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**Confronting Civil Discovery's Fatal Flaws**

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**Abstract**

Despite the conclusion of a recent study that discovery is working “effectively and efficiently” in the majority of cases, federal district courts and courts of appeals address discovery disputes in many more reported opinions today than they used to. This fact confirms the impression of many judges and lawyers that over-discovery, evasion, delay, and confrontation rather than cooperation remain problematic aspects of civil discovery practice. After examining the way in which civil discovery was intended to work, John S. Beckerman considers flaws inherent in the discovery process and shows why the ideal of cooperation with a minimum of judicial intervention is unachievable in a significant minority of cases.

First, the cooperative ethos of discovery clashes irreconcilably with the oppositional character and partisan norms of all other phases and attributes of adversarial litigation, including well articulated and widely accepted professional responsibility directives that many lawyers take to define what it means to be a litigator, to represent a client loyally, and to protect the client’s confidences. Second, the information-gathering and issue-defining functions performed by discovery in a notice-pleading regime require broad and copious discovery that often generates disputes. Third, the procedures provided by the Federal Rules of Civil Procedure for adjudicating discovery disputes are cumbersome and incorporate an inefficient incentive structure. Fourth, judges often neglect lawsuits in which counsel are engaged in discovery battles, with the result that the adversaries founder ever deeper into non-cooperation, confrontation and impasse. Fifth, many courts treat discovery problems with inappropriate leniency even when they involve egregious instances of obstruction, evasion or suppression, failing either to remove bad actors from the litigation arena or to impose sanctions that provide adequate disincentives to future misconduct. Sixth, irreversible changes in the conduct of business and practice of law have contributed indirectly to the persistence of discovery disputes, in particular, the exponential proliferation of documents resulting from the invention and ubiquity of high-speed copiers, the storage of data and documents on electronic media, increases in the size and complexity of transactions and lawsuits, and the growth of the legal profession and law firms.

Beckerman then probes the most often proposed solutions to discovery problems, including narrowing the scope of discovery ordinarily available under the Federal Rules of Civil Procedure, demanding more firm and constant judicial intervention from an early point in a lawsuit, and promoting greater education in and adherence to norms of professionalism and civility, and shows why none of these solutions is likely to succeed. He first analyzes the pending amendment of Rule 26 of the Federal Rules of Civil Procedure, which would narrow the scope of “attorney-managed” discovery, and which was approved by the Judicial Conference of the United States in September 1999 and is awaiting action by the Supreme Court. He concludes that, far from its intended effect of reducing discovery problems, the proposed amendment will actually increase discovery disputes and satellite litigation. Second, Beckerman demonstrates that certain economists’ analyses of discovery problems and their proposed solutions based on principles of cost internalization are flawed by misunderstanding of the conduct and nature of discovery in practice and by the substitution of economic efficiency alone for a host of values and policy concerns that should inform design of the litigation process. Third, he shows that although judges and lawyers have been calling for greater judicial supervision of discovery continuously for at least forty years, docket pressure, opportunity costs and the obnoxiously vituperative nature of discovery squabbles make it unrealistic to expect significant changes in judicial behavior. Fourth, he concludes that hardball and Rambo litigation tactics represent not merely a problem of civility, but a fundamental problem of professional responsibility that neither the bench nor bar has been willing to recognize for what it is or take responsibility for addressing effectively.

Beckerman concludes that discovery is riven to the core with irreconcilable theoretical and practical conflicts and will remain so despite recurring reform efforts, because of fundamental values that limit the possibility of effective changes to our litigation system. Even if it is illusory to think that discovery problems can be eliminated, given lawyerly and judicial reluctance to address discovery's central flaws and to assure the integrity of the discovery process in complex and high stakes cases, he suggests that reform could be achieved by restricting effort to the more limited goal of devising and announcing a clear ethic for lawyers participating in discovery and finding a way to enforce it.

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## Confronting Civil Discovery's Fatal Flaws

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### INTRODUCTION

Sixty years ago, discovery was the most innovative and controversial feature of the litigation process conceived by the then-new Federal Rules of Civil Procedure.<sup>1</sup> It remains the most debated, and in some cases the most fractious and vexing, aspect of litigation today.<sup>2</sup> Members of the practicing bar, judi-

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1. See 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2001 n.21 (3d ed. 1994 & Supp. 1999).

2. See Rya W. Zobel, *Foreword* to THOMAS E. WILLGING ET AL., FEDERAL JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS AND

ciary, legal academy and media espouse widely differing views about the real or supposed existence, extent and nature of discovery problems.<sup>3</sup> In part, this divergence of opinion is attributable to the paucity, until recently, of sufficient data from which to generalize with confidence about the working of discovery in practice.<sup>4</sup>

Two empirical studies of discovery conducted under the auspices of the Federal Judicial Center<sup>5</sup> and the RAND Institute for Civil Justice,<sup>6</sup> respectively, however, have yielded complementary data that support certain basic generalizations. First, discovery problems and associated elevated levels of satellite litigation and expense are most likely to be concentrated in a minority of lawsuits characterized by high stakes, high levels of complexity, high levels of contentiousness or high volumes of discovery activity,<sup>7</sup> cases which today constitute approximately one-third of the caseload of federal courts.<sup>8</sup> Second

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PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES at i, v (1997) [hereinafter FEDERAL JUDICIAL CENTER REPORT]; Edward H. Cooper, *Discovery Cost Allocation: Comment on Cooter and Rubinfeld*, 23 J. LEGAL STUD. 465, 465 (1994).

3. These range from the view, on one extreme, that discovery abuse is rampant, *see, e.g.*, RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 102 (1996), to that on the other, that widespread discovery abuse is fantasy rather than reality. *See, e.g.*, Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994).

4. *See* Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785 (1998); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—“Much Ado About Nothing?”*, 46 HASTINGS L.J. 679, 706-14 (1995). Both contain useful surveys of results of earlier studies.

5. *See* FEDERAL JUDICIAL CENTER REPORT, *supra* note 2.

6. *See* JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, *DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA* (1998) [hereinafter RAND REPORT].

7. *See* FEDERAL JUDICIAL CENTER REPORT, *supra* note 2, at 2, 21; RAND REPORT, *supra* note 6, at xxvii. This finding mirrors that of a 1978 Federal Judicial Center Study that the incidence and volume of discovery tended to be high in securities, trade regulation, tort, intellectual property, admiralty and contract cases, and that discovery volume was likely to be high in product liability, patent and franchise contract cases. *See* PAUL R. CONNOLLY ET AL., FEDERAL JUDICIAL CTR., *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY* 43-44 (1978), *cited in* McKenna & Wiggins, *supra* note 4, at 791.

8. *See* Kathleen L. Blaner et al., *Federal Discovery: Crown Jewel or Curse?*, 24 LITIG. 8, 10 (1998). The gradual raising of the jurisdictional minimum amount in controversy requirement in diversity cases in federal courts

and more surprising, discovery is not significantly problematic but is working “effectively and efficiently” in the majority of civil cases.<sup>9</sup>

The RAND Report also asserts that “[e]mpirical research has not produced evidence of widespread abuse of discovery.”<sup>10</sup> No doubt this state of affairs is partly due to the lack of consensus among practicing lawyers and commentators as to what constitutes discovery “abuse.” Definitions variously proposed include overreaching discovery beyond what the rules require or what is necessary to prove the proponent’s case; discovery of information not needed by the proponent but having potential for coercing the respondent to settle because of its confidential or embarrassing nature; discovery taken primarily to impose expense and delay on the respondent rather than to obtain information for the lawsuit; discovery for purposes unrelated to the litigation in which it is sought (such as obtaining access to protected and otherwise unavailable intellectual property); propounding discovery requests to which the costs of responding exceed the anticipated increase in value of the proponent’s claim or defense; withholding discoverable information or materials on the basis of groundless boilerplate objections; and unjustifiable or bad faith assertions of privilege. About the only thing these definitions of discovery abuse have in common is that they are practices lawyers attribute to their adversaries but rarely admit to themselves.<sup>11</sup>

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from \$3,000 to \$10,000 in 1958, to \$50,000 in 1988, to \$75,000 in 1996, closing the door on diversity cases for small amounts, has tended to ensure that diversity cases brought today mostly involve significant financial stakes. See 28 U.S.C.A. § 1332 commentary on the 1996 amendment (West Supp. 1999).

9. See RAND REPORT, *supra* note 6, at xxii; Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 523 (1998). These results largely confirm the perceptions and conclusions reached by Wayne D. Brazil in his 1980 American Bar Foundation study. See Wayne D. Brazil, *Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 789, 869-74 [hereinafter Brazil, *Civil Discovery*]; Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 222-35.

10. RAND REPORT, *supra* note 6, at xv.

11. See John D. Shugrue, *Identifying and Combating Discovery Abuse*, 23 LITIG. 10, 12 (1997) (“Finding a litigator who will readily confess to having abused discovery is equivalent to the proverbial an[d] futile search for the needle in the haystack.”). *But see* MARK PERLMUTTER, WHY LAWYERS (AND THE REST OF US) LIE AND ENGAGE IN OTHER REPUGNANT BEHAVIOR 11, 28, 38 (1998) (describing experiences of unethical conduct).

Lest too rosy a picture emerge from the RAND and Federal Judicial Center Reports, however, it is empirically demonstrable that discovery disputes occur in substantially greater numbers than in years past, and that today federal judges address discovery disputes in many more reported opinions than before. Table 1 shows the chronological dispersion by five-year periods of 3,128 opinions in which the term "discovery dispute" appears in Westlaw's Allfeds database. Even assuming that these numbers are over-inclusive,<sup>12</sup> it is indisputable that federal district courts and courts of appeals addressed or alluded to discovery disputes during the decade just concluded in almost three times as many reported opinions as in the previous decade, and during the five years from 1994-98 in twenty-one times as many reported opinions as in the five years from 1974-78.

TABLE 1

	U.S. SUPREME COURT	U.S. COURTS OF APPEALS	U.S. DISTRICT COURTS	U.S. BANK- RUPTCY COURTS	U.S. COURT OF CLAIMS	U.S. TAX COURT
1994- 1998		135	1043	59	12	2
1989- 1993		91	884	43	7	2
1984- 1988	1	45	540	17	2	
1979- 1983	1	16	160	2	3	
1974- 1978		7	48		1	
1969- 1973		1	6			

Reported opinions from United States Courts in which term "discovery dispute" appears. *Source:* Search of WESTLAW, Allfeds database (Feb. 1999).

12. I have not attempted to exclude criminal prosecutions in which opinions referred to discovery disputes or to correct these numbers for other possible type I error, that is, false positives. Thus, if a judge wrote, "Pretrial litigation was remarkably free of any discovery disputes," such a case would still appear in the numbers in Table 1. My assumption, however, is that judges would rarely include the words "discovery dispute" in a reported opinion unless pretrial litigation actually contained a discovery dispute that the judge thought noteworthy.

These numbers may reflect increased filings, greater judicial attention paid to pretrial litigation,<sup>13</sup> the trend toward “managerial” judging,<sup>14</sup> a tendency by parties to seek judicial resolution of discovery disputes, and the increasing ease with which judicial opinions are published electronically. Nonetheless, particularly since reported opinions addressing discovery disputes are undoubtedly just the tip of the iceberg of judicial treatment, the numbers can also be taken to confirm the common impressions of judges and lawyers that discovery disputes and “hardball” litigation tactics are far more common today than they used to be.<sup>15</sup> Also, regardless how we define “discovery abuse,” the increased and apparently still increasing frequency of discovery disputes strongly suggests that over-discovery, evasion, delay, and confrontation rather than cooperation remain problematic aspects of civil discovery practice.<sup>16</sup>

Opinions on the causes of persistent discovery problems vary widely. Commentators blame everything from the liberal scope of civil discovery,<sup>17</sup> to supposed asymmetries between costs of responding to discovery and anticipated increases in value of proponents’ claims or defenses,<sup>18</sup> to excesses of adversarial behavior and a perceived decline in professionalism and civility among litigators,<sup>19</sup> to asserted judicial failures to exer-

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13. See Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 21 (1984).

14. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

15. See *Dondi Properties Corp. v. Commerce Sav. and Loan Ass’n*, 121 F.R.D. 284, 286 (N.D. Tex. 1988) (en banc) (“With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction.”); ROBERT E. KEETON, *JUDGING* 182 (1990) (stating that respect for authority in the courtroom and elsewhere is less pronounced and pervasive in the 1990s than in the 1930s).

16. See Shugrue, *supra* note 11, at 10-11.

17. See, e.g., *ACF Indus. Inc. v. EEOC*, 439 U.S. 1081, 1087 n.6 (1979) (Powell, J., dissenting from denial of certiorari) (quoting letter from Hon. Griffin B. Bell that in his experience as a judge, practicing lawyer and Attorney General of the United States, “the scope of discovery is far too broad”).

18. See Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 452-54 (1994) [hereinafter Cooter & Rubinfeld, *An Economic Model of Legal Discovery*]; Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 63 (1995) [hereinafter Cooter & Rubinfeld, *Reforming the New Discovery Rules*].

19. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 511 (1994); E. Norman Veasey, *Making it Right: Veasey Plans Action*

cise control over pretrial proceedings or to impose meaningful sanctions on lawyers who take undue advantage of the process.<sup>20</sup>

Since each of these views has explanatory value, it is not surprising that disagreement abounds as to what should be done to alleviate current problems with discovery and to prevent future ones. Unfortunately, however, the solutions most often proposed are unlikely to succeed. They include: first, narrowing the scope of civil discovery ordinarily available under the Federal Rules of Civil Procedure; second, calling for more firm and constant judicial intervention from an early point in a lawsuit; and third, promoting greater education in and adherence to norms of professionalism and civility.

First, the pending amendment of Rule 26(b) of the Federal Rules of Civil Procedure that would alter the referent in the relevance standard governing civil discovery from "the subject matter involved in the pending action" to "the claim or defense of any party,"<sup>21</sup> although an apparent limitation, is basically a semantic change unlikely to have much salutary effect on the

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*to Reform Lawyer Conduct*, BUS. L. TODAY, Mar./Apr. 1998, at 42, 42-43.

20. See WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 154-55 (1968); Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 726-31 (1997); Helen H. Stern Cutner, *Discovery—Civil Litigation's Fading Light: A Lawyer Looks at the Federal Discovery Rules After Forty Years of Use*, 52 TEMP. L.Q. 933, 955-56 (1979); Barbara J. Gorham, Note, *Fisons: Will It Tame the Beast of Discovery Abuse?*, 69 WASH. L. REV. 765, 782-83 (1994).

21. See *infra* pp. 537-43. In August 1998, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published for public comment a Preliminary Draft of Amendments to the Federal Rules of Civil Procedure and Evidence. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND EVIDENCE (1998) [hereinafter PRELIMINARY DRAFT]. The key changes proposed for the Federal Rules of Civil Procedure as approved by the Judicial Conference of the United States include: scaling back the automatic disclosure provision of Rule 26(a) and eliminating the current authorization for districts to opt out; modifying the scope of discovery by striking "relevant to the subject matter involved in the pending action" from the definition of scope in Rule 26(b)(1) and substituting "relevant to the claim or defense of any party"; limiting the length of depositions in Rule 30(d)(2) to seven hours unless otherwise authorized by the court or stipulated by the parties and the deponent; and adding a provision to Rule 34(b) that makes explicit courts' power to limit excessive discovery by allowing courts to condition discovery on payment of part or all of the responding party's expenses by the requesting party. See *id.* at 34-35, 41-42, 60, 65-66; see also *Proposed Amendments to the Federal Rules of Civil Procedure* 81-82 (last modified Aug. 9, 1999) <<http://www.uscourts.gov/rules/propcivil.pdf>>.

conduct of discovery in the hurly-burly world of litigation. It is, however, certain to generate more discovery disputes and greater need for judicial attention, since the proposed amendment still permits subject-matter-relevant discovery on court order and discovery proponents are unlikely to curtail the scope of requests voluntarily.<sup>22</sup>

Second, more judicial attention to discovery disputes and earlier, firmer and more constant judicial management of discovery-heavy cases would involve opportunity costs to docket management too great for many judges to accept.<sup>23</sup> Proponents of discovery reform have been calling continuously for earlier and more resolute judicial management of discovery for almost as long as liberal discovery has been in effect. Since the early years of the Federal Rules of Civil Procedure, a common theme of conferences of lawyers and judges was how to tame the large, complex, "protracted" case through vigorous judicial supervision of discovery.<sup>24</sup> If judges have not universally heeded these calls in the past, they are hardly likely to do so now.

Furthermore, incentives to adversarial excess in discovery are simply too great in complex and high-stakes cases to yield, in the absence of effective sanctions,<sup>25</sup> to high-minded exhortations about civil behavior among professionals.<sup>26</sup> Although courts certainly have the power to sanction discovery violators, many are reluctant to impose severe sanctions in the discovery context because of the oft-enunciated policy that cases should be decided on their merits. Also, though they rarely say so, many judges are reluctant to impose sanctions that may adversely affect the professional reputations and livelihoods of lawyers who practice before them.<sup>27</sup>

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22. See *infra* pp. 540-41.

23. See *infra* pp. 564-69 & note 250.

24. See Judicial Conference of the United States, *Procedure in Anti-Trust and Other Protracted Cases*, reprinted in "Short Cuts" in *Long Cases: A Commentary on the Report Entitled Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 41, 83 (1951); James Alger Fee et al., *Proceedings of the Seminar on Protracted Cases for United States Judges*, 23 F.R.D. 319 *passim* (1958); Irving R. Kaufman, *Judicial Control over Discovery*, 28 F.R.D. 111, 111-16 (1960); Irving R. Kaufman, *The Philosophy of Effective Judicial Supervision over Litigation*, 29 F.R.D. 207, 213 (1961); Irving R. Kaufman, *Report on Study of the Protracted Case*, 21 F.R.D. 55, 61-63 (1957).

25. See *infra* pp. 571-78.

26. For discussion of the inadequate incentives to cooperate in discovery in high-stakes cases, see *infra* pp. 550-52.

27. See *infra* Part VIII.

This state of affairs should not surprise students of procedure. Despite repeated changes to the discovery rules in 1946, 1948, 1963, 1966, 1970, 1971, 1972, 1980, 1983, 1991 and 1993,<sup>28</sup> discovery is once again on the rulemakers' agenda, thus apparently still in need of fixing.<sup>29</sup> It is a serious mistake, however, to think that discovery can be perfected by additional incremental changes to the Rules,<sup>30</sup> or that problems can be eliminated. The reason is simple: discovery is riven to the core with irreconcilable theoretical and practical conflicts and will remain so despite recurring reform efforts. Given the nature of discovery's defects, what it would take to cure them, and the limits imposed on possible change by fundamental values of our litigation system, discovery disputes are likely to plague us for a very long time, perhaps forever.

This Article considers several fundamental faults inherent in the civil discovery process. It examines the aggravating per-

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28. Without any pretense to exhaustiveness, these amendments provided the following major changes, in addition to many others less significant or of a technical nature. In 1948, the requirement of leave of court for taking depositions was eliminated, *see* Advisory Committee on Rules for Civil Procedure, *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, 5 F.R.D. 433, 453 (1946); it was recognized that there should be no arbitrary limits on the number or scope of interrogatories, *see id.* at 461; the standard for document production and inspection was eased from documents "material to the case" to documents "related to the case." *Id.* at 463. In 1970, insurance policies were explicitly made discoverable, *see Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 487 (1970); automatic grant of priority was eliminated, *see id.* at 488; the party seeking discovery was made responsible for invoking judicial determination of discovery disputes, *id.* at 522; and the motion to compel was widened to apply to all discovery devices except for mental and physical exams under Rule 35, *see id.* at 538. In 1980, discovery conferences with the court were first authorized, *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 526 (1980), and depositions were permitted to be recorded by non-stenographic means, *see id.* at 528. In 1983, the sentence of Rule 26(a), which provided that the frequency of use of discovery mechanisms was not to be limited, was deleted, a sentence was added to Rule 26(b) permitting courts to limit discovery; and Rule 26(g), which encouraged judges to impose appropriate sanctions for discovery abuse, was added. *See* FED. R. CIV. P. 26, advisory committee notes to the 1983 amendments. In 1993, new automatic disclosure provisions were provided for the first time. *See Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 628 (1993).

29. *See supra* note 21. *But see* Niemeyer, *supra* note 9, at 523.

30. In a well-known dissent from the Supreme Court's adoption of the 1980 amendments to Rules 26, 33, 34 and 37, Justice Powell wrote that while the amendments themselves were "not inherently objectionable[.] . . . Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms." *Amendments to Federal Rules of Civil Procedure*, 446 U.S. 997, 997-1000 (1980) (Powell, J., dissenting).

sistence, especially but not exclusively in complex and high-stakes litigation, of overdiscovery, evasion and delay, as well as confrontation rather than cooperation, and associated expenditures of both party and judicial time and resources.<sup>31</sup> It then considers what can and what cannot be done to improve the process, consistent with the Rules' beneficent purpose of facilitating "the just, speedy and inexpensive determination of every action."<sup>32</sup>

The Article concludes that civil discovery suffers from conceptual inconsistencies and structural flaws so basic that it is doubtful whether it can ever work as intended in most complex and high-stakes cases. It certainly could not do so without far-reaching changes not only in the Rules, but also in the prevailing economics and culture of adversarial litigation and in judicial practices and behavior. Changes dramatic enough to be effective would fundamentally and, in all probability, unacceptably change the nature of American adversarial litigation. Although it may seem peculiar to state what many practicing lawyers know from experience and intuition, concentrating on trying to eradicate discovery problems has diverted attention from the facts reflected in the Federal Judicial Center and RAND studies. The great wonder is not that discovery does not work perfectly, but that in spite of its defects, it succeeds as well as it does in the majority of cases.

### I. DISCOVERY'S ELUSIVE IDEAL

At the dawning of the age of litigation enlightenment in the federal courts in 1938, with the advent of the newly crafted Federal Rules of Civil Procedure, discovery in civil litigation was intended to be an essentially cooperative, self-regulating process for which the parties would take responsibility, with little judicial intervention required.<sup>33</sup> Significant benefits were anticipated (and substantially have been achieved) from the provision of procedures for avoiding dispositions on the basis of technicalities of pleading, eliminating from trials the element of

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31. See *Clinton v. Jones*, 520 U.S. 681, 722 (1997) (Breyer, J., concurring) ("[T]he time and expense associated with . . . discovery . . . have increased.").

32. FED. R. CIV. P. 1.

33. See Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 775 & n.34 (1985).

unfair surprise,<sup>34</sup> assuring instead that cases would be decided on their merits or compromised according to their strengths and weaknesses,<sup>35</sup> and eliminating systematic unfairness resulting from disparities of wealth and power by prescribing means by which less powerful litigants could obtain the information necessary to prove their claims.<sup>36</sup>

The rulemakers and the Supreme Court thus provided a set of new tools to aid in factual investigation and defining issues: depositions upon oral examination,<sup>37</sup> depositions upon written examination,<sup>38</sup> interrogatories to parties,<sup>39</sup> requests for production of documents and things and entry upon land for inspection and other purposes,<sup>40</sup> physical and mental examinations of persons<sup>41</sup> and requests for admission.<sup>42</sup> Except for document discovery, which until 1946 was subject to a narrow standard requiring documents to "constitute or contain evidence material to any matter" involved in the action and until 1970 could be obtained only on a showing of good cause,<sup>43</sup> the new rules permitted inquiry into a wide range of matters by employing the new discovery devices.<sup>44</sup> In 1993, three years af-

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34. See GLASER, *supra* note 20, at 9. As Judge Keeton noted in his primer on trial tactics, the impossibility of eliminating the chance of surprise completely while our litigation system remains adversarial not only renders the system prone to abuse but also is a reason for its effectiveness. See ROBERT E. KEETON, *TRIAL TACTICS AND METHODS* 5 (1973).

35. See *Porter v. Shoemaker*, 6 F.R.D. 438, 442 (M.D. Pa. 1947) ("[C]ivil trials in the federal courts no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial."); GLASER, *supra* note 20, at 114, 234; GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 251-66 (1932); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1298-1303 (1978) [hereinafter Brazil, *The Adversary Character of Civil Discovery*] (summarizing the purposes of the litigation concept expressed in the Federal Rules of Civil Procedure).

36. See Blaner et al., *supra* note 8, at 8 (asserting that the drafters sought to redress imbalance of power between wealthy and poor by mandating full exchange of information).

37. See FED. R. CIV. P. 30.

38. See FED. R. CIV. P. 31.

39. See FED. R. CIV. P. 33.

40. See FED. R. CIV. P. 34.

41. See FED. R. CIV. P. 35.

42. See FED. R. CIV. P. 36.

43. Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 748 (1998).

44. Rule 26(b)(1) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending

ter enactment of the Civil Justice Reform Act of 1990,<sup>45</sup> which was intended to reduce what Congress viewed as unacceptable levels of expense and delay in litigation,<sup>46</sup> the rulemakers and the Supreme Court added required pretrial disclosures<sup>47</sup> to this toolbox (at least if the individual district court did not choose to opt out of the automatic disclosure provision as the rule currently permits).<sup>48</sup>

The framers of the Federal Rules of Civil Procedure expected the parties themselves to bear responsibility for pretrial discovery and fact investigation, and in large measure, as the Federal Judicial Center and RAND studies show, in routine cases they do so without major problems.<sup>49</sup> To make the procedures work, cooperation and self-interested reciprocity between the parties and between their lawyers were expected ordinarily to suffice.<sup>50</sup> Only when negotiation failed and the contestants'

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action, whether it relates to the claim or defense of any other 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. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1). The proposed amendments that have been approved by the Judicial Conference of the United States would narrow this standard by substituting the phrase "to the claim or defense of any party" for "the subject matter involved in the pending action," permitting discovery into the subject matter by court order on good cause shown. PRELIMINARY DRAFT, *supra* note 21, at 41-42.

45. 28 U.S.C. §§ 471-482 (1994).

46. See *Lawson v. Callahan*, 111 F.3d 403, 404 (5th Cir. 1997).

47. See FED. R. CIV. P. 26(a)(1).

48. The proposed amendments would eliminate the possibility of opting out of the automatic disclosure provision by local rule, thus restoring national uniformity as to automatic disclosure among federal district courts. See PRELIMINARY DRAFT, *supra* note 21, at 34-36.

49. See FEDERAL JUDICIAL CENTER REPORT, *supra* note 2, at 2, 21; RAND REPORT, *supra* note 6, at xxvii-xxviii, 27.

50. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 357 n.24 (1978) (noting that discovery "rules contemplate that discovery will proceed without judicial intervention unless a party moves for a protective order . . . or an order compelling discovery"); Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 7-8 (1992); Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 873, 881-82 [hereinafter Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions*]; Maurice Rosenberg & Warren R. King, *Curbing Abuse in Civil Litigation: Enough Is Enough*, 1981 BYU L. REV. 579, 581.

attorneys reached an impasse about requested information to be exchanged was resort to judicial intervention anticipated.<sup>51</sup>

The framers' instincts in this regard largely coincide with the conclusions produced by game theorists' predictive modeling of discovery. Viewing discovery as a multi-move, iterated "prisoner's dilemma," game theorists conclude that an approach to discovery favoring reciprocity (as John Setear has called it, a meta-strategy of "tit for tat")—which always cooperates the first time it encounters a particular adversary and thereafter cooperates in the current play if the adversary had cooperated in their previous encounter, but defects in the current play if the adversary had defected in the previous encounter—encourages continuing cooperation and yields long-term premiums to both participants.<sup>52</sup>

There are two caveats, however. First, although the "tit for tat" meta-strategy is likely to be productive over an aggregation of successive contests, there is no guarantee that it would be the best choice in any single contest. Second, the meta-strategy of "tit for tat" or reciprocity is more likely to be successful when the players encounter each other repeatedly, but less likely to be successful when they do not.<sup>53</sup>

Although self-interested reciprocity was the ideal, to expect it to work in all cases<sup>54</sup> was unrealistically optimistic because of

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51. This essential conception of discovery received additional support in the 1970 revision, which increased the availability of compensatory sanctions for the party prevailing when judicial intervention was invoked. See 8A WRIGHT ET AL., *supra* note 1, § 2288, at 664-66.

52. See, e.g., John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 593-601 (1989).

53. See *id.* at 598-99. This prediction appears to accord with experience. In legal communities in which counsel encounter each other (and judges) repeatedly, anecdotal evidence suggests that "hardball" and discovery disputes are less common. In large cities where mega-law firms are common and counsel rarely encounter each other (or judges) repeatedly, confrontational behavior and discovery disputes are more common. See, e.g., Gilson & Mnookin, *supra* note 19, at 537-41, 546-50. As Professor Cooper has suggested to me, this may help to explain the finding of the Federal Judicial Center Report that firm size is a factor correlating with increased discovery expense. FEDERAL JUDICIAL CENTER REPORT, *supra* note 2, at 2. Perhaps increased discovery expense is attributable less to firm size than to the location of large firms in litigation arenas that produce few repeat encounters. It is also true, however, that more complex and high-stakes cases, which the Federal Judicial Center found produce higher levels of contention and disputes in discovery, tend to be handled by large firms.

54. As Chief Judge Joe E. Estes of the United States District Court for the Northern District of Texas wrote in 1959, "[t]he scope and spirit of the federal

several basic conceptual and practical flaws in the discovery process, as well as changes in the conduct of business and the nature of law practice that the framers of the discovery rules could neither have anticipated nor predicted. The first defect in the process is that the cooperative ethos of discovery clashes directly and irreconcilably with the oppositional character and partisan norms of all other phases and attributes of adversarial litigation. If the parties had been capable of cooperation, chances are they would not have come (or continued) to litigate in the first place.<sup>55</sup> Furthermore, well-articulated and widely accepted norms of adversariness and aggressiveness that many lawyers take to define what it means to be a lawyer—especially a “litigator”—and also what it means to represent a client loyally and effectively conflict with and often overwhelm the less well-defined and more amorphous duties imposed on advocates by professional responsibility prescriptions and the discovery rules to cooperate and not to overreach, overdiscover, delay, evade or obstruct. It was thus naive to expect “that adversarial tigers would behave like accommodating pussycats throughout the discovery period, saving their combative energies for trial,”<sup>56</sup> as Professor Miller has aptly observed.

Second, the underlying philosophy of the Federal Rules of Civil Procedure, which prefers that controversies be decided on their merits than on the basis of technicalities, makes discovery perform functions, especially in complex cases, that sometimes strain the system and produce disputes. In particular, the information-gathering and issue-defining functions that discovery must perform in a notice-pleading regime require broad and often copious discovery that generates disputes that require judicial intervention to resolve. Depending on one’s definition, this voluminous discovery may also lend itself to “abuse.”<sup>57</sup>

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discovery rules are so broad and liberal that today complete discovery is virtually assured. All that need be done to obtain all relevant information in a case is to avail oneself of the veritable arsenal of discovery weapons found in the rules.” Joe E. Estes, *Discovery*, 29 F.R.D. 280, 280 (1961).

55. See Cooter & Rubinfeld, *Reforming the New Discovery Rules*, *supra* note 18, at 65; see also Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320-21 (1991).

56. Miller, *supra* note 13, at 15.

57. See *infra* Part V for discussion of the view of some economists that discovery misuse is discovery of which the expense of responding exceeds the value of the information discovered.

Third, although the Federal Rules seek “to minimize the need for judicial intervention into discovery matters[,]”<sup>58</sup> the procedures they provide for adjudicating discovery disputes are extremely cumbersome and incorporate an inefficient incentive structure. Motions to compel discovery and motions for protective orders result in sanctions for losers too paltry to provide sufficient inducements in complex or high-stakes cases to make the discovery process cooperative or truly self-regulating. Moreover, these procedures are both fact- and paper-intensive and consume disproportionate amounts of judicial resources.<sup>59</sup>

Fourth, judges unrealistically tend to assume that discovery’s cooperative ideal should be realizable in all cases. It is well known that judges dislike discovery disputes and that some resent the time that resolving them takes from other judicial activities. Not infrequently, judges neglect lawsuits in which the lawyers are engaged in discovery battles, allowing them to languish unattended on their dockets while the lawyers founder ever deeper into non-cooperation, confrontation and impasse, a result also predictable by game theorists.

Fifth, and by no means least important, many courts tend to treat discovery problems with inappropriate leniency even when they involve egregious instances of obstruction, evasion or suppression. The result is not only that clients and lawyers inclined to pursue or retain informational advantage by violating discovery rules lack adequate incentives to compel their compliance, but also that bad actors rarely are disciplined sufficiently either to remove them from the arena or to deter similar behavior by themselves or others in the future.

No less important in contributing to discovery problems than these procedural flaws, however, have been several irreversible changes in the conduct of business and the practice of law that would have been unforeseeable in 1938.<sup>60</sup> First, the appearance and ubiquity of high-speed photocopiers in the

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58. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1370 (11th Cir. 1997).

59. *See id.* at 1367-68 (“[S]carce judicial resources must be diverted from other cases to resolve discovery disputes.”).

60. Although the significance of these changes cannot be overemphasized, they have often been overlooked or ignored by critiques of discovery in practice. *See, e.g.*, BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 8 (1989) [hereinafter BROOKINGS INSTITUTION REPORT] (“What has changed during the past fifty years is not the objectives of the rules but the civil justice system itself—the number and kinds of cases, the litigants, and the lawyers.”).

1960s and 1970s resulted in an exponential proliferation in the number of documents and copies routinely distributed in the conduct of business and fundamentally changed the nature of document discovery.

Infinitely more documents were available, and litigants could routinely require adversaries to produce them. Document searches, productions and reviews became endlessly more expensive, and counsel in large or complex litigations could both require their adversaries to search offices, warehouses and archives for relevant evidence and inundate adversaries with boxcars full of documents to occupy young associates' attention for weeks, months and even years.<sup>61</sup> In response to problems including lack of space, expense of storage and difficulty of searching mass quantities of accumulated documents, firms and entities began to promulgate and implement "document retention policies" (surely one of the greatest of euphemisms), which provided for periodic culling of significant documents from files and the routine destruction of all the rest. Not surprisingly, document production is the discovery device most frequently used and the discovery activity that generates the highest percentage of problems, as the Federal Judicial Center Report confirms.<sup>62</sup>

Second, and equally unforeseeable in 1938, the information revolution of the 1980s and 1990s has had similarly expansive effects on document discovery and is continuing to alter the character of the discovery process. Specifically, the development and universal adoption of powerful personal computers and computer networks of both local and global scope and the widespread use of electronic mail has resulted in the creation and compact storage on electronic media of data and documents<sup>63</sup> in a volume previously unimaginable.

Third, the size and complexity of lawsuits, hence the magnitude of stakes they involve, exceed anything within the experience of the framers of the Federal Rules of Civil Procedure. Various factors have helped to increase the complexity and

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61. Unusually candid, if cynical, observations about aspects of document productions and review can be found in CAMERON STRACHER, *DOUBLE BILLING* (1998).

62. FEDERAL JUDICIAL CENTER REPORT, *supra* note 2, at 8.

63. The term "document" is usually defined broadly enough in requests for production of documents pursuant to Rule 34, to encompass electronically recorded and stored messages and data, e.g., "Document" means the original and all non-identical copies of any written, graphic or recorded matter of any kind or character, including all drafts."

magnify the consequences of litigation. They include liberal joinder of claims and parties to achieve efficiencies in adjudication, the advent of public-law litigation intended to restructure institutions, acceptance of business combinations of national and international scope, adaptation of the class action device to comprehend statewide or national classes, and acceptance of theories of collective liability in the mass tort context and similar doctrinal innovations in other areas of law.

Fourth, the spectacular growth in the size of the legal profession during the past sixty years and the accompanying emergence of global mega-firms probably could not have been predicted by the framers of the Federal Rules of Civil Procedure in 1938. Among other effects, these developments have resulted in firms too large to enforce professional ethics prescriptions assiduously<sup>64</sup> and the rarity in large cities of litigators encountering the same adversary repeatedly. One-time encounters lessen the force of reputation as a restraining influence on adversarial behavior and do nothing to foster cooperation.<sup>65</sup>

## II. DISCOVERY AND THE NATURE OF ADVERSARIAL LITIGATION

At the outset, the theory of discovery as an activity in which information and evidentiary material is exchanged cooperatively among the parties with a minimum of judicial supervision conflicts irreconcilably with both the essence of all other phases of adversarial litigation and the lawyer's ordinary role in conducting it. The conflict between the parties and the economic advantage the parties seek to attain through aggressive discovery undermine the cooperative discovery dynamic envisaged by the rules, just as the oppositional character of other facets of the litigation process overwhelm it. Had cooperation been possible, the parties would not be in court. The nature of litigation as a zero sum game magnifies the conflict, since one side's winning a lawsuit is and can only be at the other's expense.

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64. See Geoffrey C. Hazard, *Ethics Crossfire: Two Legal Titans Face Off*, NAT'L L.J., Feb. 1, 1999, at A22 ("[L]aw firms [should] be limited to 50 lawyers, on the theory that some such scale is the maximum for maintaining an effective ethical climate.").

65. See *supra* text accompanying note 53.

In obvious contrast to the cooperative ethic that the Rules' framers intended for discovery, other aspects of litigation retain a fundamentally partisan and contentious character. As is well known, adversarial litigation is first and foremost regulated conflict, designed to be a stylized and non-violent substitute for self-help. As one recent court opinion put it, "in civilized societies . . . part of the reason we resolve disputes by making appeals to reason and law in a courtroom is to avoid resorts to threats of physical force."<sup>66</sup>

Apart from incidental, purely procedural endeavors in which the lawyers are expected to work together, however, such as scheduling or assembling a final pre-trial order,<sup>67</sup> discovery is the only part of litigation short of settlement negotiations intended to be cooperative rather than oppositional. All other parts of the process, from the pleadings to motion practice to trial to appeal, are inherently partisan and contentious. In its intended attitude of cooperation rather than disputation, then, discovery is a striking anomaly and is often subject to inordinate strain that it cannot bear.<sup>68</sup>

The ultimate source of the adversarial nature of Anglo-American litigation is, in theory at least, the conflict between the parties. The drama inherent in adversarial litigation derives from its essence as regulated conflict.<sup>69</sup> Clients who participate in litigation commonly personalize the conflict, often voicing expressions of antagonism, belligerence and vindictiveness.<sup>70</sup> Where significant harms, rights and obligations are at

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66. United States v. Cleveland, No. Crim. A. 96-207, 1997 WL 539664, at \*4 (E.D. La. Aug. 27, 1997).

67. Even these matters are extremely contentious on occasion. See United States *ex rel.* Mobin v. Desert Constr., No. 95-1661, 1996 WL 328803, at \*2-3 (9th Cir. June 11, 1996) (noting that counsel refused to cooperate in drafting joint final pretrial order); Ward v. Mawee, No. 92-2579, 1994 WL 38682, at \*1 (7th Cir. Feb. 9, 1994) (same); Four Star Capital Corp. v. Nynex Corp., No. 93 Civ. 3706, 1995 WL 594863, at \*1 (S.D.N.Y. Oct. 10, 1995) (noting counsel unable to agree on schedule); Alexander v. Primerica Holdings, Inc., 822 F. Supp. 1099, 1106 (D.N.J. 1993) (same).

68. A study by Joseph L. Ebersole and Barlow Burke concluded *inter alia* that "many of the causal factors [of discovery problems] arise out of the adversary system itself." JOSEPH L. EBERSOLE & BARLOW BURKE, FEDERAL JUDICIAL CTR., DISCOVERY PROBLEMS IN CIVIL CASES 72 (1980).

69. See ERIC BENTLEY, THE LIFE OF THE DRAMA 4 (1964) ("To see drama in something is both *to perceive elements of conflict* and *to respond emotionally to these elements of conflict*"). This fact goes far to explain the persistent popularity of fictionalized and romanticized dramatizations of lawsuits and prosecutions.

70. To the extent that clients take conflicts personally they make large

stake, compromise has not been achieved, or prospective ramifications of a judgment are enormous, it is understandable that both litigants and their lawyers exhibit strong feelings.<sup>71</sup>

Litigation aggressiveness<sup>72</sup> consequently has enormous appeal to clients.<sup>73</sup> It is no accident that popular lawyer metaphors such as “hired gun,” “gladiator,” and “warrior” invoke the imagery of killing, contest and battle. The stylized nature of adversarial litigation as enshrined in American popular culture requires that the conflict be conceived and often expressed in images of armed hostility and warfare. These typically include war’s most destructive and wasteful exemplars: “war of attrition,” “scorched earth,” “trench warfare,” “taking no prisoners,” and “giving no quarter.” The ordinary ethos of litigation—that of attack, battle and siege—is thus diametrically and, if the stakes are high enough, fatally antagonistic to discovery’s ideal of cooperation.

Moreover, to the extent that success in litigation depends on strategic informational advantage, discovery, contrary to its inventors’ expectations, is the critical battlefield on which the war is waged.<sup>74</sup> Generations of litigators, for example, have

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emotional investments in litigation, and the potential for them to behave in ways that are not obviously rational (at least by reference to conventional economic measures) increases.

71. Given the uncertainty, expense and aggravation inherent in litigation, the damages, rights and obligations at issue must by definition be “significant” to the parties.

72. Recent empirical research suggests that litigators’ aggressiveness may be related to body chemistry. One study found that both male and female trial lawyers had testosterone levels about 30% higher than non-trial lawyers, a finding that seemingly corroborates common perceptions of trial lawyers as having a “macho mystique and confrontational manner.” James M. Dabbs, Jr. et al., *Trial Lawyers and Testosterone: Blue-Collar Talent in a White-Collar World*, 28 J. APPLIED SOC. PSYCHOL. 84, 87 (1998). The study explicitly left open the question whether increased testosterone levels cause or result from the pugnacious environment in which litigators operate, although it expressed doubt that trial work would have raised the subjects’ testosterone levels, since testosterone changes due to circumstance are usually temporary. See *id.* at 87-88; see also Juris Cojones, N.Y. TIMES MAG., Nov. 1, 1998, at 27.

73. See, e.g., Gilson & Mnookin, *supra* note 19, at 512 n.13 (citing quotation of chairman of Sullivan & Cromwell that “Sullivan & Cromwell fights tough . . . and ‘clients like a law firm that’s aggressive’”). The appeal of aggressiveness to clients conveniently coincides with the strategic advantages thought by many lawyers to accrue from aggressive tactics and behavior.

74. See NADER & SMITH, *supra* note 3, at 63 (“Winning the discovery war is often the key to winning the lawsuit . . .”); Marvin E. Aspen et al., *Interim Report of the Committee on Civility of the Seventh Judicial Circuit*, 143 F.R.D. 371, 383 (1991) (stating that discovery too often is a “battlefield on which verbal hostility, overly aggressive tactics and often automatic and unreasoned

been schooled in discovery with advice such as “the key to success in a deposition is gaining control of the room.”<sup>75</sup> Given the inconvenience and expense of responding to discovery or of compelling a recalcitrant adversary to respond, discovery is also one of the potent weapons with which the war is waged.<sup>76</sup> That many lawyers and clients have trouble cooperating in a process of which the unspoken underlying premise is “[g]ive me all the information and evidence I demand, regardless how much it may cost or disadvantage you, so I can prove my case and disprove yours” is not really a surprise.<sup>77</sup> That lawyers should be able to cooperate without major disruption in the majority of cases, as the RAND Report suggests they do,<sup>78</sup> is remarkable.

### III. INFORMATIONAL ADVANTAGE AND ZEALOUS ADVOCACY

Litigators’ adversariness<sup>79</sup> thus derives conceptually from the conflict between the parties, their clients. It is inherent in

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denials of cooperation are the principal weapons”); Kenneth W. Starr, *Law and Lawyers: The Road to Reform*, 63 *FORDHAM L. REV.* 959, 964 (1995) (“In litigation, pretrial discovery is, and has been, the great battlefield.”).

75. This is what I was taught by an early mentor in private practice when beginning to take and defend depositions. For a description of a similar approach, see PERLMUTTER, *supra* note 11, at 59. The potential of such advice to encourage lawyers defending depositions to cross the line from legitimate behavior to speaking objections, interruption and obstruction should be obvious.

76. In his posthumously published memoirs, Arthur Liman wrote, “Adopted in the federal system in 1938 as a well-intentioned and sensible reform, discovery became in my time a weapon lawyers wielded to harass and bludgeon adversaries into submission or settlement.” ARTHUR L. LIMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* 234-35 (1998). To the same end, see MARVIN E. FRANKEL, *PARTISAN JUSTICE* 18 (1980) (“Where the object always is to beat every ploughshare into a sword, the discovery procedure is employed variously as weaponry.”).

77. Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 *COLUM. L. REV.* 480, 482-83 (1958). Furthermore:

Laymen do not view with unbounded enthusiasm the prospect of expending their time and money in pretrial procedures that are expressly designed to produce information or evidence to help their adversary’s case. . . . Sometimes sooner, sometimes later, the client’s attitude is translated into his lawyer’s actions, and he resists his adversary’s discovery demands.

*Id.*

78. RAND REPORT, *supra* note 6, at xx, 27.

79. I use the term “adversariness” to refer to partisan opposition or competitiveness of attitude. For litigators’ aggression or obstruction, see *supra* note 72 and *infra* Part VIII.

the essential oppositional nature of litigation, although litigation through agents may also incite and magnify client litigiousness.<sup>80</sup> Since the parties' interests are fundamentally (and until the point of settlement, irreconcilably) in conflict, so too are the interests of the lawyers, as their agents.<sup>81</sup>

The discovery rules embodied in Rules 26 through 37 of the Federal Rules of Civil Procedure impose obligations on the parties, not on their counsel. Lawyers should explain to clients the nature of the discovery process and clients' rights and obligations under it. Although it is ultimately the client's obligation to search for and provide responsive information, lawyers traditionally assist clients in this task and clients often delegate the conduct of discovery in its entirety to their lawyers. The participation of lawyers in discovery creates a direct conflict between parties' obligations of cooperation and responsiveness under the discovery rules and lawyers' traditional obligations of "zealous advocacy" imposed by professional responsibility directives.

The ideal of zealous advocacy,<sup>82</sup> derived from the fiduciary obligations of loyalty and confidentiality of the lawyer-agent, often is invoked to justify adversarial behavior in discovery. A lawyer "should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf[.]" according to the official comment to Rule 1.3 of the American Bar Association's Model Rules of Professional Conduct (the Model Rules).<sup>83</sup> Additionally, the lawyer "may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."<sup>84</sup>

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80. See Gilson & Mnookin, *supra* note 19, at 510-11.

81. "Agent" is used here in its technical sense as one who represents and can bind a principal and who, under prevailing concepts of agency law, has a fiduciary duty to further the principal's interests. See RESTATEMENT (SECOND) OF AGENCY § 1 cmt. b, e (1958).

82. According to Professor Simon and others, the mandate of "zealous advocacy within the bounds of the law" contained in the Model Code of Professional Responsibility accurately if crudely encapsulates the prevailing approach to lawyers' ethics, and legitimates (or in some lawyers' views obligates) the lawyer "in pursuing any arguably lawful goal of the client through any arguably lawful means." WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 7-8 (1998).

83. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1983).

84. *Id.* Many lawyers understand this to permit any conduct on the client's behalf that is not explicitly prohibited. The comparable provision of the Model Code of Professional Responsibility, Canon 7, stated, "A lawyer should represent a client zealously within the bounds of the law." MODEL CODE OF

Proficient advocates maximize strategic advantage during the investigation and discovery phase of pretrial litigation by obtaining as much relevant and useful information, admissions and impeachment material as possible from and about the adversary, for potential use at trial, while minimizing information and admissions obtained by or given to the adversary.<sup>85</sup> Lawyers endeavor to achieve this end in many ways<sup>86</sup> including: propounding wide-ranging, penetrating and comprehensive discovery requests; pursuing them if necessary through motions to compel discovery; simultaneously asserting all possible objections in response to adversaries' requests, including those of irrelevance, excessive scope and undue burden; construing all of the opponents' requests narrowly and excluding everything not directly responsive to them; asserting on the client's behalf all available privileges as excuses for non-production of documents, failure to answer interrogatories or instructions not to answer questions on depositions; and seeking protective orders to validate any decisions not to answer or produce. Unscrupulous lawyers go further, crossing into rule violations and illegal behaviors. Examples are coaching witnesses by making as extensive "speaking objections" during depositions as they can get away with, and other "dirty tricks" such as scrambling the order of documents produced for inspection and copying and hiding critical documents in unrelated files,<sup>87</sup> to say nothing of downright falsification of discovery responses, or suppression or destruction of relevant evidence.

Commentators occasionally criticize the behavior of lawyers using pretrial discovery in aggressively adversarial ways,

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PROFESSIONAL RESPONSIBILITY Canon 7 (1980). Simon notes that although the Model Rules are less explicit, its advocacy and confidentiality provisions "amount to almost precisely the same approach as the *Code*." SIMON, *supra* note 82, at 8.

85. There are, of course, additional practical reasons for aggressive behavior in discovery, including "sending a message" of various kinds to the opposing party and its counsel, e.g., that the party will not capitulate easily, or that suing the party will result in various expensive and unpleasant consequences.

86. See Brazil, *The Adversary Character of Civil Discovery*, *supra* note 35, at 1315-31, for a description of some of the ways in which adversarial norms influence lawyers' conduct of informal investigations, responses to interrogatories and requests for production of documents, and conduct in depositions.

87. Both of these practices clearly violate Rule 34's directive that documents produced for inspection and copying may be produced "as they are kept in the usual course of business[.]" or shall be organized and labeled "to correspond with the categories in the [document] request." FED. R. CIV. P. 34(b).

asserting that lawyers have incentives to do so “[b]ecause investigation and discovery . . . do not take place under the direct scrutiny of judges,”<sup>88</sup> or that lawyers should have a duty to seek the truth. Such criticism, however, not only mistakes the nature of discovery and the proper role of lawyers in adversarial litigation but also overlooks the strong support, if not complete justification, for such aggressively adversarial behavior in professional responsibility directives.<sup>89</sup> Indeed, the pursuit of strategic informational advantage is what litigation lawyers are paid to do and finds theoretical support in the ethical admonition to represent the client zealously and loyally. Insofar as it involves the minimization of information and material given to the adversary, pursuit of informational advantage is grounded both in the lawyer’s cardinal duty to keep and preserve the client’s secrets, and in the evidentiary doctrines of the attorney-client privilege and attorney’s work product.

The duty of confidentiality concerning the client’s affairs is one of the defining characteristics of a lawyer in the American legal system. Currently contained in Model Rule 1.6 of the Model Rules, the duty of confidentiality comes both from the law of agency and, as respects the attorney-client privilege, from the law of evidence. Rule 1.6 forbids revelation by the lawyer of information relating to the representation unless: (a) the client consents; (b) the disclosures are “impliedly authorized in order to carry out the representation”; (c) the disclosures are necessary in order “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm”; or (d) the disclosures serve “to establish a claim or defense on behalf of the lawyer” in proceedings involving the lawyer’s representation of the client, including controversies with the client and other civil claims or criminal charges.<sup>90</sup>

Disclosure of information about the client and the client’s affairs is thus within the bounds of permissible disclosure for discovery only because the rule of client-lawyer confidentiality

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88. Crystal, *supra* note 20, at 726.

89. As a recent article put it, “[t]here is nothing improper about aggressively pursuing discovery. In fact, that is precisely what litigators are paid to do. . . . Again, we owe our clients a duty to oppose requests for discovery that are improperly broad, ambiguous, burdensome, or directed to irrelevant information.” Shugrue, *supra* note 11, at 11.

90. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983); *see also* RESTATEMENT (SECOND) OF AGENCY § 169 (1958).

theoretically yields in situations in which “a lawyer may be obligated or permitted by other provisions of law to give information about a client.”<sup>91</sup> Disclosure by the lawyer of information sought in discovery is permissible, also, by virtue of Rule 1.6’s exception for disclosures “impliedly authorized in order to carry out the representation.”<sup>92</sup>

As the official Comment notes, however, there should be a presumption against supersession of Rule 1.6 by other provisions of law.<sup>93</sup> So strong is the obligation of client confidentiality that despite the lawyer’s duty of candor to the court and duty to the administration of justice, a lawyer need not disclose client information to correct factual errors by the court or opposing counsel when fraud by the client is not implicated.<sup>94</sup>

The lawyer’s obligation to keep the client’s secrets is thus deep-seated and largely unyielding. Client interest and need, images enshrined in popular culture and strictures of professional responsibility all combine to produce a vision of the lawyer in adversarial litigation as a fighter who will contend tirelessly for the client in what is essentially a war, who should gain every lawful strategic advantage for the client and who is obliged to protect the client’s secrets and confidences to the greatest extent possible.

Against this vision of the advocate as partisan warrior, prescriptions of cooperative lawyerly behavior in discovery and proscriptions of obstructive or dilatory tactics sit most uneasily.<sup>95</sup> Such cooperative, anti-obstructive norms are found in two places: the ethical directives that address the lawyer’s responsibilities as an officer of the legal system, and the discovery rules themselves.

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91. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 21 (1983).

92. *Id.* Rule 1.6. Confidentiality stipulations and protective orders thus help to facilitate discovery, since even though a lawyer has an obligation to assist a client in responding to discovery by adversaries in litigation, she still has an obligation to preserve the client’s secrets with respect to the rest of the world and to keep them from being used for purposes beyond the litigation.

93. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 21.

94. *See id.* Rule 3.3(a)(2) (discussing the duty to disclose material facts and the limits of this duty). In most jurisdictions—Florida, Illinois and Massachusetts being notable exceptions—the Rules as adopted make no provision for disclosure of a client confession to a crime even where necessary to show that another person is being wrongly incarcerated or in danger of execution. *See* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 74-78 (Aspen Law & Business 1998).

95. *See* Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 19-20 (1988).

First, prescriptions of cooperation in discovery are founded in the traditional conception of the lawyer as an officer of the court, which embodies the notion that lawyers have fiduciary responsibilities to the court as representative of a larger community having a vital interest in the administration of justice. These obligations generally include the duty of forthrightness and the obligations not to abuse court processes or corrupt the administration of justice, but rather to conduct cases efficiently and expeditiously.<sup>96</sup> Although it is said that the organized bar historically subordinated the norm of zealous advocacy to professional responsibilities to the legal system and the ideal of justice, it is certain that in the United States today, if not also since the days of Lord Brougham in England around 1820,<sup>97</sup> client interests have come to be exalted in both general bar ideology and the ethics codes.<sup>98</sup>

Reported opinions sometimes ground the advocate's duty to cooperate in discovery in counsel's obligations as an officer of the court,<sup>99</sup> although these obligations are expressed more specifically in Rules 3.4 and 3.2 of the Model Rules. Rule 3.4, entitled "Fairness to Opposing Party and Counsel," proscribes un-

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96. See D.A. Ipp, *Lawyers' Duties to the Court*, 114 LAW Q. REV. 63, 65 (1998).

97. Lord Henry Brougham, who defended Queen Caroline against charges of adultery, is reported to have told the House of Lords:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. . . . [H]e must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821).

98. Professor Gordon has referred to this as the triumph of "the Zealous Advocacy principle" over "the Justice-Serving principle." Robert W. Gordon, *Is Law Still a Profession? Was it Ever One? And Does it Matter?* 12 (Nov. 20, 1998) (unpublished paper presented at the Don Herzog and Rick Pildes Legal Theory Workshop at the University of Michigan Law School) (on file with author).

99. See *McLeod, Alexander, Powel & Appfel, P.C. v. Quarles*, 894 F.2d 1482, 1486 (5th Cir. 1990) ("Counsel have an obligation, as officers of the court, to assist in the discovery process by making diligent, good-faith responses to legitimate discovery requests."); *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1466 n.3 (11th Cir. 1984) (per curiam) (stating that attorneys do not meet obligations as officers of court by pre-trial game playing); *Smith v. Our Lady of the Lake Hosp., Inc.*, 135 F.R.D. 139, 150 (M.D. La. 1991) (quoting *McLeod, Alexander, Powel & Appfel, P.C.*, 894 F.2d at 1486), *rev'd on other grounds*, 960 F.2d 439 (5th Cir. 1992).

lawful obstruction of another party's access to evidence or unlawful alteration, destruction or concealment of documents or materials of potential evidentiary value, falsification of evidence, and knowing disobedience of an obligation under the rules of a tribunal. In pretrial procedure, Rule 3.4 forbids propounding a frivolous discovery request or failing to try to comply with a discovery request by an opposing party. It notably does not prohibit all obstruction, alteration, destruction and concealment (only that which is unlawful), or limit discovery (except as to that which is "frivolous"), or require prompt compliance with discovery requests (requiring instead, only "reasonably diligent effort[s] to comply with . . . legally proper discovery request[s]").<sup>100</sup>

These limitations are consistent with the primary responsibility of counsel (other than prosecutors) to their clients, rather than to some overarching extrajudicial conception of "the truth."<sup>101</sup> They accord with the responsibility of lawyers, especially defense counsel, to subvert, conceal or disguise the truth by lawful means when it is in the client's interests to do so.<sup>102</sup> Similarly, Rule 3.2, which requires lawyers to expedite litigation, does not require unlimited efforts, but only "reasonable" ones consistent with client interests.<sup>103</sup> The Legal Background to Rule 3.4 recognizes that there are sound reasons to pursue legitimate tactics that may have the effect of lengthen-

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100. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a)-(d) (1983). As Professor Rhode has aptly noted, "the *Model Rules* do little more than incorporate general prohibitions on crime and fraud." Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 601 (1985).

101. See *The Worrying Zeal of Ken Starr*, ECONOMIST, June 6, 1998, at 32 (quoting view of Kenneth Starr that "lawyers have a duty not to use their skills to impede the search for truth" and response of leading legal ethics expert Professor Geoffrey C. Hazard, Jr. that Starr's assertion "is not only ludicrous; it is pernicious").

102. See *id.*

103. Model Rule 3.2, entitled "Expediting Litigation", states: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2. The official comment explains that the test is "whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay[.]" and notes further that "[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client." *Id.* cmt. Although professional responsibility treatises accept this position without question, see, e.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 599-600 (1986), it may be doubted whether it would meet with significant (much less universal) acceptance among practicing lawyers.

ing a lawsuit, but distinguishes them from abusive attempts to cause unreasonable delay.<sup>104</sup>

Lawyers' duties to the court, the legal system, and an overarching conception of justice or truth are thus generally subordinated to duties to clients.<sup>105</sup> Similarly, courts recognize that the exhortations and admonitions contained in professional ethical rules and codes, whether or not cast as mandatory, "are primarily aspirational[.]"<sup>106</sup> "symbolic and pedagogic."<sup>107</sup>

The other main source of lawyers' duties to cooperate in discovery is the Federal Rules of Civil Procedure themselves. When the Rules provided a host of new discovery devices in 1938, they took for granted, or at least did not explicitly address, a lawyer's duty to cooperate in the discovery process. Such a duty was introduced obliquely into the rules by the 1983 and 1993 amendments. In 1983, the Rules were amended to add Rule 26(g), which imposed a signing obligation for discovery requests, responses and objections parallel to that required of other court papers by Rule 11.<sup>108</sup> Similarly, the 1993

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104. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(d) cmt.

105. See Rhode, *supra* note 100, at 600-01; see also Blaner et al., *supra* note 8, at 9 ("Under the ethics rules, the attorney's primary obligation is to the client, not the court."). For a contrary view, see William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 720-21 (1989).

106. McLeod, Alexander, Powel & Appfel, P.C. v. Quarles, 894 F.2d 1482, 1487 n.3 (5th Cir. 1990) (quoting *The Texas Lawyers' Creed—A Mandate for Professionalism* (1989), reprinted in 52 TEX. B.J. 1304, 1304-05 (1989)).

107. Rhode, *supra* note 100, at 647. Notwithstanding the patent efficacy limitations of professional responsibility norms, some courts treat counsel's duty to cooperate in discovery as based in professional responsibility directives or refer to it as an ethical duty. See, e.g., *Higgins v. Lufi*, 353 N.W.2d 150, 155 (Minn. Ct. App. 1984) (discussing how attorneys have an ethical duty to cooperate in discovery).

108. Rule 26(g), as amended, provides:

(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, re-

amendments altered the existing provision of Rule 26(f) for judicial intervention through a discovery conference by requiring the attorneys of record and unrepresented parties to meet to attempt in good faith to frame a discovery plan prior to the Rule 16 status and scheduling conference held by the court.<sup>109</sup> According to the Advisory Committee Comment, Rule 26(g) imposes “an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes” of the discovery rules.<sup>110</sup> Absent a more detailed exposition of this duty, however, this prescription is not only vague,

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sponse, 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.

FED. R. CIV. P. 26(g).

109. According to Rule 26(f):

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

FED. R. CIV. P. 26(f).

110. FED. R. CIV. P. 26(g)(3), advisory committee comments to the 1983 amendments. The certification duty “requires the lawyer to pause and consider the reasonableness of his request, response or objection.” *Id.* It does not require the signing lawyer to certify “the truthfulness of the client's factual responses[,]” merely “that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available that are responsive to the discovery demand.” *Id.*

but weak. Despite Rule 26(g)(3)'s directive that district courts "shall impose . . . an appropriate sanction"<sup>111</sup> upon violators, the provision appears hardly to be used,<sup>112</sup> at least in the sense that although lawyers sign discovery requests and responses routinely, proceedings for sanctions pursuant to Rule 26(g)(3) are rarely if ever reported.<sup>113</sup>

In addition to the courts that base the lawyer's duty to cooperate in discovery either in counsel's obligations as an officer of the court or in the ethical rules, some base it in the discovery rules,<sup>114</sup> while still others do not advert to its source.<sup>115</sup> Regardless of the source ascribed to the lawyer's duty to cooperate in the discovery process, however, few reported opinions analyze the duty, and none that I have found do so incisively or in depth. This dearth of judicial analysis may result from the uncomfortable truths that the duty to cooperate in discovery conflicts directly with the lawyer's responsibility to the client,<sup>116</sup> that courts have as much trouble reconciling the conflict as do advocates, and that they therefore do not like to think about the problem.

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111. *Id.*

112. A search of Westlaw's Allfeds database revealed only 19 reported opinions referring to Rule 26(g)(3) of the Federal Rules of Civil Procedure.

113. Since Rule 26(g)(3) provides mandatory rather than permissive sanctions for violations, one might expect experience with the Rule to approximate the courts' experience with Rule 11, of the Federal Rules of Civil Procedure, between 1983 and 1993, when it provided mandatory rather than permissive imposition of sanctions and generated large amounts of satellite litigation. *See, e.g.*, *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1083 (Wash. 1993) (en banc) (finding that attorneys violated certification requirement for discovery responses equivalent to Rule 26(g) of the Federal Rules of Civil Procedure).

114. *See Airtex Corp. v. Shelley Radiant Ceiling Co.*, 536 F.2d 145, 154 (7th Cir. 1976) (finding that an answer did not comport with duty of cooperation and disclosure imposed by discovery provisions of federal rules); *Ritter v. Diasonics, Inc.*, No. 91-7660, 1992 WL 164905, at \*1 (E.D. Pa. 1992) ("The Federal Rules of Civil Procedure give the trial court the power to impose sanctions for parties' failure to cooperate in discovery."), *rev'd on other grounds*, 993 F.2d 225 (3d Cir. 1993).

115. *See Mungin v. Stephens*, 164 F.R.D. 275, 279 (S.D. Ga. 1995) (court instructed plaintiff regarding "duty to cooperate fully in discovery"); *Zinn v. Leach*, Nos. 90-A-03, 90-CA-08, 1990 WL 187466, at \*5 (Ohio Ct. App. 1990) (discussing attorneys' duty to cooperate in discovery).

116. Professor Resnik has referred to the "contradictory mandates" of the Federal Rules of Civil Procedure, stating that "a discovery system ('give your opponent all information relevant to the litigation') was grafted onto American adversarial norms ('protect your client zealously' and therefore 'withhold what you can')." Resnik, *supra* note 14, at 378.

First, the duty to cooperate in discovery clashes directly with the lawyer's obligation to contend zealously for the client that is epitomized both in the norm of lawyerly adversariness and the fiduciary duty of loyalty.<sup>117</sup> At the most practical level, by disclosing information or documents in the client's possession that are responsive to an adversary's discovery requests, the lawyer may give up material that will assist adversary parties. This obviously diminishes the client's interests and conflicts with the lawyer's obligation to further them.

Second, in being required to divulge information about the client and the client's affairs that is not publicly known, the lawyer must act in a manner directly at odds with the lawyer's fiduciary duty of confidentiality. As noted above, the lawyer's duty to keep secrets is subject to exceptions concerning information required to be divulged by other provisions of law, evidence sought under compulsion of legal process and disclosures impliedly authorized to carry out the representation, each of which allows the duty to keep secrets to be viewed as subordinate to the lawyer's discovery obligations. Were it not for these exceptions, the conflict between discovery obligations and the duty of confidentiality would be theoretically irreconcilable as well as practically intractable.

Lawyers' efforts to obtain strategic informational advantage on behalf of their clients are therefore not only motivated by client inducements. They are thoroughly grounded in fundamental professional responsibility directives of loyalty and confidentiality to the client that many lawyers take to predominate over norms of cooperation and responsibilities to the court, the truth, the profession and the legal system. Thus, as long as lawyers can justify or rationalize stretching and violating the discovery rules in the name of zealous advocacy for

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117. No less an authority than Judge Schwarzer has written:

Contrary to a common perception among lawyers, there is no inherent conflict between the lawyer's duty to the client and the duty to the system—the obligation owed as an officer of the court. The obligation of zealous representation owed the client can and should be carried out within the justice system, and hence within the limits imposed by the obligation to preserve and protect the integrity of that system. To acknowledge that limitation on the duty owed to the client need not eviscerate the adversary process in its proper place, for . . . it is premised on an institutional framework rather than on the measure of adversarial confrontation.

Schwarzer, *supra* note 105, at 720-21. With all due respect to Judge Schwarzer, this is simply wrong. To conclude that one set of duties, norms or prescriptions should yield to another does not mean that they do not conflict.

their clients, discovery problems in complex and high-stakes cases will remain a familiar part of the legal landscape.<sup>118</sup>

#### IV. DISCOVERY'S FUNCTIONS IN A SYSTEM OF NOTICE PLEADING

A critic of excessive discovery stated a decade ago: "For many lawyers, discovery is a Pavlovian reaction. When a lawsuit is filed, and the filing stamp comes down, the word processor begins to grind out interrogatories and requests for production. Deposition notices drop like autumn leaves."<sup>119</sup> Putting aside Judge Schwarzer's unflattering implication that lawyers are conditioned to behave reflexively like drooling dogs,<sup>120</sup> comprehensive discovery energetically undertaken and vigorously pursued is precisely what lawyers in pretrial litigation are supposed to do. Indeed, failing to take discovery in any case but one in which all the facts are known and indisputable is often criticized as highly suspect if not outright malpractice and is viewed universally as more serious dereliction than discovering too much.<sup>121</sup>

Since 1938, our system of adjudication has endeavored to promote adjudications and settlements based on the merits over those with results determined by pleading technicalities and information asymmetries. In the regime created by the Federal Rules of Civil Procedure, wide-ranging discovery plays a critical and distinctive role. Specifically, it performs the functions of determining the facts each party believes to exist and

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118. Cf. Brazil, *The Adversary Character of Civil Discovery*, *supra* note 35, at 1347. Brazil states:

Without major changes in the adversary rules that shape the pretrial environment, there can be no effective judicial control of discovery. If the rules of the adversary game are left essentially intact, interjecting a judicial officer into the discovery process will simply add another adversary (the court) to the combat. Counsel and clients will continue to conceal material evidence until clearly compelled to divulge it, resist disclosure of damaging information, and seek ways to gain advantages over opponents through the use of discovery tools.

*Id.*

119. BROOKINGS INSTITUTION REPORT, *supra* note 60, at 7 (quoting Judge William Schwarzer).

120. To the extent that Judge Schwarzer had in mind unthinking discovery, as well as the "one size fits all" mentality often exemplified by word-processor-generated discovery requests, his criticism is well taken.

121. See *In re Ruben*, 825 F.2d 977, 989-90 (6th Cir. 1987); *Aldrich v. Wainwright*, 777 F.2d 630, 631-37 (11th Cir. 1985); *McClung v. Smith*, 870 F. Supp. 1384, 1404-05 (E.D. Va. 1994).

narrowing the issues in dispute (or sometimes broadening them).<sup>122</sup> It is beyond serious dispute that discovery performs these functions more fairly and efficiently than they were performed traditionally by pleadings.<sup>123</sup> Since unsubstantiated claims and defenses may be winnowed out through summary judgment, pleadings need only provide adversaries with fair notice of the parties' claims and defenses. Liberal discovery thus allows pleadings to be "generalized statements."<sup>124</sup> A complaint should not be dismissed unless it appears on its face that the plaintiff could prove no set of facts that would entitle him to relief.<sup>125</sup> In order to work satisfactorily, "notice pleading" requires liberal, free-ranging discovery.

In routine litigations with few parties, conventional legal theories, limited possible factual variations and few fact witnesses, notice pleading and liberal discovery need not create problems. The greater the generality with which claims are pleaded, however, the more liberal and searching must be the discovery permitted.<sup>126</sup> Otherwise, surprises at trial would return as the norm rather than the exception; parties would not be required to commit to positions on the facts ordinarily in advance of trial; and other devices, such as pleadings, motions to dismiss and motions for summary judgment would have to be used to narrow issues to those that truly require trials.

The more generalized the statement of claim or defense permitted, however, the more difficult it is for courts to decide when information sought by the parties is or is not "relevant to the subject matter involved in the pending action" or "reasonably calculated to lead to the discovery of admissible evidence."<sup>127</sup> Thus, paradoxically, the more liberal and searching the discovery needed because of the generality of pleading or

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122. Pre-trial conferences and partial summary judgment can also be used to narrow issues.

123. See CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 468 (5th ed. 1994).

124. Patrick E. Higginbotham, *General Provisions Governing Discovery; Duty of Disclosure*, 6 MOORE'S FEDERAL PRACTICE 3D § 26.02, at 26-26 (1999); see also *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

125. See *Conley v. Gibson*, 355 U.S. at 47-48; *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944).

126. See EBERSOLE & BURKE, *supra* note 68, at 77-78.

127. FED. R. CIV. P. 26(b)(1). Judicial decisions about when discovery sought is "reasonably calculated to lead to the discovery of admissible evidence" are much easier in fact pleading than in notice pleading regimes, since complaints are richer in factual detail.

complexity of the case, the less it may be obviously relevant to or reasonably calculated to lead to admissible evidence about matters suggested by the pleadings. Additionally, the more litigants attempt to frame issues in a manner favorable to themselves, the greater the likelihood that disputes over the scope of permissible discovery will ensue.<sup>128</sup>

These generalizations apply with even greater force when litigation is complex, or when the legal basis for the claim or defense is novel or unfamiliar. As noted above, civil lawsuits today are frequently larger and much more complex than during the early years of the Federal Rules.<sup>129</sup> Changes in law, novelty of claims or defenses, doctrinal subtlety or complexity, increases in the number of parties, increases in the quantity of alternative or hypothetical theories asserted, all tend to require wider-ranging discovery; hence they produce more squabbles about what discovery should be permissible<sup>130</sup> and about privilege.

From time to time, frustration with the expense and disruption caused by discovery prompts calls, typically from the defense bar and business interests but sometimes from judges as well, for curtailment of the scope of discovery and a reversion to more particularized pleading of facts. At the National Conference on Discovery Reform in 1982, for example, Judge Gerard L. Goettel of the Southern District of New York stated: “[T]he rules as presently written give tremendous latitude to discovery. It was a mistake not to reduce that latitude, as proposed a few years ago, so that there would be a point at which it could be said that certain discovery is too peripheral, and is not necessary.”<sup>131</sup>

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128. See GLASER, *supra* note 20, at 161.

129. See *supra* pp. 519-20.

130. See Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 873, 879; see also Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 641 (1989).

131. *The Judge's Role in Discovery*, 3 REV. LITIG. 89, 117 (1982). Although Judge Goettel did not specifically identify the proposal he had in mind, in all likelihood it was that advanced in 1977 by a Special Committee of the American Bar Association's Section of Litigation to limit the scope of discovery to "issues raised by the claims or defenses of any party." PRELIMINARY DRAFT, *supra* note 21, at 9-10; see also *ACF Indus. Inc. v. EEOC*, 439 U.S. 1081, 1087 (1979) (Powell, J., dissenting from denial of certiorari) (quoting letter from Hon. Griffin Bell that in his experience as a judge, practicing lawyer and Attorney General of the United States, the scope of discovery is far too broad).

More successfully from the perspective of curtailing discovery, an alliance of interests from the high-tech industries and large accounting firms successfully lobbied Congress in 1995 to pass the Private Securities Litigation Reform Act<sup>132</sup> over President Clinton's veto. Among other procedural provisions specifically for securities fraud lawsuits, the Reform Act raised the standard of factual particularity with which fraud in the issuance or sale of securities must be pleaded in a complaint. It also provided for a moratorium on all discovery, beginning when a motion to dismiss the complaint is filed, until its decision. Although there is continuing debate about the supposed merits of the Reform Act and its departure from principles of "trans-substantive" procedure, there is little question about the immediate effect of these essentially pro-defendant provisions. Because the facts constituting suspected fraud and the evidence necessary to prove it typically are within the exclusive knowledge and control of defendants, the Reform Act makes it much more difficult both for complaints alleging securities fraud to survive motions to dismiss and for plaintiffs in securities fraud cases in federal court to obtain discovery at all.

In 1998, the Advisory Committee on Civil Rules published for comment a draft of proposed amendments to the Federal Rules of Civil Procedure.<sup>133</sup> After receiving comments and holding hearings, in April 1999 the Advisory Committee approved the proposed amendments, with minor revisions,<sup>134</sup> and

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132. Pub. L. No. 104-67, 109 Stat. 737 (1995).

133. PRELIMINARY DRAFT, *supra* note 21. Its proposals included: elimination of the opt-out authorization from the automatic disclosure procedure in Rule 26(a)(1) as well as limitation of the scope of required automatic disclosure; elimination of the authorization in Rule 26(b)(2) for local rules altering presumptive national limits on frequency or duration of discovery requests; amendment of the discovery moratorium of Rule 26(d) so that the parties can immediately commence discovery in cases to which initial disclosure does not apply; amendment of Rule 26(f)'s provision for a face-to-face discovery conference to one that could occur by telephone or video conferencing; addition of a presumptive limit of one seven-hour day on depositions; and sanctions for failure to supplement discovery responses under Rule 26(d)(2). *See id.* at 34-59. The Preliminary Draft also contained another proposed change, making explicit court power to allow a party to pursue a discovery request that otherwise would violate the limit of Rule 26(b) on condition that the requesting party pay part or all of the reasonable costs of responding, however, this proposal, after being approved by both the Advisory Committee on Civil Rules and the Standing Committee on Rules of Practice and Procedure, was not approved by the Judicial Conference of the United States. *See infra* notes 134-36.

134. *See* Memorandum from the Honorable Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to the Honorable Anthony J. Scirica, Chair,

on June 14 and 15, 1999, the Standing Committee on Rules of Practice and Procedure approved a proposal that the amendments be forwarded to the Judicial Conference of the United States with a recommendation for adoption of the proposed rule changes.<sup>135</sup> At its meeting on September 15 and 16, 1999, the Judicial Conference of the United States considered the proposed amendments and, except for one provision not relevant to this discussion, approved them.<sup>136</sup> If the Supreme Court approves them by the end of April 2000, the amendments will take effect on December 1, 2000 unless they are disapproved by Congress before that time.<sup>137</sup>

One of the most controversial of the proposed amendments would alter Rule 26(b)(1), concerning the scope and limits of discovery. Specifically, it would amend the rule by changing the relevance referent that presently governs discovery's scope and limits, "[p]arties may obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]" to "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party."<sup>138</sup> Furthermore, the proposed amendments would add the sentence, "For good cause shown, the court may order discovery of any information relevant to the subject matter involved in the action."<sup>139</sup>

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Committee on Rules of Practice and Procedure 1 (May 11, 1999) (on file with author) [hereinafter Niemeyer Memorandum].

135. See E-mail from Professor Thomas Rowe to Law Faculty Discussion List on Civil Procedure (July 26, 1999) (on file with author).

136. See E-mail from Professor Thomas Rowe to Law Faculty Discussion List on Civil Procedure (Sept. 15, 1999) (on file with author). According to the Rules Committee Support Office at the Administrative Office of the United States Courts, the Judicial Conference "voted to approve, with one exception, all the rule amendments recommended by the Standing Rules Committee. The Conference rejected the proposed amendments to Civil Rule 26(b)(2) dealing with cost bearing. Long discussions were held on the Civil Rules' initial-disclosure and scope-of-discovery proposals, and the votes approving these two proposals were extremely close." *Id.* (quoting a report on the Conference's action).

137. See *id.*

138. *Proposed Amendments to the Federal Rules of Civil Procedure*, *supra* note 21, at 81-82.

139. *Id.* at 83.

In the Introduction to the Preliminary Draft, the Advisory Committee described this change<sup>140</sup> as attempting to divide discovery as it presently exists into attorney-managed discovery, which would have to be relevant to claims and defenses stated in the pleadings, and court-managed discovery, which could be relevant to the subject matter of the action upon good cause shown.<sup>141</sup> The official Committee Note explained the change as follows:

The Amendment is designed to involve the court more actively in regulating the breadth of discovery in cases involving sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

The Committee intends to focus the parties and the court on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. However, the rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.<sup>142</sup>

Whether the amendment would achieve its desired end, if approved by the Supreme Court, is doubtful at best. The Advi-

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140. The Advisory Committee traces the ancestry of this proposal back to a proposal to amend the rule made in 1978 by the American Bar Association's Section of Litigation and renewed from time to time by different bar groups, most recently by the American College of Trial Lawyers. See PRELIMINARY DRAFT, *supra* note 21, at 9-10, 54; see also *supra* note 131.

141. See PRELIMINARY DRAFT, *supra* note 21, at 4.

142. *Id.* at 55-56 (citation omitted).

sory Committee suggested that the revision was not intended to change the scope of available discovery so much as to change the presumption to the need for court approval for discovery ranging beyond the claims and defenses in the pleadings.<sup>143</sup> Because federal district courts today already have the power to limit discovery to protect parties or other persons from “annoyance, embarrassment, oppression, or undue burden or expense,”<sup>144</sup> however, and because since 1970 it already has been the responsibility of the party seeking discovery to seek orders to compel recalcitrant respondents to provide discovery, it is not clear why this change should be necessary.

To the extent that its proponents believe that the amendment would change real-world discovery practice, their view that the parties should not be entitled ordinarily to explore matters not obviously and specifically relevant to claims and defenses stated in the pleadings suggests a fundamental, reactionary departure from the orthodox view of the respective functions of discovery and pleading long accepted by the Supreme Court. As Justice Powell, a committed opponent of discovery excess, wrote for a unanimous Court in 1978:

The key phrase in this definition [from Rule 26(b)(1)]—“relevant to the subject matter involved in the pending action”—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. *Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by pleadings, for discovery itself is designed to help define and clarify the issues.*<sup>145</sup>

Justice Powell also quoted Moore’s Federal Practice for the proposition that “[t]he court should and ordinarily does interpret ‘relevant’ very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation.”<sup>146</sup>

There are other problems with the amendment,<sup>147</sup> besides its radical, pro-defendant<sup>148</sup> novelty. First, as the quotation

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143. *See id.*

144. FED. R. CIV. P. 26(c); *see also* *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

145. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (quoting *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (emphasis added); *see also* *Klonoski v. Mahlab*, 156 F.3d 255, 267 (1st Cir. 1998), *cert. denied sub nom. Mary Hitchcock Mem’l Hosp. v. Klonoski*, 119 S. Ct. 1334 (1999); *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995).

146. *Oppenheimer Fund*, 437 U.S. at 351 (quoting 4 J. MOORE, FEDERAL PRACTICE ¶ 26.56[1], at 26-131 n.34 (2d ed. 1976)).

147. As students of legal change are aware, the unintended consequences

from the Committee's note reveals, the amendment offers no guidance whatsoever for determining the point at which requested discovery should be deemed relevant to the subject matter involved in the action, without being relevant to the claims and defenses of any party. Second, it offers no assistance in determining what constitutes "good cause" that should be sufficient for a judge to justify granting discovery relevant to the subject matter of the action rather than simply to the claims and defenses of the parties. Third, since defense lawyers would use the amended scope provisions to resist discovery to an even greater extent than they do already, an immediate effect of the proposed amendment would likely be to increase the number of discovery disputes that result in motions to compel and thus require judicial intervention. In view of the low likelihood that such intervention would be forthcoming (especially in view of the history of unsuccessful calls for judicial intervention over the past forty years),<sup>149</sup> one may be forgiven for being less than sanguine about the proposed amendment's effects.

Fourth and even more troubling, however, would be another unintended but likely consequence of the amendment: the effective abandonment by the federal courts of the philosophy of "notice pleading" and a return to "fact pleading," with all of the problems associated with it. Lawyers cannot predict with precision where useful evidence will be found or when they have enough of it,<sup>150</sup> especially in complex and high-stakes cases. As noted above, although lawyers need liberal discovery in order to pursue factual support for clients' claims where claims and defenses have been pleaded in generalized statements, the danger exists that the relevance of any given discovery sought might not be obvious to adversaries or to a court that must rule on motions to compel or motions for protective orders.

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of legislation or rulemaking are often even more significant than the intended effects.

148. The proposal favors defendants for at least two reasons. First, plaintiffs typically need more discovery than do defendants, and the restricted scope of "attorney-managed" discovery will facilitate narrowing and resisting discovery by defendants. Second, the proposal's indirect effects on pleadings, namely that it will require plaintiffs' lawyers to aver the circumstances giving rise to claims in greater detail if discovery is to be available, will give additional particularized notice to defendants.

149. See *infra* Part VII.

150. See Easterbrook, *supra* note 130, at 641.

Limiting discovery to matters relevant to the claims and defenses of the parties therefore would require lawyers (mainly plaintiffs' lawyers) to aver the circumstances giving rise to the claims and defenses (mainly claims) much more specifically than is required today. This probable but unintended<sup>151</sup> consequence of the proposed amendment of Rule 26(b) would thus aid defendants and effect a radical departure from notice pleading traditions enshrined both in the philosophy of Rule 8(a) and in such venerable cases as *Conley v. Gibson*.<sup>152</sup> Although these consequences were stressed repeatedly throughout the proceedings of the Advisory Committee, especially in the public comments,<sup>153</sup> they did not suffice to dissuade both the Advisory Committee and the Standing Committee on Rules of Practice and Procedure from ultimately recommending the proposal,<sup>154</sup> or the Judicial Conference of the United States from approving it.

The Committee offers no reason to think that reducing the scope of discovery available without court order will have the desired effect of reducing discovery disputes and expense in complex and high-stakes cases. Undoubtedly, generalized statements of claim and wide-ranging discovery required by the philosophy of notice pleading and sanctioned by venerable cases interpreting Rules 8(a)<sup>155</sup> and Rule 26(b)(1) contribute to the adversarial friction apparent in discovery disputes. Reducing the scope of discovery, however, will exacerbate, not ameliorate, the problem, as well as begin to transform our procedural system back to a fact-pleading system that too easily

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151. Since the proposals for this revision have come mainly from the defense bar through the years, I use the term "unintended" to refer presumptively to the Advisory Committee, not to the proposal's originators and boosters.

152. 355 U.S. 41 (1957).

153. I am grateful to Professor Edward H. Cooper, Reporter to the Civil Rules Advisory Committee, for this information. See Summary of Public Comments on the Preliminary Draft of Proposed Amendments to the Civil Rules Regarding Discovery 1998-99, at 74-121 (unpublished report prepared by Professor Richard L. Marcus, Reporter to the Discovery Subcommittee of the Advisory Committee on Civil Rules) (on file with author).

154. See Niemeyer Memorandum, *supra* note 134, at 5-6. One member of the Advisory Committee, Professor Thomas Rowe, moved to abandon the proposed change to Rule 26(b)(1) relating to the scope of discovery, however, following debate, the Committee voted 9-4 against the motion, thus to continue with the Proposed Amendment as it relates to the scope of discovery. See *id.*

155. Rule 8(a) provides in relevant part: "A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." FED. R. CIV. P. 8(a).

disposes of disputes on the basis of technicalities rather than merits.<sup>156</sup>

## V. DISCOVERY AND COST INTERNALIZATION

One consequence of discovery flows from the value of information gleaned, while another derives from the burden discovery inflicts on the respondent. Writers from law and economics sometimes characterize these values or effects as “informational” on one hand and “impositional” on the other,<sup>157</sup> and observe that both enhance the settlement value of the discovery proponent’s position. Their analysis assumes not only that informational benefits of discovery flow exclusively to the requesting party but also that impositional effects, the costs of discovery, are born to a much greater degree by the discovery respondent than the proponent, since in general it is easier and cheaper to propound discovery requests than to respond to them.<sup>158</sup> To put it another way, the requester receives not only all of the informational benefits from discovery, but also impositional benefits in the form of expenses imposed on the responder.<sup>159</sup> The ability of litigants under the Federal Rules to “externalize” discovery costs results, it is sometimes said, in “socially inefficient” levels of discovery.<sup>160</sup>

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156. It is possible to argue that liberal discovery of facts relevant to the subject matter of an action permits commencement of litigation based on little more than well-founded suspicion. “Subject-matter-relevant” discovery thus assists private enforcement of complex regimes of public law, such as federal securities law, civil rights law, and antitrust law, to name but three examples. Undoubtedly discovery of facts relevant to the subject matter of a claim or defense allows plaintiffs to develop and piggy-back claims discovered after commencement of an action on claims known prior to commencement. Defendants opposed to the underlying law thus may have added incentives to obstruct and resist discovery. Moving back from the standard of “subject-matter-relevant” discovery would reduce the possibility of leveraging known into unknown claims, but unless one believes that discovery should permit fishing expeditions, that may well not be a bad thing. Regardless, it is beyond the scope of this Article.

157. See Setear, *supra* note 52, at 581-82; see also Easterbrook, *supra* note 130, at 637-38 (distinguishing “normal” discovery requests, i.e. informational, from “impositional” discovery requests).

158. See Easterbrook, *supra* note 130, at 645 (“Impositional discovery depends on asymmetric stakes; the requester incurs lower costs than the person interrogated.”).

159. See Setear, *supra* note 52, at 580-81.

160. John K. Setear, Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352, 353, 357 (1982). The analysis defines a “socially efficient” level of discovery by hypothesizing a litigant who both receives all the benefits from discovery and must incur all its costs. *Id.* at 357.

Professors Robert Cooter and Daniel Rubinfeld recently have taken the economic analysis several steps further. First, what some have called "social inefficiency," Cooter and Rubinfeld label "misuse" of discovery. Litigants "misuse" discovery, they assert, when the costs of responding to discovery exceed the expected increase in value to the proponent's case.<sup>161</sup> Second, knowingly "misusing" discovery, according to Cooter and Rubinfeld, constitutes discovery "abuse."<sup>162</sup> In permitting parties to externalize their discovery costs, their analysis concludes, "current law promotes discovery misuse and abuse."<sup>163</sup> Additionally, Cooter and Rubinfeld assert, because discovery costs are not shared equally between the parties to litigation, results of settlements are skewed in an inequitable manner.<sup>164</sup>

In order to cure these problems, Cooter and Rubinfeld propose a two-part cost-shifting rule.<sup>165</sup> Each party would be required to pay its own costs of discovery (including compliance) up to a level prescribed by law.<sup>166</sup> Beyond the prescribed level, however, the reasonable cost of compliance would be shifted to

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Such a litigant would only take a particular discovery step if its benefits to him exceeded its costs. *See id.* Because litigants under the Federal Rules of Civil Procedure are able routinely to externalize costs of discovery, they have an incentive to take discovery in socially inefficient amounts. *See id.* This asserted problem of socially excessive discovery is intensified, it is said, by the fact that litigants are represented by lawyers who gain benefits from discovery that do not accrue to the client while they incur few of the costs. *See id.* at 357-58.

161. *See* Cooter & Rubinfeld, *An Economic Model of Legal Discovery*, *supra* note 18, at 437. In Setear's terminology, this is when discovery's impositional effects exceed its informational benefits. *See* Setear, *supra* note 52, at 581-83.

162. Cooter & Rubinfeld, *An Economic Model of Legal Discovery*, *supra* note 18, at 437.

163. *Id.*

164. *See id.* They reason:

When the parties agree to settle a dispute by dividing the bargaining surplus equally, the settlement corresponds to the expected judgment in the event of a trial, provided that the transaction costs of dispute resolution are equal for the two parties. In contrast, asymmetrical transaction costs distort the terms of settlement so that they do not correspond to the expected trial judgment. For example, if the plaintiff faces lower trial costs than the defendant, then the plaintiff can demand more than the expected judgment to settle the case.

*Id.*; *see also* Cooter & Rubinfeld, *Reforming the New Discovery Rules*, *supra* note 18, at 62 ("Equalizing discovery costs eliminates distortions in bargaining power between the parties and promotes fairness.").

165. *See* Cooter & Rubinfeld, *Reforming the New Discovery Rules*, *supra* note 18, at 71.

166. *See id.*

the requesting party.<sup>167</sup> The resulting cost internalization would result in parties only making discovery requests that are essential to their claims and defenses and forgoing requests that are “marginal,” hence dispensable.<sup>168</sup>

As theoretically elegant and attractive as this critique and proposal may appear, they are based on several misleading assumptions about the operation of discovery in practice that would be surprising but for the fact that their authors are economists rather than lawyers. First, although economic analysis is enlightening as to whether activities are “efficient” or “inefficient,” it offers no guide for determining when discovery activities should be regarded as “misuse” or “abuse.” Such concepts are essentially value judgments that implicate and should be informed by other policy considerations, including the size and complexity of the lawsuit, the potential merits of the claims and defenses, the parties’ access to information, and their respective abilities to bear the costs of the process.

Second, litigants’ ability to “externalize” the costs of discovery is not as great as Cooter and Rubinfeld suppose, since the informational value of discovery does not flow entirely or even disproportionately to the requesting party. In the “notice pleading” regime of the Federal Rules, in which discovery rather than the pleadings bear a significant part of the burden of narrowing issues, both parties benefit from clarification and specification of the factual and legal contentions in dispute. Discovery sometimes is used not to unearth information, but in fact to bring it to the attention of the adversary in order to promote a settlement. For example, in complex multi-party cases, it is not uncommon at some point for plaintiffs’ lawyers to use a deposition of a defendant to parade strong documentary evidence that plaintiffs have discovered, ostensibly to ask the witness about it, but in fact to inform the assembled defense lawyers that, in light of the evidence being paraded at the deposition, they would be ill-advised to take the case to trial. Informational benefits in such cases go from the requesting to the responding party, not vice versa.

Professors Cooter and Rubinfeld systematically exaggerate the disparity between the costs of discovery borne by proponents and respondents. It should of course be less time-consuming to draft a set of interrogatories than to answer

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167. *See id.*

168. *Id.* at 71-72.

them, to draft a request for production of documents than to search for and produce the requested documents, to draft a deposition notice than to be deposed in response to the notice. However, to generalize from these facts that it is more expensive to respond to discovery than to propound it and that costs are therefore borne disproportionately by respondents completely ignores the time and effort customarily spent by discovery-requesting lawyers. They must design a discovery program, draft discovery requests, review documents produced by respondents, plan and outline depositions, prepare to take them (including arranging exhibits), take them, and analyze information disclosed or material produced in response to discovery requests, including requests for document production, interrogatories, deposition questions and requests for admission. In addition, lawyers for plaintiffs, including government agencies, often conduct extensive and expensive pre-filing investigations. Taking discovery involves more than just spitting out requests on the word processor.

Although the respective costs to the parties ultimately present an empirical question,<sup>169</sup> it would be surprising if in many cases these additional expenditures of time and effort by discovery proponents did not approach the time spent by respondents answering interrogatories, reviewing documents in order to produce them or in preparing witnesses for depositions and being deposed. Because the informational benefits litigants glean from discovery responses often depend on additional efforts by requesting lawyers,<sup>170</sup> it is fair to assume much greater correspondence between the costs of discovery to proponents and respondents than Cooter and Rubinfeld and other litigation commentators<sup>171</sup> take into account.

A third problem with Cooter and Rubinfeld's proposal is that when a lawyer requests discovery in a lawsuit, there is ab-

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169. Lawyers for discovery respondents—particularly defendants—may, of course, review for responsiveness, privilege and work product far more material than they ultimately produce, and often are heard to complain that they routinely produce hundreds of thousands of pages of requested materials that the requesting lawyers never even inspect.

170. As Professor Cooper has put it, “[t]he actual value of information will depend on many factors, including the relative astuteness of the person who gains it.” Cooper, *supra* note 2, at 467.

171. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 548 (1991); John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, LAW & CONTEMP. PROBS., Summer 1985, at 17.

solutely no way for her to calculate ex ante the increased likelihood of success that will result from the discovery requested, or to weigh it against her adversary's costs of compliance or response. It is ordinarily impossible to know with anything approaching precision what discovery will reveal or how valuable it will be. As Judge Easterbrook—no fan of abusive litigation—has described it:

Lawyers cannot limit their search for information in discovery, because they do not know what they are looking for. They do not know when to stop, because they never know when they have enough. . . . When the stakes are high—and often the stakes for corporations are many times the ad damnum of the complaint—it is worthwhile to invest the legal resources needed to produce even a small change in the probable outcome. Lawyers practicing in good faith, therefore, engage in extensive discovery; anything less is foolish.<sup>172</sup>

If one knew in advance the results of discovery requests, it would not be necessary to make them. Given the lack of specificity with which parties are allowed to plead in a notice pleading regime, lawyers must use discovery broadly, initially to determine what are the areas of dispute or contention in the lawsuit, and then to try to provide factual support for each of the party's material factual assertions that remains in dispute.

Fourth, although in economic terms there is a sense in which any item of evidence disclosed in discovery might theoretically increase a party's likelihood of success on a claim or defense by a few percent, in a legal analysis the only difference that matters is the difference between prevailing or not prevailing, winning or losing. With respect to ordinary civil matters in which the standard is proof "by a preponderance of the evidence" this is the difference, typically, between forty-nine and fifty-one percent. Any item of evidence that tends to prove or disprove any of the essential elements of a claim or defense, without which the party cannot meet its burden of proof, has the potential to make this critical two-percent difference. As a practical matter, therefore, even a small increase in proof translates into the entirety of the claim or defense and equates to one-hundred percent of its dollar value.<sup>173</sup> Therefore, even under Cooter and Rubinfeld's own analysis, in order to determine whether a particular discovery request is "marginal" or "impositional," compliance costs should be weighed against the entire dollar value of related claims or defenses, and not simply

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172. Easterbrook, *supra* note 130, at 641 (footnote omitted).

173. As Professor Cooper has pointed out to me, a judge or jury is likely to render a larger award if 75% confident on the merits than if 51% (or 30%).

a smaller dollar amount attributable to a small percentage increase in the likelihood of prevailing on particular claims or defenses.<sup>174</sup>

Fifth, determination of a “switching point” beyond which costs should be shifted would require retrospective factual determinations by courts of both the anticipated value of requested information and the reasonable expenses of complying with discovery requests. Courts understandably would be extremely reluctant to undertake any such inquiries. Cooter and Rubinfeld’s cost-shifting proposal, assuming that it could be implemented, would engulf courts in a morass of satellite litigation much worse than the *ex ante* reasonableness inquiry, imperfect and malleable though it is, that courts use today in ruling on discovery motions.<sup>175</sup>

Sixth, in singling out discovery as economically inefficient, Cooter and Rubinfeld focus on the wrong snapshot. To suggest that discovery should be deemed acceptable or “abusive” depending on whether or not it conforms to an economic construct of cost internalization ignores the purposes of discovery as well as the policies that inform the law concerning the “American Rule” and fee-shifting generally. If there is economic inefficiency or loss from discovery costs, the problem is less that discovery is not fully cost-internalizing than that various real-world extra-litigation activities, which prompt or require litigation, are not. Society may require persons to purchase liability insurance to internalize some of the costs of activities such as negligent driving or manufacturing and selling harmful products, and may adopt various liability rules that require tortfeasors or contract-breakers to internalize some of the costs of their conduct. But these expedients are not fully cost-internalizing, both for historical reasons and for policy reasons that many find persuasive.

In the United States, under the so-called “American Rule,” each party to litigation bears its own attorney’s fees unless a legislatively created or judicially recognized exception ap-

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174. How their model would operate in cases in which what is at stake is injunctive or declaratory, rather than monetary, relief, Cooter and Rubinfeld conveniently do not bother to describe. See Cooper, *supra* note 2, at 470.

175. As Judge Easterbrook has put it, “How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?” Easterbrook, *supra* note 130, at 639; see also Cooper, *supra* note 2, at 468.

plies.<sup>176</sup> The American Rule, which has been law since the eighteenth century,<sup>177</sup> has four traditional policy justifications: first, that shifting fees would have a “penalizing” effect on losing participants in litigation, which is, after all, inherently uncertain; second, that awarding prevailing parties their attorney’s fees would tend to discourage litigants of small means from “seeking to vindicate their rights in court”; third, that it would overburden the judicial system to have to determine reasonable attorney’s fees in each case; and fourth, that lawyers might subordinate client interests to avoid irritating judges who later would be determining the lawyers’ fees.<sup>178</sup> Any proposal for shifting litigation expenses must ultimately confront and come to terms with these policy concerns. Proposals such as Cooter and Rubinfeld’s, which fail to mention, much less consider, them are clearly insufficient.

As superficially theoretically attractive as the Cooter-Rubinfeld analysis and its accompanying proposal may seem at first, they are based ultimately on misleading assumptions about the conduct of discovery in practice and a sleight-of-hand substitution of economic efficiency alone for a host of other values and policy concerns that need to inform the design of our litigation process.

## VI. THE FANTASY OF SELF-ENFORCEMENT

Another basic flaw in the theory and structure of civil discovery under the Federal Rules also negates the drafters’ expectation that discovery would be self-enforcing in all but truly exceptional cases. As law and economics scholars have shown, rules are efficient when they provide penalties of a magnitude that, in light of the probability of enforcement, suffice to produce the desired behavior.<sup>179</sup> Rules should provide effective incentives for observance and disincentives for violation. In this sense, the discovery rules are woefully inefficient in a significant percentage of cases. The incentive structure they create

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176. See generally *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247-71 (1975).

177. See *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796).

178. Joseph J. Ward, *Corporate Goliaths in the Costume of David: The Question of Association Aggregation Under the Equal Access to Justice Act—Should the Whole Be Greater Than Its Parts?*, 26 FLA. ST. U. L. REV. 151, 156 n.24 (1998).

179. See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 75-86 (2d ed. 1989).

becomes increasingly inadequate as the stakes in a lawsuit rise, which is one of the main reasons why discovery disputes requiring judicial intervention are distressingly common in complex or high-stakes cases.

Despite the drafters' hopes and expectations, the discovery provisions of the Federal Rules of Civil Procedure have not proved self-enforcing. They provide two enforcement procedures: the motion to compel discovery, which can be invoked by a discovery proponent to secure compliance with the respondent's discovery obligations,<sup>180</sup> and the motion for protective order, which can be invoked by a respondent to curtail overreaching discovery.<sup>181</sup> Either or both can be used to litigate discovery disputes, although since 1970, the obligation to seek judicial resolution belongs primarily to the party who desires to have discovery requests enforced.<sup>182</sup> Since motions to compel and motions for protective orders inevitably require fact-scrutinizing judicial interventions typically after full briefing, the procedures are time-consuming and generate much fact-intensive, satellite litigation.

If a party's automatic disclosure or response to an interrogatory, document request or deposition question is incomplete, evasive or denied, if the response is obfuscated by objections or assertions of privilege of doubtful validity, or if a discovery request is disputed as to content, breadth or scope, the parties can resort to a motion to compel discovery<sup>183</sup> or motion for a protective order.<sup>184</sup> This involves, first, a meeting between the attorneys to try in good faith to reach agreement concerning the desired discovery without judicial intervention.<sup>185</sup> Assuming that no agreement is reached,<sup>186</sup> the moving

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180. See FED. R. CIV. P. 37(a).

181. See FED. R. CIV. P. 26(c).

182. See FED. R. CIV. P., advisory committee's explanatory statement concerning 1970 amendments to discovery rules, pt. V ("The party seeking discovery, rather than the objecting party, is made responsible for invoking judicial determination of discovery disputes not resolved by the parties.").

183. See FED. R. CIV. P. 37(a).

184. See FED. R. CIV. P. 26(c).

185. Both Rule 26(c) and Rule 37(a) impose "meet and confer" obligations. FED. R. CIV. P. 26(c), 37(a).

186. Ronald Olson, a prominent member of the California bar, has stated that "the rules requiring attorneys to confer, or to certify that a good faith effort to do so was made . . . are totally mechanistic and a waste of time. They create just one more hurdle and one more costly step before reaching the heart of the problem." *The Judge's Role in Discovery*, *supra* note 131, at 141; see also FEDERAL JUDICIAL CENTER REPORT, *supra* note 2, at 32 (finding that the ma-

party must bring its motion to compel or motion for protective order with full briefing. If the proponent of the request prevails on a motion to compel, typically she will obtain an order directing the respondent to answer more fully. Conversely, if the discovery respondent prevails on a motion for protective order, typically she will obtain an order limiting or curtailing the discovery or imposing terms and conditions by which it may be had. In either case, the court is directed to award sanctions in favor of the party prevailing on the motion, which almost always consist of the prevailing party's expenses of litigating the motion, including the party's reasonable attorney's fees, unless the loser's opposition was substantially justified or the circumstances render an award of expenses unjust.<sup>187</sup>

This procedure is problematic for several reasons. First and foremost, the incentive structure inherent in the Federal Rules fails to provide sufficient incentives to cooperate, except in low-stakes cases where the amount at issue does not justify the costs of litigating a discovery motion with its risk of sanctions.<sup>188</sup> The risk of having to pay one's adversary's attorney's fees incurred in litigating a motion to compel discovery or motion for protective order in addition to one's own fees, however, pales into insignificance as the stakes<sup>189</sup> in the litigation increase.

To take a simplified example, assume that it costs from \$7,500 to \$15,000 for each side to brief and argue an average discovery motion. The risk of having to pay from \$15,000 to \$30,000 (one's own and one's adversary's expenses) if one were

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majority of 60% of lawyers "who had met and conferred did not think meeting and conferring had any effect on litigation expenses, disposition time," or number of issues in case).

187. Conversations with friends in practice suggest that some judges rarely award monetary sanctions, despite the apparent intention of the initially mandatory language of Rule 37, leaving the risk of incurring judicial displeasure as the only practical limit on adversarial behavior in discovery disputes. See *infra* pp. 554-55.

188. This explains the findings of the Federal Judicial Center Report and the RAND Report that discovery works well in the majority of "routine" cases. FEDERAL JUDICIAL CENTER REPORT, *supra* note 2, at 21; RAND REPORT, *supra* note 6, at 74.

189. The "stakes" can vary tremendously, from simply the maximum possible monetary recovery or loss in the specific case, to possible considerations or consequences extending far beyond the case, including the value of the information sought to be produced or protected, the stare decisis value of the result of the lawsuit, the value of future litigations based on similar claims, etc., which sometimes can far exceed the amount at issue in the immediate case. See FEDERAL JUDICIAL CENTER REPORT, *supra* note 2, at 71-72.

to lose the motion would be a significant disincentive to taking an unjustified or unreasonable position in a paradigmatic “ordinary” case in which the maximum at stake is \$100,000 and the total litigation budget for each side is in the neighborhood of \$35,000. On the other hand, where the stakes approach or exceed half-a-million dollars, the risk of having to pay from \$15,000 to \$30,000 if one loses a motion to compel or motion for protective order is much less important and undoubtedly worth bearing in order to obtain or preserve strategic informational advantage. Where the stakes are even greater, any deterrent effect of this sanction becomes negligible.

In high-stakes cases, therefore, the quantum of sanctions that the rules prescribe for losers of discovery motions is grossly inadequate. The incentive structure envisaged by the Federal Rules is ill-designed to deter overreaching discovery by proponents and incomplete, evasive and dilatory responses to discovery by respondents. Most of all, it is insufficient to deter disputing parties from avoiding impasse and seeking judicial resolution of their disputes.

Whenever the stakes involved in litigation are great enough for a party to risk incurring all or part of the expenses of a discovery motion—including paying the opponent’s attorney’s fees if the court’s ruling on the motion is adverse—there is little to lose and potentially much to gain from dilatory, evasive or obstructive behavior by discovery respondents or from overreaching discovery by discovery proponents.

Empirical evidence confirms this analysis. The Federal Judicial Center’s study reports:

Discovery problems were . . . much more likely to be reported in cases with higher stakes. As the stakes increased from \$4,000 or less (27% of these attorneys saying there were problems) to over \$2 million (69%), the percentage reporting problems increased progressively. . . . Attorneys in cases valued over \$150,000 (28% of these attorneys) were more than twice as likely to report multiple types of problems with discovery than attorneys in lower-stakes cases (12%). . . . Where a lot of money is at stake, where the issues involve personal injury or matters of principle, where the relationships are contentious and the issues complex, here we see more discovery and more problems with discovery.<sup>190</sup>

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190. FEDERAL JUDICIAL CENTER REPORT, *supra* note 2, at 21. This analysis accords with David M. Trubek’s finding that stakes cap the amount of lawyer time invested. See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 95-96 (1983).

In addition to the incentive problem, the procedure for litigating discovery disputes is extremely cumbersome. It requires the parties to generate stacks of briefs with weighty supporting affidavits. It also requires judges who typically are ill-acquainted with the out-of-court conduct of the litigation to make extremely fact-intensive determinations of relevance, entitlement and fault. Since notice pleading permits claims to be alleged in a vague and general manner, deciding questions of relevance and entitlement, scope and burden is a difficult, daunting and time-consuming task that devours a disproportionate amount of judicial resources.

Experienced litigators know that it is easy to comply technically with the letter of the discovery rules while significantly departing from their spirit. To take but one common example, many lawyers routinely interpose boilerplate objections<sup>191</sup> to both interrogatories and document requests and then offer answers or state that they will produce documents subject to the stated objections.<sup>192</sup>

The purported rationale for this practice is to protect against the possibility that an answer or production will later be deemed insufficient or incomplete. Nonetheless, it also has two problematic effects, both of them intended: first, evading the requirement of Rule 26(g) that a lawyer's signature on a discovery response constitutes a certificate that to the best of the signer's knowledge formed after reasonable inquiry, the response is complete as of the time it is made,<sup>193</sup> and second, keeping the discovery proponent from knowing whether the answer or production is thought or intended by the respondent to be complete.

Although objectionable deposition questions, apart from those that trench on recognized evidentiary privileges, are sup-

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191. Among the common ones are that the interrogatory or document request is: (1) vague; (2) not reasonably calculated to lead to the discovery of admissible evidence; (3) overly broad in scope; or (4) unreasonably burdensome to respond to. *See, e.g., Trustmark Life Ins. Co. v. University of Chicago Hosp.*, No. 94-C4692, 1996 U.S. Dist. LEXIS 1614, at \*24-25 (N.D. Ill. Feb. 14, 1996) (including objections stating that document request was "overly broad, unduly burdensome, oppressive, designed to annoy and/or harass, and . . . not reasonably calculated to lead to the discovery of admissible evidence" merely tracked language of Rule 26(b)(2) and did not give any factually-based explanation for conclusion that request was improper).

192. *See, e.g., Wallace v. General Elec. Co.*, No. 87-1236, 1988 U.S. Dist. LEXIS 10711, at \*7-9 (E.D. Pa. Sept. 22, 1988) (stating that defendant answered plaintiff's interrogatories subject to objections).

193. FED. R. CIV. P. 26(g).

posed to be answered subject to objections,<sup>194</sup> answering an interrogatory or stating that one will produce documents subject to stated objections is manifestly improper. Some courts acknowledge as much,<sup>195</sup> but others do not seem to appreciate the purpose and effects of the practice.<sup>196</sup>

In any case, despite their theoretical availability, serious sanctions for violations of the discovery rules are awarded rarely under Rule 37 of the Federal Rules of Civil Procedure. Under Rule 37(b), sanctions are to be awarded when a party fails to comply with a discovery order, which obviously requires that such an order be in place.<sup>197</sup> Under Rule 37(d), however, sanctions are only available when a party has ignored a discovery request totally.

This means that in practice, parties and their lawyers can initially evade, obfuscate and respond incompletely to discovery virtually with impunity, so long as they do not ignore a discovery request or totally fail to respond.<sup>198</sup> Not until the proponent

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194. See FED. R. CIV. P. 30(c).

195. See *Badalamenti v. Dunham's Inc.*, 896 F.2d 1359, 1362 (Fed. Cir. 1990) (holding that a party served with a document request has the options of (1) responding by agreeing to produce documents as requested; (2) responding by objecting; (3) moving for protective order; and (4) ignoring the request; only ignoring the request or totally failing to respond justifies imposition of Rule 37(d) sanctions). The court in *Fisons* stated:

It appears clear that no conceivable discovery request could have been made by the doctor that would have uncovered the relevant documents, given the above and other responses of the drug company. The objections did not specify that certain documents were not being produced. Instead the general objections were followed by a promise to produce requested documents. These responses did not comply with either the spirit or letter of the discovery rules and thus were signed in violation of the certification requirement.

*Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1083 (Wash. 1993) (en banc).

196. See, e.g., *American Health Sys., Inc. v. Visiting Nurse Ass'n*, No. 93-0542, 1994 U.S. Dist. LEXIS 15447, at \*20 (E.D. Pa. Oct. 20, 1994) (holding that where defendants represented repeatedly that they would produce requested documentation subject to their initial objections, plaintiff has obligation to facilitate defendants' promised production prior to filing motion to compel).

197. *But see Fisons*, 858 P.2d at 345 (holding that a motion to compel compliance is not a prerequisite to a sanctions motion).

198. See, e.g., Jerold S. Solovy & Robert L. Byman, *Discovery: The Utility of RFAs*, NAT'L L.J., Jan. 18, 1999, at B16, B16 ("Putting aside systematic and outrageous discovery abuse for which ultimate sanctions can be imposed, the typical remedy for typical evasiveness is usually no more severe than an order to do what you should have done in the first place, probably coupled with a manageable monetary sanction.").

has obtained from the trial court an order compelling discovery will the respondent run any serious risk by obstructing, evading or responding incompletely.<sup>199</sup> Should the respondent still not comply, despite the proponent having obtained a court order, the proponent can return to the court and by further motion practice persuade the judge of the respondent's intransigence. Only at this stage may judicial displeasure result in serious repercussions. As befits penalties for defiance of court orders, these will be significantly more dire than the legal expense sanctions involved in the original Rule 37 motion and may include various kinds of preclusion sanctions.<sup>200</sup>

Defects in the incentive structure in the discovery rules have not gone completely unnoticed by jurists, although few solutions have been suggested. Judge Robert Keeton, for example, a highly experienced trial lawyer, longtime law professor and one of the most insightful of sitting federal trial judges, has recognized that "[t]he real incentive structure that rules tend to create in current circumstances may be an incentive structure not intended by drafters."<sup>201</sup> Indeed, it would be difficult to argue with the proposition that the discovery rules presently create an incentive structure that fails abysmally to achieve the cooperative ideal envisaged by the drafters, at least in complex and high-stakes cases.

One can imagine various ways to alter the incentive structure of the discovery rules, including: (a) immediately imposing

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199. Evasion is not completely without risk, since courts have discretion under Rule 37 to exclude evidence not produced in discovery without a prior motion to compel. See Jerold S. Solovy & Robert L. Byman, *Discovery: Fight the Compulsion to Compel*, NAT'L L.J., June 7, 1999, at B22, B22.

200. The "preclusion sanctions" provided by Rule 37(b)(2) include:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

FED. R. CIV. P. 37(b)(2).

201. KEETON, *supra* note 15, at 182.

the preclusion sanctions of Rule 37(b)(2) upon parties that litigate discovery motions and lose, rather than first requiring violation of an order compelling discovery or a protective order; (b) adopting a procedure better designed to promote cooperative behavior among attorneys in discovery consistent with the spirit and purpose of the Rules, such as that proposed by Judge Keeton, essentially a form of "final offer arbitration" in which the judge informs the parties that he will spend only as much time investigating a discovery dispute as is necessary to identify the party espousing the less reasonable position, and then will rule against that party in toto;<sup>202</sup> (c) awarding a quantum of sanctions against litigants who lose decisions on discovery motions that more closely corresponds to the stakes in the lawsuit than simply the expenses of litigating the motion; and (d) eliminating the possibility of adjudication of discovery disputes by judges and magistrate judges altogether, leaving lawyers who engage in such disputes and the parties they represent to suffer the consequences of taking unreasonable positions.<sup>203</sup> None of these proposals is without problems, however, and the last is seriously deficient.

#### A. IMMEDIATELY IMPOSING PRECLUSION SANCTIONS UPON LOSERS OF DISCOVERY MOTIONS

Imposing preclusion sanctions immediately, the argument runs, would change attorneys' behavior in short order. Rather than risk preclusion of evidence, striking of a claim or defense or establishment of a disputed fact as stipulated by a court order or jury instruction, attorneys would alter their behavior to curtail excessive discovery demands on one hand and avoid evasive or dilatory responses on the other. Attorneys would be especially likely to change their behavior if preclusion could give rise to a legal malpractice action by the client.

Although the Supreme Court has approved dismissal of claims in circumstances of persistent dilatory conduct by counsel,<sup>204</sup> courts typically are reluctant to award preclusion sanctions, holding them excessively harsh unless provoked by a willful violation of an order compelling discovery.<sup>205</sup> Use of pre-

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202. See *id.* at 184-87.

203. I owe this suggestion to Professors Jeffrey S. Parker and Larry E. Ribstein of George Mason University School of Law. See *infra* pp. 560-61.

204. See *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 & n.10 (1962).

205. See, e.g., *Baker v. General Motors Corp.*, 86 F.3d 811, 817 (8th Cir. 1996), *rev'd on other grounds*, 522 U.S. 222 (1998).

clusion sanctions as a prophylactic for discovery disputes in civil litigation would resemble imposing the death penalty as a means of preventing recidivism for petty crimes.

Judicial reluctance to impose preclusion sanctions is well-founded. In addition to due process concerns and the fear of depriving litigants of their day in court, in many discovery disputes which side should prevail is a close question and ample justifications exist for the positions of both.<sup>206</sup> Also, if a party makes reasonable efforts to comply with its discovery obligations but cannot do so because of facts beyond the party's control, applying a preclusion sanction, such as dismissal of the complaint, arguably would constitute deprivation of a property interest without due process of law.<sup>207</sup>

Given society's expressed preference for having disputes decided on their merits<sup>208</sup> rather than technicalities, preclusion sanctions would be too draconian to employ routinely, and we should not expect to see them utilized as a matter of course any time soon.<sup>209</sup>

#### B. CHANGING THE OPERATIVE INCENTIVE STRUCTURE TO PROMOTE COOPERATION

Observing correctly that an award of attorney's fees after a ruling on a discovery motion often does not provide a sufficient disincentive for lawyers to take unreasonable positions in discovery, Judge Keeton routinely has utilized a procedure crafted to produce better incentives for counsel to cooperate:

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206. See, e.g., *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1162, 1172-73 (7th Cir. 1984) (en banc) (showing disagreement between majority and minority whether plaintiffs' discovery of defendant's membership records was "predatory" or necessary to establish claims), *rev'd on other grounds*, 470 U.S. 373 (1985). Another example was the discovery reported by the press to have been requested by each party in *Jones v. Clinton* concerning the sexual history, practices and attitudes of the adversary. See Neil A. Lewis, *Jones's Lawyers Ask President For Details About His Sex Life*, N.Y. TIMES, Oct. 15, 1997, at A16. Although discovery into such private matters obviously had potential for embarrassment, humiliation and coercion to settle, it also was the kind of information arguably needed by each party to prove its respective claims or defenses.

207. See *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979).

208. See *Baker*, 86 F.3d at 817 (holding that the sanction for failure to comply with a discovery order is too harsh if it "failed to achieve a balance between the policies of preventing discovery delays and deciding cases on the merits.").

209. See Rosenberg, *supra* note 77, at 483.

It is the sanction of adopting as a judicial order the position of the attorney whose posture just before hearing is less unreasonable than the opponent's. That is, the judge hears the controversy only long enough to determine which side has been more unreasonable up to the point that the hearing commenced, and adopts the other side's position as the court's order resolving the discovery dispute.<sup>210</sup>

This is, in effect, a form of "final offer arbitration," such as that regularly employed in professional baseball salary disputes.<sup>211</sup> The arbitrator has no discretion to fashion his own result; all he can do is to choose one or the other of the contestants' final offers. In theory, this procedure has several advantages. First, since the judge is unlikely to accept an unreasonable position, it gives the parties an incentive to concede the more extreme and adversarial aspects of their positions during negotiation, in order to make their final offer more reasonable. Thus, it is designed to utilize effectively the disciplining force of uncertainty<sup>212</sup> to restrain and mold lawyers' behavior into a cooperative mode and encourage dispute settlement consistent with the letter and spirit of the discovery rules. In addition, it should reduce the time judicial officers need to spend combing the fine details of discovery disputes in order to reach rulings.

The procedure is not without disadvantages, however. In complex or high-stakes cases, especially where the parties each may have good reasons for requesting and withholding disputed information or materials, as for example highly prized trade secrets in an intellectual property dispute, the procedure probably will not suffice everywhere to produce the cooperative behavior desired. To be effective, it still would require determined and constant judicial supervision, including timely rulings when discovery disputes arise.<sup>213</sup> Not least, where there

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210. KEETON, *supra* note 15, at 184. Judge Keeton gives notice to lawyers who appear before him both through an order regarding discovery (a form of which is included in his book, *see id.* at 185-88) and, at status conferences, in repeated descriptions of his procedure and admonitions to cooperate. *See id.*

211. *See* Jonathan M. Conti, *The Effect of Salary Arbitration on Major League Baseball*, 5 SPORTS LAW. J. 221, 230 (1998); Amy Farmer & Paul Pecorino, *Bargaining with Informative Offers: An Analysis of Final-Offer Arbitration*, 27 J. LEGAL STUD. 415, 415 (1998).

212. *See generally* Charles M. Yablon, *Poison Pills and Litigation Uncertainty*, 1989 DUKE L.J. 54 (noting the beneficial effects of uncertainty in litigation).

213. Professor Cooper informs me that judges who promise prompt discovery rulings say they have no difficulty delivering on the promise, since it is the promise of prompt judicial attention, with its attendant risk of uncertainty, that produced lawyer cooperation. This accords well with the experience of Wilmington lawyers who observe that the Delaware Supreme Court's recent

are good reasons for the positions taken on both sides, its application would seem of doubtful propriety, since parties should not be penalized<sup>214</sup> for exercising their rights to assert non-frivolous grounds for seeking or withholding discovery.

### C. CHANGING THE QUANTUM OF SANCTIONS AWARDED ON DISCOVERY MOTIONS

Another way to deter litigants from taking confrontational positions in discovery would be to change the quantum of sanctions awarded to the prevailing party on adjudications of discovery motions from the expenses incurred in litigating the motion (including reasonable attorney's fees) to some amount bearing a closer correspondence to the stakes in the lawsuit. Obviously directed to the problem of the inadequacy of the attorney's fee sanction in high-stakes cases, such a proposal would face certain obvious problems at the outset. First, it would be difficult if not impossible to apply in suits seeking injunctive or other non-monetary relief. Second, even if the Rules Enabling Act would permit use of such sanctions without express congressional approval,<sup>215</sup> their interaction with attorney's fee-shifting statutes designed to encourage plaintiffs to bring meritorious lawsuits would create a host of new policy complications without clear solutions. Third, as with Judge Keeton's proposal, requiring the loser to pay a large sanction when it asserted a good-faith or non-frivolous position that did not carry the day seems unduly punitive. Fourth, increasing the sanctions for losing discovery motions risks further displacement of the emphasis of the litigation process from adjudication of the merits to pretrial procedural wrangles.

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declaration that in case of disputes at depositions, "the Delaware Courts are just a phone call away" has had a salutary effect on the conduct of depositions. See *infra* note 316.

214. It may be argued that being held to the position the judge deems more reasonable can hardly be viewed as a penalty. However, in situations where the parties have well-grounded arguments for seeking to discover and to protect documents or information, what seems marginally more reasonable to the judge may seem manifestly unreasonable to the losing party, who has scant opportunity to seek appellate review of the decision without incurring contempt sanctions, since rulings on discovery motions are unreviewable interlocutory orders.

215. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-71 (1975) (holding that new fee-shifting exceptions to the American Rule require Congressional approval); cf. FED. R. CIV. P. 11(c)(2).

## D. REMOVING THE POSSIBILITY OF JUDICIAL INTERVENTION

Advocates of market-based solutions suggest that simply abolishing the possibility of adjudicating discovery disputes might lessen the incidence of such disputes. The argument reasons that to get information, one must be willing to give information, and, like the framers of the discovery rules, assumes that self-interest would produce on both sides a willingness to cooperate. If adjudication of discovery disputes were abolished, parties obviously would save the expense of briefing discovery motions. Without recourse to adjudication of discovery disputes, parties and their lawyers would be less likely to take extreme positions leading to confrontation and impasse. Further, it is argued, attorneys as officers of the court would of necessity take greater responsibility for cooperative discovery, and concern for their professional reputations would deter lawyers from cheating.

One may be forgiven for regarding this proposal skeptically.<sup>216</sup> First, many lawsuits are not amenable to anything approaching an equal exchange of information, since one party has more information than the other, while the party with the burden of persuasion at trial has special need for information. Often, of course, these conditions combine to produce the familiar scenario in which the plaintiff needs information while the defendant has it, so that any incentives to share are entirely asymmetrical.

Second, the history and professional norms of the American adversarial system are so skewed toward promoting clients' advantage and protecting clients' interests that, regardless of the theory's predictions, it would take a cultural sea change for lawyers to cooperate freely in discovery in high-stakes and complex cases without an enforcement mechanism. In the short run, removing the possibility of enforcement through adjudication by judicial officers would most likely result in more, rather than less, cheating, evasion and obstruction. In the long

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216. It resembles unpersuasive arguments by some law and economics scholars that issuers of securities in the capital markets have sufficient incentives to disclose information at a socially optimal level without being compelled to do so by the requirements of the federal securities laws and regulations promulgated by the Securities and Exchange Commission, and that therefore we should abolish the Securities and Exchange Commission along with the federal securities statutes and their system of mandatory disclosure. See, e.g., Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 921-49 (1994).

run, it would turn the clock back to before 1938, when disparities of wealth and power among the parties often resulted in insurmountable informational asymmetries and trial by surprise.

Additionally, most discovery in complex and high-stakes cases is conducted by relatively new associates at large law firms. Most of these lawyers do not have serious expectations of becoming partners and therefore are not particularly concerned with maintaining their firms' long-term reputations for fairness or playing by the discovery rules. Indeed, to the extent that these associates care about reputation at all, they are more likely to be concerned with building their own reputations within the firm for toughness, aggressiveness and thoroughness on the client's behalf than with the firm's ethical reputation in the local legal community.<sup>217</sup>

Self-enforcement of the discovery rules is accordingly much easier said than done in cases in which the stakes are high. Although lawyers tend to agree in principle that cooperation and reciprocity is a good idea, when it comes to their own cases adversariness guides behavior designed to capture and maximize informational advantage. The available enforcement mechanism, adjudication of discovery motions, provides sanctions against adversarial excess that are ineffective, insufficient and in any case come far too late.

## VII. THE MIRAGE OF JUDICIAL INTERVENTION

According to the Advisory Committee on Civil Rules, "[t]he belief [is] almost universal [among members of the academic community, the bench and the bar] that the cost of discovery disputes could be reduced by greater judicial involvement and that the earlier in the process that judges became involved, the better."<sup>218</sup> According to the Federal Judicial Center Report published in 1997, when asked how to alleviate discovery problems, lawyers most often recommend increased judicial case management.<sup>219</sup> Similarly, the RAND Report observed that cases high in complexity, discovery difficulty or stakes

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217. Cf. Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1639 (1996) ("Younger lawyers, convinced that their future careers may hinge on how tough they *seem* while conducting discovery, may conclude that it is more important to look and sound ferocious than to act cooperatively, even if all that huffing and puffing does not help (and sometimes harms) their cases.").

218. PRELIMINARY DRAFT, *supra* note 21, at 3.

219. FEDERAL JUDICIAL CENTER REPORT, *supra* note 2, at 2.

“appear to especially benefit from the use of discovery/case management plans.”<sup>220</sup> To students of procedure, these conclusions evoke nothing as much as a vivid feeling of déjà vu, for they closely track similar recommendations of myriad lawyers and judges for at least the last forty years, a period during which there have been remarkably consistent calls for increased judicial control.

In 1957, Judge Albert Ridge, discussing the organization of large cases, warned how easy it was to lose control of a case with many fringe issues if the court did not “exercise rigid control from the time the complaint [was] filed.”<sup>221</sup> Other lawyers’ and judges’ views echoed those of Judge Ridge. Then-Professor Jack Weinstein observed that greater judicial control over the discovery process was desirable, even as he doubted the sufficiency of judicial manpower to exercise that degree of control in the Southern District of New York.<sup>222</sup> Another lawyer stated:

The control of discovery cannot wait until it proves to be burdensome or oppressive. If the courts want to keep a big case within bounds, they must control it from the start. Otherwise the case gets off on the wrong foot and it becomes more and more difficult to keep it from becoming a judicial nightmare.<sup>223</sup>

As another put it, “[i]f [discovery procedures] are permitted to operate without adequate restraint they can become more of a burden than they are worth.”<sup>224</sup>

Explaining the need for greater judicial management in 1958, Judge Joe E. Estes noted:

If the judge fails to forcibly curb counsel who violate the letter and spirit of the rules of discovery, the entire process will break down. As every trial lawyer knows, the great abuse of discovery occurs in the court whose judge is unwilling to enforce the powerful sanctions available. There are few lawyers who fail to heed the considered suggestion of a firm judge.<sup>225</sup>

Judge Irving R. Kaufman voiced similar sentiments: “[T]he type of broad search for truth contemplated by the discovery

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220. RAND REPORT, *supra* note 6, at xxii.

221. Albert A. Ridge, *The Organization of the Big Case—The First Pretrial Conference*, 21 F.R.D. 396, 408 (1957).

222. See Jack B. Weinstein, *Standing Masters to Supervise Discovery*, 23 F.R.D. 36, 37 (1958) (recommending increased use of masters in view of insufficiency of judicial manpower).

223. James R. Withrow, Jr., *Defense Counsel’s View of a Government Civil Antitrust Suit*, 21 F.R.D. 427, 438 (1957).

224. Manley B. Strayer, *Discovery in Pretrial Conference Procedure*, 23 F.R.D. 347, 350 (1958).

225. Estes, *supra* note 54, at 297.

procedures . . . can be effective only if the judiciary is available at all stages to enforce the spirit of the rules.”<sup>226</sup>

In 1968, the author of a major study of discovery published by the Russell Sage Foundation concluded that “effective judicial administration is necessary to implement the goals and letter of the rules.”<sup>227</sup> In 1979, an experienced lawyer reflecting on the discovery rules again called for more court-directed supervision and management of cases if the rules were to achieve their goals.<sup>228</sup> The same year, the Supreme Court observed that district judges had “ample powers” to prevent abuse of the discovery process.<sup>229</sup>

Once more in 1980, the authors of a Federal Judicial Center study agreed with views of the attorneys they interviewed and concluded that “the best short-term solution to . . . discovery problems . . . lies in judicial control.”<sup>230</sup> In 1981, Professor Maurice Rosenberg observed that “the current trend of thinking is that greater judicial involvement, not less, is essential to reduce problems of discovery abuse.”<sup>231</sup>

A year later, at the National Conference on Discovery Reform held in Austin, Judge William W. Schwarzer urged, “[o]bviously this is not a self-executing process that can be left to the lawyers. It requires the active involvement of the judge from the earliest stages of the lawsuit.”<sup>232</sup> Judge Alvin Rubin agreed: “Judges should get involved *early*. They should get involved because that is the best way for the lawyers to cooperate and the best way for judges to know the case and resolve problems. Judicial involvement is the best way to manage cases.”<sup>233</sup>

These repeated calls for increased judicial involvement came to a fruition of sorts with the 1983 amendments to the Federal Rules of Civil Procedure, which extensively revised Rules 7, 11, 16 and 26 with the explicit purpose of facilitating

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226. Irving R. Kaufman, *The Philosophy of Effective Judicial Supervision Over Litigation*, 29 F.R.D. 207, 213 (1958).

227. GLASER, *supra* note 20, at 243.

228. See Cutner, *supra* note 20, at 954.

229. *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

230. EBERSOLE & BURKE, *supra* note 68, at 79; see also *id.* at 64, 73, 76.

231. Rosenberg & King, *supra* note 50, at 589.

232. William W. Schwarzer, *Discovery in the Scheme of Things—Rethinking the Litigation Process*, quoted in *The Judge's Role in Discovery*, *supra* note 131, at 123.

233. *The Judge's Role in Discovery*, *supra* note 131, at 205 (quoting Judge Rubin) (emphasis in original).

early judicial involvement in and supervision of cases.<sup>234</sup> As the Advisory Committee stated in the Official Comments to the Amendments,

Without judicial guidance beginning shortly after institution, [complex or protracted] cases often become mired in discovery.

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... Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.<sup>235</sup>

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[Rule 26(b)] contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.<sup>236</sup>

....

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision.<sup>237</sup>

Despite the official adoption of increased judicial management through early intervention and ongoing supervision as a guiding principle, a mere two years elapsed before a law review article noted once more that although judicial intervention was necessary to curb discovery problems, many judges were reluctant to undertake it and left discovery disputes unresolved for inordinately long periods of time.<sup>238</sup> In 1989, a Brookings Institution Report once again concluded that in order to reduce cost and delay associated with civil litigation, judges should take a more active role in case management.<sup>239</sup> In 1995, well-known

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234. See Margaret L. Weissbrod, *Sanctions Under Amended Rule 26—Scalpel or Meat-ax? The 1983 Amendments to the Federal Rules of Civil Procedure*, 46 OHIO ST. L.J. 183, 187-90 (1985).

235. FED. R. CIV. P. 16, advisory committee's notes to 1983 amendment.

236. FED. R. CIV. P. 26(b), advisory committee's notes to 1983 amendment.

237. FED. R. CIV. P. 26(g), advisory committee's notes to 1983 amendment.

238. See Cavanagh, *supra* note 33, at 776, 778.

239. BROOKINGS INSTITUTION REPORT, *supra* note 60, at 3, 12-14. The report stated:

The excessive cost and delay associated with litigating civil cases in America should no longer be tolerated and can be forcefully addressed through procedural reform, more active case management by judges, and better efforts by attorneys and their clients to control cost and delay.

In particular, we conclude:

....

Chicago attorney Philip Corboy stated, "Judicial management is the only way we are going to get sanity back into the pretrial procedures."<sup>240</sup> In 1996, Professor Yablon called for judicial involvement yet again, when in a flippant article he called for judges simply to tell lawyers engaging in abusive discovery practices "to shut up and knock it off."<sup>241</sup> Similarly, in September 1997, Professor Thomas Rowe, summarizing proceedings of the Civil Rules Advisory Committee's conference at Boston College Law School, noted that several lawyers repeated requests for judges to be available to provide "adult supervision" of bickering lawyers.<sup>242</sup> The conclusions of the Advisory Committee and of the RAND and Federal Judicial Center reports are thus only among the most recent exemplars of an unbroken tradition of calling for greater judicial involvement and supervision that stretches back forty years at least.

If calls for increased judicial management of the discovery process have been so remarkably consistent, why have they not been more consistently heeded by judges? There appear to be three main reasons. The first is limited judicial resources, in terms of both the number of judicial officers and competing demands on their time. Judge Irving Kaufman wrote in 1957, even as he advocated close day-to-day supervision of the discovery process, that he supposed judges would have sufficient time to provide the required supervision themselves "[w]hen the millen[n]ium comes," and that until then he believed the use of special masters to supervise discovery worthy of consideration.<sup>243</sup> Despite the addition of more judges and magistrates,

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—That judges should take a more active role in managing their cases, ending the practice in some courts of delegating to magistrates functions that are in fact better performed by judges.

*Id.* at 3.

240. Gilbert Jimenez, *Justices Order Pre-Trial Speedup*, CHI. SUN-TIMES, June 2, 1995, at 20, available in 1995 WL 6656185.

241. Yablon, *supra* note 217, at 1620.

242. E-mail from Professor Thomas Rowe to Law Faculty Discussion List of Civil Procedure (Sept. 10, 1997) (on file with author).

243. Irving R. Kaufman, *Report on Study of the Protracted Case*, 21 F.R.D. 55, 64 (1957). For the use of masters generally, see GLASER, *supra* note 20, at 240-41; Weinstein, *supra* note 222, at 37. At the 1982 National Conference on Discovery Reform, diverse opinions were expressed concerning usefulness of magistrates in supervising the discovery process. See *The Judge's Role in Discovery*, *supra* note 131, at 100-01. A 1987 Louis Harris opinion survey of 800 state judges and 200 federal judges concluded that the judges polled thought shortage of judges to be the second most important cause of litigation delay generally. See LOUIS HARRIS & ASSOCS., JUDGES' OPINIONS ON PROCEDURAL ISSUES: A SURVEY OF STATE AND FEDERAL TRIAL JUDGES WHO SPEND AT

increasing caseload pressure “makes understandable judges’ decisions to assign a relatively low priority to discovery squabbles,” as Flegal and Umin observed in 1981.<sup>244</sup>

In the last two decades, however, docket pressure has increased, not abated.<sup>245</sup> As of this writing, on the eve of the millennium, Judge Kaufman’s hopeful prediction that judges would have enough time for more personal supervision of discovery has not been fulfilled. Moreover, the increasingly partisan approach to the judicial confirmation process taken by both political parties in the Senate, particularly since the Bork and Thomas Supreme Court confirmation hearings, has exacerbated the judicial personnel problem, leaving many authorized judgeships vacant for inordinate periods.<sup>246</sup>

In any event, district judges generally spend only about five percent of case-related time on discovery matters, including scheduling, management, and considering and deciding motions to compel and motions for protective orders, according to a recent Federal Judicial Center time study of federal district

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LEAST HALF OF THEIR TIME ON GENERAL CIVIL CASES 33-34 (1987).

244. Frank F. Flegal & Steven M. Umin, *Curbing Discovery Abuse in Civil Litigation: We’re Not There Yet*, 1981 BYU L. REV. 597, 603-04.

245. Published reports of the Administrative Office of the United States Courts make clear that despite additions of authorized judgeships in 1979, 1988 and again in 1996, caseloads have increased overall. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD: A FIVE-YEAR RETROSPECTIVE (1997), available in *The Federal Judiciary Homepage* (visited Oct. 25, 1999) <<http://www.uscourts.gov/publications.html>>; see also the Annual Reports of the Administrative Office of the United States Courts. In his 1997 Year-End Report on the Federal Judiciary, Chief Justice Rehnquist noted that 1997 saw courts of appeals and bankruptcy filings at their highest rates in history, with both a small increase in civil filings and the largest federal criminal caseload in 60 years in district courts. He stated further, “unless steps are taken to stop or reverse this trend, either the demands placed on the federal Judiciary will eventually outstrip its resources, or the Judiciary will become so large that it will lose its traditional character as a distinctive judicial forum of limited jurisdiction.” WILLIAM H. REHNQUIST, THE 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available in *The Federal Judiciary Center Homepage* (visited Nov. 24, 1999) <<http://www.uscourts.gov/cj97.htm>>.

246. In his 1997 Year-End Report on the Federal Judiciary, Chief Justice Rehnquist noted that 82 of the 846 Article III judicial offices in the federal judiciary were vacant and that 26 of those judgeships had been vacant for 18 months or more and constituted “judicial emergencies.” REHNQUIST, *supra* note 245; see also FEDERAL JUDICIAL CASELOAD: A FIVE-YEAR RETROSPECTIVE, *supra* note 245, at 12 (“On July 1, 1997, in the U.S. district courts, 73 vacancies existed among the 647 district judgeship positions authorized. Twenty of the vacancies had existed for at least 18 months.”).

courts.<sup>247</sup> Judges explain that spending increased amounts of time supervising discovery would divert judicial attention from other important tasks, such as conducting trials,<sup>248</sup> and unfairly favor cases in which counsel misbehave.<sup>249</sup>

Supervising discovery and addressing discovery problems promptly would have obvious opportunity costs for docket management. Less time would be available for conducting trials in other cases,<sup>250</sup> ruling on motions, working to settle cases and holding status conferences. Absent clear demonstration that judicial time is better spent addressing discovery problems than discharging other responsibilities in other cases, judges are not likely to change their behavior and devote significantly more time to the discovery process than they do already.

The second reason for insufficient judicial involvement in discovery disputes is that ruling on discovery motions requires

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247. See McKenna & Wiggins, *supra* note 4, at 799 (quoting John E. Shapard, Oral Presentation at the Federal Judicial Center Research Conference on Civil Discovery (Sept. 1991)).

248. See *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367-68 (11th Cir. 1997) (“[S]carce judicial resources must be diverted from other cases to resolve discovery disputes.”); Brazil, *Improving Judicial Controls over the Pre-trial Development of Civil Actions*, *supra* note 50, at 887.

249. As Judge Keeton said in a discussion at the National Conference on Discovery Reform in 1982:

I would like to know if we are talking about a budget or litigating on a budget. The court has to budget the court's limited time and the simple exercise of that discretion, which is what is required in dealing with proportionality, will take *court* time. Thus, attention will be diverted from other issues for which the court's time might be budgeted. It is being proposed to give more of the limited judicial time to this small percentage of our total case load in which discovery abuse has occurred and to take it away from other cases. How can that be justified? As a judge, must I not consider whether the other cases deserve that time *more* than this body of cases? If so, the sanction rule will not amount to much because the judge is likely to conclude that he cannot properly give the attention required in order to make considered judgments about sanctions because the discovery cases do not deserve the judge's budgeted time as soon as the other cases pending.

*The Judge's Role in Discovery*, *supra* note 131, at 181 (emphasis in original).

250. The enactment of the Federal Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1994), which required that arraignments be held within 10 days of indictment and that criminal trials be held within 60 days of arraignment, causing them to jump to the head of the queue on every district judge's docket, resulted in less judicial attention being available for civil dockets. The advent of the Federal Sentencing Guidelines pursuant to the Sentencing Reform Act of 1984 (title II of the Comprehensive Crime Control Act of 1984), 18 U.S.C. §§ 3551-3559 (1994), had a similar effect on civil dockets, since mandatory minimum sentences made plea bargains less attractive to accused persons, more of whom chose to take their chances at trial.

courts to engage in much specific fact-finding, often in the absence of sufficient familiarity with the facts. As then-Professor Brazil observed, judges were concerned that there was too much to know in big cases to make well-considered decisions about many discovery matters.<sup>251</sup> Moreover, without the assurance of thorough knowledge of the matters in dispute, courts could not be confident that their discovery decisions would maximize disclosure of all relevant evidence and impose no unfair burden on litigants.<sup>252</sup>

The third reason for insufficient judicial involvement is simply that courts dislike having to deal with discovery disputes, not unfairly viewing them as arising primarily from immoderate behavior of unreasonable lawyers.<sup>253</sup> Many judges have no intent to manage discovery, according to Brazil, who reported that one judicial proponent of aggressive case management stated "that he finds most discovery disputes 'puerile' affairs whose consumption of judicial resources he resents."<sup>254</sup> A 1987 survey of a thousand state and federal trial judges by Louis Harris and Associates revealed that the overwhelming majority reported having problems with the discovery process and that a sizeable majority blamed lawyers who used discovery to turn over every stone and lawyers who used discovery to intimidate or raise the stakes for their opponents.<sup>255</sup>

A related reason why judges dislike discovery disputes is that they often assume an obnoxiously vituperative and personal tone. As one court wrote recently, "[I]f there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery dis-

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251. See Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions*, *supra* note 50, at 887; see also *The Judge's Role in Discovery*, *supra* note 131, at 181 (quoting Judge Keeton); *id.* at 117 ("[I]t is presumptuous for the judge to believe that on the basis of a ten minute or even one hour presentation, he truly understands the parameters of the litigation." (quoting Judge Gerard L. Goettel)).

252. See Brazil, *The Adversary Character of Civil Discovery*, *supra* note 35, at 1348-49.

253. See *Diehl v. H.J. Heinz Co.*, 901 F.2d 73, 74 (7th Cir. 1990) (referring to discovery dispute euphemistically as a "spitting match"); *Trustmark Life Ins. Co. v. University of Chicago Hosps.*, No. 94-C4692, 1996 U.S. Dist. LEXIS 1614, at \*25-26 (N.D. Ill. Feb. 14, 1996) (stating that discovery battles are "distasteful and wasteful in general"); see also Shugrue, *supra* note 11, at 13.

254. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions*, *supra* note 50, at 886-87.

255. See LOUIS HARRIS & ASSOCS., *supra* note 243, at 38, 91-92.

putes with other lawyers of equally repugnant attributes.”<sup>256</sup> Lawyers bickering over discovery often cast aspersions on each other’s veracity and credibility, sometimes setting forth conflicting versions of purported agreements or negotiations among counsel. To the extent that their affidavits do more than simply authenticate other documents for judicial consideration, they transform the lawyers into adverse witnesses, providing an additional reason for judicial disgust with the process. Judges regard such behavior not simply as unpleasant but also as unprofessional, since it violates the traditional prohibition against advocates simultaneously acting as witnesses.<sup>257</sup>

Persistent incentives to adversarial excess in discovery in complex and high-stakes cases undoubtedly will continue to produce discovery disputes. Given the reasons for judicial reluctance to devote significantly more time to management of discovery or resolution of discovery problems, however, it is unrealistic to expect major changes in judicial behavior, despite the benefits that many argue would accrue from greater attention to the discovery process and its problems.

Viewing limitations on available judicial supervision simply in terms of opportunity costs, one might think that persistent discovery wrangling might be eliminated by a significant increase in the size of the federal judiciary. This is unlikely to occur for a host of political and economic reasons, including, not least significantly, the opposition of certain influential federal judges themselves.<sup>258</sup>

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256. *Dahl v. City of Huntington Beach*, 84 F.3d 363, 366 (9th Cir. 1996) (quoting *Krueger v. Pelican Prod. Corp.*, No-CIV-87-2385-A (W.D. Okla. Feb. 24, 1989)).

257. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1983); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (1980).

258. Among the reasons commonly proffered in opposition to proposals to increase the size of the federal judiciary are the asserted impossibility of maintaining a judiciary of the highest quality; asserted excessive costs; the supposed inconsistency of law that would result; and supposed reduction in the collegiality of appellate courts. See *Prepared Statement of Jon O. Newman, United States Circuit Judge, Before the Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts*, Federal News Service, Sept. 4, 1997, available in LEXIS, News Library, Fednew File; *Prepared Statement of Gerald Bard Tjoflat, United States Circuit Judge, Before the Senate Judiciary Committee on Administrative Oversight and the Courts, Subcommittee on “Conserving Judicial Resources: Considering the Appropriate Allocation of Judgeships in the United States Court of Appeals for the Fourth Circuit.”* Federal News Service, Feb. 5, 1997, available in LEXIS, News Library, Fednew File; Jon O. Newman, *Size of Federal Judiciary Threat to Qual-*

Another oft-proposed alternative would be the more regular appointment of judicial surrogates, such as special masters to oversee discovery pursuant to Rule 53 of the Federal Rules of Civil Procedure.<sup>259</sup> Among the asserted advantages of such appointments are that masters could be more available than judges on short notice<sup>260</sup> and could gain greater familiarity with the conduct of discovery and circumstances of cases, that decisions in instances of disputes could be delivered more promptly, and that masters would be well situated to propose cost-efficient and cooperative methods of sharing information.<sup>261</sup>

More regular appointment of masters to supervise discovery would not be problem-free, however. One would have to find a way to apportion fairly the expenses of the master's services among the parties.<sup>262</sup> In addition, informality of procedure without a record could encourage manipulative and opportunistic behavior by litigators. It also would remove adjudi-

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ity, CONN. L. TRIB., Nov. 4, 1991, at 3; see also GORDON BERMANT ET AL., FEDERAL JUDICIAL CTR., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS 23-54 (1993); Laura E. Little, *The Future of the Federal Judiciary*, 70 TEMPLE L. REV. 1151, 1151 (1997); William M. Richman & William L. Reynolds, *Elitism, Expediency and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 297-334 (1996).

259. There is an extensive literature on the possibility of using masters to supervise discovery and other aspects of pretrial litigation. See Wayne D. Brazil, *Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule*, in MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS 305 (Wayne D. Brazil et al. eds., 1983) [hereinafter Brazil, *Authority to Refer Discovery Tasks*]; FEDERAL JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION, THIRD § 21.52, at 111-14 (1995); Frederick B. Lacey & Jay G. Safer, *The Authority, Roles, Responsibilities, and Utilization of Special Masters*, in 2 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS 620, 620 (Robert L. Haig ed. 1998); Wayne D. Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 AM. B. FOUND. J. 143 [hereinafter Brazil, *Referring Discovery Tasks to Special Masters*]; Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986) [hereinafter Brazil, *Special Masters in Complex Cases*]; Edward H. Cooper, *Civil Rule 53: An Enabling Act Challenge*, 76 TEX. L. REV. 1607, 1607-09 (1998); Irving R. Kaufman, *Use of Special Pre-Trial Masters in the "Big" Case*, 23 F.R.D. 572 (1959); Weinstein, *supra* note 222.

260. See Wayne D. Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, in MANAGING COMPLEX LITIGATION, *supra* note 259, at 1, 19 [hereinafter Brazil, *Special Masters in Pretrial Development*].

261. See Brazil, *Special Masters in Complex Cases*, *supra* note 259, at 411.

262. See Brazil, *Authority to Refer Discovery Tasks*, *supra* note 259, at 22-23; see also Cooper, *supra* note 259, at 1623.

cation from public scrutiny, and could lead judicial surrogates to "quick fixes" even as it insulated their actions from effective judicial review.<sup>263</sup>

In any case, the appointment of masters to supervise discovery appears to have been considered and rejected during the formulation of Rule 53 of the Federal Rules of Civil Procedure.<sup>264</sup> Additionally, the Supreme Court has been wary of allowing non-judicial officers to perform judicial functions, explicitly rejecting congested calendars, complex issues and possible lengthy trials as conditions that would warrant reference to special masters.<sup>265</sup> Several courts of appeals have viewed judicial authority to utilize masters as strictly limited,<sup>266</sup> and counsels' inability to resolve routine discovery disputes has been rejected as sufficiently exceptional to warrant appointment of a special master to supervise discovery.<sup>267</sup> Routine reference of discovery to special masters in the hope of reducing or resolving discovery problems would thus require satisfactorily addressing both the policy concerns and practical difficulties involved in such referrals. It would also be necessary to enact a new source of authority for referrals to masters.<sup>268</sup> In most litigation reform proposals, however, routine appointment of special masters does not command high priority.

#### VIII. SANCTIONS, WRIST SLAPS AND RAMBO

Courts have ample authority to impose sanctions, including serious ones, on lawyers and litigants who fail to comply with discovery obligations, unlawfully obstruct their adversaries' access to proof, or suppress or destroy relevant information or evidence.<sup>269</sup> Although many courts address such matters

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263. See Brazil, *Special Masters in Complex Cases*, *supra* note 259, at 421-22.

264. See Brazil, *Authority to Refer Discovery Tasks*, *supra* note 259, at 306; Brazil, *Referring Discovery Tasks to Special Masters*, *supra* note 259, at 143-85.

265. See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 258-59 (1957).

266. See *Liptak v. United States*, 748 F.2d 1254, 1257 (8th Cir. 1984); see also *Jack Walters & Sons Corp. v. Morton Bldg. Inc.*, 737 F.2d 698, 712 (7th Cir. 1984); *Weissman v. Fruchtman*, No. 83 Civ. 8958 (PKL), 1986 WL 15669, at \*22-23 (S.D.N.Y. Oct. 31, 1986).

267. See *Weissman*, 1986 WL 15669, at \*22-23.

268. See Cooper, *supra* note 259, at 1608.

269. These include: (1) the powers granted by the Federal Rules of Civil Procedure to impose "an appropriate sanction, which may include an order to

with sanctions appropriate to the gravity of the violation,<sup>270</sup> trial courts that exercise their sanctioning power authoritatively and with an eye to deterrent potency are often reversed decisively on appeal.<sup>271</sup> It is unusual for federal courts to refer

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pay the amount of the reasonable expenses incurred because of the violation[.]” FED R. CIV. P. 26(a)(3), in cases of violations of the signing/certification duty of Rule 26(g), as well as the reasonable expenses sanctions of Rule 37(a), (c) and (d), and the various preclusion sanctions of Rule 37(b)(2), *see supra* note 200; (2) the power pursuant to 28 U.S.C. § 1927 to require a person who “multiplies the proceedings in any case unreasonably and vexatiously . . . to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct[.]” 28 U.S.C. § 1927 (1994); and (3) the inherent power of courts to sanction bad-faith conduct that abuses the judicial process, *see Chambers v. Nasco, Inc.*, 501 U.S. 32, 43-46 (1991). In addition, courts have the inherent power to regulate the behavior of lawyers admitted to their bars, as well as the power (and arguably the duty) to refer matters in appropriate circumstances to disciplinary committees and prosecutors.

270. *See Stars’ Desert Inn Hotel & Country Club, Inc. v. Hwang*, 105 F.3d 521, 524-25 (9th Cir. 1997) (stating that default judgment was an appropriate sanction for defendant’s repeated failure to submit to deposition); *Melendez v. Illinois Bell Tel. Co.*, 79 F.3d 661, 671-72 (7th Cir. 1996) (deciding that it was not an abuse of discretion to bar defendant’s expert testimony as a sanction for discovery violations); *Phipps v. Blakeney*, 8 F.3d 788, 790-96 (11th Cir. 1993) (concluding that dismissal was an appropriate sanction for plaintiff’s repeated failure to attend discovery conferences or depositions); *Chilcutt v. United States*, 4 F.3d 1313, 1325 (5th Cir. 1993) (concluding that the district court’s sanction of deeming that plaintiff established the prima facie elements of the liability claim was an appropriate sanction for discovery abuses); *cf. Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 858 P.2d 1054, 1079-85 (Wash. 1993) (en banc) (directing the trial court to impose sanctions on defense counsel for discovery abuse).

271. *See Bonds v. District of Columbia*, 93 F.3d 801, 809 (D.C. Cir. 1996) (reversing discovery sanction precluding defendant from offering witnesses at trial as abuse of discretion because the court did not consider whether the sanction was necessary to further interests other than deterrence and if not, whether less severe sanctions would have been more proportionate to the violation); *Dahl v. City of Huntington Beach*, 84 F.3d 363, 366-67 (9th Cir. 1996) (reversing dismissal of action as sanction but affirming imposition of monetary sanctions); *Wouters v. Martin County*, 9 F.3d 924, 934 (11th Cir. 1993) (holding dismissal an inappropriate sanction for discovery violations); *Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 444-48 (5th Cir. 1992) (reversing the lower court’s use of Rule 11, Rule 26(g), § 1927, and the inherent power of the court to impose monetary sanctions and public reprimand on plaintiff and his lawyers); *Walton v. Throgmorton*, 652 N.E.2d 803, 807 (Ill. App. Ct. 1995) (stating that dismissal with prejudice for abuse of discovery is to be employed only as last resort—in cases “where the actions of a party show a deliberate, contumacious, or unwarranted disregard of the court’s authority”).

Awards of serious sanctions for discovery violations are sometimes reversed on due process grounds. *See Crowe v. Smith*, 151 F.3d 217, 226-29 (5th Cir. 1998) (reversing imposition of fines on defendants because court did not use procedures adequate for a criminal contempt proceeding), *cert. denied*, 119 S. Ct. 2047 (1999); *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 372,

instances of perceived obstruction of access to evidence or other discovery violations to a disciplinary or ethics committee for appropriate action,<sup>272</sup> although that course of action should always be available even when an offending lawyer is thought to be beyond the limits of a court's territorial/jurisdictional reach.<sup>273</sup> It is rarer still to find cases in which judges refer lawyers who flagrantly fail to satisfy their discovery obligations to prosecutors for investigation of obstruction of justice charges.<sup>274</sup>

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377-381 (3d Cir. 1997) (holding that suspending defense counsel as discovery sanction without affording particularized notice violated counsels' due process rights); *In re E.I. DuPont de Nemours & Co.-Benlate Litig.*, 99 F.3d 363, 368-69 (11th Cir. 1996) (reversing order imposing sanctions of \$115 million for repeated violation of discovery orders since sanctions were punitive hence criminal in nature, and had been imposed without constitutional protections accorded criminal contempt defendants).

272. See, e.g., Richard Pliskin, "Rambo" *Litigation Tactics Sanctioned*, N.J.L.J., July 25, 1994, at 8 (reporting that U.S. District Court Judge William Bassler, in addition to imposing sanctions of \$70,000 of attorney's fees against attorney for harassing litigation tactics, also "referred [lawyer's] conduct to state and federal ethics officials for disciplinary review and to the U.S. Attorneys' Offices in Newark and Manhattan for criminal investigation"). *But see* McGuire v. Sigma Coatings, Inc., 48 F.3d 902, 904-06 (5th Cir. 1995) (explaining that grievance committee of Texas bar decided that no disciplinary violation had occurred, despite trial court's finding that defendant's in-house counsel had engaged in discovery violations by destroying documents responsive to plaintiff's requests for production of documents).

273. Obstructing a deposition or destroying documents that are responsive to a Rule 34 request, even if committed beyond the limits of a court's territorial reach by a lawyer who is not a member of the bar of the court in which the proceedings are pending, should be considered a tortious act sufficient to bring the conduct within the reach of the long-arm statutes of most, if not all states, hence state and also federal courts, assuming service of appropriate process on the offending lawyer.

274. Two well-known examples are the Berkey Photo-Kodak civil antitrust litigation, see *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), and the DuPont-Benlate litigation, see *In re E.I. DuPont de Nemours & Co.-Benlate Litig.*, 99 F.3d at 369 n.7. In *Kodak*, a partner at a well-known New York City law firm eventually pleaded guilty to one count of obstruction of justice for suppressing reports of an expert witness that should have been produced to the plaintiffs and then lying to the court about it. See Jack Egan, *Former Kodak Lawyer Charged With Contempt*, WASH. POST, Sept. 19, 1978, at D9. In one of the Benlate cases, the Eleventh Circuit, in reversing the district court's imposition of a \$115 million fine against DuPont for withholding evidence during the trial, also suggested that a criminal investigation of DuPont and its lawyers was called for if it had not already been undertaken. See Milo Geyelin, *Fine Against DuPont in Benlate Case Is Overturned by Federal Appeals Court*, WALL ST. J., Oct. 21, 1996, at B9. DuPont eventually paid a fine of \$11.25 million to end the criminal action. See Torri Still, *DuPont Suits Surface Again*, LEGAL INTELLIGENCER, June 16, 1999, at 4.

These conditions create a climate in which so-called "Rambo"<sup>275</sup> litigation flourishes.

Even apart from courts' unwillingness to award sanctions beyond attorneys' fees except where there has been a violation of an existing court order compelling discovery,<sup>276</sup> judicial responses to serious discovery violations are often manifestly inadequate.<sup>277</sup> This is true despite generations of critics who have emphasized that in order for discovery to succeed, courts must not shrink from using the sanctions provided by the rules.<sup>278</sup> Indeed, variations on the theme of insufficient judicial responses to discovery violations appear so frequently in the literature of reported opinions that they have become judicial-rhetorical topoi. One is solemnly to invoke the sanctioning authority and then to give the transgressing lawyer or party "one more chance."<sup>279</sup> Another is to criticize an offending lawyer or party severely on the record and then do little or nothing about the offending behavior.<sup>280</sup> Three select but not unusual examples more than suffice to make the point.

First, in *Llewellyn v. North American Trading*,<sup>281</sup> after holding defendants' untimely objections to plaintiff's discovery requests waived and noting that defendants had not complied with discovery orders previously entered on two separate occasions by the district judge and magistrate judge, for which sanctions of plaintiffs' attorney's fees incurred in obtaining the orders had been awarded, the magistrate judge solemnly re-

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275. See *infra* notes 297-302.

276. See *supra* pp. 554-55.

277. As Justice Stephen G. Crane stated in his handbook for the New York State Supreme Court, "[J]udges complain that there are too many discovery motions and too much indifference to discovery orders, yet many a judge will let the culprit off to rob again." STEPHEN G. CRANE, HANDBOOK ON CASE MANAGEMENT 49 (1996).

278. See FED. R. CIV. P. 26(g), advisory committee's note to the 1983 amendment; see also Rosenberg, *supra* note 77, at 496-97.

279. See, e.g., Marianne Lavelle, *Rockwell Slapped Over Access to Shuttle Papers*, NAT'L L.J., Aug. 14, 1995, at A9 (describing how the district judge imposed \$10,000 in penalties on Rockwell and shifted all attorney's fees of a former employee who litigated access to documents, as well as \$3,000 in sanctions against Rockwell's Houston law firm). The Judge said he would stop short of entering judgment against Rockwell for discovery abuse including repeated disobedience of court orders and gave Rockwell and its officials "one final opportunity to conduct themselves properly." *Id.*

280. See *Murray v. Sevier*, 993 F. Supp. 1394, 1405 (M.D. Ala. 1997); *Guardian Life Ins. Co. of America*, No. Civ. A. 95-3997, 1996 WL 515500, at \*2 (E.D. Pa. Aug. 30, 1996) (mem.).

281. No. 93 Civ. 8894, 1996 WL 715532 (S.D.N.Y. Dec. 11, 1996).

cited the court of appeals' admonition that attorneys flout discovery orders at their peril.<sup>282</sup> Nonetheless, he then denied plaintiff's motion to strike defendants' answer, since to do so would be equivalent to entering a default judgment and part of the fault was attributable to the conduct of defendant's lawyer.<sup>283</sup> He once more awarded plaintiff the expenses of its discovery motion and then stated:

Counsel for defendants should not, however, mistake the meaning of my exercise of discretion. This is defendants' final warning. Unless defendants respond fully to all outstanding interrogatories and document requests within ten (10) days of the date of this Order, I shall issue a Report and Recommendation, recommending that a default judgment be entered. Put plainly, this is defendants' last chance to comply with its discovery obligations.<sup>284</sup>

Here, the judicial bite was nowhere up to its bark, and it appears that the lucky defendants already had two chances more than they were entitled to under the Federal Rules.

Why, in such cases, should not the failures of counsel to comply with discovery obligations be attributed to their clients, even if it means foreclosing claims and defenses? The rules plainly contemplate striking claims and defenses,<sup>285</sup> and clients ordinarily bear the consequences of their counsel-agents' actions and behavior in all other areas of the law. Even in the criminal context, the prejudice to the client by way of loss of liberty or even death is generally not sufficient to outweigh the binding effects of counsel's actions, including mistakes.<sup>286</sup> Courts often rationalize reluctance to preclude claims or defenses by reference to the policy preference that cases be decided on their merits. Where evasion or destruction of evidence by the lawyer or client threatens to prevent discovery, however, merits adjudication becomes impossible or at best unreliable. Thus, rationalizing failure to preclude claims or defenses by reference to the policy preference that claims be decided on their merits makes no sense, especially where the dereliction is the lawyer's, since a malpractice remedy is available. As long

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282. *See id.* at \*2.

283. *See id.*

284. *Id.* at \*3.

285. *See* FED. R. CIV. P. 37(b)(2)(C).

286. To prevail on an ineffective assistance of counsel claim on appeal or in a habeas corpus proceeding, a convicted defendant must show that counsel's derelictions were "of such a kind as to shock the conscience of the court and make the proceedings a farce and a mockery of justice." *United States v. Horton*, 334 F.2d 153, 155 (2d Cir. 1964) (quoting *Smith v. United States*, 324 F.2d 436, 439-40 (D.C. Cir. 1963)).

as courts think that the policy of deciding claims on their merits means allowing parties to flout discovery orders without serious consequences, discovery disputes will never disappear.

*Sanders v. Toyo Umpanki Co.*<sup>287</sup> provides another example of empty judicial rhetoric. There the court excoriated defense counsel for “prejudicial and reprehensible” conduct in withholding critical evidence from plaintiff until the eve of trial and characterized defense counsel’s approach as part of a pattern of abuse regularly engaged in by defense counsel’s firm.<sup>288</sup> The court then stated that “[a]busive discovery practice such as this simply will not be tolerated by this Court” and concluded that in light of the fact that defense counsel’s withholding of evidence was deliberate, the court should have excluded certain evidence adduced by the defendant.<sup>289</sup> After all this, the court still denied plaintiff’s motion for new trial and failed to impose any sanction on defense counsel.<sup>290</sup>

Why, if an identifiable team of lawyers regularly engages in suppression of evidence, should a court not impose sanctions with deterrent bite beyond a tongue-lashing in an unreported opinion? If the integrity of the discovery process is important in reaching litigation outcomes that are just, reliable, and worthy of public confidence, why did this court not institute disciplinary proceedings against lawyers whom it perceived to corrupt the process repeatedly? Why did the court not initiate action to suspend the offending lawyers from practice or remove them from its bar, and why did the court not grant plaintiff’s motion for new trial? In light of the court’s complete failure to act, the unfortunate reality is that its seemingly powerful rhetorical attack on defense counsel amounts to little more than free advertising.

Third, *Gonsalves v. City of New Bedford*<sup>291</sup> furnishes an example of an insufficient judicial response to deliberate falsification of discovery responses by counsel. *Gonsalves* was a six-year-long civil rights case for wrongful death, as the result of a beating followed by withholding of appropriate medical treatment, of a man who had died in the custody of the City’s police department. After judgment for the plaintiff, decedent’s sister and administratrix, the case settled for a payment by the City

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287. No. Civ. A. 7:92-2402-3, 1994 WL 902775 (D.S.C. Feb. 1, 1994).

288. *See id.* at \*1-3.

289. *Id.* at \*5.

290. *See id.*

291. 168 F.R.D. 102 (D. Mass. 1996).

of \$555,000 to plaintiff, an exchange of mutual releases, and vacatur of the judgments against the City and Mayor.<sup>292</sup>

In its post-settlement opinion, the court addressed some unpleasant unfinished business, namely plaintiff's counsel's deliberate violations of both his discovery obligations under the Federal Rules of Civil Procedure and his duty of candor to the court, and possible sanctions against plaintiff. The court found that counsel, by preparing false interrogatory responses about plaintiff's decedent's health and suppressing evidence of his hospitalization, had deliberately concealed from defendants the material information that plaintiff's decedent was HIV positive at the time of his death.<sup>293</sup> This information about the state of decedent's health was both clearly responsive to defendants' interrogatories and obviously relevant to the issue of hedonic damages. Counsel had caused plaintiff to sign false interrogatory responses that he had prepared (thus possibly subjecting her to penalties of perjury), while purporting to limit the effect of his own signature to objections to the interrogatories. The court imposed sanctions on plaintiff's counsel in the amount of \$15,000 to be paid to the clerk of the court but expressly declined to refer the matter to the Board of Bar Overseers of the United States District Court.<sup>294</sup>

The reasons for the court's leniency with plaintiff's counsel were that it approved of the benefits that counsel had achieved both for plaintiff and for the community at large as a "private attorney general," that the plaintiff's lawyer was a former Assistant Attorney General of the Commonwealth of Massachusetts, and that the court assumed counsel would be concerned enough about his reputation not to sin again.<sup>295</sup> Collectively, they signify that in the court's view, a favorable result yielding public benefit partly made amends for the means by which it was reached, namely deliberate suppression of unfavorable evidence and fraud on the court. Apart from the obvious "ends justifies the means" fallacy,<sup>296</sup> the problem, of course, is that if

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292. *See id.* at 103-04. Pursuant to the settlement, counsel would receive \$231,700 in attorney's fees, rather than more than \$800,000 petitioned for by counsel following the trial. *See id.* at 104.

293. *See id.* at 106-14. The court also found that counsel had concealed this information from the court by making arguments that he knew to be false. *See id.* at 113.

294. *See id.* at 105-07, 116-17.

295. *Id.* at 117.

296. Although the media often indulge this fallacy in television shows such as *The Practice* (ABC television broadcast), which often lauds a small firm for

one “good guy” gets off easily for suppression of evidence and fraud on the court in the District of Massachusetts, why should not everyone?

In light of the persistent judicial preference for lenient treatment of discovery violations, including flagrant ones, it is difficult to argue with those who blame judges for helping to create an environment in which discovery misbehavior, including so-called “Rambo”<sup>297</sup> litigation tactics, can flourish.<sup>298</sup> Commentators view the Rambo phenomenon variously, including as a problem of lawyer incivility<sup>299</sup> and as a problem of lawyer insecurity caused by both fear of losing and greed.<sup>300</sup> Although some believe that Rambo and hardball tactics have increased in recent years,<sup>301</sup> it is beyond dispute that such obstructive and evasive stratagems had equally dilatory, if perhaps more genteel, prototypes in earlier times.<sup>302</sup>

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taking just about any action at all that helps its clients, could not one have expected greater sophistication from a federal court?

297. Although the concept of the overly aggressive, contentious, antagonistic and obstructive lawyer is well known, the name Rambo derives from the character John Rambo, a U.S. Green Beret veteran in the novel *First Blood*, DAVID MORELL, *FIRST BLOOD* (1972), and played by Sylvester Stallone in the films *FIRST BLOOD* (Orion 1982), *RAMBO: FIRST BLOOD PART II* (Orion 1985) and *RAMBO III* (Tristar 1988). See Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 637 n.4 (1990).

298. See Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81, 94-96 (1991).

299. See Reavley, *supra* note 297, at 638.

300. See PERLMUTTER, *supra* note 11, at 51-64, 71-77.

301. See *In re Daniels*, 570 A.2d 416, 428 (N.J. 1990) (noting that “hardball, ‘Rambo-style’ litigation tactics [are] on the rise”); *The Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 146 F.R.D. 205, 216-32 (1992) (discussing the “Rambo litigator”); Sidney A. Fitzwater, *Toward a Renaissance of Professionalism in Trial Advocacy*, 20 TEX. TECH. L. REV. 787, 789 (1989) (noting a proliferation of “hardball,” “Rambo-like” litigation tactics).

302. In a candid and amusing reflection on his career at a seminar for judges held in 1958, Bruce Bromley, longtime head of the litigation department at the Cravath firm, who in 1949 had served at Governor Thomas E. Dewey’s appointment as a Judge of the New York Court of Appeals, wrote:

By big case I mean protracted case. Now I was born, I think, to be a protractor. . . . I quickly realized in my early years at the bar that I could take the simplest antitrust case . . . and protract it for the defense almost to infinity. [Bromley went on to describe his first motion picture block booking case.] We won that case and as you know my firm’s meter was running all the time—*every month for fourteen years*.

Bruce Bromley, *Judicial Control of Antitrust Cases, Proceedings of the Seminar on Protracted Cases for United States Judges*, 23 F.R.D. 417, 417-18 (1958)

Regardless of these views, policymakers need to understand and focus on three central, critical and sometimes forgotten facts about Rambo. *First, Rambo litigation is the logical conclusion of partisan zealous advocacy unrestrained by supervening obligations to society or the justice system.* It is the attorney's willingness—indeed, perceived obligation—to seize every advantage for a client by any tactic not explicitly outlawed, no matter how nasty or unpleasant the means, regardless whether the client is entitled to it or not.<sup>303</sup> Thus, Rambo litigation is essentially a problem of professional ethics and responsibility, not merely a problem of enforcing civility and professional courtesy, as some courts and commentators naively have treated it.<sup>304</sup>

Bar associations, courts and legislatures must eventually recognize that Rambo litigation tactics, including overreaching and obstruction in discovery, fundamentally threaten the efficacy of pretrial fact-finding, compromise the reliability of adjudications and erode public confidence in the legal system. Until they take steps to proscribe Rambo behaviors, including the suspension or removal from practice of those who indulge in them, the integrity of civil adjudication remains in jeopardy.

*Second, Rambo is a style or tactic deliberately and opportunistically assumed or cultivated often by intelligent and successful lawyers because it works.*<sup>305</sup> Excessive personal aggressive-

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(emphasis added); see also *United States v. Cutler*, 58 F.3d 825, 840 (2d Cir. 1995) (identifying Lord Henry Brougham as an "early apostle of what today would be known as Rambo litigation tactics").

303. See Wayne D. Brazil, *Ethical Perspectives on Discovery Reform*, 3 REV. LITIG. 51, 58-59 (1982) ("The assumption that a lawyer inevitably serves the best interests of the system by vigorously pursuing client interests through all methods not currently deemed unlawful strikes me as fatuous. It is not unlawful to disclos[e] nothing until . . . compelled by carefully crafted discovery probes to do so.").

304. See Jerome J. Shestack, *ABA Leader Promotes Professionalism*, N.J. LAW., Dec. 8, 1997, at 6 ("We need to resist the Rambo-type tactics in which civility is mocked and ruckus is routine."); see also Roger Abrams, *Law Schools Must Teach Professionalism—Now*, N.J.L.J., Dec. 4, 1995, at 27 ("[L]ack of civility and courtesy among lawyers has corroded the practice of law."); *Infectious Lawyers*, N.J.L.J., Apr. 7, 1997, at 30 ("The virus has not been assigned a specific name, although in its various forms it has been called hardball, scorched earth or Rambo litigation. It is characterized by incivility and unprofessionalism.").

305. This is not always the case, however. See, e.g., *In re Jordan Schiff*, No. HP 22/92 (N.Y. Sup. Ct. Feb. 2, 1993), reprinted in STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 775-79 (5th ed. 1998).

ness,<sup>306</sup> nastiness and overreaching are tools, not immutable personality characteristics, of Rambo lawyers.<sup>307</sup> One need not be a social psychologist to know that these behaviors deter adversaries from wanting to deal, confer or even speak with those who assume them. They allow Rambo lawyers to obtain unfair advantages not only in the discovery process, but also in many other situations that involve cooperative regulation or private bargaining.

Perhaps the best-known example of a Rambo litigator is Joseph D. Jamail, who won for his client, Pennzoil Corp., the largest civil judgment in American history against Texaco, Inc.<sup>308</sup> and whose aggressively obstructive and vulgar behavior in depositions was singled out for condemnation by the Delaware Supreme Court in the well-known extraordinary addendum to its opinion in *Paramount Communications, Inc. v. QVC Network, Inc.*<sup>309</sup> Jamail is not one of the four hundred wealthi-

306. See generally Anita Bernstein, Reciprocity, Utility and the Law of Aggression, Michigan Legal Theory Workshop, University of Michigan Law School (1999) (unpublished manuscript, on file with author).

307. Doubtless one should make the philosophical point that eventually one becomes the way one acts. This is easy to agree with in the case of aggressive lawyers occasionally encountered who exult in the self-description, "We pride ourselves on being assholes. It's part of the firm culture." *Lawyers Wage Civil War*, CHI. DAILY L. BULL., Oct. 28, 1991, at 20.

308. The amount of the judgment was \$10.53 billion, which at the time Texaco's action challenging the constitutionality of the supersedeas bond provisions of the State of Texas reached the Supreme Court of the United States was estimated to exceed \$11 billion, including prejudgment interest. See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 4 (1987). The case ultimately settled for \$3 billion, of which Jamail's fee was estimated to be \$345 million. See *Texaco-Pennzoil Battle Is Over*, J. COM., Apr. 8, 1988, at 11B; *The 400*, FORBES, Oct. 13, 1997, at 256.

309. 637 A.2d 34, 51-56 (Del. 1994). The Addendum quotes the following widely-reproduced excerpt from the deposition of Hugh Liedtke, a Paramount director, defended by Mr. Jamail:

A. [Mr. Liedtke] I vaguely recall [Mr. Oresman's letter] . . . I think I did read it, probably.

. . . .

Q. (By Mr. Johnston [Delaware counsel for QVC] ) Okay. Do you have any idea why Mr. Oresman was calling that material to your attention?

MR. JAMAIL: Don't answer that.

How would he know what was going on in Mr. Oresman's mind?

Don't answer it.

Go on to your next question.

MR. JOHNSTON: No, Joe—

MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.

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MR. JOHNSTON: No. Joe, Joe—

MR. JAMAIL: Don't "Joe" me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.

MR. JOHNSTON: Let's just take it easy.

MR. JAMAIL: No, we're not going to take it easy. Get done with this.

MR. JOHNSTON: We will go on to the next question.

MR. JAMAIL: Do it now.

MR. JOHNSTON: We will go on to the next question. We're not trying to excite anyone.

MR. JAMAIL: Come on. Quit talking. Ask the question. Nobody wants to socialize with you.

MR. JOHNSTON: I'm not trying to socialize. We'll go on to another question. We're continuing the deposition.

MR. JAMAIL: Well, go on and shut up.

MR. JOHNSTON: Are you finished?

MR. JAMAIL: Yeah, you—

MR. JOHNSTON: Are you finished?

MR. JAMAIL: I may be and you may be. Now, you want to sit here and talk to me, fine. This deposition is going to be over with. You don't know what you're doing. Obviously someone wrote out a long outline of stuff for you to ask. You have no concept of what you're doing.

Now, I've tolerated you for three hours. If you've got another question, get on with it. This is going to stop one hour from now, period. Go.

MR. JOHNSTON: Are you finished?

MR. THOMAS: Come on, Mr. Johnston, move it.

MR. JOHNSTON: I don't need this kind of abuse.

MR. THOMAS: Then just ask the next question.

Q. (By Mr. Johnston) All right. To try to move forward, Mr. Liedtke, . . . I'll show you what's been marked as Liedtke 14 and it is a covering letter dated October 29 from Steven Cohen of Wachtell, Lipton, Rosen & Katz including QVC's Amendment Number 1 to its Schedule 14D-1, and my question—

A. No.

Q. —to you, sir, is whether you've seen that?

A. No. Look, I don't know what your intent in asking all these questions is, but, my God, I am not going to play boy lawyer.

Q. Mr. Liedtke—

A. Okay. Go ahead and ask your question.

Q. —I'm trying to move forward in this deposition that we are entitled to take. I'm trying to streamline it.

MR. JAMAIL: Come on with your next question. Don't even talk with this witness.

MR. JOHNSTON: I'm trying to move forward with it.

MR. JAMAIL: You understand me? Don't talk to this witness except by question. Did you hear me?

MR. JOHNSTON: I heard you fine.

MR. JAMAIL: You fee makers think you can come here and sit in somebody's office, get your meter running, get your full day's fee by asking stupid questions. Let's go with it.

est individuals in the United States<sup>310</sup> because he is stupid or unsuccessful in his work.<sup>311</sup> In non-vocational contexts, Mr. Jamail is reported to be both personally charming and a generous philanthropist.<sup>312</sup>

His technique in discovery, however, is apparently to obstruct and bully by any means possible. In the following 1992 deposition excerpt from a lawsuit in which he represented plaintiffs against the Monsanto Company, he was disputing whether his adversary, counsel for Monsanto, should be permitted to object to questions and represent the deposition witness, a former Monsanto employee:

JAMAIL: You don't run this deposition, you understand?

CARSTARPHEN: Neither do you, Joe.

JAMAIL: You watch and see. You watch and see who does, Big Boy. . . . And don't be telling other lawyers to shut up. That isn't your goddamned job, Fat Boy.

CARSTARPHEN: Well, that's not your job, Mr. Hairpiece.

THE WITNESS: As I said before, you have an incipient

JAMAIL: What do you want to do about it, asshole?

WITNESS: I'd like to knock you on your ass.

JAMAIL: Come over here and try it, you dumb son of a bitch. Come over here.

CARSTARPHEN: You're not going to bully this guy.

JAMAIL: Oh, you big fat tub of shit, sit down.

CARSTARPHEN: I don't care how many of you come up against me.

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*Id.* at 53-54.

310. Jamail has been on Forbes's annual list of the four hundred wealthiest Americans since 1989. In October 1997, his net worth was reported to be \$950 million. *See The 400*, *supra* note 308, at 256.

311. Although I believe that cooperation is a good thing and that mutual cooperation increases efficiency, I find law school courses in alternative dispute resolution that emphasize "getting to yes" disturbing, since they too often fail even to advert to the fact that lawyers in the real world sometimes use over-aggressiveness and personal nastiness—in short, Rambo tactics—as a strategy in all negotiation situations. Faced with Rambo, a lawyer interested in "getting to yes" will have a difficult time not sacrificing his client's interests, to say nothing of avoiding being eaten alive.

312. Joseph Jamail, for example, has been a generous benefactor of the arts, charities, education and athletics in Texas, *see* Mary Ann Roser, *UT Gets \$5 million in Joe Jamail's \$17 Million Gift to Arts, Education*, AUSTIN AM.-STATESMAN, Sept. 5, 1996, at A1; and is often described in the press as well able to turn on the charm when he wants to. *See* Roger Parloff, *Fare's Fair*, AM. LAW., Oct. 1993, at 60; *see also* Diane Jennings, *King of Torts: Corporate Giant Killer? Planet-sized Ego? Joe Jamail Won't Argue the Case*, CHI. TRIB., July 25, 1989, at C1.

JAMAIL: Oh, you big fat tub of shit, sit down. Sit down, you fat tub of shit.<sup>313</sup>

Upon reading this excerpt, as well as the one quoted by the Delaware Supreme Court in its Addendum to *Paramount Communications Inc. v. QVC Network Inc.*, the question is unavoidable why Mr. Jamail is still permitted to practice law at all, anywhere. The Delaware Supreme Court, in inviting Jamail to show why in the future he should not be barred from participating in proceedings related to actions pending in the Delaware courts, understood this to be the critical issue, and knew that discovery obstruction of the magnitude and character exemplified by the excerpt from *Paramount* fundamentally undermines the integrity of, and respect for, the adjudicative process and its results. Given Jamail's response—he was quoted as stating “I'd rather ha[ve] a nose on my ass then go to Delaware for any reason”<sup>314</sup>—and his failure to appear as invited before the Delaware Supreme Court, one wonders why the court failed to take further action by referring the matter publicly to the Texas Supreme Court. Although the matter appears to have come to the attention of the State Bar of Texas, no public discipline followed, and it is likely that the matter was reviewed and dismissed by a local grievance panel in Houston.<sup>315</sup> The Delaware Supreme Court's condemnation of Jamail's behavior appears to have been regrettably without effect,<sup>316</sup> a fact which exemplifies the final critical point about Rambo lawyers.

*Third, the Rambo strategy of seizing every advantage not expressly outlawed, including evading, obstructing, and “jerking the adversary around” until forced to comply with specific directives from the court, is rational only because of the low likeli-*

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313. *Let's Work Together for a Lawyers' Civility Rights Act*, IND. LAW., Aug. 23, 1995, at 7. A lengthier excerpt, including this passage, but with counsel's names changed, is included in PERLMUTTER, *supra* note 11, at 39-44.

314. Brenda Sapiro, *Jamail Unfazed by Delaware Court's Blast*, TEX. LAW., Feb. 14, 1994, at 11.

315. See Jerry Urban, *State Bar to Review Lawyer Rebuked by Delaware Court*, HOUSTON CHRON. Feb. 15, 1994, at A15; see also E-mail from James M. McCormack, Adjunct Professor of Law, University of Texas School of Law, to author (Feb. 22, 1999) (on file with author) (stating that because no public discipline occurred, Mr. Jamail's case was most likely dismissed).

316. Anecdotal evidence suggests that the court's *QVC* addendum, especially its statement that in cases of misconduct at depositions “Delaware trial courts are ‘but a phone call away,’” has had a beneficial prophylactic effect on the conduct of depositions in Delaware. *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 55 (Del. 1994).

*hood that appropriate sanctions will ever be imposed.* The Rambo lawyer's incentive structure thus resembles one gently satirized in a well-known story traditionally told of Nasrudin, the holy fool of Sufi legend:

Nasrudin was caught in the act and sentenced to die. Hauled up before the king, he was asked by the Royal Presence: "Is there any reason at all why I shouldn't have your head off right now?" To which he replied: "Oh, King, live forever! Know that I, the mullah Nasrudin, am the greatest teacher in your kingdom, and it would surely be a waste to kill such a great teacher. So skilled am I that I could even teach your favorite horse to sing, given a year to work on it." The king was amused, and said: "Very well, then, you move into the stable immediately, and if the horse isn't singing a year from now, we'll think of something interesting to do with you."

As he was returning to his cell to pick up his spare rags, his cellmate remonstrated with him: "Now *that* was really stupid. You know you can't teach the horse to sing, no matter how long you try." Nasrudin's response: "Not at all. I have a year now that I didn't have before. And a lot of things can happen in a year. The king might die. The horse might die. *I* might die.

And, who knows? Maybe the horse will sing."<sup>317</sup>

In discovery, a Rambo lawyer's favorite strategy is "to give as little as possible so [your opponents] will have to come back and back and back and maybe will go away or give up," as one unusually candid lawyer responded to Magistrate Judge Brazil's 1980 American Bar Foundation study of attitudes of lawyers in Chicago.<sup>318</sup> Indeed, there is a much greater chance that the adversary will eventually give up and go away than that most courts will ever issue effective sanctions against Rambo lawyers. As Judge Keeton has written, "[t]he message appears to be that the remedy for hardball is more hardball—hardball judges to control and punish hardball lawyers. *I believe judges in general have neither the time, the resources, nor the will to undertake this responsibility.*"<sup>319</sup> Rambo lawyers know this. The chances that they will ever be subject to severe or serious sanctions for routinely playing hardball in discovery, given the current judicial climate, are about the same as that Nasrudin's horse will sing. Absent effective judicial control and deterrent

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317. This retelling is from the homepage of Professor John Lawler of the University of Michigan (visited Nov. 11, 1999) <<http://www-personal.umich.edu/~jlawler/ae/sig.html>>. Many of the Nasrudin stories have been collected and published by Idries Shah. See, e.g., IDRIES SHAH, *THE EXPLOITS OF THE INCOMPARABLE MULLA NASRUDIN* (Octagon Press 1966).

318. Brazil, *Civil Discovery*, *supra* note 9, at 829.

319. Robert E. Keeton, *Times Are Changing for Trials in Court*, 21 FLA. ST. U. L. REV. 1, 15 (1993) (emphasis added).

use of sanctions, and with their techniques of obstruction serving Rambo lawyers so well, why should they change?

### CONCLUSION

From its introduction to federal procedure in 1938, discovery was intended to alter the nature of adversarial litigation to promote cooperative pretrial fact-finding. As the findings of the Federal Judicial Center Report and the RAND Report confirm, the change has successfully taken hold in two areas: routine or low-stakes lawsuits and litigation in arenas with relatively small bars in which lawyers encounter each other, and judges, repeatedly.

Especially in complex and high-stakes cases, however, and in otherwise particularly contentious litigation, conceptual flaws and structural defects prevent civil discovery from working as intended. The following problems all have contributed to what has become an enduring and intractable problem of our legal culture: conflicts between discovery's cooperative ideal and the rest of adversarial litigation's aggressively partisan ethic,<sup>320</sup> and between the obligation not to obstruct one's adversary from obtaining evidence and the imperative of obtaining and preserving informational advantage; the strains placed on discovery by the demands of notice pleading and the uncertainties of proof; the Federal Rules' inadequate disincentives to evasion and to resort to judicial intervention to resolve discovery disputes; judges' oft-demonstrated reluctance or inability to manage complex discovery efficaciously and to resolve discovery disputes expeditiously; and the bar's refusal to take responsibility for the integrity of the discovery process by bringing professional discipline to bear to enforce discovery duties, including the ethical obligation not to obstruct other parties from obtaining evidence.

Not only do these failings impede discovery in practice, increasing litigation delay and expense; they also imperil the integrity of adjudication of complex and high-stakes lawsuits and undermine public confidence in the civil justice system. In particular, evasion and disregard of discovery obligations and ob-

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320. Problems of stonewalling and Rambo litigation derive in large part from the development of that ethic, but they also respond to perceived client needs and desires: some clients demand overly aggressive litigation tactics, while many would like to bury or obscure "bad" or embarrassing facts and incriminating evidence. Many lawyers strive to provide what their clients desire.

struction of adversaries' access to relevant information and evidence fundamentally undermine our system's policy of deciding controversies on their merits.

Justice Powell's famous dissent from the adoption of the 1980 amendments to the Federal Rules of Civil Procedure could apply equally well to the "tinkering" changes presently under consideration by the Advisory Committee on Civil Rules.<sup>321</sup> Alterations such as imposing a presumptive limit on the length of a deposition day, adjusting the scope of automatic disclosure and eliminating the opt-out provision, or trying to rearrange the balance between attorney-managed discovery and court-managed discovery will not solve the problems of persistent overdiscovery, evasion, delay, and confrontation rather than cooperation in complex and high-stakes cases.

There should be no doubt about the causes of these problems, as described above. Unfortunately, however, neither the judiciary nor the legal profession has shown any indication of having the will to address them head on. Given their reluctance, one might rationally conclude that it is time for the Advisory Committee to consider more global solutions,<sup>322</sup> such as moving to an inquisitorial model, like that which informs the litigation paradigm of the continental European legal systems. Adopting an inquisitorial model would remove from the parties and their counsel the primary responsibility for developing factual issues and gathering evidence and place this responsibility on the judge, with the cooperation of counsel for the parties.<sup>323</sup>

However appealing such a change might be in theory, it would be far too sweeping to receive serious practical consideration. Its conflicts with central defining values of our present litigation regime, including the adversarial development of issues and evidence and the traditional notion of the umpireal judge more than suffice to make it unacceptable. Moreover, if judges already are uncomfortable with the prospect of excessive involvement in discovery, it is difficult to imagine that they would be willing to accept primary responsibility for development of issues and investigation of necessary evidence.

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321. See *supra* note 21 and accompanying text.

322. For the distinction between "tinkering" and "global" changes, see *Transcript of the "Alumni" Panel on Discovery Reform*, 39 B.C. L. REV. 809, 814-26 (1998).

323. For a description of the fact discovering and evidence gathering functions of these systems, see Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017 (1998).

Problems of discovery thus ultimately evidence two particular problems of professional responsibility. History shows that neither the bar nor the bench has been willing to accept responsibility for the integrity of the civil discovery process, either in enforcing the rules as they exist or in developing and implementing a new body of professional responsibility directives for pretrial representation.<sup>324</sup>

Suggesting that we must therefore learn to live with persistent discovery problems in complex, high-stakes, and otherwise contentious cases is far from the happiest of conclusions. It is illusory to think that discovery problems can be eliminated, however, given lawyerly and judicial reluctance to address discovery's central flaws and to assure the integrity of the process in complex and high-stakes cases. If the total solution of discovery problems is not possible, however, must we conclude that nothing can be done? The answer is "hardly." If the courts, bar associations and Advisory Committee on Civil Rules cannot make discovery's flaws disappear, perhaps their attention and effort would better be directed to the more restricted goal of devising a plan for containing discovery problems, by announcing a clear ethic for lawyers participating in discovery and then trying to implement and enforce it.

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324. Professor Cooper informs me that "[s]ome of the proponents of the 1993 version of initial disclosure hoped that the combination of the Rule 26(f) conference with the obligation to disclose damaging information would begin the process of changing the ethic of representation[.]" and that many litigators report that the Rule 26(f) conference, when used, has proved the most effective of recent discovery reforms. Comments by Edward H. Cooper to the author on a draft of this Article presented to the University of Michigan Law School Legal Theory Workshop on Mar. 15, 1999 (on file with author).