South Carolina Law Review

Volume 64 | Issue 3 Article 3

Spring 2013

# A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery

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# A PRAGMATIC APPROACH TO DISCOVERY REFORM: HOW SMALL CHANGES CAN MAKE A BIG DIFFERENCE IN CIVIL DISCOVERY

The Honorable Paul W. Grimm* & David S. Yellin**



## I. INTRODUCTION

In 2009, the American Bar Association (ABA) Section of Litigation conducted a survey of approximately 3,300 attorneys and concluded that "[a]lthough the matter has not reached the level of a crisis, there is dissatisfaction in the bar with litigating civil cases in federal court."[1] This conclusion mirrored the results of a similar survey conducted that same year by the American College of Trial Lawyers (ACTL) Task Force on Discovery and the Institute for the Advancement of the American Legal System (IAALS), which found that, "[a]lthough the civil justice system is not broken, it is in serious need of repair.

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The views expressed herein are those of the authors only and do not represent the views of the United States District Court for the District of Maryland, the Advisory Committee on Civil Rules, or Fried, Frank, Harris, Shriver & Jacobson LLP.

1. *Member Survey on Civil Practice: Detailed Report*, 2009 A.B.A. SEC. LITIG. REP. 5, 6 [hereinafter *Member Survey*], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf.

In many jurisdictions, today's system takes too long and costs too much."[2] Few practicing attorneys would be surprised that discovery was singled out as "the primary cause for cost and delay,"[3] and often "can become an end in itself."[4]

The Advisory Committee on Civil Rules has responded to these criticisms over the last several years and has sought out ways to fulfill the Rules' promise of "secur[ing] the just, speedy, and inexpensive determination of every action and proceeding."[5] Meaningful improvements have resulted: the electronic discovery provisions included in the 2006 amendments to the Civil Rules sought to adapt discovery to the changing technological demands of the twenty-first century.[6] Other changes, such as the adoption of Rule 502 of the Federal Rules of Evidence, sought to ease the burdens caused by massive amounts of electronically stored information (ESI) by reducing the penalties for inadvertent production of privileged material in large document reviews.[7]

However, the core problems remain. In 2010, the Advisory Committee convened the 2010 Conference on Civil Litigation, commonly known as the Duke Conference, which brought legal scholars and members of the bench and

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2. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009) [hereinafter ACTL/IAALS REPORT], *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008.

3. *Member Survey*, *supra* note 1, at 6; *see also* ACTL/IAALS REPORT, *supra* note 2, at 1 (identifying "increasing concerns that problems in the civil justice system, especially those relating to discovery, have resulted in unacceptable delays and prohibitive expense").

4. ACTL/IAALS REPORT, *supra* note 2, at 2. Both the ABA and the ACTL/IAALS Reports offered findings and recommendations regarding the Federal Rules of Civil Procedure, generally, and did not focus exclusively on discovery provisions. *See* ACTL/IAALS REPORT, *supra* note 2, at 4–5 (criticizing the "'one size fits all' approach" of the Federal Rules); *id.* at 5–7 (discussing notice pleading); *id.* at 18–24 (citations omitted) (discussing dispositive motions and the need for active judicial management, generally); *see also Member Survey*, *supra* note 1, at 12–13 (discussing disagreement regarding notice pleading and the utility of dispositive motions and dissatisfaction with the speed with which courts decide dispositive motions).

5. FED. R. CIV. P. 1.

6. *See* HON. LEE H. ROSENTHAL, ADVISORY COMM. ON THE FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 18 (2005). The 2006 amendment arose out of an extended effort to "examin[e] whether the discovery rules could better accommodate discovery directed at information generated by, stored in, retrieved from, and exchanged through, computers." *Id.* Following an extensive study, "the Committee reached consensus on two points. First, electronically stored information has important differences from information recorded on paper. . . . Second, these differences are causing problems in discovery that rule amendments can helpfully address." *Id.*

7. Rule 502 of the Federal Rules of Evidence represented an attempt to relieve some of the pressure created by e-discovery and placed on the system by the need to thoroughly review massive amounts of electronically stored information for privilege. *See* FED. R. EVID. 502; Hopson v. Mayor & City Council of Balt., 232 F.R.D. 228, 231–32 (D. Md. 2005) (discussing the lack of legal protection for privileged material inadvertently produced and the resulting need for costly and time-consuming privilege review of massive amounts of ESI).

bar together "to step back, to take a hard look at how well the Civil Rules are working, and to analyze feasible and effective ways to reduce costs and delays."[8]

The Duke Conference took a hard look at the entirety of the civil justice system. Reams of empirical data were presented to identify and diagnose the perceived shortcomings of civil practice.[9] The Conference explored deep theoretical questions regarding the proper aim of the civil justice system, including "Is the Litigation Process Structured for Settlement Rather than Trial and *Should It Be*?"[10] and at least one proposal to redefine the very purpose of the Civil Rules.[11] Likewise, focused discussions were held regarding specific and perceived problems with the Civil Rules and their possible solutions.[12]

All of this discussion yielded no shortage of suggestions for how the Rules could be improved—including several proposals regarding the discovery process. The ACTL/IAALS Report essentially proposed turning the current

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8. JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 2 (2010) [hereinafter DUKE CONFERENCE REPORT], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf.

9. *See, e.g.*, REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT'L EMP'T LAWYERS ASS'N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009, at 3, 11 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/NELA,%20Summary%20of%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf (surveying approximately 300 members of the National Employment Lawyers Association and finding that "[n]early 65% of NELA respondents find that existing discovery mechanisms do not work well, and approximately two-thirds believe that discovery is abused in almost every case"); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL 1 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/IAALS,%20General%20Counsel%20Survey.pdf (surveying corporate counsel on various aspects of the civil justice system and finding that "[a] majority of respondents agreed that the American civil justice system is 'too complex'" and that "90% agreed that it takes 'too long' and 97% agreed that it is 'too expensive'"); LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 2 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf (finding that "the transaction costs of litigation against large companies, especially discovery, are so high that the mandate of Rule 1 . . . is simply not being met"); Marc Galanter & Angela Frozena, 'A Grin Without a Cat': Civil Trials in the Federal Courts 1 (May 1, 2010) (unpublished manuscript), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Marc%20Galanter%20and%20Angela%20Frozena,%20A%20Grin%20Without%20a%20Cat.pdf (finding that "the civil trial is approaching extinction").

10. *See* 2010 Civil Litigation Conference, Conference Agenda, at 3 (emphasis added), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Conference%20Agenda%20-%20Final.pdf.

11. *See id.* at 2–3; *see also* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 288 (2010) (arguing that Rule 1 "embodies . . . assumptions that make little sense for modern litigation and stand in the way of effective procedural design").

12. *See* Conference Agenda, *supra* note 10. The Duke Conference included panels titled: "Issues with the Current State of Discovery: Is There Really Excessive Discovery, and if so, What Are the Possible Solutions?" and "E-Discovery: Discussion of the Cost Benefit Analysis of E-Discovery and the Degree to Which the New Rules Are Working or Not." *Id.*

discovery system on its head: eliminating the broad scope of discovery under Rule 26 and replacing it with more expansive initial disclosures tailored closely to the parties' claims and defenses, and only permitting limited additional discovery as necessary.[13] Other proposals suggested cost shifting or even adopting the "English Rule," under which the requesting party pays for discovery;[14] moving away from notice pleading in favor of fact pleading as a prelude to more limited discovery;[15] or providing clearer guidance on preservation obligations to decrease the costs and risks of e-discovery.[16] None of these changes have been implemented, but in the wake of the Duke Conference, the perception that "[t]he need for revision of the discovery provisions of the rules is urgent and immediate" has continued unabated.[17]

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13. ACTL/IAALS REPORT, *supra* note 2, at 7–14. The use of "staged discovery" and significantly narrowing the scope of permitted discovery have been frequently advocated as means to reduce the overwhelming cost of discovery. *See, e.g.*, Patrick J. Stueve & E.E. Keenan, *Pre-trial Cost Reform Imperative to Preserving Endangered Jury Trial* (2010) (unpublished manuscript), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Patrick%20Stueve%20and%20E.E.%20Keenan,%20Pre-Trial%20Cost%20Reform.pdf (advocating the use of "staged discovery," focusing first on dispositive issues).

14. *See* JOHN H. BEISNER, U.S. CHAMBER INST. FOR LEGAL REFORM, THE CENTRE CANNOT HOLD: THE NEED FOR EFFECTIVE REFORM OF THE U.S. CIVIL DISCOVERY PROCESS 26–29 (2010) (citations omitted), *available at* http://www.instituteforlegalreform.com/sites/default/files/ilr_discovery_2010_0.pdf (suggesting reforms on preservation obligations as a means to reduce the cost of e-discovery).

15. *See* Amy Schulman & Sheila Birnbaum, From Both Sides Now: Additional Perspectives on "Uncovering Discovery" 2 (2010) (unpublished manuscript), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Amy%20Schulman%20and%20Sheila%20Birnbaum,%20From%20Both%20Sides%20Now.pdf (arguing that "[d]iscovery and trials would be more efficient and fair" under fact pleading); *see also* ACTL/IAALS REPORT, *supra* note 2, at 5–6 (suggesting that fact pleading should replace notice pleading and noting that "[d]iscovery cannot be framed to address the facts in controversy if the system of pleading fails to identify them."). *But see, e.g.*, *Member Survey*, *supra* note 1, at 12 ("Plaintiffs' lawyers generally support notice pleading and generally do not believe there is an advantage to fact pleading for the purpose of narrowing issues.").

16. One panel focused primarily on this issue and included several proposals for reform. *See, e.g.*, Thomas Y. Allman, Preservation and Spoliation Revisited: Is It Time for Additional Rulemaking? 22 (April 9, 2010) (unpublished manuscript), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Thomas%20Allman,%20Preservation%20and%20Spoliation%20Revisited.pdf (advocating for a uniform federal preservation rule); John M. Barkett, *Zubulake* Revisited: *Pension Committee* and the Duty To Preserve 28–29 (2010) (unpublished manuscript), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/John%20Barkett,%20Zubulake%20Revisited.pdf (outlining proper preservation conduct after *Pension Committee*); Gregory P. Joseph, Electronic Discovery and Other Problems 1 (2009) (unpublished manuscript), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Gregory%20P.%20Joseph,%20Electronic%20Discovery%20and%20Other%20Problems.pdf ("Precisely when, in the absence of litigation, is the duty to preserve evidence triggered?").

17. LAWYERS FOR CIVIL JUSTICE ET AL., THE TIME IS NOW: THE URGENT NEED FOR DISCOVERY RULE REFORMS 3–4, 6 (2011), *available at* http://www.nldhlaw.com/wp-content/uploads/2012/07/LCJ-Comment-The-Time-is-Now-The-Urgent-Need-for-E-Discovery-Rule-Reforms-

The stakes remain high: "the savings of adopting meaningful preservation rules could be measured in the billions of dollars for businesses and individual litigants."[18] Courts and parties have tried some creative solutions. With the identification of the review of ESI as the greatest driver of discovery costs—often accounting for at least 70% of the total costs of production[19]—some courts are experimenting with new innovations, such as predictive coding,[20] to reduce the number of nonresponsive documents that must be reviewed, thereby controlling costs.[21] But, because nobody has found a reliable way to reduce the costs of document production[22] and because predictive coding remains a largely untested solution,[23] there remains a pressing need to find other ways to control discovery costs.[24]

Accordingly, the calls for reform persist. The Chairman of the House Judiciary Committee's Constitution Subcommittee recently noted that the costs of civil discovery "make access to the justice system more expensive for individuals and businesses alike," and even "hamper the American economy."[25] Advocates of change say that "the savings from a single rule change" could be in the billions.[26]

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103111.pdf (arguing that given the burdens of preservation and production of massive amounts of ESI, the rules are no longer effective for controlling the discovery process).

18. *Id.* at 10.

19. *See* NICHOLAS M. PACE & LAURA ZAKARAS, RAND CORP., WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY, at xvi (2012).

20. Predictive coding is a computerized method of searching large data sets of ESI, which uses an algorithm that allows lawyers to rank a small sampling of documents as relevant or not, and the computer program then refines the search methodology in light of the rankings. After a few reviews of randomly selected sample documents, the computer is able to search the much larger data set and select those documents matching the search criteria with great accuracy and at much less expense than would be incurred by having attorneys or paraprofessionals review the documents manually. *See* Moore v. Publicis Groupe, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 607412, at *2 (S.D.N.Y. Feb. 24, 2012) (quoting Andrew Peck, *Search, Forward*, L. TECH. NEWS, Oct. 2011, at 25, 29).

21. *See id.* at *12 (approving, for the first time, the use of predictive coding in document production under the Federal Rules).

22. *See* PACE & ZAKARAS, *supra* note 19, at xvii.

23. *See id.* at xvii–xviii. *But see Moore*, 2012 WL 607412, at *12 (approving use of predictive coding).

24. *See, e.g.*, Mary Mack, *Mary Mack: Litigation Prenups, E-Discovery ADR and the Campaign for Proportionality*, METROPOLITAN CORP. COUNS., May 2010, at 10, *available at* http://www.metrocorpcounsel.com/pdf/2010/May/10.pdf (discussing "the pressing need to control outsized e-discovery cases").

25. Letter from Trent Franks, Chairman, House Judiciary Comm., Constitution Subcomm., to Hon. Mark R. Kravitz, Chairman, U.S. Judicial Conference Comm. on Rules of Practice & Procedure & Hon. David G. Campbell, Chairman, Civil Rules Advisory Comm. (Mar. 21, 2012) [hereinafter Franks Letter], *available at* http://iaals.du.edu/images/wygwam/documents/publications/FRCP_Franks_LTR_to_Kravitz_and_Campbell_032112.pdf.

26. LAWYERS FOR CIVIL JUSTICE ET AL., *supra* note 17, at 11.

Given these high stakes, it is remarkable that comprehensive change has not already occurred. But, although there is broad agreement that the Civil Rules need to be changed, there is little agreement as to how.[27] Nor is this outcry for change a new development. Indeed, as Roscoe Pound observed over a century ago, "Dissatisfaction with the administration of justice is as old as law."[28] The Civil Rules "Committee considered, and rejected, a proposal to narrow the scope of discovery from 'relevant to the subject matter' to 'relevant to the issues raised by the claims or defenses,' and to limit the number of interrogatories" while attempting to address problems with discovery in 1980.[29] In 2000, the Rules were amended to make that change, allowing discovery of "any matter relevant to the subject matter" only on a showing of good cause.[30] Prior to the 2000 amendment, the Committee made changes to address "continued unhappiness about discovery costs and related litigation delays."[31] But dissatisfaction remains, and although proposals for reform currently abound,[32] there is no

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27. It is worth noting that not everyone who has discussed the matter has taken the position that radical change is needed. *See, e.g.*, Hon. Paul W. Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burden, or Can Significant Improvements Be Achieved Within the Existing Rules?*, 12 SEDONA CONF. J. 47, 49 (2011) ("While it is possible to envision some changes to the Rules of Civil Procedure, it is worth asking whether that is the best route to improvement, or whether the real problem is the failure to adhere to the Rules in their current form. In fact, the existing Rules provide all of the necessary tools to achieve the changes in practice that have eluded us for decades."); Letter from Tony West, Assistant Attorney Gen., U.S. Dep't of Justice, to Hon. David G. Campbell, Chairman, Civil Rules Advisory Comm. (Mar. 6, 2012), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf (taking the position that rule reforms to more clearly define the duty to preserve evidence are premature and may be unnecessary). Indeed, when backed up by active judicial oversight, faithful application of the rules as already written can penalize discovery abuses. *See, e.g.*, Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 356–57, 359 (D. Md. 2008) (emphasizing Rules 26(g) and 33(b)(4)). In *Mancia*, Judge Grimm, one of this Article's authors, noted that the common practice of reflexively objecting to discovery requests with a litany of boilerplate objections was a violation of Rule 33(b)(4) of the Federal Rules of Civil Procedure—which requires the basis of an objection to be stated with specificity—and was also indicative of a violation of Rule 26(g)(1) of the Federal Rules of Civil Procedure—which requires any discovery response to reflect counsel's "knowledge, information, and belief *formed after a reasonable inquiry*." *Mancia*, 253 F.R.D. at 356–57 (emphasis added) (quoting FED. R. CIV. P. 26(g)(1)). Judge Grimm also observed that "[t]he failure to engage in discovery as required by Rule 26(g) is one reason why the cost of discovery is so widely criticized as being excessive." *Id.* at 359.

28. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 445 (1906).

29. ROSENTHAL, *supra* note 6, at 19.

30. FED. R. CIV. P. 26(b)(1). The United States District Court for the District of Maryland has described the difference between "relevant to the claims and defenses" and relevant "to the subject matter" as being "the juridical equivalent to debating the number of angels that can dance on the head of a pin." Thompson v. Dep't of Hous. & Urban Dev., 199 F.R.D. 168, 172 (D. Md. 2001).

31. ROSENTHAL, *supra* note 6, at 20.

32. *See, e.g.*, ACTL/IAALS REPORT, *supra* note 2, at 7–14 (listing possible solutions to discovery issues); BEISNER, *supra* note 14, at 26–30 (outlining several proposals for reform).

indication that any of the new proposals rest on any firmer ground than the marginal fixes of the past several decades.

This Article seeks to find that firmer ground, by focusing not only on identifying the problems plaguing civil discovery, but also on understanding their causes. It may be that the Civil Rules are not up to the task of guiding and channeling civil discovery. But it is painfully obvious that the Rules, as written, have at least the potential to provide better limits on discovery; thus, looking at the Rules alone will yield only limited insight.[33] By shedding light on *why* civil discovery has become so problematic, this Article will attempt to explore how the causes of discovery problems can be addressed. Rather than focusing on the Rules alone, this Article will look at the behavior and motivations of litigants and courts in the twenty-first century, from the perspective of an experienced trial court judge and a practicing attorney. This practical, behavioral approach has an additional advantage: although this Article will focus on federal civil practice, its insights will most likely be applicable in state cases as well.

## II. INSTITUTIONAL PROBLEMS IN CIVIL PRACTICE

The dissatisfaction with the civil justice system did not simply appear *ex nihilo*. Rather, it has a panoply of causes—including, perhaps, the reality that it is impossible to create a civil justice system devoid of flaws or loopholes. However, a few systemic changes have occurred in civil practice since the Federal Rules of Civil Procedure were enacted in 1938, which means that even if the Rules were perfectly oriented for their purpose when enacted, the realities of litigation have changed so as to render them less fitting now. Perhaps the most significant changes are: (1) a significant decline in the number of cases that go to trial and, specifically, in the number of jury trials; (2) a shift in the legal system in favor of claims lending themselves to expansive discovery; and (3) an evolution in how discovery is understood and used.

### *A. The Vanishing Jury Trial*

One major issue in the modern civil justice system is that it is no longer oriented toward trying cases; rather, the number of trials has declined sharply in recent years, and more and more cases are being settled or resolved in pretrial practice. As Judge Mark Kravitz explained:

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33. If nothing else, a court could apply the proportionality requirement of Rule 26(b)(2)(C)(iii) to prevent some of the most severe abuses. *See* FED. R. CIV. P. 26(b)(2)(C)(iii) ("[T]he court *must* limit the frequency or extent of discovery . . . if it determines that: . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." (emphasis added)).

> The number of trials held each year in courts across the country, both state and federal, is declining at what to some is an alarming rate, all at the same time that nominal case filings are increasing. This phenomenon, which the data show is quite real, has potentially great implications for our justice system—for the methods we have devised to resolve disputes; for the institutions we have created to entertain disputes; for the training of lawyers to represent clients in those disputes; and even for the body of law (for example, the rules of evidence) that we have developed to assist parties and juries to resolve disputes.[34]

Empirical evidence confirms this view. Marc Galanter and Angela Frozena found that both the percentage and absolute number of jury trials—and trials in general—in United States District Courts have declined dramatically over the last half-century.[35] For example, between 1962 and 2002, there was a striking decrease in the number of tort cases going to trial: "[w]here once 1 in 6 . . . tort cases went to trial, this has dropped steadily so that now only 1 in 46 . . . do."[36]

Surveys of practitioners have shown that the Bar has noticed this decline as well. Respondents to the ABA Survey—a survey of the ABA Litigation Section, no less—reported that they averaged less than one trial a year over the previous five years.[37] This shift has a real effect on how pretrial practice and discovery are viewed. Unsurprisingly, in a world without trials, about half of the respondents thought that discovery was more useful in developing information for summary judgment or assessing the value of a case for settlement than for attempting to grasp the other party's claims and defenses for a trial that is unlikely ever to happen.[38] Similarly, the National Employment Lawyers Association (NELA) found that "trial by paper is to a large extent supplanting trial by jury in our civil justice system."[39]

Furthermore, the decline of trials has, in and of itself, been identified as "a major crisis for the legal profession today."[40] United States District Judge

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34. Mark R. Kravitz, *The Vanishing Trial: A Problem in Need of Solution?*, 79 CONN. B. J. 1, 1–2 (2005).

35. Galanter & Frozena, *supra* note 9, at 3–5. Galanter & Frozena found that there were around 6,000 cases per year in the early 1960s, rising to a peak of over 12,000 trials—about half of which were jury trials—in 1985. *See id.* at 5. Since, the number of trials has dropped precipitously, and there have been fewer than 4,000 trials per year every year since 2004. *See id.* The percentage of cases going to trial fell consistently during this time, from nearly 12% of cases in 1962 to well under 2% in 2010. *Id.* at 4.

36. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 466 (2004).

37. *See, e.g.*, *Member Survey*, *supra* note 1, at 19 (detailing results from the survey responses on trial experience).

38. *Id.* at 71–72.

39. HAMBURG & KOSKI, *supra* note 9, at 7.

40. Robert P. Burns, *What Will We Lose If the Trial Vanishes?*, 37 OHIO N.U. L. REV. 575, 575 (2011).

William Young went even further, asserting that the "withering away" of the American jury trial represents "the most profound change in our jurisprudence in the history of the Republic."[41]

At the very least, it is probably worth taking stock of whether the decrease in the number of trials may be a problem in and of itself. The ACTL and IAALS suggest that the lack of cases tried is either a result of the failure of the promise of Rule 1 or perhaps a cause of the Civil Rules' inability to realize the promise of Rule 1.[42] "*Trials do not represent a failure of the system. They are the cornerstone of the civil justice system.* Unfortunately, because of expense and delay, both civil bench trials and civil jury trials are disappearing."[43] Trials may be more likely to promote true justice, whereas settlements may often be less a truly fair outcome and more "a capitulation to the conditions of mass society and should be neither encouraged nor praised."[44] Judge Kravitz, for example, was one of many voices urging that "adjudications of some kind are needed to allow the law to develop."[45]

But if trials are declining—and the evidence shows that they are[46]—it is not happening by accident.

> Changes in the *Federal Rules of Civil Procedure* and in the judicial culture in the 1980s and 1990s have led to an increased emphasis on case management and settlement. This change in emphasis has also coincided with some of the most dramatic declines in civil trials, leading some to suppose that federal judges have seen their principal mandate as disposing of cases as soon as possible, rather than as trying cases.[47]

"Over 70% [of attorneys responding to the ABA Survey] agree that court-ordered dispute resolution increases the number of cases that settle without trial,

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41. Hon. William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW., July 2003, at 30.

42. *See* ACTL/IAALS REPORT, *supra* note 2, at 3.

43. *Id.*

44. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). Fiss argues that settlement "is a truce more than a true reconciliation, but it seems preferable to judgment because it rests on the consent of both parties and avoids the cost of a lengthy trial." *Id.* However, he suggests that "[c]onsent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done." *Id.*

45. Kravitz, *supra* note 34, at 26; *see also* Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1423 (2002) ("Ultimately, law unenforced by courts is no law.").

46. *See* Galanter & Frozena, *supra* note 9, at 3–5; Galanter, *supra* note 36, at 460–70 (citations omitted).

47. Kravitz, *supra* note 34, at 18; *see also* Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 789 (2004) ("[T]he federal judiciary has in recent decades been in the forefront of the anti-adjudication movement.").

and over 60% believe that it results in earlier settlements, which is seen as a positive development across the board."[48] Judith Resnick writes about a meeting in 1994, at which a federal district judge attributed the fact that as many as eight percent of cases were still going to trial "as evidence of 'lawyers' failure.'"[49]

However, it is more accurate to see the ascendancy of settlements and decrease in trials as the *success* of an environment in which lawyers and judges are predisposed to push for settlement.[50] Moreover, if judges are frequently discouraging cases from going to trial,[51] it is hard to imagine that rational litigants would be champing at the bit to try cases in defiance of the clear preferences of the presiding judge.

Normative issues aside, the reality is that pretrial practice has, in many cases, become the only adversarial forum in which cases can be developed and resolved.[52] Ralph Nagareda suggests that we are living "in an era in which the pretrial process has become the trial in practical effect, [and] the pretrial phase increasingly has taken on trial-like dimensions."[53] This reality creates a disconnect with the Federal Rules of Civil Procedure, which have as their clear aim a process that begins with a complaint and proceeds with discovery and claim development as way-stations on the road to trial. "[T]he major pretrial motions today share a common structural feature. All operate—whether in form or in function—as relatively blunt instruments that signal either 'stop' or 'go' on the road toward trial."[54]

Therefore, it should be of no surprise that the Civil Rules begin to break down when litigants are no longer proceeding with an eye towards an adjudication of their dispute. Indeed, those eager for a hearing on the merits of their case typically opt out of the Civil Rules altogether and pursue extrajudicial fora such as arbitration.[55] As resolution of disputes out of court becomes an

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48. *Member Survey*, *supra* note 1, at 10.

49. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 925 (2000).

50. *See* Michael M. Baylson, Are Civil Jury Trials Going the Way of the Dodo? Has Excessive Discovery Led to Settlement as an Economic and Cultural Imperative: A Response to Judge Higginbotham and Judge Hornby 2 (April 14, 2010) (unpublished manuscript), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Judge%20Baylson,%20Are%20Civil%20Jury%20Trials%20Going%20the%20Way%20of%20the%20Dodo.pdf.

51. There is evidence to suggest that they are—or at least that litigants believe they are. *See, e.g.*, HAMBURG & KOSKI, *supra* note 9, at 40 (finding that over 70% of respondents agreed or strongly agreed that "[j]udges do not like taking cases to trial").

52. *See generally Member Survey*, *supra* note 1, at 71–72 (showing that approximately 50% of lawyers use discovery to develop evidence for summary judgment and to settle a case rather than prepare for trial).

53. Richard A. Nagareda, *1938 All over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 667 (2011).

54. *Id.* at 652–53.

55. *See id.* at 692 ("[T]he general tenor of the literature at the intersection of litigation and arbitration has been one of lament, bordering on alarm. The usual concern is that significant segments of what was formally civil litigation are now shunted off . . . to an opaque regime of arbitration that lacks the process protections and accountability of the civil lawsuit.").

ever-more-frequent occurrence, the Civil Rules simply do not work as well. Rule 26 qualifies that the scope of discovery is purposely broader than that subset of evidence that can be admitted at trial,[56] but if parties are using discovery to uncover issues that may increase the value of a settlement, then whether or not information is eventually admissible at trial becomes wholly irrelevant. Nagareda suggests that "[c]ivil litigation as a process of civil settlement, in short, demands a distinctive law of civil settlement procedure."[57] At the very least, civil litigation needs a system that is better geared towards guiding pretrial practice in the absence of the looming specter of trial.

### *B. A Lack of Active Judicial Involvement*

Even if the civil justice system should be made more effective at dealing with matters that will never be tried, this is not to say that litigants should be left to work things out for themselves. To the contrary, another frequently heard complaint about the civil justice system is a lack of active judicial management.[58] Seemingly little has changed in the century since Roscoe Pound noted that "in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference."[59] And yet, nearly every study of the issue has found broad agreement that early and active judicial involvement in a case leads to better, and more satisfying, results.[60]

Indeed, in 2010, a Federal Judicial Center survey of NELA members found that "two-thirds [of respondents] agree that judges do not invoke Rule 26 limitations on their own," and nearly half "also agree that judges do not enforce Rule 26 to limit discovery."[61] Similar majorities "believe that District Judges are not available to resolve discovery disputes on a timely basis."[62] The ACTL and IAALS also noted that "[j]udicial delay in deciding motions is a cause—perhaps

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56. FED. R. CIV. P. 26(b)(1) ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

57. Nagareda, *supra* note 53, at 694.

58. *See, e.g.*, ACTL/IAALS REPORT, *supra* note 2, at 23 ("These Principles call for greater involvement by judges.").

59. Pound, *supra* note 28, at 447.

60. *See Member Survey*, *supra* note 1, at 124–26 (finding that an overwhelming majority of respondents believed that early judicial intervention helped to narrow the issues, limit discovery, and produce more satisfactory results); HAMBURG & KOSKI, *supra* note 9, at 13 ("Almost two-thirds of NELA respondents agree both that early intervention in cases by either district or magistrate judges helps to narrow the issues, and that when a judicial officer intervenes early on in a case and stays involved, the results are more satisfactory.").

61. HAMBURG & KOSKI, *supra* note 9, at 11.

62. *Member Survey*, *supra* note 1, at 63. A possible saving grace is the fact that over two-thirds of respondents believed that "magistrate judges are available to resolve discovery disputes on a timely basis." *Id.* at 64.

a major cause—of delay in our civil justice system."[63] There is anecdotal support for this problem as well; according to Judge Higginbotham, "Judge Gerald Tjoflat reports that . . . [the] lions of the bar confided to him [(as Chief Judge of the Eleventh Circuit)] that they were unable to see the federal district judge before whom their cases were pending, for as long as a year—even in complex litigation."[64]

If cases are unlikely to go to trial, the inability to get before a judge on discovery and other pretrial matters can be particularly harmful because there may be no later opportunity to resolve disputes. Of course, out-of-control discovery can always add distortive costs to litigation, but at least parties can be comforted in knowing that, when a case proceeds to trial, such practices are unlikely to affect the final result, as the Federal Rules of Evidence provide a counterweight to broad discovery.[65] But where parties will be assessing the value of their claims outside of court based on the information they have found during discovery, inadmissible or irrelevant evidence may have significant effects on an eventual settlement. Thus, if fewer cases are going to trial, it is necessary for judges to become *more* involved in discovery, not less so.

But of course, even if, as the saying goes, "90% of life is showing up,"[66] parties require more from judges than just their attention. There are also common complaints that "sanctions allowed by the discovery rules are seldom imposed,"[67] and there does appear to be a reluctance to impose sanctions for discovery violations throughout the courts. Rule 37(c), for example, was amended in 1993 to include an "automatic sanction [that] provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence."[68] Nevertheless, many courts have refused to impose an automatic sanction and have simply excused discovery violations.[69] Whereas Rule 11 has iconic status within the bar and has become synonymous with

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63. ACTL/IAALS REPORT, *supra* note 2, at 22.

64. Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 745 (2010).

65. *See, e.g.*, FED. R. EVID. 402 (providing for the admissibility of relevant evidence only).

66. This saying is frequently attributed to Woody Allen, an American actor, director, and comedian. *See* Interview by the Collider with Woody Allen (Aug. 15, 2008), *available at* http://collider.com/entertainment/interviews/article.asp/aid/8878/tcid/1/pg/2; Ari Kaplan, *The Other 10% of Life*, NAT'L L.J., Apr. 14, 2008. However, the saying has had many subsequent variations, including: "90% of life is just showing up"; "80% of life is showing up"; and "80% of success is showing up." *See* Rosland Gammon, *Reuters Finds Woody Allen Was Right: Show Up to Get the Inside Scoop*, REYNOLDS CENTER FOR BUS. JOURNALISM (May 19, 2011), http://business journalism.org/2011/05/19/reuters-finds-woody-allen-was-right-show-up-to-get-the-inside-scoop/.

67. *Member Survey*, *supra* note 1, at 67.

68. FED. R. CIV. P. 37(c) advisory committee's note to 1993 amendment.

69. *See generally* 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2289.1, at 593–95 (3d ed. 2010) (noting that "the Second Circuit held that a district judge erred in concluding that preclusion was mandatory," and that "[o]ther courts have similarly concluded that preclusion is not mandatory, or that admission of material improperly withheld was permissible" (citations omitted)).

sanctions generally, Rule 26(g), its analogue in the discovery rules, is "apparently [one of the] least understood or followed . . . of the discovery rules."[70]

### C. *The Changing Nature of Discovery*

Finally, over the last several decades, the nature of discovery itself has changed in ways that go to the heart of the civil justice system.[71] Whereas pretrial discovery was all but unknown at common law,[72] the Federal Rules of Civil Procedure—through the introduction of such discovery rules in 1938—were expected, ironically, to *lower* the cost of litigation.[73] "By mandating a full exchange of information, the drafters thought that they could help less powerful litigants prove their legal claims and thus redress the imbalance."[74] It is quite possible this framework was a fool's errand from the start,[75] but the system did at least seem to work satisfactorily for the first thirty years or so.[76]

But, in the years since, several changes in discovery itself have thrown the system out of balance. At least three trends may be to blame: (1) a steady expansion in the accepted use of discovery in litigation;[77] (2) a related growth in the types of litigation that rely upon broad discovery;[78] and (3) most recently, the

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70. Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 357 (D. Md. 2008).

71. *See, e.g.*, BEISNER, *supra* note 14, at 9–11 (citations omitted) (providing a brief historical overview of the Federal Rules and the various amendments affecting the discovery provisions).

72. *See, e.g.*, 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1845, at 375–76 (3d ed. 1940), *quoted in* Harvey v. Horan, 285 F.3d 298, 317 (4th Cir. 2002) (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc) ("To require the disclosure to an adversary of the evidence that is to be produced, would be repugnant to all sportsmanlike instincts. . . . [The common law] did not defend or condone trickery and deception; but it did regard the concealment of one's evidential resources and the preservation of the opponent's defenseless ignorance as a fair and irreproachable accompaniment of the game of litigation.").

73. *See* BEISNER, *supra* note 14, at 7.

74. Kathleen L. Blaner et al., *Federal Discovery: Crown Jewel or Curse?*, 24 LITIG., Summer 1998, at 8.

75. *Cf.* BEISNER, *supra* note 14, at 7–8 ("[T]he drafters . . . dismissed clear warning signs that these two key premises[—that discovery would reduce costs and that attorneys would pursue it responsibly—]were deeply flawed. Abuse was already prevalent even under the limited discovery that some states permitted at that time.").

76. *Id.* at 9 (citing Blaner et al., *supra* note 74, at 8; Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 748–50 (1998)).

77. *See, e.g.*, *id.* at 10 (stating that, going back to the 1970 amendments, the "amendments . . . allowed parties to use discovery devices as frequently as they wished" and that "[t]he floodgates had been opened").

78. *See id.* at 9–10 (citing Blaner et al., *supra* note 74, at 8; Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2181–83 (1989); Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 743 (1998)).

rise of electronic discovery.[79] Like the downward trends in the number of trials and level of judicial engagement, these shifts in discovery are cultural[80] and, unlike the relatively modest changes discussed in Part III, are not easily untangled.[81] Rather, they have altered the nature of the field of play, and the system will remain unbalanced so long as these changes are not understood and addressed.[82]

### *1. The Growth of Discovery Under the Federal Rules of Civil Procedure*

An expansion in discovery, generally, has been in progress for most of the last century.[83] In 1911, the United States Supreme Court rejected the notion that pretrial discovery was inherent in civil litigation and held that § 724 of the Judiciary Act of 1789—which allowed federal courts to compel parties "to produce books or writings"—only allowed for the production of such items *at trial*.[84] By way of comparison, the Court noted that an equitable "bill of discovery cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its strength of weakness. A discovery sought upon suspicion, surmise or vague guesses is called a 'fishing bill.'"[85]

Just thirty-six years later, the Court approved broad discovery in the landmark case of *Hickman v. Taylor*.[86] In the intervening years, the Federal Rules of Civil Procedure had been adopted, and the scope of discovery had already been expanded in 1946 to expressly permit discovery of evidence that would not be admissible at trial.[87] Suddenly, the state of play had changed. As the Court explained in *Hickman*:

> The pre-trial deposition–discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. . . . The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow

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79. *See id.* at 12 (citing Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8, at 1 (2008), http://law.richmond.edu/jolt/v14i3/article8.pdf).

80. *See id.* at 3.

81. *See, e.g.*, *id.* at 21 (noting that recent reform efforts to limit the scope of discovery and address challenges caused by the increasing use of electronic documents have proven largely ineffectual).

82. *See id.* at 31–32.

83. *See id.* at 6–11 (citations omitted).

84. Carpenter v. Winn, 221 U.S. 533, 537 (1911).

85. *Id.* at 540.

86. 329 U.S. 495 (1947).

87. *See* Subrin, *supra* note 78, at 736 (citing FED. R. CIV. P. 26 advisory committee's note to 1946 amendment).

> and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.[88]

Civil litigation came to be built around the full development of relevant facts *before* trial. It became a cornerstone of civil practice that "pretrial procedures make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[89]

The drafters of the Rules in 1938 were not particularly concerned that discovery would be abused.[90] Rather, they thought that "discovery does not need judicial attention because lawyers will practice it under a rule of reason reinforced by mutual self-interest in avoiding the waste of their time or their clients' money which results when unnecessary pursuit or resistance in the discovery process occurs."[91] But even under the liberal discovery regime of the 1938 Rules, the one discovery device that sits at the root of most of today's problems—the Rule 34 request for production of documents or things—was still only available by judicial permission, following a showing of "good cause."[92]

However, the 1970 amendments to the Civil Rules included "major changes in the existing [R]ule [34]: (1) to eliminate the requirement of good cause; [and] (2) to have the rule operate extrajudicially."[93] The advisory committee was not without justification. The good cause requirement "furnished an uncertain and erratic protection" because of the inconsistency of standards applied by courts.[94] Additionally, the revision sought to match the Rules to the reality of existing practice: only about a quarter of litigants seeking the inspection of documents or things filed motions seeking court orders, and the party seeking production almost always prevailed.[95] "In a sense, the 1970 amendments to the [R]ules completed what one could call a cultural cycle in American procedural reform . . . which was characterized by increased relaxation and expansion of

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88. *Hickman*, 329 U.S. at 500–01 (citing James A. Pike & John W. Willis, *The New Federal Deposition–Discovery Procedure*, 38 COLUM. L. REV. 1179, 1179, 1187, 1453–54 (1938); James A. Pike, *The New Federal Deposition–Discovery Procedure and the Rules of Evidence*, 34 ILL. L. REV. 1, 1 (1939)).

89. United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (citing *Hickman*, 329 U.S. at 501).

90. *See* BEISNER, *supra* note 14, at 7–8.

91. Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough Is Enough*, 1981 BYU L. REV. 579, 581.

92. *See* FED. R. CIV. P. 34; *see also* 48 F.R.D. 487, 526 (1970) (indicating several major changes made to Rule 34 in 1970).

93. 48 F.R.D. at 526 (advisory committee's note to 1970 amendment).

94. *Id.*

95. *See id.* at 527.

procedure."[96] But they also led directly to the current environment, in which discovery is carried out, in the first instance, entirely free from any judicial oversight and is limited, in a practical sense, only by the attorneys carrying it out.[97]

Since "[p]arty-controlled discovery reached its high-water mark in the 1970 amendments,"[98] we have spent the last forty years trying to chase the horse back into the barn, with nearly constant attempts to "fix" the Civil Rules.[99]

*2. The Expansion in Litigation*

The expansion of discovery abuse has also coincided with an evolution in the types of lawsuits brought today. "It seems undeniable that broad discovery has benefitted plaintiffs attempting to prove certain types of claims by enabling them to obtain both 'smoking guns' and less inflammatory but critical evidence."[100] Civil rights suits, mass torts, and discrimination suits may be particularly conducive to such broad discovery.[101] As the Second Circuit noted, "[b]ecause employers rarely leave a paper trail—or 'smoking gun'—attesting to a discriminatory intent, disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer."[102]

Broad discovery can also facilitate types of public interest litigation that might otherwise be impossible to bring because the material sought is unlikely to be relevant to any individual suit. Products liability suits, for instance, may rely on evidence of defects that simply would not come out if discovery were narrowly restricted to the specific claims brought by any given plaintiffs.[103]

Even if broad discovery may not be strictly necessary for some newer causes of action, the law has also developed in reliance on such broad discovery.[104] In 1989, the United States Supreme Court held that a disparate impact claim must

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96. Marcus, *supra* note 76, at 748.

97. *See supra* notes 58–59, 61–63 and accompanying text.

98. Marcus, *supra* note 76, at 749.

99. *See id.* at 752–53 (chronicling the wide variety of special committees and conferences in the 1970s aimed at discovery reform).

100. Marcus, *supra* note 76, at 749.

101. *See, e.g., id.* ("Over the years developments in areas such as products liability, employment discrimination, and consumer protection have been the result at least partly of broad-ranging discovery provisions." (quoting Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 818 (1981))).

102. Hollander v. Am. Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990).

103. *Cf.* CTR. FOR CONSTITUTIONAL LITIG., NINETEENTH CENTURY RULES FOR TWENTY-FIRST CENTURY COURTS? 9–10 (2010) (quoting Wyeth v. Levine, 555 U.S. 555, 574 (2009)) (discussing the importance of discovery in tort suits).

104. *See generally* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (quoting Jones v. Goord, No. 95 CIV. 8026(GEL), 2002 WL 1007614, at *1 (S.D.N.Y. May 16, 2002)) (stating that liberal discovery is now a "cornerstone" of the litigation process).

show that the employer conduct complained of was the cause in fact of a racial imbalance.[105] The Court noted that "[s]ome will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims."[106] The Court, in a prior case, applied similar reasoning in placing the burden on a plaintiff to rebut the employer's nondiscriminatory justification, noting that because of "the liberal discovery rules," such a requirement would not "unduly hinder the plaintiff."[107]

It should come as no surprise, then, that plaintiffs' attorneys often resist any change that could threaten to narrow the scope of discovery.[108] But, because the landscape of substantive law has evolved in reliance on broad discovery, simply hacking away at the scope of discovery could have complex implications for the civil justice system—results that would not have arisen if civil discovery had never reached its current levels.

### 3. *The Advent of E-Discovery*

The most recent change in the nature of discovery—and perhaps the most jarring to the system—is the rise of electronic discovery. When the Civil Rules were drafted, the amount of information available in any lawsuit was limited by how much paper the parties could afford to generate and keep.

> [T]he volume of potential discovery in any given case was once thought of in terms of numbers of pages or even numbers of boxes. In contrast, discovery is now frequently being thought of in terms of megabytes, gigabytes, and even terabytes. This explosion of information has brought along with it an explosion of costs.[109]

Indeed, "[v]ast quantities of potentially relevant ESI are reaching incomprehensible volumes and every potential litigant will be affected."[110]

This rise in potentially relevant ESI has led to the need to search, review, and produce thousands upon thousands of pages of data in many suits. A recent study by the RAND Corporation on the costs of document discovery noted that

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105. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989).

106. *Id.*

107. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981).

108. *See generally* CTR. FOR CONSTITUTIONAL LITIG., *supra* note 103, at 1–3 (criticizing and opposing a proposal for radical changes to the civil justice system that was made in an effort to curtail discovery costs).

109. LAWYERS FOR CIVIL JUSTICE ET AL., NOW IS THE TIME FOR MEANINGFUL NEW STANDARDS GOVERNING DISCOVERY, PRESERVATION, AND COST ALLOCATION 12 (2012), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03_Addendum.pdf.

110. LAWYERS FOR CIVIL JUSTICE ET AL., *supra* note 17, at 6.

more than half of the cases sampled involved at least 100 gigabytes of data.[111] For a sense of perspective, one gigabyte is approximately 65,000 pages of Microsoft Word documents or 100,000 pages of emails.[112] Assuming—probably accurately—that most of those electronic files were emails, these productions probably involved over 10 million pages of documents!

Even the mere existence of these massive amounts of data can be extremely costly, particularly given the lack of clarity regarding how much data must be stored and for how long in anticipation of litigation.[113] But the review of documents for responsiveness and privilege that is necessitated by litigation has become particularly costly.[114] The RAND Corporation estimates that these costs come to 73% of the total cost of production.[115] Moreover, depending on the type of case, the total cost of production can range from under $10,000 to over $80,000 per gigabyte.[116] Although Federal Rule of Evidence 502 has attempted to provide some protection for litigants faced with the impossible task of reviewing hundreds of thousands of pages for privilege, the need to carefully review every document cannot easily be wholly eliminated.[117]

Notwithstanding any other issues arising in the civil justice system, the rise of e-discovery has changed the game completely. As the *Manual for Complex Litigation* explains:

> Conventional "warehouse" productions of paper documents often were costly and time-consuming, but the burdens and expense were kept in check by the time and resources available to the requesting parties to review and photocopy the documents. In a computerized environment, the relative burdens and expense shift dramatically to the responding party. The cost of searching and copying electronic data is insignificant. Meanwhile, the tremendously increased volume of computer data and a

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111. PACE & ZAKARAS, *supra* note 19, at 16 n.39.

112. Discovery Services, *How Many Pages in a Gigabyte?*, LEXISNEXIS, http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf (last visited Feb. 5, 2013) (also providing that Excel files are closer to 165,000 pages per gigabyte, and PowerPoint presentations are a paltry 17,000 pages per gigabyte).

113. *See generally* Brian C. Vick & Neil C. Magnuson, *The Promise of a Cooperative and Proportional Discovery Process in North Carolina: House Bill 380 and the New State Electronic Discovery Rules*, 34 CAMPBELL L. REV. 233, 239–40 (2012) (discussing costs of storing ESI in anticipation of litigation).

114. *See* PACE & ZAKARAS, *supra* note 19, at xiv–xvi.

115. *Id.* at xv.

116. *See id.* at 103.

117. *Cf.* Hopson v. Mayor & City Council of Balt., 232 F.R.D. 228, 244 (D. Md. 2005) (asserting that it would be unwise for parties to litigation to assume any "non-waiver" electronic records production agreements "will excuse them from undertaking any pre-production review . . . or doing less of a pre-production review than is reasonable under the circumstances" and concluding that the best practice "is to assume that complete pre-production privilege review is required, unless it can be demonstrated with particularity that it would be unduly burdensome or expensive to do so").

> lack of fully developed electronic records-management procedures have driven up the cost of locating, organizing, and screening data for relevance and privilege prior to production. Allowing requesting parties access to the responding parties' computer systems to conduct their own searches, which is in one sense analogous to the conventional warehouse paper production, would compromise legally recognized privileges, trade secrets, and often the personal privacy of employees and customers.[118]

In short, e-discovery has placed us in a paradigm for which the Federal Rules were never designed, and it has removed many of the practical limits that once served to restrict the scope of discovery.

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Any prudent reforms to modern discovery must first come to terms with the current state of play. The number of trials is declining,[119] judges are, perhaps, less available and certainly more overworked than they once were,[120] and discovery is now run mostly by the parties,[121] who must contend with novel claims and massive amounts of ESI. Put simply, the realities facing the civil justice system are not the same as they were in 1938. However, as we discuss in the next Part, we believe there are still sensible, realistic reforms that can be implemented and that would release some of the pressure that out-of-control discovery has placed on our civil justice system.

## III. PROPOSED REFORMS TO CIVIL DISCOVERY

Now that we have outlined some of the deeper issues that set the stage for today's discovery problems, we can turn to less intractable issues and attempt to fix what can more easily be fixed. In this Part, we will describe some of the specific reasons why the system is as bad as it appears to be and what, if anything, is being done, or can be done, to improve the civil justice system. We do not pretend to possess any greater insight to these challenging questions than the legions of judges, lawyers, and academics who have considered them before us. We do propose, however, to offer our insight, from the perspectives of a trial judge and practicing attorney, and offer three modest suggestions about where improvements can be made. The first is to amend the rules to limit the scope of discovery to only that information that is not privileged or work-product

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118. MANUAL FOR COMPLEX LITIGATION § 11.446, at 80 (4th ed. 2004).

119. *See supra* Part II.A.

120. *See* Diarmuid F. O'Scannlain, *Striking a Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-first Century*, 13 LEWIS & CLARK L. REV. 473, 473 & n.1 (2009).

121. *See supra* notes 58–59 and accompanying text.

protected and that is needed by the requesting party to prove the claims or defenses that it has pleaded. The second is to amend the rules to incorporate the concept of cost shifting or allocation, under which a party may obtain a base level of discovery without any cost, but beyond which no additional discovery may be obtained absent a showing of good cause and an evaluation of whether the requesting party should bear all or part of the costs to the producing party of the additional discovery. The third is that the Federal Rules of Civil Procedure should be amended to clearly state that the parties have an obligation to cooperate during the discovery process in order to tailor the discovery to the needs of the case and minimize the overall costs and burdens of discovery.

### *A. No. 1. Excessively Broad Scope of Discovery*

The scope of discovery is stated in Rule 26(b)(1) of the Federal Rules of Civil Procedure. Last amended substantively in December 2000,[122] it creates a two-tiered approach to what can be discovered in a civil action. A party may discover as a matter of right "any nonprivileged matter that is relevant to any party's claim or defense,"[123] subject to certain additional limitations to be described below. Thereafter, it may discover information more broadly described as "relevant to the subject matter involved in the action" only upon a showing of "good cause."[124] Furthermore, information that falls within the scope of discovery, as provided by the rule, "need not be admissible at trial if [it] appears reasonably calculated to lead to the discovery of admissible evidence."[125] The Advisory Committee's Note to the 2000 amendment to the Civil Rules contains an extensive discussion of efforts to narrow the scope of discovery "to address concerns about overbroad discovery."[126] By allowing the parties the freedom to control discovery of facts relevant to the *claims and defenses*, while giving the court power to control discovery of facts that are more broadly relevant to the *subject matter* of the litigation, the Civil Rules Advisory Committee intended "that the parties and the court focus on the actual claims and defenses involved in the action."[127] However, the Committee added, with prophetic insight, that "[t]he 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"[128]—and therein lies the problem. The blurry dividing line between the two categories, lawyers will tell you, has resulted in no divide at all, and the goal of the amendment has not been achieved because neither lawyers nor judges can accurately apply the rule. Accordingly, what

122. Rule 26(b)(1) was amended in 2007 as part of the general restyling of the Civil Rules.
123. FED R. CIV. P. 26(b)(1).
124. *Id.*
125. *Id.*
126. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 amendment.
127. *Id.*
128. *Id.*

happens in reality is that discovery proceeds apace as broadly as before the rule change.[129]

Likewise, lawyers will tell you that the other limits on discovery currently found in the rule have not done much to curb overbroad requests. For example, the last sentence of Rule 26(b)(1) somewhat cryptically enjoins that "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C)."[130] One might hope that a lawyer or judge reading that final sentence—and perhaps not fully remembering the text of Rule 26(b)(2)(C)—would immediately turn to that subsection of the rule and, in doing so, would immediately find a significant additional limitation to the scope of discovery. If they did, they could not help but notice that Rule 26(b)(2)(C)—applied as a counterbalance to the breadth of Rule 26(b)(1)—is a very effective means to protect against overbroad and burdensome discovery;[131] but only if it is actually understood by lawyers and enforced by judges, neither of which, experience suggests, appears to be the case.[132] To fully appreciate this provision, the rule is worth quoting in full:

> (C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[133]

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129. *See generally* Thomas D. Rowe, Jr., *A Square Peg in a Round Hole?: The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 14 (2001) (predicting "that the amendment may lead to little positive change by way of curbing cost and excess in federal discovery").

130. FED. R. CIV. P. 26(b)(1).

131. *See* FED R. CIV. P. 26(b)(2)(C).

132. *See generally Member Survey*, *supra* note 1, at 76–78 (showing that approximately 60% of respondents agreed or strongly agreed that they did not typically request Rule 26(b)(2)(C) discovery limitations; that approximately 75% of respondents agreed or strongly agreed that judges do not invoke Rule 26(b)(2)(C) sua sponte; and approximately 60% of respondents agreed or strongly agreed that judges do not enforce Rule 26(b)(2)(C) to limit discovery). *But see* Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather than the Exception*, 87 DENV. U. L. REV. 513, 530 (2010) ("[S]ome federal courts are slowly beginning to enforce proportionality guidelines against litigants—albeit primarily in the context of electronic discovery.").

133. FED. R. CIV. P. 26(b)(2)(C).

The limitations imposed on discovery by Rule 26(b)(2)(C)—colloquially, but helpfully, referred to as the "proportionality" limit on discovery—are intended to force both the lawyers[134] and the court, on its own initiative, to consider a comprehensive list of cost–benefit factors and tailor the discovery sought to that which bears some reasonable relation to the issues in the case.[135] Therefore, the rule intends that the discovery that should be sought by the parties and allowed by the court should be significantly more limited for a diversity automobile tort case where the plaintiff seeks $100,000.00 in damages, than what should be sought and allowed in a mass tort class action suit in which billions of dollars are sought.[136]

But if you talk to trial judges who are routinely called upon to resolve acrimonious discovery disputes, they overwhelmingly will tell you that lawyers seem to be comprehensively ignorant of the significant limitations that Rule 26(b)(2)(C) imposes on the scope of discovery. It is as if lawyers, when reading Rule 26(b)(1), skip right over the reference to Rule 26(b)(2)(C) in the last sentence, or, if they do notice it, they do not then go to the referenced rule to refresh their recollections as to what it says.

Similarly, lawyers and judges will tell you that Rule 26(b)(2)(B), which is an important additional limit on the scope of discovery of ESI—public enemy number one in the war to prevent overbroad and burdensome discovery—seems to have had little effect in achieving its intended goal. Rule 26(b)(2)(B) is titled "Specific Limitations on Electronically Stored Information," and it states: "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."[137] The rule does allow the party denied ESI discovery to file a motion to compel discovery, at which time the party asked to produce the ESI must back up its claim of undue burden or cost.[138] Under Rule 26(b)(2)(B), a party faced with a Rule 34 document production request seeking ESI from too many custodians; for a period of time that is too extensive, given the events that led to the lawsuit; or from sources that are not part of the electronic information maintained and used by the party in the conduct of its ordinary affairs, can

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134. Rule 26(g) expressly requires attorneys to respect the proportionality provisions of Rule 26(b)(2)(C), by requiring that "[e]very disclosure . . . and every discovery request, response, or objection must be signed by at least one attorney of record," and that

> [b]y signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: . . . (B) with respect to a discovery request, response, or objection, it is: . . . (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

FED. R. CIV. P. 26(g)(1).

135. *See* The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 294 (2010).

136. *See* FED. R. CIV. P. 26(b)(2)(C)(iii) (considering the amount in controversy).

137. FED. R. CIV. P. 26(b)(2)(B).

138. *Id.*

simply refuse the request because it is disproportionately expensive or burdensome, considering what is at issue in the case.[139] In response, the requesting party must then file a motion to compel its production,[140] which requires a showing of good faith.[141] Yet, to read the law review articles, litigation blogs, and reports, or attend CLE programs on how to control and manage ESI discovery, it seems as if Rule 26(b)(2)(B) is, as a defense against excessive or burdensome discovery, about as effective as the Maginot Line.[142]

Collectively, we could spend the rest of our careers wondering why it is that these limitations—carefully built into the rules themselves—have had so little effect in ensuring the proportionality of discovery in civil litigation, but such wondering would not change the status quo one bit. Rather, it might be more productive to consider—as it increasingly has been done—how the current rules could be amended, yet again, to achieve the goal that has to date been so elusive. If the purpose of discovery in a civil case is to identify the facts that the parties must produce at trial to actually prove the claims and defenses that have been raised in the pleadings,[143] then why shouldn't the scope of discovery be limited to those essential facts? Put differently, why should your adversary have to bear the expense of searching for information, reviewing the information for privileged or otherwise protected material, and producing the information that is merely relevant to the "subject matter" of the litigation, if it is not necessary to actually prove something that is at issue in the litigation? For example, if the outcome of a suit will turn on the intent of an employer when he terminated an employee and if there are a series of emails authored by the employer to others within the company discussing the termination decision, then why shouldn't the discovery obligation of the defendant be to search for and produce a single copy of each email that speaks to that issue? Broad discovery into the "subject matter" of the defendant's business and personnel policies is unlikely to produce additional evidence that the plaintiff will need to show intent when the employer decided to fire the plaintiff. If the plaintiff insists on obtaining this broader discovery, then—as will be considered in the next Part—does it make sense that the defendant should bear the expense of finding it and producing it?

Now, of course, in reality the issues are often more nuanced than that, and in individual cases, it may not be as easy in all instances to provide an inventory of the facts that are needed from an adversary to prove your claims or defenses, because—without knowing what your adversary has—you may be hard-pressed

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139. *Id.*

140. *Id.*

141. FED. R. CIV. P. 37(a).

142. For an interesting article on the Maginot Line, see Irving M. Gibson, *The Maginot Line*, 17 J. MOD. HIST. 130 (1945). The Maginot Line was an elaborate defensive barrier constructed along France's borders with Germany and Italy. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1358 (2002). During World War II, German troops easily outflanked these fortifications by invading through Belgium. *See id.* Today, the term is often used to describe something that inspires a false sense of security. *Id.*

143. *See supra* notes 126–27 and accompanying text.

to articulate what you will need to prove your case. But that does not excuse the fact that the logical starting place ought to be the causes of actions and defenses actually pleaded, the elements of proof that must be met for each, and the information that the party does not already have from sources other than their adversary. At a minimum, discovery should be phased to focus first on the actual evidence needed to prove the pleaded claims and defenses and only after receipt and review of those facts, should it be broadened beyond those limits.[144] Under the current system, the parties too often ask for all of their discovery "up front," in a sweeping discovery request that demands full production all at once, which necessarily increases the costs and burdens on the producing party.[145] It is true that lawyers can, and sometimes do, work together to implement phased discovery to initially focus on the most important facts needed for the case, and when asked to do so, judges are usually inclined to issue a pretrial discovery order that accommodates and encourages this approach.[146] But across the spectrum of civil litigation, phased discovery happens too infrequently.[147]

So, what's to be done about it? Currently, the Duke Subcommittee of the Civil Rules Advisory Committee[148] has developed a series of rule "sketches" designed to identify changes to the existing Civil Rules to help curb excessively burdensome and costly discovery.[149] This process has been guided by public input received during a one day "miniconference" held on October 8, 2012, in Dallas, Texas.[150] Participants included lawyers representing plaintiffs; lawyers representing corporate, governmental, and institutional defendants; academics; researchers; and judges.[151] The sketches "seek to advance the just, speedy, and

144. *See supra* notes 13, 126–27 and accompanying text.

145. *See, e.g.*, Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 778–83 (2011) (citations omitted) (describing the current approach to discovery cost allocation under the Federal Rules of Civil Procedure).

146. *See generally* Nathan R. Sellers, Note, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 LOY. U. CHI. L.J. 327, 354 n.183 (2011) (discussing "phased discovery").

147. *See, e.g.*, Lee H. Rosenthal, *Electronic Discovery—Is the System Broken? Can It Be Fixed?*, 51 ADVOC. (TEX.) 8, 9 (2010), *available at* http://www.litigationsection.com/downloads/Advocate_Vol51-Summer10.pdf (stating that "[d]iscussion of phased discovery into ESI occurred only about 10 percent of the time").

148. The Civil Rules Advisory Committee has two subcommittees currently working on potential rules changes to address the issues raised during the Duke Conference. *See* Thomas Y. Allman, E-Discovery Standards in Federal and State Courts After the 2006 Federal Amendments 2 (May 3, 2012) (unpublished manuscript), *available at* http://www.ediscoverylaw.com/uploads/file/2012FedStateEDiscoveryRules(May3).pdf. One is the Discovery Subcommittee and the other is the Duke Subcommittee, which is charged with implementing the recommendations from the Duke Conference. *Id.*

149. DUKE CONFERENCE SUBCOMM., CIVIL RULES ADVISORY COMM., NOTES OF THE DALLAS MINI-CONFERENCE (OCT. 8, 2012) 309 (2012), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-10.pdf.

150. *Id.*

151. *Id.*

less costly disposition of litigation. The hope is that adopting a number of changes all at once, as part of an integrated package, can have an important impact."[152] The proposals contained in the sketches include the following: (1) changing Rule 4(m) to shorten the time for service of process—thereby shortening the time until the court holds a conference with counsel to discuss the case, particularly the discovery needed—and Rule 16(b) to shorten the time to issue a scheduling order commencing discovery;[153] (2) adopting a rule that encourages informal conferences with the court before the filing of discovery motions so as to reduce the cost and volume of motions, especially when, as often is the case, a telephone or personal conference with the judge will resolve the issues without the need for briefing;[154] (3) permitting the service (but not requiring the filing of an answer) of certain discovery requests prior to the time that the parties meet and confer pursuant to Rule 26(f), to discuss discovery and related issues, so that the initial meeting will be more productive as a producing party will more fully understand what the requesting party wants, can identify any excessive scope or burden problems, and can propose alternatives;[155] (4) amending Rule 26(b)(1)—the "scope of discovery rule"—to incorporate the often overlooked "proportionality" language currently found at Rule 26(b)(2)(C), in the hope that lawyers and judges will more fully appreciate the primacy of this principle;[156] (5) limiting the number of discovery requests—such as interrogatories, document production requests, and requests to admit—and lowering the number of depositions allowed and the time for each deposition;[157] (6) changing the discovery rules to prohibit "boilerplate objections" to discovery requests;[158] (7) introducing specific language into the Rules to permit cost shifting for discovery only;[159] and (8) amending Rule 1 to introduce the notion that it should be interpreted to promote cooperation among the parties during pretrial proceedings in addition to achieving a just, speedy, and inexpensive determination of every action.[160] While the sketches are just that—draft proposals designed to identify possible improvements and foster public comment—they are an important step along the path to improving the current state of things.[161] If approved for publication and comment, these sketches could well blossom into new rules within a few years.[162] Their effect, if enacted, could provide new tools to ensure that the scope of discovery is not excessive.

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152. *Id.*
153. *See id.* at 319.
154. *Id.* at 322–24.
155. *See id.* at 324–326.
156. *See id.* at 327–31.
157. *See id.* at 331–35.
158. *See id.* at 335–37.
159. *See id.* at 339.
160. *See id.* at 341.
161. *See id.* at 309.
162. *See id.* at 354.

*B. No. 2. Producing Party Pays vs. Requesting Party Pays*

If you carefully read the discovery rules, you will not find any express language regarding which party—the requesting party or the producing party—should bear the cost of searching for; reviewing for relevance, privilege, and work-product protection; and producing the information asked for in discovery.[163] Implicitly, however, the rules establish a presumption that this burden and expense falls upon the responding or producing party.[164] For example, Rule 26(b)(2)(C)'s entire cost–benefit, proportionality limitation on discovery is designed to balance the need for the information sought against the cost of its production and its importance to the resolution of the case.[165] Similarly, Rule 26(c)—the protective order rule—permits a court to enter any order needed "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[166] Moreover, Rule 26(g) requires that each "discovery request, response, or objection must be signed" by an attorney of record or self-represented party, certifying that, *inter alia*, a discovery request is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[167] Obviously, if the requesting party were required to pay for the costs associated with discovery under a "user-pays" system, the rules would not need to have so many provisions designed to provide the means for courts to issue orders preventing excessive and disproportionate burden and expense to the producing party. Indeed, the United States Supreme Court, speaking long before the problems caused by the current "ESI discovery crisis," said:

> Under [the discovery rules], the presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the district court's discretion under Rule 26(c) to grant orders protecting him from "undue burden or expense" in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery.[168]

Many critics of the current discovery rules argue that the "producer-pays" paradigm is largely responsible for much, if not all, of the Rule 34-related discovery abuse, especially regarding discovery of ESI.[169] They point out, not unreasonably, that the current rules—despite the injunctions of Rules

163. *See generally* FED. R. CIV. P. 26–37 (providing discovery and disclosure rules).
164. *See* Redish & McNamara, *supra* note 145, at 774.
165. *See* FED. R. CIV. P. 26(b)(2)(C).
166. FED R. CIV. P. 26(c)(1).
167. FED. R. CIV. P. 26(g)(1)(B)(iii).
168. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).
169. *See* Redish & McNamara, *supra* note 145, at 774.

26(b)(2)(C), 26(g)(1)(B)(iii), and 26(c)—are ineffective for the fundamental reason that they impose no economic incentive for the party asking for information to moderate its requests to ensure that they are proportional to the issues at stake and not excessively expensive to the producing party.[170] Even more so, they say, the current rules actually create an economic incentive purposely to ask for excessively expensive and burdensome discovery in order to coerce the producing party to seek a settlement purely as a means to avoid excessive discovery costs and not on the basis of the merits of the case.[171]

The clear solution, it is said, is to replace the flawed current system with one that requires the requesting party to have some "skin in the game," meaning that if they want any discovery, or discovery beyond a preset point, they should have to pay for the expense to the responding party of producing it.[172] That way, there will be economic incentives set forth in the rules that will cause the requesting party to ask for only what they are willing to pay for and concomitantly eliminate the byproduct of the current rules—placing excessive cost and burden on the producing party currently required to shoulder all, or most, of it.[173] From an economic point of view, it is hard to argue with the logic of this position, but opponents counter that it is overly simplistic because it assumes that the value of all civil suits may be measured by determining a proportionate balance between monetary damages foreseeable should a suit be successful and the costs of obtaining the facts needed to obtain that result even though many civil claims are filed to obtain results not easily measured by monetary damages, such as civil rights actions, whistleblower cases, and discrimination cases.[174] These so-called "impact cases," brought to initiate change, often are initiated by organizations or individuals without the significant financial resources that would be required to maintain a suit under a "user-pays" system.[175] The language of the advisory note to the 1983 amendments to the Rules of Civil Procedure captured this notion well:

> The elements of Rule 26(b)[] address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as

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170. *See, e.g.*, Nicola Faith Sharpe, *Corporate Cooperation Through Cost-Sharing*, 16 MICH. TELECOMM. & TECH. L. REV. 109, 123 (2009) (analogizing the requesting party to "an unsupervised child in a candy store toting an unlimited credit card").

171. *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010).

172. *See id.* at 551, 586.

173. *See id.* at 585.

174. *See* Redish & McNamara, *supra* note 145, at 813 (quoting Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 607 (2001)).

175. *See id.*

> measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.[176]

Opponents of a "user-pays" system also argue that its adoption would be a radical departure from the method by which civil cases have been litigated in federal court since the adoption of the discovery rules in 1938.[177] They contend that the presumption that the producing party must pay for its own costs in responding to proper discovery requests is wholly ingrained in the civil justice system,[178] and any changes adopted to require "user pays," cost shifting, or cost allocation, in whole or in part, would constitute a sea change in the way the system works and would sow the seeds for its destruction.[179] This criticism, however, is a great exaggeration because, as noted, the current rules caution against one party imposing disproportionately costly discovery burdens on an adversary and afford the courts great flexibility to prevent abuse of the system.[180] A rational examination of this problem demonstrates that the authority for a court to order cost allocation, cost shifting, or to impose all or part of the cost of discovery on the requesting party has long been recognized as implicit in the rules[181] and is well accepted by the case law.[182]

As for the former, the advisory notes to Rule 26(b)(2) clearly state:

> The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. *The conditions may also include payment by the requesting party of part or all of the reasonable costs* of obtaining information from sources [of

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176. FED. R. CIV. P. 26(b) advisory committee's note to 1983 amendment.

177. *But see* Redish & McNamara, *supra* note 145, at 774 (stating that "the collective failure on the part of most scholars and judges to question the theoretical foundations of our current model of discovery cost allocation" is surprising).

178. *See* Sharpe, *supra* note 170, at 136 (citing Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 653 (2006)).

179. *See generally* Andrew Mast, Note, *Cost-Shifting in E-Discovery: Reexamining* Zubulake *and 28 U.S.C. § 1920*, 56 WAYNE L. REV. 1825, 1840–41 (2010) (listing several common criticisms of cost shifting in e-discovery).

180. *See supra* notes 123–24, 126–27, 130–41 and accompanying text.

181. *See* FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendment.

182. *See, e.g.*, Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) (stating that a court has the discretion to grant orders conditioning discovery on the requesting party's payment of the costs of discovery so as to protect the producing party from undue burden or expense).

> ESI] that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause.[183]

As for the latter, the courts have long recognized that it is within their power to order a party that requests costly and burdensome discovery from an opponent to pay for all or part of it. Indeed, as already noted, *Oppenheimer Fund, Inc. v. Sanders*,[184] which is cited as the primary authority for the "producer-pays" system, recognized that the producing party may seek a protective order from the court requiring the requesting party to bear all or part of the cost of burdensome discovery.[185] Moreover, in a host of cases, courts throughout the country have recognized that the authority to allocate some or all of the costs of discovery to the requesting party is neither radical nor unfair, if properly undertaken.[186]

Furthermore, the experience of one of the co-authors of this Article—in cases assigned to him for resolution—suggests that it is possible to introduce the notion of discovery cost allocation in a wide range of civil cases without undermining the civil justice system or even drawing any notice, much less significant protest from the litigants. Rather, this experience suggests that if the rules of procedure could be drafted to provide a "base level" of discovery that was proportionate to the needs of the case, the burden and expense of which is borne by the producing party with the provision that any further discovery must be conditioned on a showing of good cause and an assessment of cost allocation,

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183. FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendment (emphasis added).

184. 437 U.S. 340 (1978).

185. *See id.* at 358 (stating that a judge "may invoke the district court's discretion under Rule 26(c) to grant orders protecting [the responding party] from "undue burden or expense" in [complying with discovery requests], including orders conditioning discovery on the requesting party's payment of the costs of discovery").

186. *See, e.g.*, Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 341 (E.D. Pa. 2012) (stating that "the plaintiffs have asked for very extensive discovery, compliance with which will be very expensive," and as such, "absent compelling equitable circumstances to the contrary, the plaintiffs should pay for the discovery they seek"); Schweinfurth v. Motorola, Inc., No. 1:05CV0024, 2008 WL 4449081, at *2 (N.D. Ohio Sept. 30, 2008) (holding that given the "sheer size and scope of discovery," cost shifting was warranted); Foreclosure Mgmt. Co. v. Asset Mgmt. Holdings, LLC, No. 07-2388-DJW, 2008 WL 3822773, at *7 (D. Kan. Aug. 13, 2008) (citing FED. R. CIV. P. 26(b)(2)(C)(iii)) (finding no undue burden for plaintiff to produce the requested documents, but weighing the factors set forth in Rule 26(b)(2)(C)(iii) and finding that it was appropriate to shift the cost of discovery); Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594, 602–03 (E.D. Wis. 2004) (citing Spears v. City of Indianapolis, 74 F.3d 153, 158 (7th Cir. 1996); Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 564 (7th Cir. 1984)) (adopting the seven-factor *Zubulake* test and using Rule 26(c) as authority to grant the court discretion "to create any order that would spare a party undue burden or expense"); Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (setting forth seven factors to consider in conducting the cost-shifting analysis under Rule 26); Byers v. Ill. State Police, 53 Fed. R. Serv. 3d (West) 740, 756 (N.D. Ill. 2002) (holding that if plaintiffs wanted archived emails produced, they were responsible for paying the cost of licensing an old email program).

there would be no unfairness to the requesting party or the producing party. Indeed, the requesting party, aware that it must choose wisely when it seeks its "free discovery," has an economic incentive to better tailor its requests to seek what it genuinely needs to prove its case.[187] During the time in which this process has been put in place in individual cases assigned to the co-author, not once has a requesting party come back to the court seeking additional discovery for which it would be willing to pay. The key, however, is in figuring out how to define the amount of "free discovery" so that it is sufficient to give the requesting party a fair shot at the discovery it needs, while simultaneously protecting the producing party from excessive cost and burden. While this balancing may be done effectively in individual cases where the court has access to the parties and can confer with them regarding how to tailor the amount of discovery that should be available to the requesting party without cost, it is a far more daunting task to accomplish by rule amendment when the rules must apply to all litigation in the federal courts. Such rulemaking may be difficult; however, that is no excuse to avoid the effort. The public manner in which rules are amended in the federal system ensures that the views of all who may be affected by a rule change would have notice and an opportunity to make their views and recommendations known.[188] The bottom line is that cost containment in discovery cannot be discussed seriously without entertaining the concept of cost allocation. Rule amendments that do not include express authority to allocate costs will be no more effective at cost control than those that have come before it and failed. There are two logical places where cost allocation could be addressed explicitly. The first is Rule 26(c), where the list of actions a court may take to protect a party from excessive and overly burdensome discovery could be amended to expressly include cost allocation. The second is Rule 34, which could be amended to include specific limits on the amount of discovery of ESI that may be obtained from an adverse party without cost to the requesting party, with additional ESI discovery permitted on a showing of good cause and cost allocation. Examples of such restrictions could include limits on the number of custodians from whom ESI must be produced, limits on the span of time from which ESI discovery may be required, and limits on the type of search methodology to be employed by the party that has been served with a request to produce documents.

### *C. No. 3. The Duty to Cooperate During Discovery*

Rule 1 of the Federal Rules of Civil Procedure states, "These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . . They should be construed and administered to secure the just,

187. *See supra* notes 172–73 and accompanying text.
188. *See supra* notes 148–51, 161–62 and accompanying text.

speedy, and inexpensive determination of every action and proceeding."[189] This goal cannot be realized without a cooperative interaction among three entities: the court, which defines and manages the discovery in each case; the lawyers, who initiate and respond to discovery requests; and the parties, who bring and respond to the lawsuit, direct the lawyers how to achieve their litigation goals, and compensate them for the work done on their behalf. It does not require Napoleonic insight to realize that all three of these entities must work in synchronization if costs are to be contained to those proportional to what is at stake in the litigation. It is equally obvious that for this synchronization to be achieved, an appropriate amount of cooperation between the parties—and their lawyers—is essential. Despite the obviousness of this proposition, the requirement of cooperation is entirely absent from the text of the discovery rules, and the word "cooperation" appears only once in the Federal Rules of Civil Procedure: in the title of Rule 37, which states "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions."[190] Moreover, the sad reality is that if you ask anyone familiar with how litigation actually takes place in state and federal courts whether cooperation between the parties during discovery is commonplace, they will tell you with near unanimity that it is not.

It is beyond the scope of this modest Article to try to divine why this lack of cooperation between parties is the case, but much has been written on the topic.[191] One published opinion, written by the co-author of this Article, considered this issue at length.[192] The truth is that lawyers and clients avoid cooperating with their adversary during discovery—despite the fact that it is in their clear interest to do so—for a variety of inadequate and unconvincing reasons. They do not cooperate because they want to make the discovery process as expensive and punitive as possible for their adversary, in order to force a settlement to end the costs rather than having the case decided on the merits.[193] They do not cooperate because they wrongly assume that cooperation requires them to compromise the legitimate legal positions that they have a good faith basis to hold.[194] Lawyers do not cooperate because they have a misguided sense that they have an ethical duty to be oppositional during the discovery process—to "protect" their client's interests—often even at the substantial

189. FED. R. CIV. P. 1.

190. FED. R. CIV. P. 37.

191. *See, e.g.*, Steven S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363, 365 (Supp. 2009) (analogizing cooperation to a "bull's-eye"); The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 356 (Supp. 2009) (discussing the need for cooperation in discovery); The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 331 (Supp. 2009) ("With this Proclamation, The Sedona Conference launches a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.").

192. *See* Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 360–61 (D. Md. 2008).

193. *See id.* at 362.

194. *See* The Sedona Conference, *The Case for Cooperation*, *supra* note 191, at 359.

economic expense of the client.[195] Clients do not cooperate during discovery because they want to retaliate against their adversary, or "get back" at them for the events that led to the litigation.[196] But the least persuasive of the reasons for not cooperating during the discovery process is the entirely misplaced notion that the "adversary system" somehow prohibits it.[197]

As the court noted at length in the *Mancia* case:

> The central precept of the adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society. This formulation is advantageous not only because it expresses the overarching adversarial concept, but also because it identifies the method to be utilized in adjudication (the sharp clash of proofs in a highly structured setting), the actors essential to the process (two adversaries and a decision maker), the nature of their functions (presentation of proofs and adjudication of disputes, respectively), and the goal of the entire endeavor (the resolution of disputes in a manner acceptable to the parties and to society). However central the adversary system is to our way of formal dispute resolution, there is nothing inherent in it that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery of the competing facts on which the system depends.[198]

Similarly, Professor Lon L. Fuller, a "celebrated professor at Harvard Law School who wrote extensively on jurisprudence, including the importance of the adversary system,"[199] stated:

> Thus, partisan advocacy is a form of public service so long as it aids the process of adjudication; it ceases to be when it hinders that process, when it misleads, distorts and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult.
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> . . . .
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> The lawyer's highest loyalty is at the same time the most tangible. It is loyalty that runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those

195. *See id.* at 344.

196. *See id.* at 359.

197. *See Mancia*, 253 F.R.D. at 360–61.

198. *Id.* at 361 (citing STEPHAN LANDSMAN, A.B.A. SECTION OF LITIG., READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2 (1988)).

199. *Id.* at 361 n.4.

> fundamental processes of government and self-government upon which the successful functioning of our society depends.
>
> . . . A lawyer recreant to his responsibilities can so disrupt the hearing of a cause as to undermine those rational foundations without which an adversary proceeding loses its meaning and its justification. Everywhere democratic and constitutional government is tragically dependent on voluntary and understanding co-operation in the maintenance of its fundamental processes and forms.
>
> It is the lawyer's duty to preserve and advance this indispensable co-operation by keeping alive the willingness to engage in it and by imparting the understanding necessary to give it direction and effectiveness. . . .
>
> . . . It is chiefly for the lawyer that the term "due process" takes on tangible meaning, for whom it indicates what is allowable and what is not, who realizes what a ruinous cost is incurred when its demands are disregarded. For the lawyer the insidious dangers contained in the notion that "the end justifies the means" is not a matter of abstract philosophic conviction, but of direct professional experience.[200]

In *Mancia*, the court further noted that:

> A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is, as Professor Fuller observes, hindering the adjudication process, and making the task of the "deciding tribunal not easier, but more difficult," and violating his or her duty of loyalty to the "procedures and institutions" the adversary system is intended to serve.[201]

As a result of these flagrant and intentional discovery abuses, *Mancia* observed that "rules of procedure, ethics[,] and even statutes make clear that there are limits to how the adversary system may operate during discovery."[202]

The *Mancia* court was not alone. In case after case, courts throughout the country adamantly have stated that the discovery process mandates that the parties cooperate to ensure compliance not only with Rule 1, but also with Rules

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200. *Id.* at 361–62 (quoting Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162, 1216 (1958)).

201. *Id.* at 362 (quoting Fuller & Randall, *supra* note 200, at 1162).

202. *Id.* at 362–63 (footnotes omitted).

26(b)(2)(C), 26(c), and 26(g)(1).[203] Sadly, while some may feel that the altogether uncivil manner in which civil litigation is conducted in this country is a product of the fact that there are so few civil trials anymore[204]—a relatively contemporary occurrence—it is likely that it has always been so. In 1906,[205] in an address to the American Bar Association titled *The Causes of Popular Dissatisfaction with the Administration of Justice*, the legendary Dean Roscoe Pound—one of the greatest legal minds of the time—observed:

> A no less potent source of irritation lies in our American exaggerations of the common-law contentious procedure. The sporting theory of justice, the "instinct of giving the game fair play," as Prof. Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet. But it is probably only a survival of the days when a lawsuit was a fight between two clans in which change of venue had been taken to the forum. So far from being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent. Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the

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203. *See, e.g.*, Bd. of Regents of the Univ. of Neb. v. BASF Corp., No. 4:04CV3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) (emphasizing that the theme of the recent amendments to the discovery rules is "open and forthright sharing of information by all parties to a case"); Network Computing Servs. Corp. v. CISCO Sys., Inc., 223 F.R.D. 392, 395 (D.S.C. 2004) (noting that contentious and expensive discovery battles present challenges to the judicial system). *See also, e.g.*, Malot v. Dorado Beach Cottages Assocs., 478 F.3d 40, 45 (1st Cir. 2007) (reversing the district court's dismissal with prejudice because it was too harsh of a penalty under the circumstances and commenting that "[b]oth sides contributed to the contentiousness and lethargic pace of the discovery process"); Sweat v. Peabody Coal Co., 94 F.3d 301, 306 (7th Cir. 1996) (admonishing opposing attorneys for being "combative, obstinate, and wholly uncooperative in the process of exchanging information"); Buss v. Western Airlines, Inc., 738 F.2d 1053, 1053–54 (9th Cir. 1984) (affirming a dismissal because of counsel's refusal to cooperate with opposing party); Flanagan v. Benicia Unified Sch. Dist., No. CIV S-07-0333 LKK GGH, 2008 WL 2073952, at *10 (E.D. Cal. May 14, 2008) ("The abusiveness of plaintiff's discovery responses indicate a lack of cooperative spirit."); Marion v. State Farm Fire & Cas. Co., No. 1:06cv969-LTS-RHW, 2008 WL 723976, at *3–4 (S.D. Miss. Mar. 17, 2008) ("This court demands the mutual cooperation of the parties."); *In re* Spoonemore, 370 B.R. 833, 844 (Bankr. D. Kan. 2007) ("Discovery should not be a sporting contest or a test of wills . . . ."). Various states have also implemented local court rules that stress the importance of cooperation during discovery in order to "facilitate the just, speedy, and inexpensive conduct of discovery in civil cases before the Court." U.S. DIST. CT. MD. R. app. A, discovery guideline 1(a); *see also* U.S. DIST. CT. S. & E.D.N.Y. R. 26.4(a) ("Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous with each other, including in matters relating to scheduling and timing of various discovery procedures.").

204. *See* Kravitz, *supra* note 34, at 1.

205. This year was thirty-one years before the introduction of the discovery rules into the Federal Rules of Civil Procedure. *See* Blaner et al., *supra* note 74, at 8.

> game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interests of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to "get error into the record," rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations "to affect credit," which have made the witness-stand "the slaughter-house of reputation[s]." It prevents the trial court from restraining the bullying of witnesses, and creates a general dislike, if not fear, of the witness-function, which impairs the administration of justice. It keeps alive the unfortunate Exchequer-rule, dead in the country of its origin, according to which errors in the admission or rejection of evidence are presumed to be prejudicial and hence demand a new trial. It grants new trials because by inability to procure a bill of exceptions a party has lost the chance to play another inning in the game of justice. It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived. The inquiry is not, what do substantive law and justice require? Instead, the inquiry is, have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play.
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> The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We need not wonder that one part of the community strain their oaths in the jury-box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the courts,

> instituted to administer justice according to law, are made agents or abettors of lawlessness.[206]

It would appear that there is something in the DNA of the American civil justice system that resists cooperation during discovery. If that is so, then absent a "gene mutation" that leads to a change of approach, it is likely that no amount of rule amendments, court opinions, pilot programs, local rules, guidelines, protocols, or standing orders will be sufficient to stop the decline of the civil litigation system. But, there is reason for modest optimism. First, there are proposals to amend the Federal Rules to include an explicit reference to the need for cooperation during discovery,[207] and as noted, some courts are starting to stress this duty to cooperate in their local rules and discovery guidelines.[208] Second, the courts are increasingly insisting upon cooperation during discovery.[209] Third, there is anecdotal evidence that law schools—which have, in the past, been blissfully ignorant of the need to teach discovery practice as an essential component of a law school education—are beginning to encourage classes devoted to pretrial discovery.[210] Therefore, it may be that the next generation of lawyers will be more attuned to the need to adopt a cooperative approach during discovery—not because of any lofty ideals, but for the simple expedient that lawyers who do so will achieve greater success for their clients and advance their careers. Those that do not will write wills.

The authors of this Article believe that if cooperation is to be achieved, it needs to be better defined, as it, like beauty, is dependent on the eye of the beholder. Ironically, it may be easier to develop a working idea of what cooperation is by focusing on what it is *not*. Cooperation does not require a party to abandon or compromise a legitimate legal position.[211] Rather, it involves identifying how to achieve the maximum benefit for the client at the lowest cost. Usually, this outcome is reached by attempting to come to a common ground with an adversary on matters not directly related to the merits of the legal position, but which affect how quickly and inexpensively the issue may be resolved.[212] The following example will illustrate:

> Assume that an employee whose job was eliminated by a reduction in force brings an employment discrimination suit against her employer,

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206. Pound, *supra* note 28, at 447–48 (quoting 1 WIGMORE, *supra* note 72, § 58, at 127 (1904); 2 WIGMORE, *supra* note 72, § 983, at 1112 (1904)) (citing Holland v. Chi., Burlington & Quincy R.R. Co., 71 N.W. 989, 990 (Neb. 1897); Degraw v. Elmore, 50 N.Y. 1 (1872)).

207. *See supra* text accompanying notes 148–49, 160.

208. *See* sources cited *supra* note 203.

209. *See* cases cited *supra* note 203.

210. *See generally* Peter Toll Hoffman, *Law Schools and the Changing Face of Practice*, 56 N.Y.L. SCH. L. REV. 203, 207 (2011–2012) (discussing curriculum changes in law schools to include pretrial litigation courses focusing on discovery and motions practice).

211. *See supra* text accompanying note 194.

212. *See* Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 365 (D. Md. 2008).

> contending that she was fired as a result of gender discrimination and not for a legitimate, nondiscriminatory reason. During discovery, the plaintiff serves document production requests demanding documents, both "hard copy" and electronic, relating to all termination actions taken by the company nationwide for the past twenty years. The defendant takes the position that this discovery is overbroad and burdensome because the case involves a single plaintiff alleging that she was fired because of her gender and that the production of employment records relating to terminations going back twenty years, covering the entire country rather than the specific division at which plaintiff worked and pertaining to former employees of both genders, is beyond the scope of discovery in Rule 26(b)(1) and grossly disproportionate to what is at issue in the case, in violation of Rules 26(g) and 26(b)(2)(C). Assume further that the employer has reached this position after having done the factual inquiry mandated by Rule 26(g)(1) and having prepared an estimate of the cost of complying with the plaintiff's request, which demonstrates that the cost would be substantial and would tie up the time of many employees of the company, diverting them from their normal assignments.

Most would agree that the defendant's legal position that the plaintiff's discovery request is excessive and burdensome is a good faith, legitimate position to take.[213] How, then, should defense counsel best protect the interests of his client in asserting this position? One way is to adopt an adversary, combative approach and file a written answer to the document production request raising boilerplate, nonspecific objections, such as the discovery sought is "overbroad, burdensome, irrelevant, and not likely to lead to the identity of admissible evidence,"[214] and refuse to produce any of the documents. The inevitable response of the plaintiff's lawyer is to write a letter threatening to file a motion to compel. After the defendant sticks to its guns and refuses to budge, the plaintiff will then file the motion to compel, the defendant will file an opposition, and the plaintiff will file a reply in response to the defendant's opposition, all of which drives up the cost of the litigation to both parties, and delays the progress of the case.[215] At this point, the court will need to resolve the dispute, which may involve further delay. Under the facts of the case, there is almost no chance that the defendant will prevail in its refusal to produce any documents, as clearly some subset of what the plaintiff demanded is within the scope of discovery and production of it would be proportional to what is at issue in the case.[216] Therefore, the defendant will not prevail, and the judge will issue

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213. *See* FED R. CIV. P. 26(g).

214. *See, e.g.*, Francis v. Bryant, No. CV F 04 5077 REC SMS P, 2006 WL 947771, at *2 (E.D. Cal. Apr. 12, 2006) (making similar objections).

215. *See Member Survey*, *supra* note 1, at 6.

216. *See* FED R. CIV. P. 26(b)(2)(C)(iii).

an adverse ruling and, in doing so, may order production of far more documents than the defendant anticipated. The court (and the plaintiff's counsel) will perceive the defense counsel as having taken an unreasonable position,[217] and the end result is that the defendant will have lost complete control over the decision of how many documents to produce, in what sequence, and at what expense. The net result to the client is more expense, more delay, and an increased risk that the court will order more documents produced than the defendant anticipated, resulting in additional burden and cost.[218]

Contrast this approach with a cooperative one that the parties could take. The defense attorney could write a civil, though direct, letter to plaintiff's counsel, pointing out that the discovery request is far broader than the issues pleaded in the complaint. The letter could particularize the estimate of the cost to the defendant to comply with the request, and rather than refusing to produce any documents (a position that the court is highly unlikely to agree with), propose as an alternative to produce all documents going back five years from the division in which the plaintiff worked relating to the termination of female employees. Additionally, the defense counsel could suggest that if the plaintiff agreed to modify her demand, as suggested by the defense counsel, the defense counsel could produce the documents to the plaintiff within thirty days, and the plaintiff could reserve the right, after having reviewed what the defendant produced, to request additional documents, to which the defendant would still have the right to object.

If the plaintiff agrees, then both parties to the litigation win. The plaintiff gets prompt access to the records most likely to be relevant to her specific claim without the expense and delay of motions practice, while concomitantly reserving the right to request more documents if the results of reviewing the first ones suggest that there may be additional relevant records. The defendant also benefits because it too avoids the cost of motions practice and, more importantly, gains control over the nature and timing of the documents it has to produce, while significantly lowering the burden and cost of responding to the discovery request. This cooperative approach works best for both parties because each achieves a result that is clearly to its advantage, with minimal cost, and preserves all of its legal positions regarding the propriety of the original document request. Under this scenario, each lawyer has effectively represented his or her client, advanced their interests, and avoided cost.

Assume, however, that the plaintiff responds to the defendant's cooperative position by digging in and demanding everything in its production request. The defendant may now take the initiative and file a Rule 26(c) motion for a protective order, in which it gets to frame for the court the discovery dispute and attach as an exhibit the letter written by the defense attorney to the plaintiff's

217. *See Mancia*, 253 F.R.D. at 359.

218. *See* Network Computing Servs. Corp. v. CISCO Sys., Inc., 223 F.R.D. 392, 395 (D.S.C. 2004).

counsel. Because of its civil tone, the fact that the objections were supported by particularized facts, and the solution offered was reasonable on its face, the defendant will either win its motion—and the court will order the outcome suggested by the defendant—or issue an order that perhaps grants more than what the defendant proposed but unlikely anything near as expansive as what the plaintiff demanded. Furthermore, in the process, the court will have formed a positive impression of the defense counsel and a more negative one of the plaintiff's counsel.

However measured, the above hypothetical shows that a cooperative approach will net a better result to the defendant than a combative one. Moreover, the defendant achieved a favorable outcome without abandoning its legal position that the discovery sought by the plaintiff was overbroad and burdensome. Rather, the defendant leveraged this position to achieve a result that advanced its goals, lowered its expense, and did not delay the resolution of the case. Thus, properly viewed, a cooperative approach to discovery is entirely consistent with the principles of the adversary system and can be expected to produce far better results for a client than a confrontational one, without sacrificing the ability to preserve and assert legitimate legal positions held in good faith.[219]

## IV. CONCLUSION

It may well be that ever since the adoption of the discovery rules as part of the Federal Rules of Civil Procedure, parties have been dissatisfied with the inadequacy of the rules,[220] and the serial amendments intended to fix current problems have not been sufficient to prevent the emergence of new ones. Given the problems of civil practice focused on in this Article—the decline of the civil jury trial, the lack of sufficient judicial involvement in the discovery process, and the changing nature of discovery itself, as exemplified by the strains to the system caused by the explosion of ESI discovery[221]—it would be naive to expect that a single set of rules first instituted in the 1930s would be sufficient to absorb all these changes and still continue to operate at peak efficiency. Likewise, the process of amending the federal rules piecemeal to focus on individual problems without reexamining the entire premise underlying the discovery rules—fact-gathering aimed at resolving the case by a jury trial—has not satisfied the many critics who still argue that the current rules are not up to the task of regulating modern litigation practice where trials are so infrequent.[222] Perhaps the time will come when there is a national consensus that the discovery rules should be completely reimagined to deal with a system where civil cases are resolved

219. *See supra* text accompanying notes 194, 211.
220. *See Member Survey*, *supra* note 1, at 6.
221. *See supra* Part II.
222. *See supra* Part II.A.

through settlement or dispositive motion; however, it is hard to imagine that such a time will be soon, as the belief in the importance of a civil jury trial is deeply ingrained in the American legal system. To this point, the Duke Conference held in 2010, which was the most comprehensive reexamination of the discovery system in a generation, did not go anywhere close to proposing such a dramatic change.[223]

The Civil Rules Advisory Committee has taken seriously the concerns raised at the Duke Conference by the many individuals and organizations that shared their views. The Duke Subcommittee has developed a comprehensive series of "sketches" outlining a number of potential changes to the discovery rules, the collective effect of which would usher in real reforms to ensure that discovery is proportional to the issues to be decided in the case and that the rules live up to the aspirational objective of Rule 1[224]: that the civil procedure rules be interpreted to achieve the "just, speedy, and inexpensive" resolution of cases.[225] If approved for public comment, one can expect that these sketches will focus the discussion of interested parties and organizations on a broad array of potential rule improvements.

Similarly, as proposed in this Article, narrowing the scope of discovery to focus on information that is neither privileged nor protected work product and that is relevant to the actual claims and defenses raised by the pleadings could greatly improve things, at least as long as there is a consensus that the purpose of the discovery rules is to prepare for trial.[226] Likewise, introducing an economic incentive to make discovery proportional, by incorporating the possibility of cost allocation for discovery that is sought beyond a threshold limit established by the rules, would force litigants to prioritize their discovery requests to ensure that they first ask for what they really need to prove their claims or defenses.[227] This concept will likely draw vigorous debate; however, in truth, the law already is well established that cost allocation is appropriate and authorized in certain circumstances.[228] The key is to make sure that the concept is applied in a manner that makes sense given a variety of factors, including the type of litigation, the resources of the parties, and the type of relief sought. Finally, our third recommendation—institutionalizing the concept of cooperation during discovery into the rules of procedure—would work hand in glove with the other two recommendations to help trim unnecessary costs and burdens and focus on what facts truly are needed to resolve a particular dispute.[229] As we previously noted, the one excuse most offered for not doing so at present is the misguided

223. *See supra* notes 8–17 and accompanying text.
224. *See supra* notes 148–62 and accompanying text.
225. FED. R. CIV. P. 1.
226. *See supra* Part III.A.
227. *See supra* Part III.B.
228. *See supra* note 182 and accompanying text.
229. *See supra* Part III.C.

notion that cooperation somehow is at odds with the adversary system of civil litigation.[230] In fact, it is just the opposite.

It is difficult not to wonder what the topic of discussion will be twenty-five or thirty years from now among trial lawyers, judges, and litigants as they muse about the strengths or failings of the civil litigation system. Undoubtedly, there will still be complaints. But wouldn't it be refreshing to imagine that whatever those complaints may be, they would not be that the current generation of rules drafters, judges, lawyers, academics, and litigants failed to act with commitment and vision to adopt reforms, such as those discussed in this Article. Only time will tell.

230. *See supra* notes 194, 197–98 and accompanying text.

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