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ADDRESSING THE ADVERSARIAL DILEMMA OF CIVIL DISCOVERY

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I. INTRODUCTION

Theory and reality in the practice of pretrial discovery offers a contradictory and troubling picture of a process in jeopardy. Take for example the following discovery dispute. Two corporations, engaged in

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the furniture business, are involved in a lawsuit which alleges unfair competition and trademark infringement.[1] In a set of interrogatories to the plaintiff, the defendant uses the term "early American furniture." The plaintiff objects arguing that the term is vague and ambiguous. A motion to compel is brought and the court, after due deliberation, sides with the plaintiff and sustains its objection to the disputed phrase. Yet both parties should have known how the term "early American furniture" was defined in the general custom of the furniture trade and either party could have defined the term either in the interrogatories or in the responses. Even if the parties did not choose to act, the court could have solicited definitions and ordered an answer based on the one it found most appropriate. But neither the parties nor the court chose to advance the litigation in this manner. They instead opted for a inefficient, wasteful and inconclusive approach that left everyone no wiser than when they started and the litigation no closer to resolution.

How does one reconcile such an example of litigational reality with the clarion declarations of the United States Supreme Court that discovery is one of the most significant innovations of modern civil procedure, allowing parties to obtain the fullest possible knowledge of the issues and facts before trial?[2] Does the decision to sustain the plaintiff's objection comport with the admonition that the discovery rules are to be accorded broad and liberal interpretation[3] so that trials are no longer a game of blindman's bluff, but a fair contest with the basic issues and facts disclosed before trial to the fullest practical extent?[4] Has the sporting theory of litigation, which pervaded the early common law, really been replaced[5] by a system that adheres to the maxim "mutual knowledge, [before trial,] of all relevant facts gathered by both parties is essential to proper litigation?"[6]

In comparing theory and practice, one comes to the inescapable conclusion that discovery has simply become an extended field of play in an on-going game of blindman's bluff.[7] Far from offering the salutary benefits of allowing the parties to obtain the fullest possible knowledge of the facts and issues before trial, it more often than not gives impetus and opportunity to the baser litigational instincts of delay, deception, and

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[1] Heritage Furniture, Inc. v. American Heritage Inc., 28 F.R.D. 319 (D. Conn. 1961).

[2] Hickman v. Taylor, 329 U.S. 495, 500-01 (1947).

[3] *Id.* at 507.

[4] United States v. Procter & Gamble, 356 U.S. 677, 682 (1958).

[5] Griswold, *The Long View*, 51 A.B.A.J. 1017, 1021 (1965) ("In civil cases we have largely abandoned the sporting . . . theory of justice, and we have developed procedures designed to elicit the truth."); address by the Honororable Alexander Holtzoff, *reprinted in Twelve Months Under the New Rules of Civil Procedure*, 26 A.B.A.J. 45 (1940).

[6] *Hickman*, 329 U.S. at 507 (1947).

[7] Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1303-04 (1978).

unbridled confrontational advocacy.[8] For many, discovery has become a self-contained universe with a life of its own, rather than a tool for facilitating litigation.[9]

Why and how have we come to this state of affairs? The formal rules which govern discovery are reasonably clear as to what is discoverable[10] and how the process is to function.[11] The courts are clear that the rules are to be liberally interpreted in favor of early and thorough pretrial disclosure.[12] Yet discovery practice is all too often mired in deception, resistance and delay. Meaningful disclosure, when it occurs at all, results more from a bloody battle than a straightforward exchange of relevant information. Excessive, unnecessary and abusive discovery practices have become an increasing topic of widespread concern and debate.[13] Yet with all this attention, discovery reform has essentially been a superficial endeavor.[14] It has treated the symptoms of misconduct by putting limits on the amount of discovery available to litigants and sanctioning parties and attorneys who are deemed to have engaged in unacceptable activities.[15] But these reforms have failed to address the fundamental cause of the disparity between what discovery was intended to accomplish and what really occurs during the pretrial phase of a lawsuit.

While everything from lawyer avarice to judicial inattention has been blamed for the problems which beset the discovery process,[16] the more fundamental cause lies, not with the people who function within the system, but with the system itself. As long as we essentially ignore the fact that discovery has been engrafted onto a thoroughly adversarial process, no solution to its problems will materially succeed. A system that promotes adversarial resolution of disputes through the efforts of client-dedicated legal representatives cannot be expected to easily accommodate

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[8] Amendments to the Federal Rules of Civil Procedure, 446 U.S. 995 (1980)(Powell, J., dissenting).

[9] Sherman, *The Judge's Role in Discovery*, 3 REV. LITIG. 89, 196-97 (1982)(quoting Judge Goettel: "Discovery was intended to be a domesticated bird dog to help flush out evidence. It has become, instead, a voracious wolf roaming the countryside, eating everything in sight.")

[10] See FED. R. CIV. P. 26(b)(1); Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 350-52 (1978).

[11] See FED. R. CIV. P. 26-37.

[12] Hickman v. Taylor, 329 U.S. 495, 507 (1947).

[13] For example, in November, 1982, the A.B.A. co-sponsored a National Conference on Discovery Reform at the University of Texas Law School which explored the problems of discovery abuse and proposed solutions. The proceedings of the conference appear in 3 REV. OF LITIG. 1 (1982). See also, amendments to the Federal Rules of Civil Procedure, 446 U.S. 995, 997-1001 (1980)(Powell, J., dissenting)("Delay and excessive expenses now characterize a large percentage of all civil litigation.")

[14] 446 U.S. at 1000-01.

[15] See *infra* notes 116, 171-78 and accompanying text.

[16] See *infra* notes 184 and 191-92 and accompanying text.

to a process that mandates disclosure of vital case-related information through the simple expediency of one party making a request of the other. If reform is to have any significant impact, it must address the fundamental adversarial dilemma of the discovery process: Namely, how to accomplish full, efficient and meaningful pretrial disclosure without the kind of litigational behavior which constitutes the very hallmark of an adversarial system.

There can be no question that the emergence of modern pretrial discovery has contributed enormously to making the conduct of a lawsuit a more fair, just, and efficient process.[17] But discovery also offers a substantial potential for mischief. Since few civil cases today are actually resolved at trial,[18] trouble in the pretrial phase of litigation signals potentially major problems in the legal system's role as the nation's primary dispute resolution mechanism.

It is the purpose of this Article to examine the issue of discovery abuse in light of the fundamental adversarial dilemma of the discovery process and propose a new approach to reform which takes cognizance of the inconsistency between party-to-party disclosure of significant case-related information and the basic adversarial nature of litigation.

II. A Historical Perspective

In order to deal with the discovery process as it exists today, we must first briefly examine the development of discovery from its earliest common law roots. Without such a historical perspective, one cannot fully comprehend the basic purpose and fundamental policies which have helped shape our current approach to pretrial case preparation.

Pretrial discovery[19] is a relatively recent innovation of the common law.[20] Even in its most rudimentary form, it did not exist as an

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[17] Koster v. Chase Manhattan Bank, 93 F.R.D. 471, 473-74 (S.D.N.Y. 1982).

[18] Only about six percent of all civil cases filed in the federal courts ever reach resolution by way of a trial verdict. Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, App. B at 558 (1986).

[19] The term "discovery" as used in this Article refers to those formal processes by which a civil litigant may compel an adversary or a third party to disclose, before trial, information relevant to the dispute in issue. Information so obtained may be used by a litigant to prepare his case and, with some limitations, may be offered as evidence at trial.

[20] Pretrial discovery is generally unknown in civil law countries. The reason for this lack of pretrial disclosure lies in the very nature of the civil law trial. Unlike the common law which relies on a single continuous in-court proceeding in which the parties control presentation of the dispute and the court acts as a passive receptor of evidence, civil law jurisdictions rely on an active interrogating court which takes evidence in a series of sessions which are convened whenever the need for the presentation of evidence on a particular issue arises. The parties, therefore, need not be aware of all potential evidence prior to trial. A litigant in a civil law country may be confronted with aspects of his opponents case at one court session and, after a period of time and investigation, present his

independent fact-gathering process before the middle of the nineteenth century. But the true origin of the broad array of discovery tools and pervasive nature of the discovery process as it exists today, lies with the promulgation of the Federal Rules of Civil Procedure in 1938.[21] Until the advent of the Federal Rules, discovery practice in the United States was an oddly varied hodge-podge of antiquated restrictions and procedures struggling with rudimentary concepts of liberalized disclosure. Furthermore, the federal system, as opposed to that of the states, was the most antiquated, restrictive, and inadequate of them all. It, therefore, was a fertile ground for the reforms introduced by the Federal Rules of Civil Procedure.

A. Early English Common Law Practice

Pretrial discovery was virtually unknown to the early English common law. The courts and the parties relied on the pleadings to present the matter in controversy. The issue formulation process consisted of an exchange of pleadings which were expected to narrow the factual dispute.[22] The pleadings were, in theory, to be sufficiently clear and detailed to give a party notice of the nature, scope, and allegations of the case, allowing each side to prepare for whatever factual presentation their opponent might make at trial.

The parties framed their controversy and laid it before a court for decision. Whatever the parties asserted was taken at face value as a basis for trial. The courts sought to protect neither themselves nor the parties from the trial of issues based upon allegations which had no colorable existence in fact. It was the business of the courts to try a case as the parties presented it, and, if a case lacked substance, the trial was supposed to disclose that fact.[23] In such a system, a party's allegations at trial might rest on sound evidence or might rest on nothing at all. The parties could assert or deny whatever they wanted. No way existed to test a pleader's allegations prior to trial. It was for the court at trial to resolve such issues and decide the controversy.[24]

Common law pleadings rarely fulfilled their function of giving notice of

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own evidence in another session. Throughout the process, the court interrogates the attorneys, witnesses and parties and even directs the litigants to produce specific evidence at subsequent proceedings. The parties, therefore, do not need the kind of extensive pretrial discovery tools which have become essential in common law jurisdictions.

For a brief discussion of discovery in civil law countries, see Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 943 (1961).

[21] The Federal Rules of Civil Procedure became effective September 16, 1938. See effective date information preceding FED. R. CIV. P. 1.

[22] G. RAGLAND, JR., DISCOVERY BEFORE TRIAL 1 (1932).

[23] Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 215-17 (1937).

[24] H. STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS, 493 (2d Am. ed. 1831).

the factual and legal issues in controversy sufficient to allow the parties to competently prepare for trial.[25] Unfortunately, as the common law developed, the pleadings became more formalized and clear statements of fact gave way to vague and often fictitious allegations couched in a sort of antiquated terminology.[26] The pleader became more concerned with properly invoking the judicial process then giving the opposing party clear notice of the factual and legal matters in issue.[27] Preparation for trial became a sort of blind gamble which required both sides literally to guess at what their opponent would offer as evidence to support the rather vague and conclusory allegations contained in the pleadings.

Until the middle of the nineteenth century, courts which heard actions at law had no means of affording the parties any form of pretrial discovery.[28] The only assistance available through such courts was the so-called bill of particulars which allowed one party to obtain from the other a few rudimentary facts to augment the allegations contained in the pleadings.[29] But this was not discovery in the sense we know it today. It was simply a means by which a party could ask for a more definite statement of the facts and allegations which comprised the dispute, but only if their opponent's pleadings were so general or vague as to not convey the essence of the controversy.[30] It was not necessary, however, for a response to a bill of particulars to disclose specific evidence upon which a party relied, but only that information necessary "fairly [to] apprise" the opponent of the "nature" of the controversy.[31] A few clarifying paragraphs often constituted a sufficient response.

While the bill of particulars helped supplement the pleadings, it fell far short of disclosing the facts underlying a party's case. Add to this the fact that the grant or denial of a request for a bill of particulars was within the sound discretion of the court,[32] and it can be seen that the effectiveness of even this rudimentary discovery device was problematic at best.

In actions in equity, the English chancery courts were far better in providing litigants a means of discovering something about their opponent's case prior to trial. But this was more a function of the unique nature of equity practice than a conscious development of pretrial discovery procedures.

Pleadings in courts of equity performed a quite different function from

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[25] G. RAGLAND, JR., *supra* note 22, at 2.

[26] Note, *supra* note 20, at 946.

[27] G. RAGLAND, JR., *supra* note 22, at 2.

[28] Millar, *The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure*, 32 ILL. L. REV. 424, 437, 441 (1937).

[29] Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 865 (1933); 3 CHITTY, GENERAL PRACTICE 507-09 (3d ed. 1842).

[30] G. RAGLAND, JR., *supra* note 22, at 11-12.

[31] Sunderland, *supra* note 29, at 865.

[32] G. RAGLAND, JR., *supra* note 22, at 12.

pleadings in courts of law. In equity, there was no formal trial employing witnesses.[33] The pleadings were supposed to present the facts of the case in such a complete fashion that the court would be able to render a decision based entirely on the pleadings.[34] A bill of complaint in equity was a rather lengthy and formalized affair. It consisted of nine parts, the most important of which was a "stating" part, containing a narrative of the facts upon which the plaintiff relied, a "charging" part, containing the charges upon which the plaintiff sought the defendant's declaration and an "interrogating" part, composed of specific questions directed to the defendant.[35] It was the defendant's response to these interrogatories that comprised the bulk of his answer to the bill of complaint.[36] Not until the middle of the nineteenth century, with the passage of the Chancery Practice Amendment Act,[37] did equity revise this procedure to allow the bill of complaint to function only as a notice document, setting forth the plaintiff's facts and allegations, and allowing interrogatories to become a separate pleading which either the plaintiff or defendant could use to solicit information regarding a party's allegations.

While the Chancery Practice Amendment Act separated interrogatories from the bill of complaint, it did not set them free to be used as an independent discovery tool. They were still constructively tied to the pleadings.[38] If the plaintiff wished his bill of complaint answered, he served a set of interrogatories on the defendant and the answer to these comprised the defendant's answer to the complaint.[39] As for the defendant, after he had answered, he could serve the plaintiff with a set of interrogatories seeking information regarding the case.[40] This, however, was the entire extent of discovery permitted through the use of interrogatories.

To afford litigants in actions at law the same "discovery" assistance that parties in actions in equity had available to them, the chancery courts permitted litigants in the law courts to seek a bill of discovery in aid of their action at law.[41] Those who sought such a bill had to file a separate action in the chancery courts and demonstrate their need for the equitable assistance they sought.[42] The bill of discovery was very much

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[33] C. LANGDELL, SUMMARY OF EQUITY PLEADING § 57 (1877).

[34] G. RAGLAND, JR., *supra* note 22, at 6.

[35] Millar, *supra* note 28, at 437-39.

[36] G. RAGLAND, JR., *supra* note 22, at 6.

[37] 15 & 16 Vict. ch. 86.

[38] Langdell, *Discovery Under the Judicature Acts*, 12 HARV. L. REV. 150, 166-67 (1898).

[39] Millar, *supra* note 28, at 442.

[40] *Id.* at 443.

[41] G. RAGLAND, JR., *supra* note 22, at 12; 1 G. SPENCE, EQUITABLE JURISDICTION OF THE COURTS OF CHANCERY 677 (1981).

[42] Millar, *supra* note 28, at 441; J. MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY 192 (4th ed. 1827).

like a bill of complaint in that, if granted, the opposing party's response consisted of answers to interrogatories which the propounding party furnished as part of, or contemporaneously with, the filing of their bill of discovery.[43]

The process of seeking the chancery court's assistance in an action at law was cumbersome and caused substantial delays and expense to the parties.[44] In 1854, the Common Law Procedures Act[45] finally gave the courts of law access to the same "discovery" tools which had been available to litigants on the equity side of the system. With the merger of law and equity in 1873,[46] the process of affording all litigants some form of rudimentary discovery was finally complete.

While the interrogatory, even in its uniquely limited capacity, constituted the primary discovery tool of mid-nineteenth century English practice, equity also permitted limited discovery of documents when a moving party could specifically designate the documents he sought, establish his opponent's possession of them, and demonstrate their direct relevance to the case.[47] Later, equity provided a procedure to perpetuate the testimony of a witness who was outside of or about to leave the country or who, due to age or infirmity, might be unavailable at the time of trial.[48] Each of these discovery tools became directly available to litigants in actions at law after the Common Law Procedures Act of 1854.

More significant than the limited number of available discovery tools was the severely restricted scope of discovery. A party seeking discovery from his opponent could only obtain information which supported his own allegations and claims, but was precluded from seeking information with regard to his opponent's allegations and defenses.[49] In other words, a plaintiff might seek evidence to support his own version of the facts, but he could not inquire into the defendant's version of those facts. Until the time of trial, therefore, the plaintiff was not permitted to learn what evidence the defendant would offer to rebut the plaintiff's claims and allegations.[50]

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[43] *Id.*

[44] Note, *supra* note 20, at 948.

[45] 17 & 18 Vict., ch. 125.

[46] Judicature Act, 36 & 37 Vict., ch. 66.

[47] C. LANGDELL, *supra* note 33, at §§ 55-57 (1877).

[48] 1 G. SPENCE, *supra* note 41, at 680-82.

[49] Sunderland, *supra* note 29, at 867-70.

[50] This troubling restriction is best explained by the common law's inordinate fear of perjury. "[T]he possible mischiefs of surprise at the trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred, when either party is permitted, before a trial, to know the precise evidence against which he had to contend." J. WIGRAM, WIGRAM ON DISCOVERY § 347 (1842).

B. Early American Discovery Practice

1. The States

It is not surprising that the legal systems of the various states initially adopted the limited English approach to discovery.[51] But with the 1848 revision to the New York Code of Procedure, the important role discovery was to later play in civil litigation was first recognized. The draftsmen of the Code, after noting that the existing law only permitted examination of a party at trial, asserted that examination of a party should also be permitted before trial at the option of his opponent.[52] The rationale for this proposal echoed the shortcomings of the cumbersome English common law approach then in existence and the underlying societal needs which the system had so far failed to satisfy:

> One of the great benefits to be expected from the examination of the parties [before trial] is the relief it will afford to the rest of the community, to a considerable degree, from attendance as witnesses, to prove facts, which the parties respectively know, and ought never to dispute, and would not dispute if they were put to their oaths. To effect this object it should seem necessary to permit their examination beforehand, that the answer of the party may save the necessity of a witness.[53]

After the 1848 revision of the New York Code, pretrial depositions entered the inventory of discovery tools available to litigants in state courts.[54] But not all state courts. While depositions became the exclusive method for discovery in some jurisdictions,[55] interrogatories remained the exclusive discovery tool in others.[56] A number of more enlightened states, however, adopted both discovery devices as alternative methods for seeking information from the opposing party prior to trial.[57]

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[51] Note, *supra* note 20, at 949; The Judiciary Act of 1789, 1 Stat. 73 (1789).

[52] Millar, *supra* note 28, at 447.

[53] REPORT OF COMMISSIONERS ON PRACTICE AND PLEADING 244 (1848).

[54] N.Y. CODE OF PROC. § 344 (1848); G. RAGLAND, JR., *supra* note 22, at 25-26.

[55] California, New York and Minnesota are examples of states which relied exclusively on depositions as their primary means for seeking pretrial discovery. CAL. CIV. PROC. § 2021 (Deering, 1931); N.Y. CIV. PRAC. ACT §§ 288-293, 295-296 (1920); Minn. Stat. § 9820 (Mason, 1927).

[56] Massachusetts, Connecticut and Texas are examples of states which relied exclusively on interrogatories as their primary means for seeking pretrial discovery. MASS. GEN. LAWS ch. 231, §§ 61-67 (1932); CONN. PUB. ACTS ch. 252, § 601(a)(1931); TEX. STAT. §§ 3738, 3752, 3769 (Vernon 1928).

[57] Iowa, Washington and Virginia are examples of states which permitted the alternative use of interrogatories and depositions as a means of seeking pretrial discovery. IOWA CODE § 11185 (1931); WASH. COMP. STAT. §§ 1225-1230 (Remington, 1922), WASH. SUP. CT. R. 18 (150 Wash. xxxvii, 1929); VA. CODE ANN. §§ 6225, 6236 (Michie, 1930).

The old English equity rule that a party could not discover information regarding his opponent's case, but only information to support his own position, existed in the discovery practice of a number of states. While many jurisdictions abandoned the old chancery restrictions and allowed discovery of information regarding the adverse party's case as well as one's own,[58] some states clung tenaciously to the old rule.[59] This often created a rather anomalous situation. For example, New York, which had introduced the most probing and flexible pretrial discovery tool, the deposition,[60] continued to adhere to the old restrictive chancery rule,[61] thus shackling the effectiveness of the newly introduced deposition procedure. At the other end of the spectrum, Massachusetts, while rejecting the old chancery rule in favor of broader discovery,[62] did not adopt depositions, but relied exclusively on the interrogatory to provide a means for broad and probing pretrial fact gathering.[63] Such an approach was doomed to failure by the very nature of interrogatories.[64]

Even with this patchwork of discovery tools and restrictions, the development of basic discovery practice in the United States in the nineteenth century actually predated many of the innovations that eventually transformed the English common law system.[65] The New York Code of 1848 that introduced pretrial depositions also consolidated the administration of law and equity.[66] Even earlier, South Carolina,[67] Kentucky,[68] and Mississippi[69] had conferred discovery powers on their law courts. An 1831 Virginia statute provided for the unencumbered use of interrogatories in actions at law without the need for filing a petition for discovery and receiving the court's permission.[70]

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[58] Alabama, Indiana and New Hampshire are examples of states which adopted a broad scope of discovery. ALA. CODE §§ 7764-7773 (Michie, 1928); IND. ANN. STAT. §§ 383, 465, 564-568 (Burns, 1926); N. H. LAWS ch. 337 § 1 (1926).

[59] New Jersey, New York and Washington are examples of states that retained a limited scope of discovery. N. J. COMP. STAT. p. 4097 (1910); N.Y. CODE OF PROC. §§ 288-293 (1920); WASH. COMP. STAT. § 1226 (Remington, 1922).

[60] Millar, *supra* note 28, at 447.

[61] *See supra* note 59.

[62] MASS. GEN. LAWS ch. 231, §§ 61-67 (1932).

[63] *See supra* note 56.

[64] Interrogatories, to be effective, must narrowly elicit specific factual information. Broad questions which probe for information of a more subjective nature are generally ineffective since the responding party may shape their answer to their own benefit without fear of contemporaneous probing which is available only through the use of a deposition.

[65] Millar, *supra* note 28, at 446.

[66] N.Y. CODE OF PROC. §§ 2, 3, 4, 69 (1848).

[67] Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L.J. 193, 199-200 (1928).

[68] Act of 1 February 1809: 4 W. LITTELL, STATUTE LAW OF KENTUCKY 35 (1814).

[69] Act of 16 February, 1828: Hutchinson, MISS. CODE 865-66 (1848).

[70] Act of 16 April, 1831: VA. LAWS ch. 11, § 68 (1831).

Innovative as the American experience was with regard to the development of discovery practice in the state courts, the federal courts simply did not match the states' evolving and enlightened approach to pretrial discovery practice.

2. The Federal Courts

The Judiciary Act of 1789 conferred on the federal courts basically the same powers regarding discovery that existed at the time in the English common law.[71] Discovery was the exclusive purview of the equity side of the system, while the law courts were without formal discovery tools. Throughout the nineteenth century, while the state courts were developing broader, innovative, and more flexible approaches to pretrial discovery, the federal courts hardly budged from their ancient ways. While in England, prior to the Common Law Procedures Act of 1854, the chancery courts liberally granted petitions for bills of discovery,[72] the equity side of the federal courts in the United States were not generous to those who sought a bill of discovery in aid of an action at law.[73] The stated reason for this penuriousness was that the procedures available in the law courts were sufficient to meet the parties' needs.[74] In effect, litigants in an action at law in the federal courts were virtually precluded from obtaining pretrial discovery from their opponent.[75]

The Conformity Act of 1872 authorized federal courts which heard actions at law to follow the practices of the state in which they sat.[76] Unfortunately, the Supreme Court held that the Act did not affect the scope of existing federal discovery practice, but only the manner of its administration.[77] Where discovery was restricted before the Act, it remained restricted after the Act. For example, the availability of pretrial depositions under New York state law did not extend to litigants in a federal court which sat in New York.[78] Since federal law permitted testimony only at trial, and depositions were statutorily restricted to situations where witnesses were outside the court's jurisdiction or would

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[71] *See supra* note 51.

[72] J. STORY, COMMENTARIES ON EQUITY JURISPURDENCE § 1483 (3d Eng. ed. 1920).

[73] Pressed Steel Car Co. v. Union Pac. R.R., 240 F. 135 (S.D.N.Y. 1917).

[74] *Id.* at 135.

[75] "It is regrettable that in the period between the commencement of an action on the law side of this court . . . and the trial of the case, this court is unable to do much to facilitate the preparation of either party for the trial." Gimenes v. New York & Porto Rico S.S. Co., 37 F.2d 168, 169 (S.D.N.Y. 1929).

[76] 17 Stat. 197 (1872).

[77] *Ex parte* Fisk, 113 U.S. 713 (1885); Hanks Dental Ass'n v. International Tooth Crown Co., 194 U.S. 303 (1904).

[78] *Gimenes*, 37 F.2d at 169-70.

be unavailable for trial, the broader New York state practice did not alter the restrictive procedures of a federal court which sat in the State.[79]

The first true innovation in federal discovery practice, limited as it was, occurred when the Federal Equity Rules were promulgated in 1912. While these rules did not broaden the scope of discovery, they did streamline the procedures on the equity side of the federal courts, including those pertaining to discovery.[80] The old equity system of tying discovery to the pleadings was finally abandoned in favor of allowing parties to serve interrogatories on each other without requiring permission of the court or tying them in some way to the bill of complaint.[81] For the first time in federal equity practice, discovery was finally set free of the old chancery traditions. Almost three decades after the English had abandoned the old chancery rules and adopted independent interrogatory practice,[82] federal equity courts finally offered litigants a true pretrial discovery tool.

The conflicting views regarding the scope of discovery which existed in the state courts were also reflected in the federal courts. Discovery practice under the Federal Equity Rules, whether in an action at equity or by way of a bill of discovery in aid of an action at law, remained hopelessly muddled as to whether a party could obtain information relevant only to his own claim or whether he could obtain information relevant to any issue or claim in the dispute.[83] On this point, the federal courts remained in conflict until the issue was settled with the promulgation of the Federal Rules of Civil Procedure in 1938.[84]

The federal courts, well into the twentieth century, remained a bastion of antiquated discovery practice. While a majority of the states and, to some extent, the courts of England, had begun to modernize their approach to discovery, the federal courts provided little opportunity for broad, probing, and effective pretrial disclosure prior to trial. As a federal district court judge lamented in an opinion issued in 1931,

> That at this date the practice on the law side of the federal courts should be so lacking in plasticity with regard to interlocutory remedies seems extraordinary, when it is remembered that under the procedure in almost all the states, through examination before trial or otherwise, the plaintiff can secure evidence and

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[79] *Id.*

[80] Note, *supra* note 20, at 950.

[81] FED. EQUITY R. 58.

[82] *See supra* note 46.

[83] 4A MOORE'S FEDERAL PRACTICE § 33.03[3] (2d ed. 1987).

[84] FEDERAL RULE OF CIVIL PROCEDURE 26(b) defines the scope of discovery broadly: "Any matter, not privileged, relevant to the subject matter involved in the pending action" and applied it to the "claim or defense of the party seeking discovery" or to the "claim or defense of any other party."

> documents in advance which he can use at the trial, and also that throughout the British Empire, including all its dominions, India and the Crown Colonies, every paper or letter, even remotely connected with a case, must, unless privileged, be discovered to the opposing party and remain available to him pendente lite that he may, if he wishes, offer it at the trial. It is unfortunate that the practice of automatic compulsory discovery is not in force here. . . . [85]

C. The Period Prior to the Promulgation of the Federal Rules

Promulgation of the Federal Rules of Civil Procedure in 1938 represents possibly the single most important event in the development of discovery practice in the United States.[86] To more fully understand the impact the Federal Rules had on the nature and extent of pretrial discovery in both the state and federal courts, it is useful to first briefly summarize the state of discovery practice during the years immediately prior to adoption of the Rules.

1. The State Courts

By the 1930's, the states, while generally well ahead of the federal courts in terms of liberalized discovery, still reflected a wide diversity of approaches to discovery practice. A minority of jurisdictions still clung to the old Chancery rule that restricted what a party could discover from his opponent.[87] A majority of states, however, had abandoned these restrictions in favor of allowing discovery by both parties of all issues and facts relevant to the dispute.[88]

More significantly, the availability of particular discovery tools in state practice varied widely. Interrogatories provided the exclusive method for obtaining discovery in a half dozen states.[89] Depositions provided the exclusive method for obtaining discovery in about two dozen states.[90] In another dozen states, the interrogatory and deposition were provided as alternative discovery tools.[91] A majority of states allowed for the inspection and copying of documents material to the issues in dispute, but required that a court, usually upon motion, order the desired production.[92]

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[85] Zolla v. Grand Rapids Store Equip. Corp., 46 F.2d 319, 320 (S.D.N.Y. 1931).
[86] Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 275 (1939).
[87] Sunderland, *supra* note 29, at 869-70.
[88] *Id.* at 870-71.
[89] *Id.* at 874 n. 48.
[90] *Id.* at 874 n. 50.
[91] *Id.* at 874 n. 49.
[92] G. RAGLAND, JR., *supra* note 22, at 272-391.

In a few states, the old distinctions between suits in equity and those at law still existed, effecting the procedures for obtaining discovery, particularly discovery in actions at law.[93]

All in all, the way in which the states approached pretrial discovery varied widely. While discovery was available in virtually all state jurisdictions, the scope, procedures and methodology involved were often remarkably different.

2. The Federal Courts

When one compares discovery practice in the federal courts of the 1930's to that which existed in the various state jurisdictions, it is clear that litigants in the federal courts were severely handicapped in their ability to obtain pretrial disclosure of information from their opponent.

The federal courts continued to maintain the old equity/law dichotomy.[94] In actions at law, the parties were provided little in the way of discovery assistance. Besides a bill of particulars,[95] a party might be permitted to take a deposition, but only if the individual sought to be deposed was about to leave the country or would not be available at trial due to illness, infirmity or because they were beyond the reach of the court's process.[96] Such depositions were more for the perpetuation of testimony to be used at trial than for pretrial investigative purposes.[97] Since the parties and the primary witnesses in a case rarely came within the narrow requirements for the taking of a deposition, this form of discovery was usually of little use to a litigant.

Interrogatories were not available in the law courts, and the state practice of permitting various means of discovery before trial was generally not applicable in actions at law on the basis that federal law pre-empted the field.[98] Unfortunately, federal law gave litigants little discovery assistance.[99] For example, a statute appeared to give litigants in an action at law the ability to compel the production of books or writings from an opponent, but the Supreme Court held that the statute authorized only production at trial and did not constitute a pretrial

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[93] Johnson, *Depositions, Discovery, and Summary Judgments Under the Proposed Uniform Federal Rules*, 16 TEX. L. REV. 191, 193 nn. 5 & 6 (1938); Pike & Willis *The New Federal Deposition-Discovery Procedure, Part I*, 38 COLUM. L. REV. 1179, 1185 n. 49 (1938).

[94] 4 MOORE'S FEDERAL PRACTICE § 26.03 (2d ed. 1986).

[95] Under the Conformity Act federal courts in actions at law followed state practice since there was no federal law providing for a bill of particulars other than that contained in Federal Equity Rule 20. 2A MOORE'S FEDERAL PRACTICE § 12.04[1](2d ed. 1987). Most states provided for a bill of particulars in actions at law. See for example N.Y.R.C.P. 115 (1937) and Elman v. Ziegfied, 193 N.Y.S. 133 (1922).

[96] 4 MOORE'S FEDERAL PRACTICE § 26.03[1] (2d ed. 1986).

[97] Sunderland, *The New Federal Rules*, 45 W. VA. L. Q. 5, 19 (1938).

[98] 4A MOORE'S FEDERAL PRACTICE § 33.03[1] (2d ed. 1986).

[99] Gimenes v. New York & Porto Rico S.S. Co., 37 F.2d 168 (S.D.N.Y. 1929).

discovery procedure.[100] Therefore, the only way a litigant could obtain books and writings prior to trial was by way of a subpoena duces tecum on the taking of a deposition.[101] But since taking depositions was a severely limited practice, which primarily focused on the perpetuation of testimony, such an approach to document production was of little practical use.[102]

The only other means of discovery available to a litigant in an action at law was by way of a bill of discovery, filed in a court of equity, seeking to use one of the discovery tools available under the Federal Equity Rules.[103] The bill, as in the old Chancery courts, was a costly, time consuming and cumbersome proceeding which all too frequently failed to result in the granting of the assistance sought.[104]

Suits in equity offered a bit more flexibility in terms of available discovery, since litigants could use interrogatories to obtain information from an opposing party.[105] But interrogatories could only be used to discover material or ultimate facts known to the opposing party and relevant to the establishment of the propounding party's case or defense.[106] Discovery based on surmise or mere suspicion that one's opponent might know something which would be of use (the so-called "fishing expedition") was not permitted.[107] Even the discovery of the names and addresses of percipient witnesses was not permitted because such information did not constitute ultimate facts.[108] Interrogatories, therefore, although available to a litigant in equity, were far from the broad discovery tool they are today.

Deposition practice in the courts of equity was similar to that available at law and suffered all the same restrictions and limitations.[109] Production and inspection of documents was available under Equity Rule 58, but, as might have been expected, there were serious restrictions on what could be sought and how one was required to seek it. Only "documents" could be sought under Rule 58 and the party seeking them had to clearly demonstrate that the documents were in the opponent's possession, custody or control.[110] Unless one's opponent had admitted possession of

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[100] Carpenter v. Winn, 221 U.S. 533 (1911).

[101] 4A MOORE'S FEDERAL PRACTICE § 34.03[1] (2d ed. 1986).

[102] *Id.*

[103] Zolla v. Grand Rapids Store Equip. Corp. 46 F.2d 319 (S.D.N.Y. 1931); Pressed Steel Car Co. v. Union Pac. R.R. 240 F. 135 (S.D.N.Y. 1917).

[104] 4 MOORE'S FEDERAL PRACTICE § 26.03[1] (2d ed. 1986); *Pressed Steel Car Co.*, 240 F. 135.

[105] FED. EQUITY R. 58.

[106] 4A MOORE'S FEDERAL PRACTICE § 33.03[2] (2d ed. 1986).

[107] J. HOPKINS, THE NEW FEDERAL EQUITY RULES 259 (7th ed. 1930).

[108] McCleod Tire Corp. v. B.F. Goodrich Co., 268 F. 205 (S.D.N.Y. 1920).

[109] 4 MOORE'S FEDERAL PRACTICE § 26.03[2] (2d ed. 1986).

[110] Fidelity & Deposit Co. v. Central Bank, 48 F.2d 477 (8th Cir. 1931); Dixie Drinking Cup Co. v. Paper Util. Co., 5 F.2d 322 (S.D.N.Y. 1925).

the documents in a pleading, affidavit or other papers filed with the court, including answers to interrogatories, production would not be ordered.[111] Making effective use of the production discovery tool was often a difficult matter.

Finally, equity practice provided a limited form of request for admission which allowed one party to obtain from the other admission of the execution and genuineness of documents.[112]

While equity provided a means, restricted as it was, for obtaining discovery from an opposing party before trial, a serious problem existed as to the scope of the information that could be sought. A number of federal courts limited discovery to evidence which supported the requesting party's version of the case, but did not permit discovery of matters which related to the adverse party's claim or defense.[113] Since a party often had evidence to support its own case, but knew little about its opponent's case, this restriction severely hampered the usefulness of the discovery process. Other federal courts, however, followed a much more liberalized approach to discovery practice, allowing a party to inquire into matters relevant to either party's claims or defenses.[114]

While it could be said that state discovery practice was a patchwork of twentieth-century discovery developments, federal discovery practice in the 1930's was still very much a creature of early nineteenth century traditions. It took literally a revolution to modernize federal discovery practice and, as a byproduct, to promote the standardization and liberalization of state discovery practice nationwide. That revolution was the promulgation of the Federal Rules of Civil Procedure in 1938.[115]

D. Promulgation of the Federal Rules of Civil Procedure

In 1934, Congress granted to the Supreme Court the power to prescribe rules of procedure for actions at law in the federal district courts. The court was also empowered, at its option, to unite the rules for actions at law and in equity "so as to secure one form of civil action and procedure

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[111] *Id.*

[112] FED. EQUITY R. 58.

[113] J.H. Day Co. v. Mountain City Mill Co., 225 F. 622 (E.D. Tenn. 1915). *Cf.* Lion Brewery v. The Lion, Inc., 16 F. Supp. 133 (M.D. Pa. 1936).

[114] Quirk v. Quirk, 259 F. 597 (S.D. Cal. 1919). *Cf.* Bankers Util. Co. v. David H. Zell, Inc., 15 F. Supp. 1072 (S.D.N.Y. 1936).

[115] Commentators recognized the "revolutionary" nature of the deposition-discovery rules from the very outset:

> Here a vast quantity of ancient deadwood has been swept into the discard and many outworn limitations have been removed; . . . modernization, so terribly needed, was the watchword that dominated the committee in at least a courageous attempt to draft procedural rules that would be abreast (many lawyers will doubtless deem these rules far, far ahead) of the times in which we now live.

Note, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 275 (1939).

for both."[116] After some deliberation, the court decided not to limit its rulemaking efforts solely to actions at law, but to exercise its option under the statute to unify law and equity and prescribe rules for a new single form of civil action.[117] Pursuant to this decision, the court appointed an Advisory Committee for the purpose of making recommendations for a uniform system of procedural rules.[118]

Over the next two years the Advisory Committee produced several drafts of a proposed set of rules which it circulated throughout the country for comments and suggestions by members of the bench and bar.[119] In late 1937 the Committee transmitted its report and recommendations to the Supreme Court and in January, 1938, the Court, pursuant to the requirements of the Act of 1934, reported to Congress the unified rules it intended to adopt.[120]

The primary objectives of the new rules were, in order of importance, (1) conformity between State and Federal courts sitting in the same State, (2) the regulation of procedures in the federal courts by court rule rather than by legislation, and (3) uniformity in practice among the various federal courts.[121] It is significant that one of the primary purposes envisioned for the new rules was to furnish a model to which practice in the state courts might conform.[122] The House Committee on the Judiciary in its report on the proposed rules clearly noted this purpose.

> A single uniform system of procedure under which lawyers in every locality may practice with equal facility in the National and State courts is altogether desirable. The proposed rules, which thousands of the bar and hundreds of the bench have helped to frame, undoubtedly are an important step toward an ideal system . . . .[123]

Calling the rules a landmark in the history of American juris-

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[116] 28 U.S.C. §§ 723(b), 723(c) (1934).

[117] 2 U.S.L.W., 866, 880 (U.S. May 14, 1935):
After careful consideration, the Court has decided not to prepare rules limited to common law cases but to proceed with the preparation of a unified system of rules for cases in equity and actions at law, 'so as to secure one form of civil action and procedure for both', so far as this may be done without the violation of any substantive right.

[118] Order Appointing Comm. to Draft Unified System of Equity & Law Rules, 295 U.S. 774 (1935).

[119] Johnson, *supra* note 93, at 191.

[120] C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004 (1969)[hereinafter WRIGHT & MILLER].

[121] Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116, 1128 (1934).

[122] HOUSE COMMITTEE ON THE JUDICIARY, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, H.R. REP. No. 2743, 75th Cong., 2d Sess. (1938).

[123] *Id.* at 3.

prudence,[124] Congress raised no objections to their adoption and the rules became effective September 16, 1938.[125] A new era in federal practice, which would also profoundly effect procedures in the State courts, came into existence.

E. The New Federal Rules

The new Federal Rules did not proceed on the assumption that the function of the pleadings was to prepare the case for trial. They recognized that the issue pleading of the common law did not sift out the real issues and the fact pleading of the state codes did not sift out the real facts. Under the notice pleading concept of the new federal rules, the complaint was simply a device to indicate to the defendant what grievance was being pressed and the answer was a device simply to indicate to the plaintiff what defenses were being relied on. The function of narrowing the issues and revealing the facts was consigned primarily to new pretrial discovery procedures.[126]

In its seminal decision in *Hickman v. Taylor*,[127] the Supreme Court observed that the discovery procedures established by the new rules were "[o]ne of the most significant innovations of the Federal Rules of Civil Procedure."[128] The new rules represented the first time the problem of pretrial fact gathering was addressed in a thorough, liberalized and unified manner providing a truly integrated system of pretrial investigation. The five primary discovery tools used to this day—interrogatories, depositions, requests for production, requests for admission and physical and mental examinations—were all provided for and the scope of what was discoverable was broadened to include all matters, not privileged, relevant to the subject matter involved in the pending action.[129] Furthermore, relevance was not defined in the narrow trial context, but was expanded to include even inadmissible evidence as long as that evidence could reasonably aid in the preparation of a party's case.[130]

The Supreme Court made abundantly clear the broad and liberalized

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[124] *Id.* at 4.

[125] WRIGHT & MILLER, *supra* note 120, at § 1004 (1969).

[126] In one of the very first district court decisions after the rules took effect the court observed that: "It is perfectly apparent that Rules 26-37 . . . were formulated with the intention of granting the widest latitude in ascertaining before trial facts concerning the real issues in dispute . . . [t]hey were formulated with a view to simplifying issues." Nichols v. Sanborn Co., 24 F. Supp. 908, 910 (D. Mass. 1938).

[127] 329 U.S. 495 (1947).

[128] *Id.* at 500.

[129] FED. R. CIV. P. 26 & 28-32 (depositions); 33 (interrogatories), 34 (production and inspections); 35 (physical and mental examinations), 36 (admissions). As to the broad scope of discovery see FED. R. CIV. P. 26(b); Rosseau v. Langley, 7 F.R.D. 170 (S.D.N.Y. 1945); Hercules Powder Co. v. Rohm & Haas Co., 3 F.R.D. 302 (D. Del. 1943).

[130] Engl v. Aetna Life Ins. Co., 139 F.2d 469 (2d Cir. 1943).

approach to discovery envisioned by the new rules when it addressed the issue of whether a litigant could go on a so-called "fishing expedition" in the opposing party's storehouse of information.

> No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.[131]

Civil trials in the federal courts were no longer to be carried out in the dark. The way was now clear for the parties to obtain the fullest possible knowledge of the issues and facts before trial.[132]

F. Impact on State Practice

One of the avowed purposes in promulgating the Federal Rules of Civil Procedure was to influence the states to adopt similar procedural reforms so that practice in a state or federal court in a particular jurisdiction would not be an exercise in substantially dissimilar lawyering. While in such areas of procedural reform as the adoption of notice pleading the objective of federal/state conformity has not been achieved,[133] the impact of the pretrial discovery provisions of the Federal Rules on state practice has been profound. As experience with discovery under the new rules began to accumulate, the states had not only a conceptual framework to consider as a model for reform of their own procedures, but also the practical experience of the Federal Rules in action. Over the next several decades, the states slowly, but inevitably, adopted the basic discovery framework which existed in the federal courts.[134]

One typical example of the process of state assimilation of the discovery procedures available in the federal courts is illustrated by the experience of California. Prior to reform of California's discovery statutes in 1957, discovery was limited to depositions, requests for production and medical examinations.[135] Interrogatories and requests for admission did not exist

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[131] Hickman v. Taylor, 329 U.S. 495, 507 (1947).

[132] *Id.* at 501.

[133] Twenty-three states have replicated the federal model and a number of others have modified notice pleading systems. However, while a minority of states have pleading systems different from that authorized by the Federal Rules of Civil Procedure, those states contain a majority of the country's population. Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

[134] Wright, *Procedural Reform in the States*, 24 F.R.D. 85 (1959); Note, *supra* note 20, at 951. ("Indeed, the discovery devices have achieved wider acceptance in state practice than any other federal civil rules.")

[135] J. HOGAN, MODERN CALIFORNIA DISCOVERY 3D § 1.03 (1981).

in California practice.[136] Furthermore, the use of depositions and requests for production were substantially restricted in that depositions of non-parties were limited to rather narrow circumstances[137] and a request for production required an initial showing that what was sought to be produced contained competent and admissible evidence which was material to the issues to be tried.[138] Only medical examinations under pre-1957 California law were roughly equivalent to that which was provided under the Federal Rules of Civil Procedure.[139]

The California Discovery Act of 1957 was patterned after the Federal Rules.[140] It not only made available to a litigant all five discovery tools, but also broadened and liberalized the scope of discovery which could be sought from the opposing party prior to trial.[141] In one of its first major discovery decisions after passage of the Act, the California Supreme Court relied on the discussion of the federal discovery rules in *Hickman* to interpret the scope and intent of the new California statutes.[142] Almost two decades after promulgation of the Federal Rules of Civil Procedure, and with the clear experience of those rules to rely on, the California legislature and its Supreme Court agreed that general conformity with federal practice was in the state's best interests.

The California experience was not unlike that of other states. The federal model was slowly, but inexorably, adopted by state after state.[143] Where discovery was concerned, the primary purpose behind giving the United States Supreme Court rulemaking authority in the first place was fulfilled to a remarkable degree.

G. Some Thoughts on the Historical Perspective

Taken as a whole, the development of pretrial discovery since the early nineteenth century demonstrates a growing desire to protect litigants, the courts, and society from meritless, inappropriate, and inefficient litigation activities. As the legal system came to be seen as one of society's primary dispute resolution mechanisms, the speed, efficiency, fairness, and credibility of the system became significant concerns.

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[136] *Id.*

[137] *Id.* The primary circumstances for the taking of a non-party deposition were limited to non-residence in the forum county, an infirmity preventing a trial appearance or the status of the deponent as the only witness to some material fact.

[138] McClatchy Newspapers v. Superior Court, 26 Cal. 2d 386, 396, 159 P.2d 944, 950 (1945).

[139] Note, *Procedure: Discovery: California and Federal Civil Procedure: Physical Examination of Parties: Admission of Facts and Genuiness of Documents*, 42 CALIF. L. REV. 187, 189-90 (1954).

[140] J. HOGAN, *supra* note 135, at § 1.04 (1981).

[141] *Id.* at §§ 1.04, 1.05.

[142] Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 385, 364 P.2d 266 (1961).

[143] *See supra* note 134.

Lawsuits in which the parties remained substantially in the dark about the facts, issues, and allegations until the time of trial, a court system that dealt with a case only at trial when each party was, often for the first time, exposed to their opponent's facts and allegations, and a resolution process that did not allow for the reasonable and effective preparation and resolution of a case before trial, simply did not offer society a fair, credible, and efficient dispute resolution process. The struggle to find a way to remedy these deficiencies constitutes the motivating force behind the development of modern pretrial discovery practice.

By developing ways in which the parties and the courts could compel the disclosure of facts and allegations prior to trial, a process slowly evolved which promoted litigational efficiency and fairness in a variety of ways. Not only could the issues and allegations involved in a dispute be narrowed and clarified by early exposure of meritless or unsupportable contentions, but settlement was promoted by the parties confronting the reality of the facts and issues as early as possible. Effective pretrial disclosure and thorough case preparation made trial a more efficient, fair and credible exercise since each side knew what the dispute was really about and what had to be proved at trial. No longer was it necessary to rely on vague, incomplete and often misleading pleadings to guide the parties in their preparation, decision making, and even ultimate resolution of the dispute. Effective pretrial disclosure gave the parties and the legal system the advantage of functioning in a reasonable realm of reality instead of in the often fictional world portrayed by the initial pleadings.[144]

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[144] Contemporary commentators note a variety of purposes for the use of discovery during pretrial preparation of a case. *See, e.g.*, R. HAYDOCK & D. HERR, DISCOVERY PRACTICE 8-9 (1982) which lists nine such purposes: (1) supplementation of the pleadings; (2) early and thorough disclosure of information by all sides; (3) some equalizing of the investigative resources of both sides without allowing one side to take undue advantage of the other; (4) limited exploration into the adversary's camp to discover its perceptions of the facts and case; (5) documentation of testimony and preservation of documents; (6) isolation of issues and determination of material and undisputed facts; (7) promotion of negotiated settlements; (8) fostering of trial verdicts based upon accurate presentations and informal arguments, not on surmise and surprise; and (9) providing an economical method of resolving disputes.

Earlier commentators saw the multiplicity of advantages offered by an effective system of pretrial discovery.

> Discovery relieves the trial machinery in at least two distinct ways. It furnishes a means of eliminating a large number of non-meritorious cases and of settling others so that they are not allowed to reach the already overcrowded trial dockets. By eliminating such cases greater guaranty is given that meritorious cases will be accorded an expeditious trial. Discovery serves to prepare the form of the controversy, in the cases which merit a trial, so that the trial proper can be expedited. The trial is expedited in proportion to the measure of clarity in the definition of the issues and freedom from all elements of surprise. As the element of surprise, which is the psychological child of trial by battle, is eliminated, the

With promulgation of the Federal Rules of Civil Procedure and the Supreme Court's subsequent interpretation of the Rules in cases such as *Hickman*,[145] the process of bringing into being an effective and integrated system of pretrial discovery appeared to have been accomplished. But was it? Have the Rules really achieved the goals for which they were designed? What is the reality of today's experience with modern discovery practice?

III. HAVE THE FEDERAL DISCOVERY RULES FULFILLED THEIR PROMISE?

There can be no question that conformity between state and federal discovery practice has been substantially achieved since adoption of the Federal Rules in 1938. But the 'revolutionary' nature of the discovery rules did not rest on their intended influence on state practice, but on the integrated system of broad, liberalized, and probing discovery procedures made available for the first time to every civil litigant in the federal courts. With the primary objective of affording "just, speedy and inexpensive"[146] resolution of all civil matters, a party was given the power to compel his opponent to disclose before trial virtually all the information the opponent had in his possession.[147] It was this capability that the Supreme Court was referring to when it called the new discovery procedures the most significant innovations contained in the Federal Rules of Civil Procedure.[148]

How have the federal discovery rules fared in achieving the goal of thorough and probing pretrial disclosure? In 1952, a conference of the American Bar Association's section on Judicial Administration found that discovery was not frequently used and that major problems regarding the discovery process did not exist.[149] Almost two decades later, the Advisory Committee charged with proposing amendments to the Federal Rules had a field survey conducted of federal discovery practices. That survey concluded that,

> [T]here is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope of availability of discovery. The costs of discovery do not appear to be oppressive, as

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expectation of trials becoming more nearly businesslike meetings is realized. There is no better way to prevent such surprise than by allowing a dress-rehearsal before the trial.

G. RAGLAND, JR., *supra* note 22, at 263-64. *See also* Pike & Willis, *supra* note 93, at 1453-55.

[145] Hickman v. Taylor, 329 U.S. 495 (1947).

[146] FED. R. CIV. P. 1.

[147] *Hickman*, 329 U.S. at 507.

[148] *Id.* at 500.

[149] The Practical Operation of Federal Discovery, 12 F.R.D. 131 (1952).

> a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement.[150]

At the beginning of the 1970's, it would appear that all was well with the great discovery innovations of the Federal Rules.

But all was not well. Barely six years later, in his keynote address to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the "Pound Conference"), Chief Justice Burger pointed to trouble in the use of discovery in litigation. Complaints were widespread, he noted, of abuses in the pretrial process involving both the misuse and overuse of discovery.[151] Cases had to be tried twice. Once during the pretrial process and again at trial. The Chief Justice made clear that it was the responsibility of the legal profession to undertake corrective action to bring the reality of the discovery process more in line with its objectives and ideals.

A follow-up task force was appointed by the ABA to assure that the ideas presented at the Pound Conference would be carefully considered. That task force identified discovery abuse as a significant concern and recommended that the ABA's Section of Litigation affix a high priority to the problem with a view to appropriate action by state and federal courts.[152] The Conference also sparked a veritable explosion in the literature on discovery abuse.[153]

In the face of mounting evidence of dissatisfaction with the pretrial discovery process,[154] the Advisory Committee on Civil Rules of the Judicial Conference of the United States undertook an examination of the need for changes in the federal rules relating to discovery. In 1979 the Committee concluded, to the consternation and dismay of many, that "abuse of discovery, while very serious in certain cases, is not so general as to require . . . basic changes in the rules that govern discovery in all cases."[155] The rule changes that were proposed and which went into effect in 1980, did little to address the growing complaints of discovery abuse.[156]

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[150] Advisory committee's note regarding the 1970 amendments to the discovery rules which appears immediately before FED. R. CIV. P. 26.

[151] Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 95-96 (1976).

[152] ABA, *Report of Pound Conference Follow-up Task Force*, 74 F.R.D. 159, 171 (1976).

[153] Flegal, *Discovery Abuse: Causes, Effects, and Reform*, 3 REV. OF LITIG. 1, 2, 3 n.14, 4 (1982).

[154] *Id. Cf.* Editorial, *Pretrial Punishment*, BUS. WK., Dec. 12, 1977, at 162.

[155] PROP. FED. R. CIV. P. 26(f) advisory committee's note, 80 F.R.D. 332 (1979).

[156] The only truly reform-minded changes to the discovery rules in 1980 were the inclusion of an in-court discovery conference should discovery problems between the parties become insurmountable (FEDERAL RULE OF CIVIL PROCEDURE 26(f)), and some minor tinkering with how documents must be produced under Federal Rule of Civil Procedure 33(c) and 34.

Ordinarily, adoption of amendments to the Federal Rules after years of deliberation, preparation, and review forestalls further efforts in the area to which the amendments are addressed until the changes have had an opportunity to take hold and experience has shown that they are either ineffective or defective in some substantial way. This would have been true of discovery reform after the 1980 amendments if it had not been for a unique event.

When the Supreme Court transmitted the 1980 amendments to Congress, three Justices dissented and indicated that they felt the amendments fell far short of what was needed to accomplish appropriate reforms of the rules governing pretrial procedures.[157] The dissent gave new impetus to those who sought major reform of federal discovery procedures.

A few months after the 1980 amendments went into effect, the American Bar Association's Section of Litigation issued a Second Report of the Special Committee for the Study of Discovery Abuse.[158] In commenting on the new amendments the Committee observed that "[d]espite these significant improvements, the committee is convinced that abuse of discovery is a major problem and that the recently effective amendments alone are inadequate to reverse the trend toward increasingly expensive, time-consuming and vexatious use of the discovery rules."[159]

A few months later, the Advisory Committee on Civil Rules of the Judicial Conference of the United States circulated a new set of proposed amendments to the Federal Rules focusing on discovery.[160] These amend-

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[157] Order of the Supreme Court transmitting Amendments to the Federal Rules of Civil Procedure to Congress, 446 U.S. 997, 998 (1980); Justice Powell, joined by Justices Stewart and Rehnquist, dissented and stated:

> The American Bar Association proposed significant and substantial reforms. Although the Standing Committee initially favored most of these proposals, it ultimately rejected them in large part. The ABA now accedes to the Standing Committee's amendments because they make some improvements, but the most recent report of the ABA Section of Litigation makes clear that the "serious and widespread abuse of discovery" will remain largely uncontrolled. There are wide differences within the profession as to the need for reform. The bench and bar are familiar with the existing Rules, and it often is said that the bar has a vested interest in maintaining the status quo. I imply no criticism of the bar or the Standing Committee when I suggest that the present recommendations reflect a compromise as well as the difficulty of framing satisfactory discovery Rules. But whatever considerations may have prompted the Committee's final decision, I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute problems associated with discovery. The Court's adoption of these inadequate changes could postpone effective reform for another decade.

[158] 92 F.R.D. 137 (1981).

[159] *Id.* at 138.

[160] Committee on Rules of Prac. & Proc. of the Judicial Conference of the United States,

ments, after appropriate review and revision, were adopted by the Supreme Court and went into effect in 1983.[161]

Between the 1980 and 1983 amendments to the discovery rules, the literature on discovery abuse continued to grow.[162] Most significantly, two important empirical studies were published which made it difficult to deny that serious problems existed in the conduct of pretrial discovery in the courts of the United States.[163] Finally, in late 1982 a major conference on discovery reform was convened to bring together those with views on the troubled state of discovery practice.[164] While there was not a unanimity of view at the conference, the general outlook was one favoring major reform of pretrial discovery procedures.

Since the 1983 amendments to the Federal Rules, there has been no further revision of the rules governing discovery in the federal courts. Complaints of widespread discovery abuse and vigorous debate regarding its existence and solution continue unabated.[165] Effective reform of existing pretrial discovery procedures appears to be a goal sought by many, but one without concrete direction whose time has yet to come.

A. What Are The Problems?

Discovery abuse is a term employed to describe a multitude of sins. From burdensome sets of interrogatories or requests for production to

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Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 90 F.R.D. 451 (1981).

[161] Order Amending the Federal Rules of Civil Procedure, 97 F.R.D. 165 (1983). It should be noted that in its introductory note accompanying the 1983 revision to Federal Rule of Civil Procedure 26, the Advisory Committee observed that "excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems." In an attempt to resolve these problems, Rule 26 underwent major revisions giving the courts express powers to control the amount and type of discovery used and requiring an attorney, subject to sanctions, to certify that each discovery request or response was reasonable, warranted and in conformance with the Rules (Rule 26(g)).

[162] Flegal, *supra* note 153, at 7 n.32.

[163] The first study was Ellington, *A Study of Sanctions for Discovery Abuse*, FED. JUST. RES. PROGRAM, 79-003, Office of Improvements in the Admin. of Just., U.S. Dep't of Justice (1979). The second study was published in three parts: Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM.B. FOUND. RES. J. 787; Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217; Brazil, *Improving Judicial Controls over the Pre-trial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 875.

[164] The National Conference on Discovery Reform was held in November, 1982, in Austin, Texas and its proceedings are reported in 3 REV. OF LITIG. 1 (1983).

[165] *See, e.g.*, Comment, *Sanctions Under Amended Rule 26—Scalpel or Meat-ax?* 46 OHIO ST. L.J. 183 (1985); Baldwin, *Preventing Abuses of Discovery*, 2 TRIAL 4 (Feb. 1985); Cavanagh, *The August 1, 1983, Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767 (1985).

evasive responses and frustrating delaying tactics, the subject of discovery abuse requires some form of categorization before it can be examined in an effective and useful manner. For a number of years, two basic categories have been used by those interested and concerned with reform.[166]

The first category is *overuse* of discovery. Simply stated, it is that set of practices in which discovery is used, not so much to gather pertinent information, but to so burden and pressure an opponent that he eventually settles in order to avoid further costs, time, and the frustrations of the litigation quagmire.[167] It is a technique which employs excess as its primary weapon. Numerous and lengthy depositions, massive sets of written discovery, and the stretching of the scope of discovery beyond all rational limits form the core of the overuse strategy. Its hallmark is not the legitimate pursuit of evidence, but an intentionally burdensome, costly, and frustrating experience which eventually exhausts the opponent and leads to his retirement from the field of battle.[168]

The second category into which discovery practices usually fall is that involving the *misuse* of discovery procedures. These primarily involve techniques for avoiding the legitimate and mandated disclosure of information when an opponent has made a valid discovery request. Evasive or incomplete answers, frivolous or marginal objections, and prolonged delays in responding are all typical of this category of discovery abuse.[169] Its main objective is to avoid giving an opponent information that he is entitled to under the plain language of the discovery rules.[170] The philosophy that good lawyering during the discovery phase of a case is guided by the maxim—get as much information as you can and give as little as you can—is the seed from which discovery misuse grows.

Once discovery abuse is categorized in the manner noted above, the discovery reforms which have been enacted over the last few years can be

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[166] For example, *see* Lundquist & Ball, *National Conference on Discovery Reform: Conclusions and Recommendations*, 3 REV. OF LITIG. 209, 210 (1983).

[167] Lundquist & Flegal, *Discovery Abuse—Some New Views About an Old Problem*, 2 REV. OF LITIG. 1, 6 (1981).

[168] In his study of discovery abuse, Professor Brazil reported that seventy-seven percent of those interviewed admitted that they had used discovery for the purpose of imposing work burdens or economic pressure on another party or attorney. One lawyer coyly put it this way— "It sometimes enters my mind that if I initiate a lot of discovery my opponent will throw up his hands and want to get rid of the case." Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 857.

[169] Lundquist & Flegal, *supra* note 167, at 2-3.

[170] Professor Brazil also notes in his study that a basic philosophy often articulated by the lawyers he interviewed made clear that disclosure of information was to be avoided if at all possible. Such statements as "[n]ever be candid and never helpful and make [your] opponent fight for everything" expressed a common view of the discovery process. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 250 nn. 53-4.

seen to have been an attempt to directly address the problems of "misuse" and "overuse." The sanctionable certification requirement of Rule 26(g)[171] was clearly an attempt to curb blatant misuse of the discovery process and compel attorneys to act in conformance with the rules. The Rule's message is clear, if you cannot certify that what you are doing is reasonably warranted by the rules and the nature and status of the case, then either do not do it or beware of sanctions.

The discovery conference of Rule 26(f)[172] and the discovery structuring powers provided to courts in the second paragraph of Rule 26(b)(2)[173]

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[171] Federal Rule of Civil Procedure 26(g) states:

Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

[172] Federal Rule of Civil Procedure 26(f) provides in part:

At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. . . .

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

[173] Federal Rule of Civil Procedure 26(b)(2) states in part:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations

were attempts to place greater control of the day-to-day conduct of discovery in the hands of the courts. Where once, absent a motion seeking court intervention, lawyers were free to initiate discovery in whatever manner they thought best, the 1983 amendment to Rule 26(b)(2) placed the court in a dominant managerial position where the pretrial preparation of a case was concerned. In this way, potential discovery overuse could be curtailed and the parties set on a course that allowed them to pursue only that discovery which was appropriate to the case.

Greater scrutiny by the courts, and the liberal use of sanctions,[174] was the primary tonic prescribed by the discovery rules to purge the system of the abuses of misuse and overuse. Viewing abuse as resulting primarily from lawyer misconduct, incompetence or ignorance, the amended rules attempt to guide attorneys back to high ground through the threat of sanctions and in-depth management by the court of an attorney's pretrial preparation activities.

While the Advisory Committee and the Supreme Court were engaged in discovery reform through amendment of the Federal Rules of Civil Procedure, the United States District Courts, pursuant to their authority to adopt local rules of practice under Rule 83,[175] were also busy seeking solutions to discovery abuse. The most prevalent reform adopted by the district courts was the simple expediency of limiting the amount of discovery a party could engage in without permission of the court.[176] For example, the Southern District of California limits a party to twenty-five interrogatories and twenty-five requests for admission, absent a request to the court for permission to exceed these limits.[177] This capping of available discovery is clearly an attempt to control the problem of overuse.[178]

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on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

The Advisory Committee Notes to Rule 26 explaining the 1983 amendments emphasizes that "Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision."

[174] Federal Rule of Civil Procedure 26(g) advisory committee notes repeatedly emphasize effective use of sanctions to deter discovery abuse. "[T]he premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the Rules' standards will significantly reduce abuse. . . ."

[175] Federal Rule of Civil Procedure 83 states in part: "Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules."

[176] Flegal, *supra* note 153, at 8.

[177] Rule 230-1, LOCAL RULES OF THE U.S. DIST. COURT FOR THE SOUTHERN DIST. OF CAL..

[178] It should be noted that the Advisory Committee Notes which accompanied the 1983 amendment to Federal Rule of Civil Procedure 26(b)(2) emphasized that limiting the

The district courts have also, by local rule, established various schemes of early status conferences which, among other things, allow the court to participate in and actively guide the pretrial preparation of each civil case. Long before the drafters of Rule 26(g) observed that "concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision"[179] of the pretrial preparation process, many district courts had, by local rule, been exerting early judicial control over their civil cases. For example, as early as 1978, the Central District of California adopted, by local rule, several early conference requirements specifically designed to promote, guide and facilitate both the planning for and preparation of a recently filed action.[180]

Whether by local rule or by amendment of the Federal Rules of Civil Procedure, solutions to discovery abuse have involved court mandated restrictions on or control of the discovery process and the increased threat of sanctions to compel adherence to the spirit and intent of the rules. As the literature continues to demonstrate, these reforms, though useful, have not cured the malady.[181]

Discovery abuse remains with us because the reforms which have been pursued over the past decade primarily treat the symptoms, not the root causes of the illness itself. Limiting discovery may cut down the opportunity for abuse, but does little to change the approach to discovery that adheres to the maxim—never be candid, never be helpful, and make your opponent fight for everything he seeks.[182] Imposing sanctions on egregious behavior simply adds another factor to be considered in the cost-benefit calculation often indulged in by attorneys and their clients. Threatening punishment as a means of achieving compliance with the rules is only effective if, (1) the sanction clearly outweighs the benefit of the egregious behavior, (2) its imposition is clear and swift, and (3) the likelihood of getting caught is substantial. The current approach to the use of sanctions has clearly failed on all grounds, since discovery abuse is

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"frequency of use" of discovery in a particular case was an entirely appropriate method of judicial control over the discovery process.

[179] FED. R. CIV. P. 26(g) advisory committee's notes.

[180] Rule 6.1 of the Local Rules of the Central Dist. of Cal. requires the parties to meet within twenty days after service of the answer in order to exchange discovery schedules, witness lists, relevant documents and other evidence. Rule 6.2 requires the parties, within fourteen days of this initial meeting to file a joint report with the court setting forth, among other things, a preliminary discovery schedule. Rule 6.4 authorizes the court to hold an early Status Conference, no earlier than twenty days after the filing of the joint report required by Rule 6.2, at which discovery planning and scheduling would be discussed along with establishing a firm discovery cutoff date.

[181] *See supra* note 165.

[182] *See supra* note 170.

still a major factor in the pretrial preparation of a case even in the face of a court's power to impose sanctions.[183]

If one wishes to treat the malady of discovery abuse and not just its symptoms, one must first identify those factors which lie at the very core of the problem. For if one knows what fundamentally motivates misuse of the discovery process, ways in which those root causes might be dealt with can be examined within the structure of the Federal Rules themselves.

1. The Root Causes

The root causes of the problems which permeate discovery practice are many and varied. Those who have sought a single dominant source of the trouble in order to impose a sweeping and effective solution have been sadly disappointed. There is clearly more than one underlying source and each contributes in its own way to the overall problem of dissatisfaction with the discovery process.

After World War II, law firms increasingly began to charge their clients on an hourly basis. The more hours worked, the larger the fee. This trend coincided with liberalization and reform of discovery practice initiated just before the war as a result of the promulgation of the Federal Rules of Civil Procedure. With broad, liberalized and integrated discovery, lawyers and law firms found an incentive to engage in extensive pretrial activities. Hours spent on discovery translated directly into handsome fees.[184] Fee generation is therefore, one of the contributing causes of discovery abuse.

Lawyers are concerned about their client's perceptions of their efforts and the increasing likelihood of a dissatisfied client bringing a malpractice action when a lack of vigorous representation is potentially perceived.[185] Concern over client criticism and potential allegations of malpractice heightens a lawyer's resistance to making disclosures in response to discovery requests, while increasing the frequency and extent of discovery which is sought. As one lawyer in Professor Brazil's study put

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[183] Much of the criticism regarding the failure of sanctions to stem the tide of discovery abuse is leveled at the judiciary itself. Having the power to sanction abuse is one thing, using it is another. Study after study has confirmed that judges are reluctant to impose meaningful sanctions on errant lawyers and, even when they are so disposed, the sanction is often untimely and amounts to little more than a slap on the wrist. *See* Brazil, *supra* note 168, at 789, 862; Ellington, *supra* note 163. One federal judge blamed the courts for much of the abuse of discovery in the sense that courts did little or nothing about abuse, asserting that many judges "[S]ee themselves in the role of an umpire who simply sits there and lets the players play the game." Huffman, *Protracted Litigation, Abuses of Discovery Targeted by Judge*, Legal Times, July 26, 1982, at 1, col. 1.

[184] Rosenberg, *Discovery Abuse*, 7 LITIG. 3, 8 (1981); Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 222-23 (1978).

[185] Brazil, *supra* note 170, at 244-45.

it, "any lawyer who doesn't exhaust all avenues is subject to criticism by his client."[186] Where lawyers had once felt comfortable relying on at least some representations by opposing counsel, concern over malpractice has made them more cautious and dictated a policy of confirming through formal discovery most of what they already know through informal means.[187] Greater use of discovery tools and increased resistance to disclosure are the apparent by-products of the legal professions' concern about client criticism and potential malpractice actions.

The scope of discovery is another potential root cause of the problems which plague the pretrial preparation phase of litigation. The current scope of discovery, encompassing "all matters, not privileged, which are relevant to the subject matter involved in the pending action"[188] has been interpreted so broadly that virtually any information is fair game as long as it even marginally relates to the subject matter of the case.[189] With a field of play so broad and so ill-defined at its outer boundaries, the opportunities for endless discovery are virtually unlimited.[190]

The judiciary itself is seen as another source of the problems which plague discovery practice. Many lawyers feel that the discovery rules provide a reasonable and workable framework for the process of pretrial information gathering, but that the judiciary has been lax in enforcing the rules and less than helpful to those who seek the court's assistance in both stemming discovery abuse and effectively focusing the parties discovery efforts so that a case can be efficiently and expeditiously prepared for trial.[191] When an effective mechanism does not exist to compel adherence to the letter, if not the spirit, of the rules, the legal

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[186] *Id.* at 244.

[187] *Id.* at 245.

[188] FED. R. CIV. P. 26(b)(1).

[189] *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351-52 (1978): "[d]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits."

[190] Attempts have been made to narrow the scope of discovery and thus focus the opportunities for appropriate information gathering. In 1978 a rule change was proposed which limited discovery to the "issues" raised by the claims or defenses of the parties. However, this language was criticized as returning the system to the old days of common law pleading and it was quickly abandoned. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 77 F.R.D. 613, 626-28 (1978). Later, a proposal was made to limit the scope of discovery simply to the claims and defenses of the parties. *See* Second Report of the Special Committee for the Study of Discovery Abuse (1980), *reprinted in* 92 F.R.D. 137 (1982). However, the Advisory Committee on Civil Rules of the Judicial Conference of the United States did not endorse this proposal when it reported its proposed 1980 amendments to the Federal Rules to the Supreme Court. The broad scope of discovery contained in Rule 26(b)(1) therefore, remained unchanged.

[191] Ellington, *supra* note 163; Brazil, *supra* note 170, at 245-51; Lundquist & Flegal, *supra* note 167, at 1. Cavanagh, *supra* note 165, at 775-78.

community can only assume that it is every man for himself in the discovery arena. As one lawyer rather succinctly put it, "Unless judges take a strong stand no one will quit playing games because you know you can get away with it."[192]

Finally, the fundamental nature of the legal system as an adversarial endeavor must be taken into consideration. As long as the parties to a legal dispute are opponents in every sense of the word, there is simply no incentive for attorneys to enter into a cooperative endeavor during the discovery phase of litigation. In fact, it is generally an attorney's duty and responsibility to use every means available, within the law, to further his client's goals.[193] The principles of zealous advocacy turn the mutual search for relevant information during discovery into a contentious battle in which each party attempts to get as much as it can and give as little as possible.[194] As the Supreme Court recently noted in discussing the role lawyers play in representing their clients, "Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty."[195] There can be no question then that as long as the discovery process remains fundamentally adversarial, the existence of discovery misuse and overuse will continue to represent a viable and, at times, even appropriate expression of a lawyer's role as a zealous advocate.

While current discovery reforms appear to be aimed at rousing judges from their alleged torpor and having them control the zealous behavior of lawyers through early and detailed discovery management and the liberal application of sanctions, it is the fundamental adversarial nature of discovery itself that needs to be examined and dealt with if effective and meaningful reform is to be achieved. As long as the pretrial stage of litigation is considered simply an extension of the "main event" (the trial itself), in which the lawyers are duty bound to do everything in their power to further their client's interests without materially aiding their opponent,[196] the probability of achieving the goals and potential of pretrial discovery remains problematic. If, however, an effective way

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[192] Brazil, *supra* note 168, at 862. It is interesting to note that Professor Brazil reports that fifty to ninety percent of all lawyers interviewed, depending on type of case and client, reported dissatisfaction with the courts regarding the assistance received in resolving discovery disputes. Almost the same number favored greater court involvement in the discovery process, while seventy to ninety percent favored more frequent use of sanctions by the courts.

[193] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

[194] M. FRANKEL, PARTISAN JUSTICE 17-18 (1980).

[195] Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 325 (1985)(quoting Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1287-90 (1975)).

[196] *See supra* notes 190-94 and accompanying text.

could be found to reduce the adversarial pressures that exist during the pretrial stage of litigation, discovery abuse, as well as concerns regarding potential malpractice suits, could be dealt with in the context of changes, not just in the process itself, but in the fundamental standard of conduct of lawyers during the discovery phase of case preparation.

But can the adversarial nature of litigation be sufficiently tamed to bring a measure of order and effectiveness to the overall discovery process without doing significant damage to the fundamental structure of the legal system? Can a lawsuit be squeezed of its adversariness during pretrial preparation and then allowed to run at full adversarial throttle during trial? The answer lies in an examination of the fundamental adversarial dilemma which permeates the very creation of modern discovery practice under the Federal Rules of Civil Procedure.

2. The Adversarial Dilemma

Ever since the first canons of professional ethics were drafted by the American Bar Association, lawyers have been instructed that they owe their "entire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied."[197] By the time the ABA promulgated its Model Code of Professional Responsibility, the admonition regarding a lawyer's primary responsibility had been succinctly reduced to a duty to "represent his client zealously within the bounds of the law."[198] The magic words of limitation— "within the bounds of the law"—were interpreted to allow a lawyer to "urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail."[199] Only an entirely "frivolous" position in furthering a client's interests was expressly forbidden.[200] Finally, a lawyer was prohibited from intentionally causing prejudice or damage to his client's interests during the course of the professional relationship.[201]

Several generations of lawyers have been raised on these basic tenets of legal representation. In the arena of adversarial combat, the lawyer's paramount loyalty is to the client and to the furtherance of the client's interests, even in the face of articulated duties to the public, the courts, and the legal system.[202] As long as he remains within the "bounds of the

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[197] CANONS OF PROFESSIONAL ETHICS, Canon 15 (1908).

[198] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980).

[199] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 (1980).

[200] *Id.*

[201] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A), (B); 7-101(A)(3), (1970) (amended 1978).

[202] *See e.g.*, EC 5-1 (A lawyer's personal interests, the interests of other clients or the

law" a lawyer owes his "entire devotion" to the client. It is within this ethical and societal framework that we must examine the pretrial litigational tool of discovery.

The federal discovery rules, as interpreted by the Supreme Court, exist to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent" during the pretrial preparation phase of litigation.[203] To this end, "either party may compel the other to disgorge whatever facts he has in his possession"[204] prior to trial, since "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[205]

If the fundamental goals of discovery are to be achieved, then there appears to exist an implicit assumption in the discovery rules, and in their interpretation by the Supreme Court, that pretrial disclosure is to be a straight forward cooperative endeavor devoid of the adversarial games played during trial. How else but through responsive nonadversarial interaction could the rules insure that the parties "obtain the fullest possible knowledge of the issues and facts before trial."[206] It has long been suggested that the authors of the federal discovery rules intended to use discovery to reform the adversary system, so that litigation would proceed with both sides in full possession of all the facts and with an awareness of each other's tactical strengths and weaknesses.[207] In noting that discovery simply advanced the stage at which disclosure could be compelled from the time of trial to the period preceding it,[208] the Supreme Court surely recognized that if the process was to work at all discovery had to be a substantially nonadversarial endeavor. Then, armed with all relevant information both sides could "slug it out" at a fair trial. The truth would emerge since the facts, known to both sides, would be tested in the crucible of the adversary process and a just determination on the merits would result.

Here then one sees the dilemma lying at the heart of civil discovery. The process can only work effectively if the pretrial disclosure of information is substantially nonadversarial, yet the ethical, professional, and societal framework in which lawyers function is highly client-oriented, almost myopically so, with little or no incentive to aid the opposing side or the legal system itself. Owing his devotion to the client

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desires of third parties should not be permitted to dilute the lawyer's loyalty to the client); EC 7-19 (The duty of lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.).

[203] United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).

[204] Hickman v. Taylor, 329 U.S. 495, 507 (1947).

[205] *Id.*

[206] *Id.* at 501.

[207] W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 30 (1968); Pike & Willis, *supra* note 93, at 1459.

[208] *Hickman*, 329 U.S. at 507.

and the client's interests, a lawyer's role, absent clear legal compulsion to the contrary, "is not to make sure the truth is ascertained but to advance his client's cause by any ethical means."[209] Is it any wonder then that there exists substantial concern that discovery has failed to fulfill its fundamental purpose and that it may present a greater opportunity for mischief than for constructive advancement of the litigation process?[210]

Can a way be found out of this dilemma? A way that, within the realities of our societal view of the function and practice of legal representation, could squeeze as much adversarial fervor as possible out of the discovery phase of litigation?

B. Solutions to the Dilemma

Let us first deal with a drastic solution to the discovery quandary. Namely, to do away with discovery entirely[211] and either return to early common law practices or, at the other extreme, require litigants to voluntarily disclose, prior to trial, all information in their possession without need of a formal request from the opposing party.

The early common law model, as demonstrated by the historical discussion contained in the initial sections of this article,[212] is an unsatisfactory approach to the conduct of modern litigation. Without reasonable knowledge of the opponent's factual and legal position, as well as information which supports one's own view of the case, there is simply no way to effectively prepare for and conduct a trial on the merits. In addition, issues could not be narrowed and allegations tested before trial, settlements would not be promoted, societal resources would not be conserved and trials would be inefficient and haphazard proceedings. If the long history of the development of modern discovery has taught us anything, it is that the sporting theory of litigation is a wasteful, ineffective and, ultimately, grossly unfair approach to the resolution of disputes.

But at the other end of the spectrum lies the absence of formal discovery coupled with full, timely, and voluntary disclosure to the opposing party of all unprivileged information. Such a solution, while tempting in its simplicity, suffers from several major drawbacks. First, counsel compelled to share with their opponent all information gathered on their client's behalf, is going to be reluctant to engage in substantial

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[209] Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 325 (1985)(quoting Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1287-90 (1975)).

[210] Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 256 (1985).

[211] Chief Justice Rehnquist suggested in remarks delivered at the University of Florida Law School on September 15, 1984, that "Perhaps we should entirely abolish discovery in cases where the demand is for a money judgment below a certain dollar amount, ..."

[212] See *supra* notes 22-32, 49 and accompanying text.

investigative and preparatory efforts. Why prepare a case just to turn virtually all your preparation over to the opposing counsel? Why be thorough in your preparation when thoroughness might provide the opposing party with information he may never have thought of, let alone obtained on his own? As the Supreme Court observed in the context of the work product doctrine, it is essential that a lawyer work with a certain degree of privacy in preparing a client's case. "That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests."[213] If this zone of privacy did not exist, "the effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."[214]

The second major drawback of the no discovery/full disclosure process is that no way would exist to test the honesty, credibility and thoroughness of each disclosure. If a lawyer failed to disclose a document or reveal a piece of information, absent some telltale clue in the information already obtained by the opposing party, the fact of nondisclosure might never be detected. In our current system, follow-up discovery is the tool by which the credibility and completeness of each requested disclosure can be verified. Absent such a tool, one is forced to rely on the integrity of the disclosing counsel in a highly partisan and adversarial environment.

Once one recognizes that some form of discovery is necessary and desirable in the litigation context, one needs to look at how the adversarial environment might better be controlled during pretrial preparation of a case. Ideally, a change in the very nature of the litigation culture would be desirable. A lawyer's duty to his client would continue to be paramount during trial, but would be subordinated to his duty to the court and the legal system during the pretrial phase of the case. By emphasizing fidelity to the letter and spirit of the rules governing discovery, and elevating that fidelity over the duty owed the client, the goal of both parties, obtaining "the fullest possible knowledge of the issues and facts before trial,"[215] would be promoted. Then at trial, armed with all relevant information and a realistic appreciation of the strengths and weaknesses of each side's position, the duty of zealous advocacy and fidelity to the client's interests would again become the guiding principle to the end that a fair and just result might emerge from the adversarial process.

This suggested change in the litigation culture is not a new idea.[216]

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[213] Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

[214] *Id.*

[215] *Id.* at 501.

[216] See particularly, Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

Recognizing that at the heart of our concerns about discovery is the ethical and societal concept of the lawyer as a devoted and single-minded representative of the client and the client's interests, it is entirely logical to suggest that only a change in the fundamental cultural conception of the lawyer's role in litigation can achieve meaningful discovery reform. In a philosophical sense such a suggestion makes complete sense. But like Sisyphus trying to roll a stone uphill,[217] its accomplishment is not one to be anticipated in the foreseeable future. In the long history of the adversary system, the single concept which has most tenaciously been promoted and vigorously protected is that of client-centered loyalty.

The concepts of zealous advocacy and devotion to one's client have not, however, stopped the legal system from seeking to make the litigation environment more fair, rational, efficient and even honest. But instead of accomplishing its goals through changes in the ethical and societal framework of the legal profession, the vehicle that has been used to effect improvements in the basic approach to adversarial resolution of legal disputes has been changes in the applicable rules of procedure.[218] Since procedural revision is easier to accomplish, simpler to enforce and potentially as pervasive as a change in the profession's ethical framework, it is an attractive and accessible approach to changing the litigational culture. If the history of the development of civil discovery tells us anything, it is that procedural innovation can have a profound impact on not only how litigation is carried out, but also on how the process and the relationship between the players is perceived. For example, where once the court was viewed as participating only in the ultimate trial of a matter and then only as a passive receptor of information and the ultimate decider of the issues framed by the parties, the rules of procedure have radically changed both the perception and reality of the court's function. Now, federal trial judges routinely partic-

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[217] In Greek mythology Sisyphus was King of Corinth. One day he chanced to see a mighty eagle, greater and more splendid than any mortal bird, bearing a maiden to an island not far away. When the river-god Asopus came to him to tell him that his daughter Aegina had been carried off, he strongly suspected by Zeus, and to ask his help in finding her, Sisyphus told him what he had seen. He drew down on himself the relentless wrath of Zeus. In Hades he was punished by having to try forever to roll a rock uphill which forever rolled back upon him. E. HAMILTON, MYTHOLOGY (1969).

[218] An example of a procedural reform which accomplished a major structural change in the practice of law was the adoption of pure notice pleading in the federal courts. As the Supreme Court pointed out:

> Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.

Hickman v. Taylor, 329 U.S. 495, 500-01 (1947).

ipate in every aspect of a case, including taking an active part in framing the issues, guiding pretrial preparation and accomplishing settlement.[219] These activities, which clearly represent major changes in the litigation environment, came about through rather simple procedural reforms instead of through an attempt to redefine ethical and societal norms embodied in codes of professional responsibility and the cultural history of the legal profession.

If we are going to change the adversarial nature of pretrial case preparation, then we are going to have to look at not only discovery procedures, but also areas of discoverable information for which adversarial inquiry and response does not offer fundamental benefits for the legal system or society as a whole. This is precisely the approach which, consciously or not, was used by the drafters of the 1983 amendments to the federal discovery rules. It is an approach which simply asks the question, where can changes in the litigational culture be made by way of procedural innovation without losing valid and beneficial aspects of the adversarial approach to dispute resolution?

When the day-to-day pretrial preparation of a case through discovery is examined, even cursorily, one aspect of the discovery process immediately strikes the observer as unnecessarily adversarial. That aspect is the necessity for one party to ask the other for information in a way that is supposed to leave no doubt as to what is being asked for and all too often allows the opposing party to freely employ their adversarial skills of interpretation, avoidance and delay. This is particularly troubling where the information being sought is clearly discoverable simply for the asking. For example, no one would dispute that in a personal injury case the names and addresses of all witnesses to the accident and the names and addresses of all medical personnel who examined and/or treated the plaintiff are discoverable. The information is entirely relevant, is usually unprotected by an assertion of privilege, and lies at the very heart of the case. It is disclosable, and should be, simply for the asking. Yet it often does not happen that way. The defendant's lawyer asks for the names of the plaintiff's treating physicians and the plaintiff's lawyer omits the names of two doctors who examined the plaintiff but did not "treat" her. The plaintiff's lawyer asks for the names of witnesses to the accident and the defendant's lawyer omits the name of a witness who arrived on the scene several minutes after the accident occurred. The game of adversa-

[219] Besides local rules of court which establish early meeting requirements and periodic status conferences (see for example *supra* note 173), Rule 16 of the Federal Rules of Civil Procedure, appropriately entitled "Pretrial Conferences; Scheduling; Management," gives the court a powerful tool in the active management of a case. Add to this the specific discovery management powers set forth in the second paragraph of Rule 26(b)(1), and it can be seen that a federal court is in the business of actively managing a case from filing to disposition.

rial tag is played here for no other purpose than that of protecting the client's interests. The result is frustration, inefficiency and unfairness not only to the opposing party, but to the courts, the legal system and society as a whole.

Can we and should we control the request/response nature of the discovery process so that clearly discoverable information need not become the plaything of a game of adversarial tag? Can such information be identified to a reasonable degree of certainty and can a procedural approach be devised to insure that full and timely disclosure is accomplished? Finally, are the societal values implicit in an adversary system sufficiently preserved so that the benefits of reforming the request/response process do not materially alter the benefits of our client-centered legal system?

Let us look at each of these issues in turn to determine if such a procedural change is feasible, workable and desirable.

1. The Procedural Change

First of all, what kind of procedural change is being suggested here? Simply stated, it is the automatic, voluntary and timely disclosure of certain identifiable information without the need of the opposing party making a formal discovery request. For example, instead of the defendant in a personal injury action having to ask, by way of formal discovery, for the names of all medical personnel who, during the relevant period, were consulted by the plaintiff, the plaintiff would be required to voluntarily provide the information at the outset of the case and on a timely basis thereafter without demand from the defendant. Such information should simply not be a battleground for the adversarial skills of lawyers, since it is relevant, unprivileged and fundamental to a fair and efficient determination of the case on its merits.

2. The Information

What kind of information would be subject to the automatic disclosure requirement? It would be that information which, based on the type of dispute in issue, would clearly be discoverable simply for the asking. For example, in a personal injury action, such information as an itemized listing of the plaintiff's expenses for medical care is a category of information as to which there should be no doubt the defendant is entitled to disclosure. There is no purpose in committing such areas of information to adversarial request and response, other than to provide a fertile field of play for the game of discovery hide-and-seek.

The categories of information to be withdrawn from the request/response process during discovery should be readily identifiable based on such factors as, (1) their direct and highly probative relationship to the subject matter of the case, (2) the broad and easily definable nature of the

information, (3) the apparent lack of privileges to protect them from disclosure and, (4) based on experience, the information is routinely sought and disclosed in the type of case under consideration. A brief perusal of the multitude of books which provide suggested interrogatories and requests for production in virtually every type of legal dispute yields a useful picture of the various areas of information which most easily and most comfortably satisfy the requirements set out above.[220] Experience has demonstrated, as exemplified by the form interrogatories promulgated by various state judicial councils,[221] that general categories of relevant and necessary information can be identified which are common to a particular type of legal dispute and which ought not to be the subject of contentious interpretation and evasive advocacy.

3. The Process

What kind of process would not only permit the initial identification of information that should be withdrawn from the request/response requirement, but would also provide a means for monitoring disclosure and enforcing full, timely and evasion-free compliance? Certainly, there are a number of useful processes which might accomplish these goals.[222] But the one that would appear to be the simplest, most effective and easiest to implement, is one that relies on the 1980[223] and 1983[224] amendments to the federal discovery rules in conjunction with the simple expediency of having the parties themselves propose the categories of information to be withdrawn from the request/response requirement.

The discovery conference of Rule 26(f) and the powers contained in the second paragraph of Rule 26(b)(1) give a court the means to "manage" the discovery phase of a case. At the outset, a court could routinely hold a discovery planning conference during which, among other things, the parties would propose categories of information to be subject to automatic disclosure on a periodic basis. Based on the parties submissions and the court's own experience with the type of case involved, an order would be issued setting forth the categories of information subject to automatic disclosure, the timetable for disclosure, and a requirement for the filing of a signed verification certifying that each disclosure contained all information in the party's possession, custody or control responsive to the delineated disclosure category. The order would be a continuing directive, unless modified in a subsequent discovery conference, requiring periodic

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[220] *See e.g.*, M BENDER, BENDER'S FORMS OF DISCOVERY (1987); D. DANNER, PATTERN INTERROGATORIES (1970).

[221] *See e.g.*, Form Interrogatories approved by the Judicial Council of California, West's Ann. Cal. Forms, Form FI-120 (1987).

[222] *See infra* note 230.

[223] *See supra* note 156.

[224] *See supra* note 161.

disclosure of the specified information throughout the pretrial preparation phase of the case.[225]

The advantages of a process which focuses on the individual case in dispute, involves the parties themselves in defining the categories of disclosable information, and results in a continuing court order binding the participants throughout the case, are particularly significant where full and continuing compliance is a concern. By participating in the definitional process, the parties have an opportunity to explore the needs of their particular case, raise arguments about the categories themselves and the information to be included therein, understand the meaning, scope and intent of each category ultimately included by the court and acknowledge their duties and responsibilities regarding compliance with the court's order. Once the discovery order is issued, violation could result in the direct imposition of the sanctions contained in Rule 37(b)(2) without need of resorting to the more cumbersome process of first seeking a motion to compel followed by a motion for sanctions.[226] Furthermore, the direct imposition of the sanctions contained in Rule 37(b)(2) under circumstances in which a party who participated in a discovery planning conference failed to comply with the terms of the resultant discovery order would be entirely in line with the Supreme Court's admonition that such sanctions are not merely for the purpose of penalizing those whose conduct warrant it, but also to deter those who might be tempted in the future to pursue similar conduct.[227]

Participation in the discovery order drafting conference, a clear understanding of the scope, intent and specifics of the ultimate order, the

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[225] Information which was unique to the particular case in issue and either not capable of reasonable definition by item or category or not capable of being anticipated at the time of the discovery planning conference would remain subject to normal discovery procedures.

[226] FEDERAL RULE OF CIVIL PROCEDURE 37(b)(2) states in pertinent part:

> If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

[227] National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976).

requirement for a filed certification of compliance for each required periodic disclosure and the potential for the imposition of ultimate sanctions immediately upon violation of the discovery order should substantially deter a party's urge to play adversarial hide-and-seek with the information which must be disclosed.[228] But to further assure full and fair compliance, each party may, through the use of the discovery tools normally available in litigation, seek to check any inconsistencies, gaps, or suspected evasions which might seem to exist in the information disclosed by the opposing party as a result of the court's order.[229]

It should be noted that throughout the pretrial preparation phase of a case, the full panoply of discovery tools would continue to be available to each party to seek information which is not covered by the court's continuing discovery order. As a result of obtaining such information, violations of the order itself and/or the need for amending the order could become apparent. Such situations could then be brought to the court's attention through the filing of a motion for sanctions and/or modification of the discovery order.[230]

Since at least half of all lawsuits do not employ any type of formal discovery prior to resolution,[231] mandating an early discovery planning conference in all cases would be both inappropriate and inefficient. The

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[228] In effect, the responding party would be placed in the position of having to play adversarial hide-and-seek primarily with the court instead of the opposing party—a much more dangerous and sobering prospect than the often unscrutinized and freewheeling discovery process normally carried out without major court involvement.

[229] If the district in which an action is pending imposes a numerical limit on discovery by way of local rule, any discovery which uncovered violations of the court's discovery order could be deemed to be not included in the numerical limit. This would provide a further disincentive to either party to play discovery games.

[230] A related, but substantially different, process which could be used to withdraw certain information from the usual request/response requirement of pretrial discovery, is one involving court prepared form-discovery orders. Instead of focusing on a particular case and involving the parties in one or more discovery planning conferences, a federal circuit or district court could, based on experience and input from the practicing bar, prepare form discovery orders to be used in particular types of cases. These orders would contain a description of various items or categories of information that would have to be automatically produced on a periodic basis if the case in issue was of a type covered by the standing order. The mechanics for compliance and the sanctions for noncompliance would be the same as those described in the text above. While such a form-discovery order would have the advantage of reducing or eliminating the need for discovery conferences in many cases, it would take away many of the advantages that involving the parties in case specific planning provides. Not only would the parties understanding of what was to be produced pursuant to the standing order be open to doubt, but the salutary effect of forcing the parties to think about their case as early as possible and discuss it cogently with the court would be lost. Many judges have found that after a status conference or other in-court planning activity, cases often settle or are substantially streamlined since the attorneys, for possibly the first time, have had to take a good look at their case prior to their in-court appearance.

[231] Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 234-35 (1985).

requirement of court assisted discovery planning should, therefore, apply only to those cases in which one or more of the parties desired some form of discovery. However, instead of allowing the parties to trigger scheduling of the planning conference at their discretion,[232] the better approach would be for the court to notice an early discovery conference in every case and give the parties the option of filing a declaration which stated that discovery was neither necessary, desired, nor contemplated. If both parties so stated, the conference would not be held. But if one or more parties failed to file such a declaration, the conference would go forward as scheduled.

If the conference was cancelled due to the filing of appropriate declarations, no formal discovery would be permitted in the case absent notice to the court and the convening of a discovery planning conference. Such a restriction would protect the parties and the court from last minute attempts to employ discovery primarily as an adversarial tool to surprise and burden the opposing party.

The demands on the federal judiciary due to growing caseloads are already substantial and the time judges have to devote to the pretrial preparation and resolution of each case is limited.[233] But the discovery planning activity proposed herein does not materially add to those burdens and, if properly implemented, would reduce the long term drain on judges' time created by unnecessarily protracted and contentious pretrial skirmishes. This conclusion is based on more than just academic wishful thinking. First, it takes cognizance of the fact that many jurisdictions already routinely hold status conferences in most cases and the federal judiciary has come to view such conferences as an invaluable tool in the resolution of a case.[234] Furthermore, by limiting the discovery planning conference to those cases in which formal discovery is contemplated by one or more of the parties, the court's time and energy would be focused only on those cases where there exists a real potential for the kind of trouble that creates a substantial drain on the parties and the court's resources.

A well implemented early discovery planning conference can pay substantial dividends down the line in terms of appropriate, efficient and fair case resolution. As Judge Peckham observed, "the importance of

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[232] If the power to trigger the initial discovery planning conference was primarily left in the hands of the parties, scheduling of the conference, if one were to be held at all, could easily become another weapon in the adversarial game of litigation leverage. Thus, the fundamental purpose behind the conference, i.e., to reduce adversarial pressures during pretrial preparation of a case, would be impaired.

[233] *See* Levin & Colliers, supra note 231, at 241-42.

[234] Peckham, *supra* note 210, at 267-69; Pollack, *Discovery—It's Abuse and Correction*, 80 F.R.D. 219, 224 (1978).

aggressive and meaningful use of the initial status conference cannot be overly emphasized."[235]

C. Policy Considerations

How do the procedural changes and pretrial process proposed herein deal with the significant policy issues which lie at the core of our dispute resolution system? How can automatic voluntary disclosure of information promote the goals of client centered representation, individual case preparation, adversarial testing of the facts and issues, and the attainment of speedy, efficient and fair court processes?

The first concern we must examine is the apparent invasion of an attorney's zone of privacy to prepare his client's case without unnecessary intrusion by the opposing party. Without such protection, attorneys would be reluctant to thoroughly investigate and prepare a matter for fear that their efforts would easily fall into their opponent's hands thus unnecessarily prejudicing their client. As Justice Jackson wrote in *Hickman v. Taylor*, "[d]iscovery was hardly intended to enable a learned profession to perform its function either without wits or on wits borrowed from the adversary."[236]

The zone of privacy argument is one which has more appeal in the abstract than it does in reality. Under modern concepts of discovery, a party has a right to obtain from his opponent disclosure of all information which falls within a rather broad scope of relevancy.[237] Only such concepts as the attorney/client privilege, the work product doctrine and similar evidentiary protections insulate an attorney's so-called zone of privacy. Without these particular protections, discovery, as it presently exists in the United States, requires the disclosure of virtually all information known to a party and requested by his opponent. It should be clear therefore, that our legal system is one which substantially permits, if not encourages, the preparation of cases through the expediency of "wits borrowed from the adversary." It is the availability of various protective privileges and the ethical requirement of thorough and appropriate case preparation, backed up by the fear of a potential malpractice suit, that protects and promotes an attorney's pretrial preparatory efforts. Since the procedural changes proposed in this article do not alter the role played by either evidentiary privileges or fundamental ethical considerations in the discovery process, they simply do not materially impinge on an attorney's zone of privacy in preparing a client's case.

The second concern we need address is that of devotion to the client and the prohibition against doing anything to prejudice or damage the client's

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[235] Peckham, *supra* note 210, at 268.

[236] 329 U.S. 495, 516 (1947).

[237] *See supra* note 188-89 and accompanying text.

interests. If, in preparing a case, an attorney acquires information detrimental to the client, her disclosure of that information to the opposing party is potentially an abridgment of her ethical duty. Not only is it a potential ethical violation, but it is also a disincentive to pursue investigative efforts into areas that may yield detrimental information. By removing the requirement that an opposing party at least needs to ask for the information, are we not compounding the practical and ethical dilemma that already faces an attorney in preparing her case?

Once again, the concern here addressed is more meaningful in the abstract than it is in reality. From an ethical standpoint, it need only be noted that the American Bar Association's Model Code and Model Rules specifically prohibit a lawyer from disobeying a rule of court[238] and even go so far as to command that a reasonably diligent effort be undertaken to comply with a legally proper discovery request.[239] Therefore, the Code and Rules, which prescribe fidelity to the client's interests, also command an attorney to temper that fidelity with compliance to rules of court which reflect society's and the legal system's needs and values. The prohibition against damaging a client's interests extends only as far as the rules of court and the availability of evidentiary privileges permit. Since the discovery reform proposed by this article will be implemented through procedural rules of court and the ability to assert protective evidentiary privileges will remain unchanged, there simply does not exist a serious ethical impediment to the proposed process.

More important is the related issue of a lawyer consciously avoiding preparation of those aspects of a case for which the information must be automatically disclosed to the opposing party without need of a discovery request. For unless the lawyer avoided entirely the gathering of potentially detrimental information in areas subject to automatic disclosure, the client's case would not only be prejudiced, but the opponent's case preparation would have been accomplished on borrowed wits, paid for by the client whose case was detrimentally affected. Thorough and appropriate pretrial preparation by one party could permit the opponent to sit back and simply ride the coattails of a more conscientious attorney. It seems only right that, at the very least, the opposing attorney should be made to ask, in a legally appropriate manner, for the information he believes he needs to prepare his case. Otherwise, the first attorney would be doing the work for both parties, a clearly anomalous role for a lawyer in an adversary system.

The automatic disclosure proposal made in this article has been tailored to minimize concerns over its potential impact on thorough case

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[238] *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2); DR 7-102(A)(3) (1980), MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(c)(1983).

[239] MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.4(d)(1983).

preparation by the parties to a dispute. The proposed procedural changes have been limited to general categories of information which are highly relevant, unprivileged and reasonably suggested by the nature of the dispute itself. Such information would be easily identifiable, is even today subject to virtual automatic disclosure simply for the asking, and would be routinely available to a party as a natural consequence of their role in the events and/or subject matter of the dispute. A party, even under the discovery rules now in existence, would have no reasonable expectation of keeping such information from their opponent. The only real change proposed herein is the manner of disclosure. The need to disclose has always existed and, absent notions of evasion, delay, and other forms of game playing, disclosure has been the expected norm. Even in the face of anticipated disclosure, attorneys have diligently prepared their cases. There should be no reason, under the revised procedures proposed in this Article, for that situation to change.

It should be noted that even if an attorney felt that the gathering of certain basic information would be detrimental to his client's case, the discovery rules require that, when asked by the opposing party, an attorney must make reasonable inquiry to obtain the information being requested.[240] Avoiding reasonable inquiry before discovery in the hope of avoiding disclosure during discovery is simply not a viable tactic. Sooner or later reasonable inquiry will have to be made and the information disclosed. If that information is of a type which is routinely available to a party based on his role in the dispute, then the reasonable inquiry requirement will flush it out whether or not the party wishes to avoid disclosure. Since the reasonable inquiry requirement would apply to the automatic disclosure proposal discussed herein, preparation avoidance would not pose a serious problem.

Finally, we need to address the concern that the proposed automatic disclosure process erodes the very principles upon which the adversary system is based. Namely, that each party prepares and presents his case in his own way so that through the clash of viewpoints and skills the facts and the issues in dispute are thoroughly tested. When one party is required to help his opponent in preparing the opponent's cases, the principles of adversarial dispute resolution are severely strained. While discovery, as it now exists, impinges upon these principles, it balances the detriment by requiring the disclosure process to remain essentially adversarial. Mandated automatic disclosure, without adversarial trappings, carries discovery well beyond the fundamental principles which have long guided the litigation process. Discovery itself made a major

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[240] FED. R. CIV. P. 26(g) requiring "reasonable inquiry "; WRIGHT & MILLER, *supra* note 125, at § 2177; R. HAYDOCK & D. HERR, DISCOVERY PRACTICE § 4.6.2 (1982); Milner v. National School of Health Technology, 73 F.R.D. 628, 632-33 (E.D. Pa. 1977).

change in the old sporting theory of litigation. Mandated automatic disclosure would seem to carry the process of reform to its ultimate conclusion and eliminate much of the contest aspect of adversarial dispute resolution, a process upon which the common law has long been based.

The concern over erosion of the adversary process can be addressed in several ways. First, as has repeatedly been pointed out above, the information which would be subject to automatic disclosure is information which a party, under existing discovery practice, has virtually no expectation of protecting from disclosure and would today be available to the opposing party simply for the asking. Second, one of the primary purposes of discovery, virtually from its inception, has been to make the trial of a lawsuit fairer and more efficient by forcing the parties to share information before trial. Being in possession of essentially the same information at trial allows the adversarial process to work as it was intended. The clash of contestants over issues and facts known to both sides clearly yields a better and fairer decision than one resulting from a contest in which either side lacked substantial information. But full and appropriate pretrial disclosure of relevant information can only be achieved if the discovery process is substantially less adversarial than the subsequent trial. Otherwise, the old sporting theory of litigation would not only apply to trials themselves, but also to the pretrial preparation process. The field of play, instead of being narrowed, would have been substantially expanded. If the history of the development of discovery demonstrates anything, it is that such a result was neither intended nor desired.

Finally, any concern over the potential erosion of the adversary process as a result of the proposal made in this Article must recognize a current reality that the adversary system of dispute resolution, as exemplified by lawyer represented, court adjudicated, contests, has fallen into considerable disfavor. Not only have academics written on the failure of faith in traditional adjudicatory processes,[241] but the increasing interest in and use of alternative means of dispute resolution clearly demonstrates society's search for fair, efficient and accessible resolution processes which do not carry with them the detriments and disfavor of traditional adversarial litigation.[242]

Dissatisfaction with the adversarial system is also reflected in a number of Supreme Court decisions. For example, in *Walters v. National Association of Radiation Survivors*,[243] the court discussed at length the

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[241] *See e.g.*, Resnik, *supra* note 18, at 494.

[242] Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986); J. MARKS, E. JOHNSON, JR. & P. SZANTON, DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION (1984).

[243] 473 U.S. 305 (1985).

detriments of adversarial, lawyer involved, resolution of veterans disability claims. Finding that the claim process was intended to be as informal and nonadversarial as possible, the court declined to invalidate a century old ten dollar limitation on attorneys fees, thus effectively eliminating lawyers from the claim resolution process, and thus promoting a nonadversarial environment.

There can be no question that discovery represents an intentional erosion of the pure adversary process of the early common law. The proposal contained in this Article for partial automatic pretrial disclosure of information is a further intentional erosion of the adversary process. But it is an erosion which promotes fairness, efficiency and credibility, and thus, in the final analysis, strengthens the adversary system by confining it to its proper role of testing the facts and issues at trial.

IV. A New Idea?

Is the automatic pretrial disclosure of information as proposed herein a new idea whose introduction into the adversary system would navigate uncharted waters? The answer is resoundingly in the negative. Besides the experience of such district courts as that of the Central District of California in which, by local rule, certain information in civil cases is automatically disclosed during the litigation process,[244] numerous district courts maintain standing discovery orders in criminal cases which require the prosecution to automatically provide to the defense, on a timely basis, all information to which the defendant is entitled.[245] Furthermore, early meeting requirements and/or status conferences are a staple of the pretrial management of civil cases in the federal courts.[246] Pursuant to Rules 26(b)(1) and 26(f), discovery planning conferences are becoming a more prevalent activity during the litigation process. Thus, both the concept of automatic disclosure and the process for its implementation are already part of the procedural culture of the federal courts. Extending that culture to encompass the proposal contained herein is a rational and attainable step in the process of achieving the goals for which discovery was designed.

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[244] *See supra* note 180.

[245] At the minimum, the prosecution must provide to the criminal defendant that information described in Federal Rule of Criminal Procedure 16.

[246] *See supra* note 234. It is interesting to note that the state of Kentucky has experimented with an early discovery planning conference in its civil courts. The conference results in a court order which structures the parties subsequent discovery efforts. Planet, *Reducing Case Delay and the Costs of Civil Litigation: The Kentucky Economical Litigation Project*, 37 Rutgers L. Rev. 279, 282 (1985).

V. Conclusion

The development of civil discovery as a tool in the overall litigational process of dispute resolution was initially a reaction to the insignificant amount of information that was available to a party prior to trial. Without a minimal level of information, a party was virtually unaware of what the matter in dispute really entailed and thus could not prepare and present his case in a reasonable and informative fashion. An adversarial system that operated in such a manner lacked fundamental credibility and effectiveness.

With the adoption of the Federal Rules of Civil Procedure in 1938, discovery not only became an integrated comprehensive information producing process, but also a means for dealing with the problem of adversarial behavior during the preparation phase of litigation and its impact on the amount of information available to the parties prior to trial. Not only was improvement in the disclosure of information a primary goal of the discovery rules, but they also sought to achieve a fundamental alteration in the adversarial culture. The pretrial phase of a case was to be less of a contentious process so that the trial of a case, in the best traditions of zealous advocacy, could be based on full, relevant and necessary information known in advance to both parties.

While the federal rules regarding discovery had a profound effect on the conduct of litigation in both the federal and state courts, the goal of curbing the adversarial appetite of the legal profession during the discovery process has, over the years, become less and less effective. The courts, responding to increased complaints of discovery abuse and increased demands for reform, have primarily sought to reverse the adversarial tide through court involved pretrial managerial measures. But those measures, focused primarily on limiting the amount of discovery available to the parties, do little to alter the adversarial nature of the process by which available discovery is carried out. Until the discovery process can be made less of a contentious endeavor, its goals cannot hope to be fulfilled.

Changing the adversarial culture is a particularly difficult task since we are dealing with a dispute resolution ethic which is well embedded in our legal system. To suggest that the fundamental ethical and societal relationships between client, lawyer and society undergo major revision to accomplish the goal of more effective pretrial discovery is appealing, but hopelessly impractical. The solution lies in changing the existing discovery system in a way that is immediately acceptable, capable of easy implementation, and begins the important process of squeezing out of the discovery phase of litigation as much adversarial energy as possible. Partial automatic pretrial disclosure achieves each of these goals. Furthermore, by assuring that mutual knowledge of relevant areas of fact exists before trial, the adversary system is strengthened and its credibility and utility enhanced.

The time has come to change the focus of discovery reform from one of limitation to one of unimpeded information disclosure within the framework of our existing litigation system. There is a great deal that can be done in this regard. The proposal contained in this Article is only a beginning, but it helps point the way to a new direction in discovery reform. Certainly, any basic change in our litigational culture will have its detractors. As Machiavelli pointed out, "the innovator has for enemies all those who have done well under the old conditions."[247] But the old conditions, where discovery is concerned, do not benefit either society or the legal system and do not achieve the stated goals of the Federal Rules of Civil Procedure themselves, i.e., "to serve the just, speedy, and inexpensive determination of every action."[248]

[247] N. MACHIAVELLI, THE PRINCE ch. VI (1532).
[248] FED. R. CIV. P. 1.