has never been an issue before me. Accordingly, I cannot ascertain the parties' conduct with respect to it.
- This question is too compound and needs to be broken up.

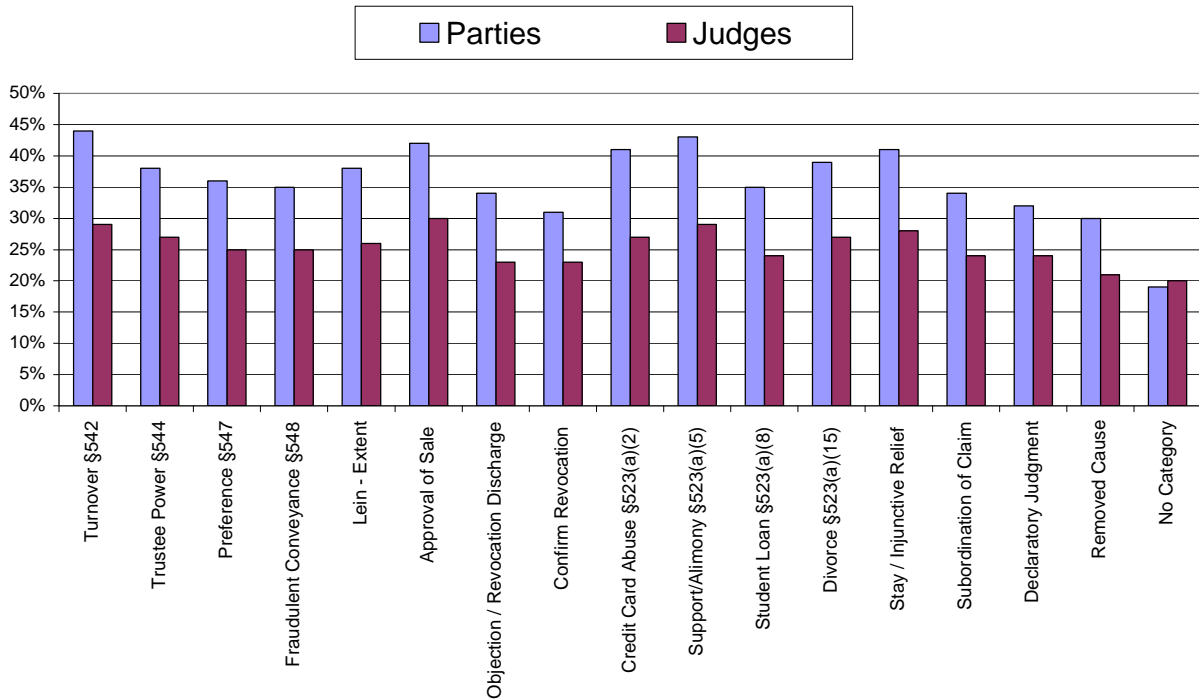
Re: Judges:

- Almost all.
- One judge requires compliance in a standard form order but never follow up in any formal way to see if compliance occurs.

The mandatory disclosure requirements are not honored in breach or implicitly disregarded by the parties or judge(s) for any category of AP.	19%	20%
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Chart 5

Question 5: % of respondents indicating that lawyers/judge(s) implicitly disregarded disclosure requirements



Whether AP should be presumptively exempt or not (Question 6)

Question 6 asked judges to indicate whether each of the sixteen AP categories should be presumptively exempt from Rule 26 mandatory disclosure requirements. Question 6 also provided space for judges to list exceptions for any AP category if they indicated that the category should be presumptively exempt “with some exceptions” (or if they indicated that the category should **not** be presumptively exempt “with some exceptions”). Their responses are summarized in Table 6, Chart 6A, and Chart 6B and presented in more detail in Appendix 6 as explained below.

Overall, judges did not agree about which categories of adversary proceedings should and should not be presumptively exempt. For each AP category, a sizeable number of judges thought the category should be exempt and another sizeable number thought it should not be. The percentage of respondents endorsing exemption ranged from 31% to 60% across the sixteen categories; similarly, the percentage of respondents endorsing non-exemption ranged from 34% to 64% across the categories.

For each AP category, Table 6 shows the percentage of respondents that indicated the AP category:

- should be presumptively exempt from mandatory disclosure requirements,
- should not be presumptively exempt,
- should be presumptively exempt with exceptions **or** not be presumptively exempt with exceptions (combined into one).

The last item listed above combines two response options (presumptively exempt, with exceptions and not presumptively exempt, with exceptions). For purposes of Table 6, we combined these response options because judges often listed a statement of broad exception along with these responses, and it was not always clear whether the stated exception would best be handled as an exception to presumptive exemption or as an exception to no presumptive exemption for the given AP category. It was clear, however, that judges providing either response thought the determination of whether a particular type AP should be exempt, or not, depended on certain factors or exceptions.

Table 6

Question 6. What categories of APs do you believe should be presumptively exempt under Bankruptcy Rule 7026 from Civil Rule 26 mandatory discovery requirements?

Question 6	Adversary Proceedings Categories	Percentage of respondents (n=121) selecting the given response:		
		Responses Choice 1: Whole category should be presumptively exempt.	Response Choice 2: None of the category should be presumptively exempt.	Response Choice 3 or 4: Category should be presumptively exempt OR not, with exceptions.
6a	§542 - turnover of property	52%	36%	12%
6b	§544 - powers of trustee	40%	52%	7%
6c	§547 - preference	32%	57%	13%
6d	§548 - fraudulent conveyance	31%	63%	6%
6e	Validity, priority or extent of lien	40%	50%	10%
6f	Approval of sale of property of the estate and of a co-owner	60%	34%	6%
6g	Objection/revocation of discharge	36%	59%	5%
6h	Revocation of confirmation	38%	57%	5%
6i	§523(a)(2) - credit card abuse/false pretenses	40%	52%	8%
6j	§523(a)(5) - support/alimony	46%	46%	7%
6k	§523(a)(8) - student loan	42%	50%	8%
6l	§523(a)(15) - divorce/separation property settlement/decree	45%	50%	5%
6m	Injunctive relief - reinstatement of stay	55%	40%	4%
6n	Subordination of claim	33%	64%	3%
6o	Declaratory judgment	36%	55%	9%
6p	Determination of removed cause of action	35%	59%	7%

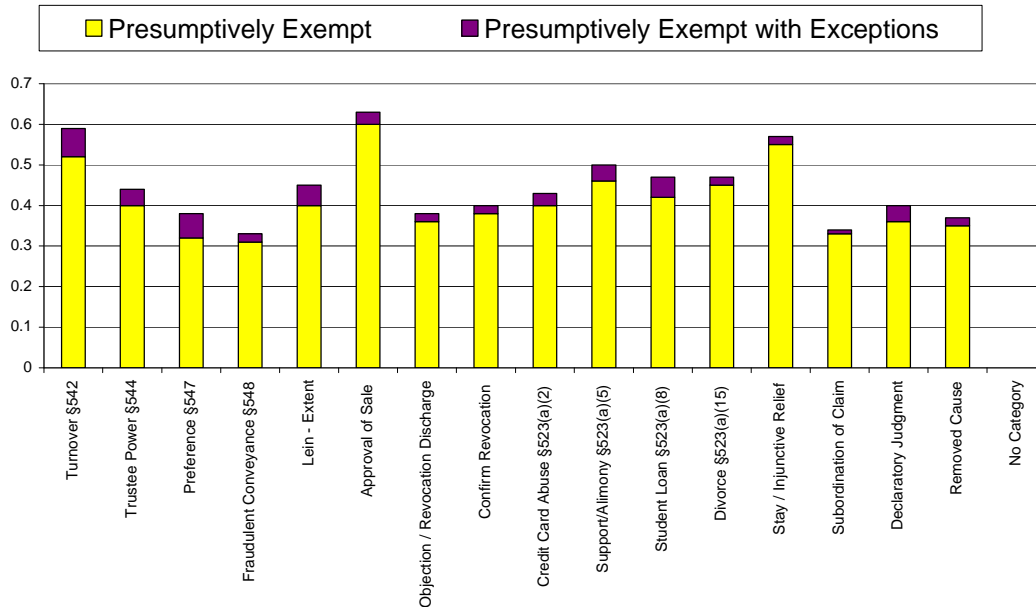
Although for purposes of Table 6 -- as explained in the prior paragraph -- we combined the two response options that involve exceptions, we do have separate data for each of those two response options. Chart 6A and Chart 6B together (see below) and Appendix 6 show data for each AP category including data for each of the two response options that involve exceptions. In other words, Charts 6A and 6B and Appendix 6 show the percentage of respondents that indicated that a listed AP category:

- should be presumptively exempt from mandatory disclosure requirements,
- should not be presumptively exempt,
- should be presumptively exempt, with exceptions,
- should not be presumptively exempt, with exceptions.

Chart 6A



Question 6: % of respondents indicating that AP should be presumptively exempt (or presumptively exempt w/exceptions)

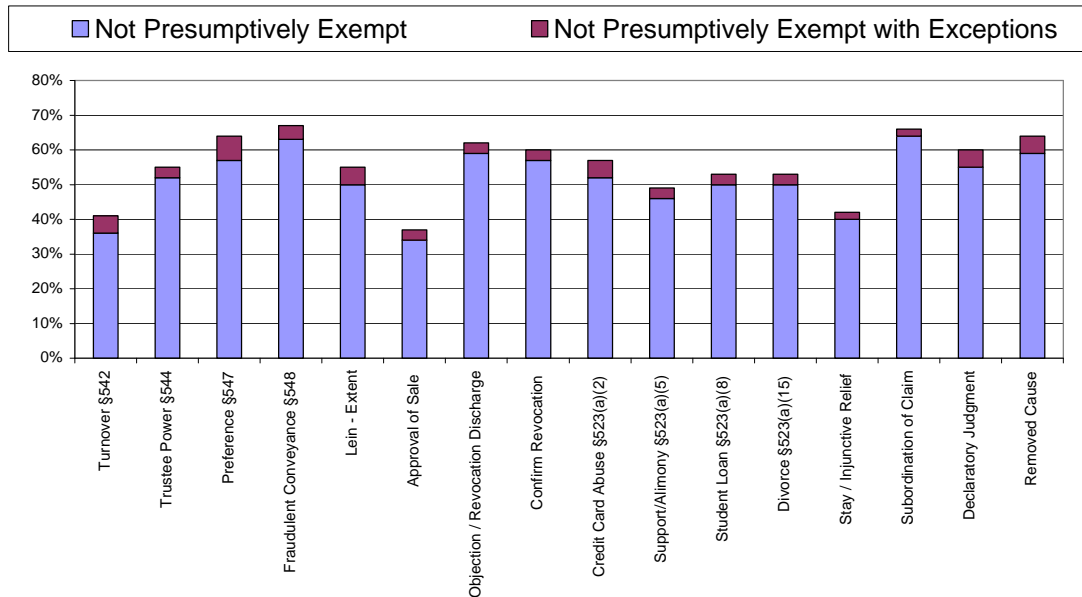


From the data recorded in Chart 6A and Appendix 6, the largest percentages of respondents indicated the following should be presumptively exempt (and presumptively exempt with exceptions):

- Approval of sale of property of the estate and of a co-owner (60% exempt; 3% exempt with exceptions);
- §542 – turnover of property (52% exempt; 7% exempt with exceptions);
- Injunctive relief – reinstatement of stay (55% exempt; 2% exempt with exceptions); and
- §523(a)(5) - support/alimony (46% exempt; 4% exempt with exceptions).

Chart 6B

Question 6: % of respondents indicating that AP should not be presumptively exempt (or not presumptively exempt w/exceptions)



As seen in Chart 6B and Appendix 6, the categories the largest percentage of respondents thought should **not** be presumptively exempt (and should **not** be presumptively exempt with exceptions) are:

- §548 - fraudulent conveyance (63% not exempt; 4% not exempt with exceptions);
- Subordination of claim (64% not exempt; 2% not exempt with exceptions);
- §547 - preference (57% not exempt; 7% not exempt with exceptions);
- Determination of removed cause of action (59% not exempt; 5% not exempt with exceptions);
- Objection/revocation of discharge (59% not exempt; 3% not exempt with exceptions);
- Revocation of confirmation (57% not exempt; 3% not exempt with exceptions); and
- Declaratory judgment (55% not exempt; 5% not exempt with exceptions).

Appendix 6 also provides additional detail about the responses. For example, it lists specific exemptions respondents choose to identify when they indicated that the category should be presumptively exempt “with some exceptions” or that the category should not be presumptively exempt “with some exceptions.” Appendix 6 also shows other more general comments respondents made with respect to the answer they chose for Question 6.

Consolidated Summary of Responses to Open-ended Questions 7 & 8

The comments respondents gave for Questions 7 and 8 are summarized in Appendix 7. These are open-ended questions as follows:

Question 7: (Optional) Please further explain why certain APs should or should not be exempt from mandatory disclosure of Rule 26.

Question 8: We welcome any additional comments or suggestions you may have regarding the application of Rule 26 disclosure requirements to adversary proceedings.

Summary and Conclusions

AP Categories Respondents Appear to Believe Should be Presumptively Exempt

Judges’ responses to the questionnaire suggest certain categories of adversary proceedings (AP) that the Advisory Committee may wish to recommend for presumptive exemption from the mandatory disclosure requirements of Rule 26 (mandatory disclosures), but with clearly stated exceptions.

From the sixteen categories of adversary proceedings listed in Chart 6A and Appendix 6 (Detailed Listing of Responses to Question 6), the highest percentages of respondents identified the following AP categories for presumptive exemption from the mandatory disclosures (and for presumptive exemption with exceptions):

- Approval of sale of property of the estate and of a co-owner;
- §542 – turnover of property;
- Injunctive relief – reinstatement of stay;
- §523(a)(5) - support/alimony.

Questions 1 through 5 respectively of the questionnaire asked judges to identify AP categories:

1. that are generally resolved before the due dates under Rule 26(a) mandatory disclosures (judges were asked to answer in three subparts: separately for Rule 26(a)(1)-26(a)(3));
2. that generally involve little or no discovery;
3. where the responding judge generally orders that mandatory disclosures are not appropriate under the circumstances of the particular AP.
4. where all affected parties generally stipulate to limited or no mandatory disclosures in AP; and
5. where lawyers/judges(s) implicitly disregarded mandatory disclosures (judges were asked to answer in two subparts: with respect to lawyers and judges separately).

When a large, or relatively large, percentage of judges selected an AP category listed under any one of the criteria listed above, that could be an indication that that category is one that the Committee might want to consider for presumptive exemption. The most frequently identified AP categories that survey respondents selected when answering Questions 1 through 5 were:

- Approval of sale of property of the estate and of a co-owner;
- §542 – turnover of property;
- Injunctive relief – reinstatement of stay;
- §523(a)(2) - credit card abuse/false pretenses;
- §523(a)(5) - support/alimony;
- §544 – powers of trustee; and
- Validity, priority, or extent of lien.

The Committee might decide that these findings indicate that certain of the AP categories listed in the three prior paragraphs are candidates for presumptive exemption. Some proposed exceptions to presumptive exemption for each AP category are described in detail in Appendix 6. Appendix 7 also identifies some judge-provided suggestions and recommendations for exceptions.

AP Categories that Respondents Appear to Believe Should Remain Presumptively Not Exempt

Judges' responses to the questionnaire suggest that certain AP categories should not be presumptively exempt from the mandatory disclosures. There again are judge-suggested exceptions within certain AP categories.

From the sixteen AP categories listed in Chart 6B and Appendix 6, the highest percentages of respondents identified the following AP categories as presumptively not exempt (and as presumptively not exempt with exceptions):

- §548 - fraudulent conveyance;
- Subordination of claim;
- §547 - preference;
- Determination of removed cause of action;
- Objection/revocation of discharge;
- Revocation of confirmation; and
- Declaratory judgment.

Questions 1 through 5 of the questionnaire asked judges to identify AP categories that meet the criteria listed above in the first section of this Summary and Conclusions. When large, or relatively large, percentages of judges selected an AP category under some or all of those criteria, that could be an indication that that category may be a candidate for presumptive exemption. The least frequently identified AP categories that survey respondents selected when answering Questions 1 through 5 indicate that those categories most likely are not good candidates for presumptive exemption. The lowest percentages of judges selected in answering Questions 1 through 5 were:

- fraudulent conveyance; and
- subordination of claim.

The Committee might read these findings to indicate that some or all the categories listed in the prior two paragraphs may not be likely candidates for presumptive exemption or that those categories might best be considered not presumptively exempt.

Rule 26 of the Federal Rules of Civil Procedure

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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

(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, 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 that the disclosing party may use to support its claims or defenses, unless solely for impeachment, 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 that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(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.

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

- (i) an action for review on an administrative record;
- (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;
- (iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;
- (iv) an action to enforce or quash an administrative summons or subpoena;
- (v) an action by the United States to recover benefit payments;
- (vi) an action by the United States to collect on a student loan guaranteed by the United States;
- (vii) a proceeding ancillary to proceedings in other courts; and
- (viii) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures -- if any -- are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or

because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written

questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act

upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good

faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) that the disclosure or discovery not be had;
- (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition, after being sealed, be opened only by order of the court;
- (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person

provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns

that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made:

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court

may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: JEFF MORRIS, REPORTER
RE: MANDATORY DISCLOSURE IN ADVERSARY PROCEEDINGS
DATE: SEPTEMBER 18, 2002

Rule 26 of the Federal Rules of Civil Procedure requires a series of actions by parties including the disclosure of a variety of information and participation in a discovery conference. This rule is made applicable to adversary proceedings by Rule 7026. The Advisory Committee has recently proposed an amendment to Rule 9014 to exempt contested matters from these mandatory disclosure requirements. Exempting these actions from the operation of the mandatory disclosure rules is necessary because many, if not most, contested matters conclude before the expiration of the mandatory disclosure periods. The question has been raised as to whether some categories of adversary proceedings should likewise be exempted from the mandatory disclosure requirements.

Rule 26 itself excludes certain kinds of actions from the mandatory disclosure requirements. Under Rule 26(a)(1)(E), there are eight categories of cases to which the disclosure obligations are inapplicable. The Committee Note to the Rule accompanying the 2000 amendment states that the enumerated actions involve "little or no discovery in most cases." Thus, the Civil Rules recognize that it is appropriate to limit the application of the mandatory disclosure rules when they are not necessary.* There may be a number of categories of adversary proceedings that should be exempted from these disclosure on the grounds that they generally are resolved prior to the conclusion of the mandatory disclosure periods. The range of adversary proceedings is essentially

* Interestingly, Rule 26(a)(1)(E)(vi) excludes "an action by the United States to collect on a student loan guaranteed by the United States." Section 523 (a)(8) actions may often present the same issues, although matters of proof relevant to a finding of undue hardship can sometimes require significant factual and expert testimony discovery.

unlimited, and the premise of Rule 26 is that it applies to all civil actions except the eight listed in Rule 26(a)(1)(E). It seems appropriate to determine whether any particular categories of adversary proceedings should be exempted from the mandatory disclosure provisions made applicable in adversary proceedings by Rule 7026.

The primary reason to exclude some adversary proceedings from the mandatory disclosure requirements is that the actions are resolved quickly. Determining which actions conclude quickly enough might be accomplished most effectively by studying the case statistics compiled by the Administrative Office. To the extent that the information is unavailable or insufficient to reach a conclusion, it may be appropriate to conduct additional study through the Federal Judicial Center to identify categories of adversary proceedings that usually involve limited discovery and that are resolved relatively quickly. I conducted an unscientific survey of attorneys throughout the country, and it would appear that the mandatory disclosure requirements of Rule 26, made applicable to both adversary proceedings and contested matters by Bankruptcy Rules 7026 and 9014, respectively, are honored much more in their breach than followed. If these requirements are to be followed, and the integrity of the rules protected, then it would seem prudent to determine the appropriate limits of the rule and propose an amendment that will exclude some adversary proceedings from the mandatory disclosure rules and leave them in place, consistent with district court practice, for the remaining actions.

Preliminary Research Design

**Should Certain Types of Adversary Proceedings
Be Exempt, under the Bankruptcy Rules,
from Civil Rule 26 Mandatory Disclosure Requirements?**

Robert J. Niemic*

Research Division
Federal Judicial Center

September 15, 2003

* A special thanks goes to Elizabeth C. Wiggins (Beth Wiggins) for her advise, consultations, and drafting suggestions.

Background

At the October 2002 meeting of the Committee, the Reporter presented his September 18, 2002 memorandum regarding Mandatory Disclosure in Adversary Proceedings. See Attachment 1. The memorandum queried whether some categories of adversary proceedings (APs) should be exempt from the mandatory disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure, which are made applicable to AP's by Rule 7026. The particular provisions that are relevant to mandatory disclosure are Fed. R. Civ. P. 26(a)(1), 26(a)(2), 26(a)(3), and 26(f). The hypothesis in the research project the Reporter proposed is this: whether applying the provisions of Rule 26(a) and 26(f) to adversary proceedings (APs) in certain types of AP's is meaningless--because many, if not most, of these types of adversary proceedings conclude before the expiration of the mandatory disclosure periods.ⁱ

At the October 2002 meeting, the Committee Chair asked the Federal Judicial Center to identify how frequently APs conclude before the expiration of the mandatory disclosure period and in which types of APs, if any, this commonly occurs. The Chair asked us at the Center to look into whether this information could be collected electronically and to report back at the April 2003 Committee meeting. At that meeting, we reported that it was not feasible to electronically gather the information needed for the study from existing AO or FJC databases for several interrelated reasons. The Committee Chair then asked us to further explore whether relevant information was accessible electronically and, if it was not, develop a proposal for obtaining it through a survey.

Our further exploration included reviewing randomly selected electronic docket sheets of closed APs. We observed that we could not rely on these docket sheets to tell us whether mandatory disclosure had taken place in most of the APs we reviewed, even those where the time between filing and disposition of the AP was over a year. Whether the AP lasted a year or less, we observed only occasional references to mandatory disclosure and even more rare instances where a court docketed the occurrence of disclosure. After further consideration, including review of database information and closed-case docket sheets, we concluded that the research objectives described in the Reporter's September 2003 memorandum would be better met using a survey for several interrelated reasons. (See *infra* Rationale for a Survey on page 3.)

Before describing the rationale and design of the proposed survey, we summarize the Center's prior research regarding the implementation of the disclosure provisions in the bankruptcy courts. Attachment 2 is the full report, which was issued in December 2000 and authored by Beth Wiggins and

ⁱ This issue concerning the applicability of the disclosure provisions to APs is related in general terms to a pending amendment to Rule 9014, which would exempt contested matters from the mandatory disclosure requirements of Rule 26. That amendment, if not disapproved, will become effective on December 1, 2004.

Shannon Wheatman. The reportⁱⁱ describes the history of the Rule 26(a), 26(d), and 26(f) “opt out” provisions, as amended December 1, 1993. The 1993 version of the Rule gave courts the option to exempt all cases or categories of cases from some or all of the Rule 26 requirements. The report also provides the findings of the Center’s 1994-1995 study to determine whether Bankruptcy Courts had opted out of the disclosure provisions for contested matters and adversary proceedings.

Similarly, the Wiggins/Wheatman report describes the history of the Rule 26(a) and 26(f) provisions, as amended December 1, 2000.ⁱⁱⁱ With respect to those amendments, the “Civil Rules Advisory Committee added language to the Note accompanying the amendments indicating that bankruptcy proceedings do not fall within [an exempt category of proceedings] and that ‘application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules.’^{iv} The report provides the findings of the Center’s updated study to determine the latest disclosure-related requirements in effect for contested matters and adversary proceedings in the districts under Rule 26, prior to its December 1, 2000 amendment.^v

Survey Design

The balance of this memorandum presents a survey design for a questionnaire to obtain bankruptcy judge opinions and views on specific questions, related to the following issues:

- whether some categories of APs should be exempt from the mandatory disclosure requirements of Rule 26 and, more specifically,
- whether applying the provisions of Rule 26(a) and 26(f) to APs in certain types of AP’s is meaningless--because many, if not most, of these types of APs conclude before the expiration of the mandatory disclosure periods or because certain types of APs involve little or no exchange of information.

Rationale for a Survey

We recommend, as described in more detail below, administering a questionnaire to bankruptcy judges. We think the survey method will lead to more reliable, more comprehensive, and more relevant information related to these issues than would manual or other data collection from case files or dockets.

ⁱⁱ. See Implementation of the Disclosure Provisions in Federal Rule Civil Procedure 26 by the United States Bankruptcy Courts 1 (Federal Judicial Center 2000) (unpublished), available at www.fjc.gov under the category of unpublished Center reports.

ⁱⁱⁱ. *Id.*, at 2.

^{iv}. *Id.*

^v. *Id.*, at 3-5.

Although some information about type of APs exists in electronic form, its use would require hand-checking it against docket sheets due to the lack of its specificity and uniformity across districts. Even if such information existed electronically or could be efficiently collected manually, Rule 26 mandatory disclosure provisions are not uniformly applied for APs across all bankruptcy courts. And, researchers have not documented the inter-district (and perhaps even intra-district) differences in application since the 2000 amendments became effective. Thus, if no disclosure takes place in an AP, docketed information would probably not tell us why (e.g., party stipulation, judge waiver of the disclosure requirements, or implicit disregard for the requirements).

A survey of bankruptcy judges could provide neutral and reliable information about:

- the mandatory requirements of Rule 26 making a difference in certain types of APs;
- what types of APs should be exempt from these Rule 26 provisions;
- at approximately what rate have attorneys voluntarily complied with the Rule 26 provisions;
- a court's actively pursuing, or not pursuing, compliance with the provisions; or
- reasons a court might or might not actively pursue compliance for certain types of APs.

The response rate of bankruptcy judges to Center questionnaires is generally very high, and judges have consistently provided insightful information through survey methods. A side benefit of surveying bankruptcy judges is that it will inform them of the Committee's concerns and provide them with an efficient way to provide input.

Questionnaire

Possible questions to be used in the questionnaire are listed below in general form. The questions in the final questionnaire will be drafted in a more precise and questionnaire-appropriate manner. Multiple choice or open-ended questions will be used depending on the nature of the question and the range of possible responses. Following below are some potential questions:

Do you think certain types of adversary proceedings (APs) should be exempt, under the Bankruptcy Rules, from Civil Rule 26 mandatory disclosure requirements?

- Yes
- No
- Not sure

Please mark your answers for Questions ___ - ___ in the corresponding columns on page ___ (the facing page).

If yes, what types of adversary proceedings: *(Check all that apply or write in)*

What types of APs are generally resolved before the due date for initial disclosure? See Rule 26(a)(1), 26(f). *(Check all that apply or write in)*

What types of APs are generally resolved before the due date for disclosure of expert testimony? See Rule 26(a)(2). *(Check all that apply or write in)*

What types of APs are generally resolved before the due date for Pretrial disclosures? See Rule 26(a)(3). *(Check all that apply or write in)*

What types of APs are generally resolved before the conclusion of the all mandatory disclosure periods? *(Check all that apply or write in)*

What types of APs generally involve little or no discovery? *(Check all that apply or write in)*

For which types of APs are the mandatory disclosure requirements of Rule 26(a) honored in the breach or implicitly disregarded:

By the parties' lawyers?

By one or more judges of your district?

(Mark your answers to Questions ___ - ___ on page ___)

Types of Adversary Proceedings:

Type 1	Type 2	Type 3	Type 4	Type 5	Type 6	Type 7	Type 8	Others: (please specify)

At the end of the questionnaire, we will ask the judges for any additional comments they would like to provide.

A description of the broadly stated issues and a short background on mandatory disclosure will precede the survey questions, either in the cover letter or on the questionnaire cover/instructions sheet. The questions themselves will instruct the respondents about the issues and then ask for respondents' input. This will help ensure the judges' responses are well informed and considered. In designing the final questionnaire, however, we will take great care to avoid leading the respondents to certain positions, views, or answers.

Sample

A survey of a nationally representative sample of bankruptcy judges would most likely provide adequate information for the Committee's purposes (e.g., 25% of all bankruptcy judges from across the country would provide a nationally representative sample). However, there is some benefit to survey all bankruptcy judges in terms of providing them notice of issues the Committee is considering and giving them an opportunity to participate in the debate.

Committee Input

We would like the Committee's input as to whether to survey all or a sample of bankruptcy judges. We would also like the Committee to designate two or three members to work with us to develop and review the questionnaire before we send it out.

Attachments (2) [not included here]

Appendix 4

From: Thomas Small/Research/FJC 01/21/2004 10:49 AM

To: Bankruptcy Judges

Re: Questionnaire on Rule 26 mandatory disclosure in Adversary Proceedings in Bankruptcy

To: All Bankruptcy Judges

From: Thomas Small, Chair, Advisory Committee on Bankruptcy Rules, Judicial Conference of the U.S.

Dear Judge,

The purpose of this email is to ask you to complete a questionnaire on the mandatory disclosure provisions made applicable in adversary proceedings (APs) by Bankr. Rule 7026. The Advisory Committee on Bankruptcy Rules is considering whether to recommend an amendment to Bankr. Rule 7026 to make as-yet-unidentified categories of APs exempt from the mandatory disclosure provisions of Civil Rule 26. The Federal Judicial Center developed this questionnaire at the request of the Bankruptcy Rules Committee.

Responses via the Web

You can access the questionnaire by clicking on this link:

<http://156.132.47.230:8081/res/br7026f.nsf> . Please complete the questionnaire directly on this Web site. When you are finished with your responses, **press the submit button** at the end of the questionnaire to transmit the questionnaire to the FJC.

Due date

Please submit the questionnaire by January 30, 2004.

Non-attribution and confidentiality

Only a small number of staff within the Judicial Center's Research Division will have access to the completed questionnaires. They will report the findings in aggregate form only; responses will not be attributed to individual judges. Any information you provide that would permit anyone to identify you is confidential.

Questions

If you have technical problems, please contact Mark Trimble at the Federal Judicial Center, Ph: 202.502.4221, Email: mtrimble@fjc.gov . If you have questions relating to the substance of the questionnaire or your responses, please contact Bob Niemic at the Center, Ph: 202.502.4074, Email: bniemic@fjc.gov .

Please accept in advance my personal thanks and those of the Advisory Committee on Bankruptcy Rules for your response.

A. Thomas Small
Chair, Advisory Committee on Bankruptcy Rules

Appendix 5

Appendix 5 is the survey questionnaire, which you will find in the accompanying PDF file.

If you cannot open the PDF file, you can access the questionnaire on the FJC Intranet (DCN) at the following address:

<http://156.132.47.230:8081/res/br7026f.nsf>

The final and full version of this report will soon be posted to the FJC's public and intranet Web sites. At that time, the questionnaire will be embedded into the report as Appendix 5, in place of the words now shown here.

Detailed Listing of Responses to Question 6

For a summary of this Appendix 6, see Table 6 and accompanying text in the body of this report.

Based on responses to Question 6, the percentages listed in the last column of the table in this Appendix 6 identify what *percent of survey respondents picked the corresponding category of AP* as a category that:

- should be presumptively exempt from mandatory disclosure requirements,
- should not be presumptively exempt,
- should be presumptively exempt, with specified exceptions identified by respondents, or
- should not be presumptively exempt, with specified exceptions identified by respondents.

Question 6. What categories of APs do you believe should be presumptively exempt under Bankruptcy Rule 7026 from Civil Rule 26 mandatory discovery requirements?

Please review the following categories of APs and click one circle for each category to indicate whether you believe the AP category, or a part of the AP category, should be exempt from Rule 26 mandatory disclosure requirements. [Examples from questionnaire are not shown here.]

	Adversary proceedings categories:	Percent³ of Respondents (n = 121)⁴ selecting the given AP category:
6a.	§542 - turnover of property	<p>52% The whole category should be presumptively exempt. Comments:</p> <ul style="list-style-type: none"> • No time for disclosures prior to the hearing. Handled on an expedited basis with hearings usually set within ten days of filing. <p>36% None of the category should be presumptively exempt. 7% The category should be presumptively exempt, with some exceptions, including:</p>

³ Percentages may not add to 100% due to rounding.

⁴ Three respondents did not answer Questions 6a to 6q.

		<p>Comments:</p> <ul style="list-style-type: none"> • Plaintiff should designate the property and the basis for its claim that the property is property of the estate. • Facts relating to trustee's claim to the property and facts relating to defendant's claim, if any, to the property. • True title disputes. • In court's discretion for more complex cases, 26(a) should apply. • Large ch. 11 or where jury demand • Actions that require discovery concerning the whereabouts of the asset in question. • Where a party desires to follow the disclosure procedures. • Discovery re: possession. • 26(a)(3) for pretrial in matters that will take more than 1/2 day to try. <p>5% The category should NOT be presumptively exempt, with some exceptions, including:</p> <p>Comments:</p> <ul style="list-style-type: none"> • Car turnovers. • Matters dealing with significant assets, possibly. • AP's involving only small monetary amounts, such as suits on small accounts receivable. • Amount at issue less than \$25000. • Non-complex proceedings.
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Adversary proceedings categories

Percent of Respondents (n = 121)⁵ selecting the given response:

6b.	§544 - powers of trustee	<p>40% The whole category should be presumptively exempt.</p> <p>Comment:</p> <ul style="list-style-type: none"> • No clue what these AP's are about. <p>52% None of the category should be presumptively exempt.</p> <p>4% The category should be presumptively exempt, with some exceptions including:</p> <p>Comments:</p> <ul style="list-style-type: none"> • Matters above a specified dollar amount, perhaps \$100,000. • Fact-based perfection and similar deutes. • Discovery re: possession. • 26(a)(3) for the pretrial in matters that will take more than 1/2 day to try. • Large ch. 11 or where jury demand.
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⁵ Three respondents did not answer Questions 6a to 6q.

		<ul style="list-style-type: none"> • Where a party desires to follow the disclosure procedures. <p>3% The category should NOT be presumptively exempt, with some exceptions including: Comment:</p> <ul style="list-style-type: none"> • Amount at issue less than \$25,000.
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6c. §547 - preference	<p>32% The whole category should be presumptively exempt.</p> <p>57% None of the category should be presumptively exempt.</p> <p>6% The category should be presumptively exempt, with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • Matters above a specified dollar amount. • Issues related to defenses to the preference action. • Discovery re: possession. • 26(a)(3) for the pretrial in matters that will take more than 1/2 day to try. • Full disclosure of all items relating to specific defenses. <p>7% The category should NOT be presumptively exempt, with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • AP's involving only small monetary amounts. • Amount at issue less than \$25,000 (2 responses). • Non-complex proceedings. • Small cases (e.g., below \$25,000) and affirmative defense cases.
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Adversary proceedings categories

Percent of Respondents (n = 121)⁶ selecting the given response:

6d. §548 - fraudulent conveyance	<p>31% The whole category should be presumptively exempt.</p> <p>63% None of the category should be presumptively exempt.</p> <p>2% The category should be presumptively exempt, with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • Above a specified dollar amount. • Where a party desires to follow the disclosure procedures. <p>4% The category should NOT be presumptively exempt,</p>
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⁶ Three respondents did not answer Questions 6a to 6q.

		<p>with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • Amount at issue less than \$25,000. • Non-complex proceedings. • Small cases of constructive fraudulent transfer.
6e.	Validity, priority or extent of lien	<p>40% The whole category should be presumptively exempt. 50% None of the category should be presumptively exempt. 5% The category should be presumptively exempt, with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • Above a specified dollar amount. • Each lien holder should be required to provide documentation establishing the lien. • Multi-party disputes. • Where the evidence is entirely derived from the public records. • If the question of value is at issue. • Where a party desires to follow the disclosure procedures. <p>5% The category should NOT be presumptively exempt, with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • Emergencies, e.g., emergency determination required because of sale, refinancing, contested borrowing, or contested use of cash collateral. • Amount at issue less than \$25,000. Non-complex proceedings.
6f.	Approval of sale of property of the estate and of a co-owner	<p>60% The whole category should be presumptively exempt. Comments:</p> <ul style="list-style-type: none"> • Typically, for motions to approve sale, the applicant describes the transaction fully. <p>34% None of the category should be presumptively exempt. 3% The category should be presumptively exempt, with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • Discovery related to liens or claims to the property. • Complex proceedings.

		<ul style="list-style-type: none"> • Actions where an expert is to testify regarding value. • Where a party desires to follow the disclosure procedures. <p>3% The category should NOT be presumptively exempt, with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • Amount at issue less than \$25,000. • Matters that must be determined on an expedited or emergency basis.
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6g. Objection/revocation of discharge	<p>36% The whole category should be presumptively exempt. 59% None of the category should be presumptively exempt. 2% The category should be presumptively exempt, with some exceptions, including: Comments:</p> <ul style="list-style-type: none"> • Discovery re: possession. • 26(a)(3) for pre trial in matters that take more than 1/2 day to try. • Where a party desires to follow the disclosure procedures. • fact in dispute & witnesses to be called & exhibits introduced. <p>3% The category should NOT be presumptively exempt, with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • Amount at issue less than \$25,000. • Non-complex proceedings.
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6h. Revocation of confirmation	<p>38% The whole category should be presumptively exempt. 57% None of the category should be presumptively exempt. Comments:</p> <ul style="list-style-type: none"> • This AP rarely occurs. <p>2% The category should be presumptively exempt, with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • Where a party desires to follow the disclosure procedures. • Fact in dispute & witnesses to be called & exhibits introduced. <p>3% The category should NOT be presumptively exempt,</p>
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		<p>with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • Where a prior court order requires debtor to take some action or confirmation will be revoked, & debtor failed to take such action. • Non-complex proceedings.
6i.	§523(a)(2) - credit card abuse/false pretenses	<p>40% The whole category should be presumptively exempt. Comment:</p> <ul style="list-style-type: none"> • Never had a case (that did not settle) take more than 3 hours to try. Respondent waives 26(a)(3) in short cause matters. • Respondent has mandatory disclosure order, if amount in controversy less than \$10,000 & only one such complaint was filed against Debtor. <p>52% None of the category should be presumptively exempt. 3%The category should be presumptively exempt, with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • Above a specified dollar amount. • Where a party desires to follow the disclosure procedures. • Fact in dispute & witnesses to be called & exhibits introduced. <p>5% The category should NOT be presumptively exempt, with some exceptions including: Comments:</p> <ul style="list-style-type: none"> • Plaintiff should be required to specify the bases for its contention that the debtor did not intend to repay debt. • Expert exchange. • Amount at issue less than \$25,000. • Non-complex proceedings. • Court should have flexibility if pro se party(ies).
6j.	§523(a)(5) - support/alimony	<p>46% The whole category should be presumptively exempt. 46% None of the category should be presumptively exempt. 4% The category should be presumptively exempt, with some exceptions including: Comment:</p> <ul style="list-style-type: none"> • Usually determined as matter of law or SJ.

		<p>Possibly could be discovery about intent of order.</p> <ul style="list-style-type: none"> • If the state court judgment is based on a jury trial. • Where documentation is ambiguous. <p>Comments:</p> <ul style="list-style-type: none"> • Amount at issue less than \$25,000. • Information required to determine amount of claim. <p>3% The category should NOT be presumptively exempt, with some exceptions:</p> <p>Comments:</p> <ul style="list-style-type: none"> • Amount at issue less than \$25,000. • Non-complex proceedings. • Court should have flexibility if pro se party(ies).
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6k.	§523(a)(8) - student loan	<p>42% The whole category should be presumptively exempt.</p> <p>50% None of the category should be presumptively exempt.</p> <p>5% The category should be presumptively exempt, with some exceptions including:</p> <p>Comments:</p> <ul style="list-style-type: none"> • Above a specified dollar amount. • Debtor's income, expenses and relevant circumstances should be provided. • Factual issues of hardship (2 respondents). • 26(a)(3) for pretrial in matters that will take more than 1/2 day to try. • Expert or medical evidence which when given leads to quick resolution. • Where a party desires to follow the disclosure procedures. <p>3% The category should NOT be presumptively exempt, with some exceptions including:</p> <p>Comments:</p> <ul style="list-style-type: none"> • Amount at issue less than \$25,000. • Non-complex proceedings. • Court flexibility if debtor is pro se.
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6l.	§523(a)(15) - divorce/separation property settlement/decree	<p>45% The whole category should be presumptively exempt.</p> <p>Comment:</p> <p>Respondent has pretrial order that eliminates need for the Rule 26 disclosures. Order is more effective</p>
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		<p>& gets at heart of proof more quickly.</p> <p>50% None of the category should be presumptively exempt.</p> <p>2% The category should be presumptively exempt, with some exceptions including: Comment: <ul style="list-style-type: none"> • If the state court order is based on a jury trial. </p> <p>3% The category should NOT be presumptively exempt, with some exceptions including: Comments: <ul style="list-style-type: none"> • Non-complex proceedings. • Court flexibility if debtor is pro se. • Amount at issue less than \$25,000. </p>
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6m	Injunctive relief - reinstatement of stay	<p>55% The whole category should be presumptively exempt. Comment: <ul style="list-style-type: none"> • For the most part, resolved at TRO hearing or within 2 weeks (3 respondents). • Generally, time is of the essence; prolonged discovery with disclosures would render matter moot. </p> <p>40% None of the category should be presumptively exempt.</p> <p>2% The category should be presumptively exempt, with some exceptions including: Comment: <ul style="list-style-type: none"> • Non-consumer cases. </p> <p>2% The category should NOT be presumptively exempt, with some exceptions including: Comment: <ul style="list-style-type: none"> • Emergencies. </p>
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	Adversary Proceedings	Percent of Respondents (n = 121)⁷ selecting the given response:
6n.	Subordination of claim	<p>33% The whole category should be presumptively exempt.</p> <p>64% None of the category should be presumptively</p>

⁷ Three respondents did not answer Questions 6a to 6q.

	<p>exempt.</p> <p>1% The category should be presumptively exempt, with some exceptions including:</p> <p>Comments:</p> <ul style="list-style-type: none"> • Where a party desires to follow the disclosure procedures. <p>2% The category should NOT be presumptively exempt, with some exceptions including:</p> <p>Comments:</p> <ul style="list-style-type: none"> • Amount at issue less than \$25,000. • Non-complex proceedings.
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60. Declaratory judgment	<p>36% The whole category should be presumptively exempt.</p> <p>55% None of the category should be presumptively exempt.</p> <p>4% The category should be presumptively exempt, with some exceptions including:</p> <p>Comments:</p> <ul style="list-style-type: none"> • Case by case decision. • Above a specified dollar amount. • 26(a)(3) disclosures for pre trial in matters to take more than 1/2 day to try. • Where a party desires to follow the disclosure procedures. <p>5% The category should NOT be presumptively exempt, with some exceptions including:</p> <p>Comments:</p> <ul style="list-style-type: none"> • In court's discretion, case-by-case depends on nature of relief. • Amount at issue less than \$25,000. • Non-complex proceedings. • Issues of law. • If tied to major litigation, major litigation generally should follow Rule 26. In small cases, it's just an added cost.
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6p. Determination of removed cause of action	<p>35% The whole category should be presumptively exempt.</p> <p>59% None of the category should be presumptively exempt.</p>
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		<p>2% The category should be presumptively exempt, with some exceptions including:</p> <p>Comments:</p> <ul style="list-style-type: none"> • Above a specified dollar amount. • Where a party desires to follow the disclosure procedures. <p>5% The category should NOT be presumptively exempt, with some exceptions including:</p> <p>Comments</p> <ul style="list-style-type: none"> • Amount at issue less than \$25,000. • Only as to issues & facts already determined by a competent court of law. • If the removed action has disclosure requirements already in place prior to removal, they should be respected and enforced. Otherwise, it should be up to the presiding bankr. judge whether any disclosure requirements should be required. • Major litigation generally should follow Rule 26. In small cases, it's just an added cost.
6q.	Other AP categories as specified by respondents:	Only one response from one respondent who said no non-core matters should be presumptively exempt.

Consolidated Summary of Responses to Questions 7 & 8

Question 7: (Optional) Please further explain why certain APs should or should not be exempt from mandatory disclosure of Rule 26.

Question 8: We welcome any additional comments or suggestions you may have regarding the application of Rule 26 disclosure requirements to adversary proceedings.

The comments respondents gave for both Question 7 and 8 are consolidated in the summary of responses shown below.

- A. Rule 26 mandatory disclosures are useful in facilitating prompt resolution of AP: (7 respondents),**
- Rule 26 mandatory disclosures work well in APs and are useful in moving a case forward so that it can be set for prompt trial.
 - Although pretrial orders may preempt Rule 26 disclosure requirements, when in place the requirements are useful in facilitating prompt resolution of issues.
 - The fact that many may ignore Rule 26 is no reason to remove its operation.
 - The creation of categorical exemption would create unnecessary complexity. Consistency and uniformity are important considerations in federal civil litigation; no category of adversary proceedings is so simple as to justify ignoring the rules of disclosure.
 - If necessary, the court can limit mandatory disclosure requirements when it is not needed in specific cases.
 - In accordance with the current iteration of the rule, one judge stated that courts should deal with exemptions as exceptions to the general rule on a case-by-case basis. For instance, in more complex bankruptcy proceedings, mandatory disclosure requirements are useful and their costs can be justified and afforded by all of the parties.
- B. Rule 26 mandatory disclosures requirements should not apply in bankruptcy proceedings: (6),**
- Mandatory disclosure requirements should not apply in bankruptcy proceedings.
 - Rule 26 requirements are unworkable and unnecessarily complicate the bankruptcy process, whereas exemption would facilitate the prompt resolution of the vast majority of bankruptcy matters.
 - Mandatory disclosures requirements are an ineffective bankruptcy management tool.

- The disclosure requirements waste judicial resources and burden the parties with unnecessary costs, which conflicts with the impecunious nature of most bankruptcy proceedings and is incompatible with the fast pace of APs.
- Generally all parties are in a financially impaired position from the beginning, and this financial exigency usually promotes a more cooperative and less costly process of informal discovery and exchange without relying on formal discovery requirements.
- One respondent found that cases are resolved with less expense if rigid discovery rules are not in place.
- In spite of mandatory disclosure provisions, Rule 26 requirements are often ignored by some courts and the parties due to the rarity of discovery issues. One respondent noted that his/her district has gone as far as implementing an across-the-board Rule 26 exemption for all bankruptcy proceedings, while another judge stated that his/her district had chosen in the past to “opt out” of most of the substantive sections of Rule 26.

C. Individual determination by court / parties:

1. Rule 26 mandatory disclosure requirements should be controlled by the judge / court: (9),

- Rule 26 requirements should not apply in every AP, unless the court so requires.
- The ability to institute Rule 26 discovery requirements should be left to the discretion of the court in each instance, or, if the circumstances warrant, by local bankruptcy rule, where judges can best determine whether required disclosure is useful to the proceedings.
- APs move more quickly and less litigation costs are incurred by the parties if the court sets appropriate discovery deadlines in each AP. Discovery-related issues can be handled through the use of pretrial and scheduling orders, establishing discovery deadlines and trial dates that are tailored to the individual case.
- Although Rule 26 is not subject to blanket exemption, one respondent noted, his/her district implemented a local rule allowing for exemption of mandatory disclosure by order of the court or by stipulation of the parties, allowing each case to be considered on its own merits rather than by relying on any presumption.

2. Rule 26 mandatory disclosure requirements should be controlled by the parties: (8),

- Rule 26 requirements should not apply in every case, unless the parties so request or think it would be helpful to the litigation.
- As a general matter, the parties should make the decision as to how and at what cost they wish to conduct discovery.
- Often times the disclosure requirements of Rule 26 are bypassed; one respondent noted that practitioners in the district apparently do not demand compliance from one another so the matter of Rule 26 compliance does not arise. Unless someone requests it for a particular case, Rule 26 is not used or required, which initially leaves policing of discovery compliance up to the parties.

D. “Flexible” approaches to disclosure provisions: Some courts take a “flexible” approach to mandatory disclosure requirements, by adopting alternative or categorical approaches with regard to Rule 26.

1. Alternative approaches:

- One respondent stated that parties should comply with the disclosure requirements in all APs unless ordered not to by the court (by request of the parties or sua sponte) or by consent of the parties. It has been accepted that Rule 26 mandatory disclosure requirements should be honored, but generally discovery disputes are few, and standard court orders ease discovery compliance issues while insuring that maximum discovery is provided.
- The respondent maintains that no provision of Rule 26 should be deemed inapplicable until after a Rule 26 conference is held with the parties and either the court orders or the parties agree to waive the disclosure requirements. The respondent raises the issue expressly at the Rule 26 conference, and over 98 percent of the parties seek waiver of all mandatory disclosure provisions.
- Another district presumes mandatory disclosure requirements to be appropriate measures, however, recognizes that the parties know the cases better than the court. The mandatory disclosure requirements force the parties to act and then, if they want to avoid that effort, they can come together and inform the court that the disclosure requirements are not necessary.

2. Categorical approaches: Other courts adopt a categorical approach to mandatory disclosure provisions, exempting selected bankruptcy matters from Rule 26 requirements.

- One respondent issues a pretrial order in all APs that exempt parties from Rule 26 mandatory disclosure requirements, with the exception of turnover proceedings and actions brought under § 523(a)(5) and (15).

Another respondent spoke to part of this approach, stating that exemption should be used sparingly, if ever, in § 523 or § 757 actions where the debtor appears before the court pro se.

- One respondent who commented on § 523 actions noted that most § 523 claims settle and the cost of Rule 26 is prohibitive and unnecessary, another stated that mandatory disclosure provisions are an unfair trap for pro se litigants.
- Other matters possibly subject to categorical exemption include matters involving sales, borrowing, or use of cash collateral, which require an immediate emergency determination by the court because of a sale deadline or the debtors need for cash.
- Without resorting to categorical exemptions, one respondent also noted that mandatory disclosures can be helpful in limited scenarios, such as “larger” adversary proceedings involving multiple parties who are well represented, which either involve at least \$500,000 in controversy or where complicated scientific facts are involved.

E. No opinion / lack of experience in mandatory disclosure requirements: A few respondents to the questionnaire were unable to offer an opinion as to whether APs should be presumptively exempt or not.

- One respondent noted, however, that the current practice in his/her court operates to exempt APs from Rule 26 disclosure requirements in all cases except turnover matters, which are subject to time constraints.
- Another respondent stated that his/her court faces few discovery disputes and that he/she had little knowledge of whether counsel complied with Rule 26 disclosure requirements, although adding that the parties honor Rule 26 in the breach for the most part.
- Lastly, one respondent was unable to provide any comment in the questionnaire because of his/her lack of experience with Rule 26 disclosure requirements, in spite of eight years of service on the bench as a bankruptcy judge.

A bankruptcy judge from one district transmitted to the Center one overall response for all of that district’s bankruptcy judges.

END OF APPENDICES