Articles

DISCOVERING A BETTER WAY: THE NEED FOR EFFECTIVE CIVIL LITIGATION REFORM

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> [T]he American civil justice system is indeed different, and the idea of discovery is a fairly novel one. [Discovery] came . . . with the 1938 experiment in revising the rules of [civil] procedure. It was an *experiment* when the civil rules were adopted[,] . . . which still hasn't been revisited.
>
> – Judge Paul Niemeyer[1]

ABSTRACT

This Article addresses the myriad problems posed by unfettered discovery in the United States. Rather than promoting fairness and efficiency in the American legal system, plaintiffs today often use discovery in an abusive and vexatious manner to coerce defendants into accepting quick settlements. Over the past several decades, discovery has expanded in both scope and magnitude such that discovery costs now account for at least half of the total litigation costs in any given case. The advent of electronic discovery has only exacerbated the problem, given the sheer number of electronic documents generated in the course of business and the corresponding time, effort, and cost associated with electronic discovery. Although recent efforts to amend the Federal Rules of Civil Procedure have failed to combat the abuses of civil discovery, meaningful and effective reform of the current system is possible. This Article

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1. Judge Paul V. Niemeyer, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, Comments at the Roscoe Pound Institute 1999 Forum for State Court Judges (July 14, 1999), *in* ROSCOE POUND INST., CONTROVERSIES SURROUNDING DISCOVERY AND ITS EFFECT ON THE COURTS: REPORT OF THE 1999 FORUM FOR STATE COURT JUDGES 33, 33 (1999), *available at* http://www.poundinstitute.org/images/1999ForumReport.pdf.

proposes a number of pragmatic reforms—including adopting the English rule for discovery disputes and suspending discovery during the pendency of a motion to dismiss—to mitigate the abusive and costly nature of discovery in the United States.

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INTRODUCTION

Since its inception in 1938, pretrial discovery has been one of the most divisive and nettlesome issues in civil litigation in the United States. Discovery was designed to prevent trials by ambush and to ensure just adjudications.[2] But it has fallen well short of these laudable goals. Instead, the pretrial discovery process is broadly viewed as dysfunctional, with litigants utilizing discovery excessively and abusively.[3] Plaintiffs' attorneys routinely burden defendants with costly discovery requests and engage in open-ended "fishing expeditions" in the hope of coercing a quick settlement. As a result, discovery frequently becomes the focus of litigation, rather than a mere step in the adjudication process.[4] By some estimates, discovery costs now comprise between 50 and 90 percent of the total litigation costs in a case.[5] Discovery abuse also represents one of the principal causes of delay and congestion in the judicial system.[6] These problems

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2. Drafters of the initial Federal Rules of Civil Procedure believed that the discovery process would not only encourage parties to settle but also help litigants reach a just outcome by making all relevant evidence available to both sides. *See* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique of Proposals for Change*, 30 VAND. L. REV. 1295, 1301–03 (1978) (noting that the framers of the Federal Rules of Civil Procedure intended the rules to increase disclosure of information, thereby reducing the adversarial nature of trial preparation); William W Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 701, 703 (1989) (asserting that the framers of the Federal Rules of Civil Procedure aimed to encourage settlements and the just resolution of disputes by creating a "procedural framework . . . free of surprise and technical encumbrance").

3. Griffin D. Bell, Chilton Davis Varner & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 2 (1992) ("Scholars, litigators, judges, and, more recently, even politicians have joined in unusual consensus to urge that reform of the discovery process is needed.").

4. *Id.* at 11 ("[Discovery] has become the focal point of litigation instead of a means to an end.").

5. *See* H.R. REP. NO. 104-369, at 37 (1995) (Conf. Rep.) (stating that "discovery cost accounts for roughly 80 percent of total litigation costs in securities fraud cases"); Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 547–48 & tbl.4 (1997) ("Among attorneys reporting discovery expenses, the proportion of litigation expenses attributable to discovery is typically fairly close to 50 [percent] . . . . Half estimated that discovery accounted for 25 [percent] to 70 [percent] of litigation expenses."); *Judicial Conference Adopts Rules Changes, Confronts Projected Budget Shortfalls*, THIRD BRANCH, Oct. 1999, at 2–3 ("Discovery represents 50 percent of the litigation costs in the average case and up to 90 percent of the litigation costs in cases in which it is actively used.").

6. Louis Harris & Assocs., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 733 (1989) (polling two hundred federal and eight hundred state judges, and finding that many judges believed that discovery abuse "is the most important cause of delays in litigation and of excessive costs").

have led to perennial calls for discovery reform[7] and have resulted in amendments to the Federal Rules of Civil Procedure (Federal Rules) in 1980, 1983, 1993, 2000, and 2006.[8] Anxiety over abusive discovery practices has also led many federal and state courts to experiment with local reforms, but such efforts have been largely unsuccessful.

The exponential growth in the volume of electronic documents created by modern computer systems has exacerbated the problem of abusive discovery and is jeopardizing the legal system's ability to handle even routine matters.[9] One recent case, for example, involved production of a volume of electronic documents equivalent to a stack of paper "137 miles high."[10] But the problem is not simply one of scope. Discovery of computer-based information costs more, consumes more time, and "creates more headaches" than conventional, paper-based discovery.[11] Indeed, the effort and expense associated with electronic discovery are so excessive that, regardless of a case's merits, settlement is often the most fiscally prudent course.

The foregoing assertions cannot be dismissed as hyperbole. A recent joint survey of trial lawyers conducted by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System unambiguously concluded that "our

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7. The growing call for discovery reform was addressed at the 1976 Pound Conference, convened at the request of Chief Justice Burger to assess growing problems in litigation. The Conference's final report observed that "[w]ild fishing expeditions . . . seem to be the norm," and lamented the "[u]nnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement" that had come to characterize the American legal system. William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978). Two years later, in 1978, the Advisory Committee for the Federal Rules of Civil Procedure discussed refining the scope of discovery in civil litigation. *See* FED. R. CIV. P. 26 advisory committee's note to 1980 amendment (noting that abuses of discovery led, in part, to the 1980 Amendments to Rule 26, which required parties to participate in discovery conferences).

8. *See* FED. R. CIV. P. 26 (listing amendment dates).

9. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, ¶ 1 (2007), http://jolt.richmond.edu/v13i3/article10.pdf (recognizing that the increasing volume and scope of information have stressed the litigation system and are making searching through discovery prohibitively expensive).

10. *In re* Intel Corp. Microprocessor Antitrust Litig., 258 F.R.D. 280, 283 (D. Del. 2008).

11. Kenneth J. Withers, *The Real Cost of Virtual Discovery*, FED. DISCOVERY NEWS, Feb. 2001, at 3, 3; *see also* Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 67–68 (2007) ("[E]-discovery is more time-consuming, more burdensome, and more costly than conventional discovery."); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 592 (2001) ("[E]lectronic discovery can be predicted, as a general matter, to give rise to burdens and expense that are of a completely different magnitude from those encountered in traditional discovery.").

discovery system is broken"[12] and that "[e]lectronic discovery, in particular, needs a serious overhaul."[13] Seventy-one percent of the survey's respondents—consisting of a group of trial attorneys from both the plaintiffs' and defense bars—believe that discovery is used as "a tool to force settlement."[14] These views are admittedly subjective, but they are confirmed by other empirical evidence showing that the number of discovery disputes resolved by courts has risen precipitously in the past decade—an increase that coincides with the ascendancy of electronic discovery.[15]

The origins of the problems in the American civil discovery system are varied and complex. One principal cause is the American rule, which obligates parties to bear their own litigation costs.[16] This fosters the indiscriminate use of discovery and encourages parties to burden their opponents with costly and time-consuming information requests. The tandem increase in cost and delay associated with discovery can also be traced to the failure of procedural rules to adequately limit the scope and amount of discovery permitted, a problem that has been exacerbated considerably by electronic discovery. The adversarial system itself also promotes discovery abuse. This system incentivizes abusive discovery tactics that can provide a competitive advantage. Such tactics include coercing a settlement by increasing an opponent's costs through unnecessary information requests and compelling an opponent to produce

12. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 9 (2009), *available at* http://www.du.edu/legalinstitute/pubs/ACTL-IAALS Final Report Revised 4-15-09.pdf.

13. *Id.* at 2.

14. *Id.* at 9.

15. During the nearly three-decade period before electronic discovery became commonplace in 1998, a total of 3,128 cases involved "discovery disputes." By contrast, 7,207 such cases have arisen since 1999, based on a search of Westlaw's ALLFEDS database performed on April 14, 2010. The search updates a search first performed by Professor John S. Beckerman. *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 508 (2000). Professor Beckerman notes that his figures could potentially be overstated because he made no effort to exclude criminal cases or cases in which the phrase "discovery dispute" is mentioned only in passing (for example, "this case was free of any discovery disputes"). *Id.* at 508 n.12. I have not attempted to correct for this potential flaw. Professor Beckerman justifies his approach by opining that "judges would rarely include the words 'discovery dispute' in a reported opinion unless pretrial litigation actually contained a discovery dispute that the judge thought noteworthy." *Id.*

16. The English rule, in contrast, requires the losing party to bear the legal costs of the prevailing party. BLACK'S LAW DICTIONARY 609 (8th ed. 2004).

confidential, proprietary, or embarrassing information. Fears of malpractice claims also lead attorneys to adopt a leave-no-stone-unturned approach to discovery. Finally, for a variety of reasons, courts have been reluctant to assertively manage the discovery process or to impose meaningful sanctions for abuses.

All of these problems have been exacerbated by the particular challenges of electronic discovery. A recent case vividly illustrates how electronic documents, particularly email, are vastly altering the discovery landscape. In *Matter of Fannie Mae Securities Litigation*,[17] the Office of Federal Housing Enterprise Oversight (OFHEO) was served with a third-party subpoena to produce certain emails.[18] OFHEO's in-house counsel agreed to voluntarily comply with the subpoena. Unfortunately, this agreement was made before OFHEO comprehended the time and expense that full compliance would entail. After OFHEO missed numerous discovery deadlines, the district court held the federal agency in contempt.[19] The court ordered OFHEO to produce all documents responsive to the subpoena, even those otherwise protected by privilege. Because many of the emails were no longer reasonably accessible and because the plaintiffs sought production of 80 percent of all of OFHEO's emails, the federal agency ultimately spent $6 million to comply with the subpoena—approximately one-ninth of its entire annual budget.[20] The United States Court of Appeals for the District of Columbia Circuit upheld the contempt citation, rejecting OFHEO's argument that it should not have been compelled to comply with the subpoena in light of the excessive costs involved.[21]

The *Fannie Mae* case provides an unsettling glimpse of the future of civil litigation in the United States. The burgeoning size and complexity of cases,[22] coupled with the explosive growth of electronic records, is stretching the pretrial discovery process beyond its breaking point. Because discovery occupies such an important role in the American legal system, resolving this problem is critical. Without

17. *In re* Fannie Mae Sec. Litig., 552 F.3d 814 (D.C. Cir. 2008).

18. *Id.* at 816.

19. *Id.* at 818.

20. *Id.* at 817.

21. *Id.* at 821–22.

22. *See, e.g.*, Bell et al., *supra* note 3, at 8 (noting that "the United States has become a litigious society in which the courts are being asked to resolve an almost incomprehensible spectrum of problems").

reform, the delay, waste, and expense signified by the *Fannie Mae* case will become routine.

Importantly, effective reform is possible. Some state courts have shown how. For example, Oregon's rules of civil procedure require plaintiffs to plead a "plain and concise statement of the ultimate facts constituting a claim for relief."[23] This fact-based standard is more stringent than the notice-pleading standard in the Federal Rules of Civil Procedure. Similarly, Oregon's discovery rules are more limited than those in the Federal Rules. No more than thirty requests for admission are permitted,[24] and interrogatories are not permitted at all. Notably, a survey conducted in Multnomah County, Oregon, found that parties in Oregon state court rarely file discovery-related motions.[25] These data suggest that Oregon's stricter pleading and discovery standards actually result in higher-quality claims being pursued in state court, with less disputed-motion practice impeding the orderly administration of cases.

Similar rule changes would be the most effective way to curb discovery abuse at the federal level. In the interim, however, some discovery problems can be alleviated under the existing rules if they are applied more rigorously. Most notably, judges should institute more formalized case-management orders that set clear guidelines for discovery early in a case and pay closer attention to discovery disputes when they first begin to percolate.

This Article examines the escalating problems in the U.S. civil discovery system and how they can be remedied. Part I reviews the origins and development of civil discovery in the United States, which sowed the seeds for today's problems. Part II demonstrates how electronic discovery has led to increased abuses of the discovery system. Part III discusses prior efforts to reform civil discovery in the United States and analyzes why they have been largely ineffective. Finally, Part IV proffers potential remedies to the problems, taking particular note of the approaches various states have adopted, as well as reforms suggested by practitioners.

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23. OR. R. CIV. P. 18A.

24. OR. R. CIV. P. 45F.

25. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE OREGON COURTS: AN ANALYSIS OF MULTNOMAH COUNTY 15–16 (2010) (proposing that the stricter limits on discovery in Oregon explain why, out of 495 cases, "only 54 motions concerning any aspect of discovery were observed").

I. BACKGROUND

This Part traces the history of the federal civil-discovery system and shows how the gradual weakening of discovery limits increased opportunities for abuse and how early reform efforts failed to counteract them.

A. The Origins of Civil Discovery in the United States

Liberal pretrial discovery is a fundamental component of the civil justice system in the United States. But it was not always so. American courts initially followed the approach of English courts of law, in which pretrial discovery was almost nonexistent.[26] In fact, under the Field Code,[27] which represented the first code of civil procedure in the United States and served as the framework for the rules of civil procedure in most American courts throughout the late nineteenth and early twentieth centuries,[28] discovery could not begin unless a plaintiff could independently state facts to substantiate the claims set forth in the complaint.[29] Even if a plaintiff could reach the discovery phase, few methods of inquiry were available.

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26. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 B.C. L. REV. 691, 694 (1998) ("Historically, discovery had been extremely limited in both England and the United States."). Professor Subrin explains that the notion of discovery was incongruous with early common law, which viewed litigation "not as a rational quest for truth, but rather a method by which society could determine which side God took to be truthful or just." *Id.* at 694–95.

27. The Field Code was drafted by David Dudley Field for New York and subsequently adopted by other states. Distrustful of authority—particularly the unelected judiciary—and intent on protecting the privacy of individuals against unnecessary intrusion, the Field Code provided for extremely limited discovery. *Id.* at 696.

28. By 1928, twenty-eight of the forty-eight states had adopted the Field Code. *See* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 19–20 (1928). Federal courts generally followed the Field Code as well. Under the Conformity Act of 1872, federal courts were obligated to hew "as near as may be" to the civil procedure rules of the state in which they were located. Act of June 1, 1872 (Conformity Act), ch. 255, §§ 5–6, 17 Stat. 196, 197 (repealed 1948); *see also* Subrin, *supra* note 26, at 692 (stating that the Conformity Act of 1872 was the initial target of criticism for proponents of a uniform set of procedural rules for civil cases in law).

29. Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2241 (1989) ("Under the [Field] codes, a plaintiff could not even get into discovery unless she could independently substantiate such suspicions, for substantiation had to be manifested in a complaint that stated 'facts.'"); *see also* Subrin, *supra* note 26, at 694–97 (asserting that under the Field Code, pleadings were used to, among other purposes, "eliminate . . . factual issues and to focus on the controversy").

Interrogatories, for example, were strictly prohibited.[30] Depositions, document requests, and other discovery practices commonplace in modern litigation were rare and could be undertaken only with leave of court.[31] Depositions, moreover, were not as they are today—only the opposing party could be deposed, and only in open court.[32] Such antagonism to discovery was captured in *Carpenter v. Winn*.[33] In that case, the Supreme Court rejected an attempt to "pry into the case of [an] adversary to learn its strength or weakness" as an impermissible "fishing bill."[34]

This general distrust of discovery, however, did not last. States eventually began to liberalize the discovery process. By 1932, some were permitting interrogatories, depositions of witnesses, or both.[35] Still, despite these changes, pretrial discovery in state courts remained extremely rare.[36] This held true in federal courts as well.[37]

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30. Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 332 (1988) ("The Field Code eliminated equitable bills of discovery, and interrogatories as part of the equitable bill.").

31. Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 601 (2002) (stating that under the Field codes, plaintiffs had "little opportunity to examine documents that might be relevant and useful, use depositions, interrogatories, or other tools of information gathering to facilitate the proof of an existing or new theory of the case").

32. Subrin, *supra* note 30, at 333 (asserting that the depositions permitted by the Code were "in lieu of calling the adverse party at the trial, and subject to the same rules of examination as at trial" and that a "pretrial deposition . . . was to be before a judge, who would rule on evidence objections" (internal quotation marks omitted)). The few federal statutes permitting depositions, however, were designed only to preserve the testimony of witnesses who could not appear at trial, rather than to uncover new information. At the time, a federal statute, 28 U.S.C. § 639 (1934), permitted depositions *de bene esse*, but only when the witness resided more than one hundred miles from the court, was at sea or about to leave the United States, or was old or infirm. Subrin, *supra* note 26, at 698. A second federal statute, 28 U.S.C. § 644 (1934), permitted depositions *dedimus potestatem*, which could be taken only upon a showing that it was (i) necessary to avoid the failure or delay of justice, (ii) the witness was beyond the reach of the court's process, (iii) the deposition could not be taken *de bene esse*, and (iv) the deposition was requested in good faith and not for discovery purposes. Subrin, *supra* note 26, at 698–99 (citing 6 MOORE'S FEDERAL PRACTICE § 26 app. 100 (3d ed. 1997)).

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

34. *Id.* at 540. The Massachusetts Supreme Court articulated a similar disdain for discovery: "This is what Lord Hardwicke termed a 'fishing bill,' to enable the plaintiff to learn whether he may sue his judgment against Kingsbury, and levy on the land, with prospect of success . . . . As a bill of discovery only, we think it cannot be maintained." Fiske v. Slack, 38 Mass. (21 Pick.) 361, 364, 366 (1838) (citations omitted).

35. Subrin, *supra* note 26, at 702–04 (discussing the evolution of the federal discovery rules to permit more frequent use of interrogation through the taking of depositions).

36. *Id.*

B. Adoption of the Federal Rules

The Federal Rules of Civil Procedure were adopted in 1938. The drafters recognized that the absence of pretrial discovery sometimes placed litigants at a serious disadvantage, leading to trials by ambush.[38] Concerned that the outcomes of trials often hinged not on the merits of the case but on the skills of counsel or the financial resources of the parties, the drafters were determined to implement a system that would allow the parties to have the "fullest possible knowledge of the issues and facts before trial."[39] The drafters believed that wide-ranging discovery would help ensure a just determination in all matters and remedy the imbalance of power between the wealthy and the poor.[40]

This shift to liberal discovery was also premised on two practical considerations. First, the drafters believed that pretrial discovery would greatly reduce litigation costs. Without pretrial discovery, parties could not easily discern what positions the opposition would assert at trial.[41] Prudent litigants therefore adopted an expensive and wasteful be-prepared-for-anything approach to trial preparation.[42] The drafters believed that discovery would reveal the strengths and weaknesses of each party's case at an early stage, thereby facilitating

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37. *Id.* Depositions were the sole discovery permitted in cases at law—aside from a bill of particulars. Depositions were also available in equity, but only upon a showing of "good and exceptional cause" for departing from the general rule that pretrial discovery was not permitted. *Id.* at 699 (citing FED. R. EQ. 47 (repealed 1938), *in* GEORGE FREDERICK RUSH, EQUITY PLEADING AND PRACTICE 221 (1913)).

38. William W Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?*, 74 JUDICATURE 178, 178 (1991) ("Discovery was intended to provide each side with all relevant information about the case to help bring about settlement or, if not, avoid trial by ambush.").

39. Bell et al., *supra* note 3, at 6 (quoting Hickman v. Taylor, 329 U.S. 495, 501 (1947)).

40. *See* Schwarzer, *supra* note 38, at 178 ("[The drafters'] purpose was to bring about the just, speedy and inexpensive determination of every action."); *see also* Kathleen L. Blaner, Alfred W. Cortese, Jr. & Donald H. Green, *Federal Discovery: Crown Jewel or Curse?*, LITIGATION, Summer 1998, at 8, 8 ("Discovery was considered a crown jewel because it sought to open the courts to all elements of society. The drafters saw an imbalance of power between the wealthy and the poor. By mandating a full exchange of information, the drafters thought that they could help less powerful litigants prove their legal claims and thus redress the imbalance.").

41. *See* Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 737–38 (1939) (explaining that another problem with the prediscovery era was that even when the pleadings accurately revealed the parties' exact positions, they did not reveal the nature or source of the proof that would be offered in support).

42. *Id.*

early settlements and preserving valuable resources.[43] Second, the drafters concluded that pretrial discovery would be an efficient and self-regulating process.[44] Mutual self-interest, coupled with a desire to avoid wasting clients' time and money, would minimize discovery disputes and lead to the expeditious exchange of relevant information.[45]

Importantly, however, the drafters of the original Federal Rules dismissed warning signs indicating that these two key premises were deeply flawed.[46] After all, abuse was already prevalent even under the limited discovery that some states permitted at that time. For example, a few states permitted depositions but required that the deposition be suspended if the parties could not resolve an objection themselves. This led to various forms of mischief. In some small towns, local lawyers would "take advantage of lawyers from the city . . . . Knowing that their opponents [were] . . . not apt to wait over until a rather tardy judge compel[led] an answer, they instruct[ed] their clients to refuse to answer questions which clearly [were] proper."[47]

Other abusive tactics familiar to modern practitioners were also common by 1938. In states where parties were entitled to take depositions, for instance, parties filed a motion to reschedule or modify the scope of the depositions "in nearly every important case."[48] In New York, where defendants were permitted discovery only as it related to their affirmative defenses, defendants regularly included in their answers "fictitious defenses for the sole purpose of securing an examination of [the] adversary."[49] Similarly, in states that permitted requests for admissions, parties would use such requests "as a tactical weapon" by routinely demanding that their opponents "admit practically every item of evidence."[50]

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43. Bell et al., *supra* note 3, at 6–7; Schwarzer, *supra* note 38, at 178.

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

45. *Id.*

46. *See* John M. Wunderlich, Note, Tellabs v. Makor Issues & Rights, Ltd.*: The Weighing Game*, 39 LOY. U. CHI. L.J. 613, 657 (2008) ("[E]ven before the Federal Rules of Civil Procedure . . . were enacted, many feared that excessive discovery would allow plaintiffs to blackmail corporate defendants.").

47. Subrin, *supra* note 26, at 703–04 (quoting GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 100–01 (1932)).

48. *Id.* at 704 (quoting RAGLAND, *supra* note 47, at 67).

49. *Id.* at 705 (quoting RAGLAND, *supra* note 47, at 132).

50. *Id.* at 706 (quoting RAGLAND, *supra* note 47, at 201).

But of all available methods of discovery, interrogatories provided the most fertile ground for abuse. Overwhelming an opponent with countless generic interrogatories or requests became a common tactic. As one commentator notes, this tactic even predated the arrival of modern photocopiers.[51] Respondents to interrogatories also engaged in abusive tactics. As interrogatories became more common, respondents began providing vague or ambiguous answers.[52] This distorted the adversarial process, forcing parties to spend time litigating the propriety of interrogatories rather than preparing their claims and defenses. In Massachusetts, the excessive use of interrogatories, combined with the prevalence of evasive answers, imposed a "surprisingly heavy" burden on courts, compelling them to devote "[a]lmost all of [their] motion hours . . . [to] deciding objections to interrogatories."[53]

Despite the extent of these abuses in state courts, the drafters of the 1938 Federal Rules radically expanded both the scope of permissible discovery and the tools parties could use to obtain it.[54] In so doing, the drafters went "further than any single jurisdiction's discovery provisions."[55]

C. Early Application of the Federal Rules

Federal courts initially resisted the broad discovery provisions provided in the new rules. Some courts, for example, limited discovery to admissible evidence.[56] Others allowed the requesting

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51. *Id.* at 707 (quoting RAGLAND, *supra* note 47, at 93).

52. *Id.* at 708 (quoting RAGLAND, *supra* note 47, at 95).

53. *Id.* at 707–08 (quoting RAGLAND, *supra* note 47, at 94).

54. The new discovery tools included depositions upon oral examination, depositions upon written examination, interrogatories to parties, requests for production of documents and things and entry upon land for inspection and other purposes, physical and mental examinations of persons, and requests for admission. FED. R. CIV. P. 30–36.

55. Subrin, *supra* note 26, at 719. The Federal Rules essentially made available all discovery tools then in existence, which no state had done at that time. *See id.* ("[A]t the time Sunderland drafted what became the federal discovery rules, no one state allowed the total panoply of devices."). Yet the Federal Rules also included significant limits. For example, documents could be examined only upon a court order, and a showing of good cause was necessary for the production of documents under the original Rule 34. Moskowitz, *supra* note 31, at 603.

56. Jonathan M. Redgrave & Ted. S. Hiser, *The Information Age, Part I: Fishing in the Ocean, A Critical Examination of Discovery in the Electronic Age*, 2 SEDONA CONF. J. 195, 199 (2001). Parties were therefore barred from seeking hearsay evidence during depositions. *E.g.*, Maryland *ex rel.* Montvila v. Pan-Am. Bus Lines, Inc., 1 F.R.D. 213, 214–15 (D. Md. 1940);

party to use discovery only to build its own case and not to test the adversary's claims or defenses.[57] Courts even disagreed over whether the discovery devices set out in the Federal Rules could be used cumulatively.[58]

In response to these and other disputes, the Federal Rules were amended in 1946. The 1946 changes were intended to permit unfettered discovery. For example, the amendments made clear that discovery extended even to inadmissible evidence, provided the evidence sought was likely to lead to admissible evidence.[59] The Supreme Court also lent its imprimatur to unfettered discovery. In the seminal case of *Hickman v. Taylor*,[60] the Court declared that the new discovery rules were "to be accorded a broad and liberal treatment" and that "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."[61] Although *Hickman* cautioned that discovery could not be employed to annoy, embarrass, or oppress an adversary,[62] it declared that litigants were free to trawl for evidence with few meaningful limitations.

Hickman's effect was profound. Lower courts began to endorse broad discovery, subject only to a nominal and increasingly soft relevancy requirement.[63] And this problem was not limited to federal

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Poppino v. Jones Store Co., 1 F.R.D. 215, 217 (W.D. Mo. 1940); Rose Silk Mills, Inc. v. Ins. Co. of N. Am., 29 F. Supp. 504, 505–06 (S.D.N.Y. 1939).

57. *See, e.g.*, *Poppino*, 1 F.R.D. at 218 ("[M]ay [a plaintiff] obtain from his adversary not only that evidence which will aid him to make out *his* case, but also that evidence which his adversary might use to make out his defense? We shall be surprised if it shall ever be ruled that the Supreme Court had any such revolutionary purpose. Nothing of that kind could be accomplished by the old bill of discovery. The function of the bill of discovery was limited to discovering what would aid the party seeking discovery in making out *his* case or *his* defense.").

58. *See* Kulich v. Murray, 28 F. Supp. 675, 676 (S.D.N.Y. 1939) (denying a motion to vacate a deposition made on the grounds that the plaintiff had already "availed himself of every pre-trial proceeding under the new Federal Rules of Civil Procedure").

59. Redgrave & Hiser, *supra* note 56, at 199.

60. Hickman v. Taylor, 329 U.S. 495 (1947).

61. *Id.* at 507.

62. *Id.* at 507–08.

63. *See, e.g.*, Reed v. Swift & Co., 11 F.R.D. 273, 274 (W.D. Mo. 1951) ("It is much more desirable to allow discovery of facts which may prove to be irrelevant and immaterial than to deny discovery which may bring to light facts which are more material to the issues than any facts theretofore known."); Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477, 479 (W.D. Mo. 1950) ("It is no valid objection to interrogatories propounded under Rule 33 . . . to merely state that they are irrelevant to the issues. . . . [T]he relevancy of interrogatories is to be determined by their relevancy to the proceedings and subject-matter and not relevancy to the issues in an action.").

courts. State courts generally fell in line with the liberal federal approach to discovery.[64]

D. 1970 Amendments to the Federal Rules

By many accounts, the American discovery system functioned reasonably well under the Federal Rules regime for approximately the first thirty years.[65] But as parties increasingly relied on U.S. courts to address various social issues, litigation expanded well beyond what the drafters of the Federal Rules could have imagined.[66] The passage of sweeping civil rights legislation,[67] the enactment of harsher criminal penalties,[68] and the trend toward relying on private litigants instead of government agencies to enforce certain laws[69] all combined to expand the societal role of federal and state courts and to raise the overall volume of litigation.

Increased litigation, in turn, led to calls for still further expansions of pretrial discovery. The Supreme Court heeded these

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64. Moskowitz, *supra* note 31, at 604.

65. *See* Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 749 (1998) ("Party-controlled discovery reached its high-water mark in the 1970 amendments in terms of rule provisions."); *see also* Blaner et al., *supra* note 40, at 8 ("Discovery reached its greatest expanse in 1970, when the rulemakers consolidated many aspects of the discovery rules and revamped Rule 26 to serve as a general guide to discovery.").

66. *See* Blaner et al., *supra* note 40, at 8 (noting that the "courts were not yet an instrument for social change" when the Federal Rules were drafted). As one expert noted, "[T]he drafters [of the Federal Rules] would be amazed at how immense many cases now become and how prominent a role discovery plays in that process." Subrin, *supra* note 26, at 743.

67. *See* Ishra Solieman, Note, *Born Osama: Muslim-American Employment Discrimination*, 51 ARIZ. L. REV. 1069, 1079–80 (2009) ("Since the passage of the Civil Rights Act in 1964, employment-discrimination cases have been on the rise. During the 1990s, federal court filings increased three-fold, accounting for nearly 10% of the cases filed in federal district courts." (footnote omitted)); *see also* Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2180–81 n.12 (1989) (noting that Judge Richard Posner has theorized that expanding civil rights litigation was part, but not all, of the reason federal caseloads ballooned after 1960); Blaner et al., *supra* note 40, at 8 (identifying equal rights legislation as one cause of expanding caseloads).

68. *See* Stuart Taylor Jr., *A Quiet Crisis in the Courts*, LEGAL TIMES, Jan. 20, 1992, at 23, 23 ("The courts have been deluged by criminal trials and appeals, in large part because harsh penalties have increased defendants' incentives to go to trial rather than plead guilty. The new sentencing process is so complex and hypertechnical that it takes judges roughly 25 percent more time than before."). In an interview, Federal District Judge Jack B. Weinstein opined that the increasing criminal caseload made it "very difficult for any judge to find the time to try civil cases." Kenneth P. Nolan, *Weinstein on the Courts*, LITIGATION, Spring 1992, at 24, 24.

69. *See* Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4 (1997) ("Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more.").

calls in 1970 when it empowered the Rules Drafting Committee to amend the Federal Rules to lift certain restrictions.[70] The 1970 Amendments abandoned the requirement that a party demonstrate good cause before it could request the production of documents.[71] The Amendments also allowed parties to use discovery devices as frequently as they wished.[72] The floodgates had been opened.

E. Early Reform Efforts

The 1970 Amendments triggered an almost immediate backlash. Broad opposition to expansive discovery emerged within only a few years,[73] as confidence in the ability of courts and litigants to manage the ever-expanding discovery process began to deteriorate.[74] The 1976 Pound Conference, which had been "convened at the behest of Chief Justice Warren Burger to examine the troubled state of litigation,"[75] concluded,

> There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm. Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as

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70. *See generally* Order Prescribing Amendments to the Rules of Civil Procedure for the U.S. District Courts, 398 U.S. 977 (1970) (detailing the Supreme Court's 1970 Amendments to the Federal Rules of Civil Procedure).

71. FED. R. CIV. P. 26 advisory committee's note to 1970 amendment; Blaner et al., *supra* note 40, at 8.

72. *See supra* note 71.

73. Marcus, *supra* note 65, at 752. The growing dissatisfaction with the discovery process in the 1960s and 1970s is evidenced by the significant increase in the literature on the subject of discovery and the number of conferences, reports, symposia, meetings, or studies devoted solely or primarily to the issue of discovery problems. *E.g.*, Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787; Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 873; Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217 [hereinafter Brazil, *Views from the Front Lines*]; David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979); David S. Walker, *Professionalism and Procedure: Notes on an Empirical Study*, 38 DRAKE L. REV. 759 (1988–89); Note, *Federal Discovery Rules: Effects of the 1970 Amendments*, 8 COLUM. J.L. & SOC. PROBS. 623 (1972).

74. James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaina, RAND Inst. for Civil Justice, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 624 (1998).

75. Bell et al., *supra* note 3, at 9.

> a lever toward settlement have come to be part of some lawyers' trial strategy.[76]

The growing problems with pretrial discovery compelled state courts, which were largely following the approaches of the Federal Rules, to begin experimenting with discovery reform in the late 1970s,[77] and prompted the American Bar Association (ABA) to convene a study group to examine the problem of discovery abuse.[78] Based on the ABA study group's 1980 report, the Judicial Conference tightened the federal discovery rules in 1980 and 1983.[79] When these reforms proved inadequate, Congress passed the Civil Justice Reform Act of 1990 (CRJA),[80] triggering a further round of

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76. Erickson, *supra* note 7, at 288.

77. *See* PATRICIA A. EBENER, RAND INST. FOR CIVIL JUSTICE, COURT EFFORTS TO REDUCE PRETRIAL DELAY: A NATIONAL INVENTORY 30 (1981) ("[C]ontrolling the pace of discovery is an increasingly common objective of court management, and courts have placed limits both on the scope of discovery and the time allowed for it."). This survey found that twenty-nine states and twenty-three of the nation's largest metropolitan trial courts had implemented reforms to expedite pretrial discovery, including using mail and telephone to expedite pretrial motions, requiring attorneys to attempt to settle their discovery disputes before requesting judicial intervention, delegating resolution of discovery motions to para-judicial employees, limiting the number of interrogatories, limiting the time allowed for discovery, holding conferences to schedule discovery, and authorizing sanctions for frivolous discovery motions. *Id.*

78. *See generally* ABA Section of Litig., *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137 (1980) (examining the problem of discovery abuse).

79. Edward D. Cavanaugh, *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, 779–81 (1985). The 1983 Amendments prohibited redundant discovery, required that discovery be proportional to the magnitude of the case, and mandated court sanctions for violation of the rules. *Id.* at 788–90. They also explicitly provided for judicial discussion of discovery plans at pretrial conferences and for the issuance of an order scheduling discovery and other pretrial events. *Id.* at 782, 785.

80. Civil Justice Reform Act of 1990 (CJRA), Pub L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471–482 (2006)). According to the legislative history underlying the CJRA, the purpose behind the Act was "to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy, and inexpensive resolution of civil disputes in our Nation's federal courts." S. REP. NO. 101-416, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804. Under the Act, each U.S. district court was required to implement a Civil Justice Expense and Delay Reduction Plan under the direction of an advisory group. *Id.* at 13, *reprinted in* 1990 U.S.C.C.A.N. at 6817. The plans served four purposes: (1) to "aid in the resolution of civil cases on the merits"; (2) to "monitor discovery"; (3) to "enhance litigation management"; and (4) to "assure the just, speedy, and inexpensive resolutions of civil matters." Lisa J. Trembly, *Mandatory Disclosure: A Historical Review of the Adoption of Rule 26 and an Examination of the Events That Have Transpired Since Its Adoption*, 21 SETON HALL LEGIS. J. 425, 434 (1997).

study and reforms.[81] In addition, the federal discovery rules were amended in 1993 to mandate that parties meet and prepare a proposed discovery plan early in the case,[82] and that certain relevant information and evidence be produced regardless of whether it had been requested by the opposition.[83] The 1993 Amendments also limited the number of depositions and interrogatories.[84]

These reforms, though well intentioned, failed to stem the delay and excessive costs that have become the hallmarks of pretrial discovery. In fact, the discovery abuses common today differ little from those that concerned the drafters of the original Federal Rules.[85] The frequency and severity of these abuses, however, have changed considerably.

II. ELECTRONIC DISCOVERY DEEPENS THE PROBLEM

The advent of electronic discovery has significantly raised the stakes in discovery abuse. The volume and costs of discovery in the electronic age amount in some cases to billions of pages and millions of dollars. Moreover, difficulties in managing and organizing electronic data have created opportunities for significant discovery abuse by litigants who see an opportunity to increase their opponents' costs and thereby force a settlement of litigation regardless of merit. These developments have pushed discovery to the forefront of litigation concerns for American businesses.

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81. The CJRA spawned a number of reforms, including mediation and arbitration in civil cases. *See* Stephanie B. Goldberg, *Rand-ly Criticized: Congressional Court Fix Had Little Effect on Cost and Delay*, A.B.A. J., Apr. 1997, at 14, 14–16 (describing a study evaluating reforms spawned by the CJRA). Other reforms adopted by district court judges included automatic disclosure and limits on the number of interrogatories and depositions. Carl Tobias, *Silver Linings in Federal Civil Justice Reform*, 59 BROOK. L. REV. 857, 867 (1993). Although some have questioned whether the CJRA-inspired reforms reduced the cost or time associated with civil discovery, the combination of methods, such as setting trial dates early and having judges manage cases upon filing, was effective in reducing the amount of time needed to dispose of cases. *See* Goldberg, *supra*, at 14.

82. Order Prescribing Amendments to the Federal Rules of Civil Procedure, 507 U.S. 1089, 1125 (1993).

83. *Id.* at 1118–21.

84. Kakalik et al., *supra* note 74, at 625.

85. *See* Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?,"* 46 HASTINGS L.J. 679, 701 (1995) ("Interestingly, the claims of discovery abuse and the types of abuse claimed seem to have remained relatively constant over time, even though there have been several amendments to the discovery rules designed specifically to cure certain types of abuse.").

A. Electronic Discovery Presents Unique and Urgent Challenges

1. *Electronic Discovery Has Significantly Increased the Volume and Cost of Discovery.* The ascendancy of electronic discovery in recent years has revealed the need for fundamental changes to the American discovery system.[86] Modern computer systems have exponentially increased the number of documents that companies create and retain in the normal course of business.[87] According to experts, 99 percent of the world's information is now generated electronically.[88] Approximately 36.5 trillion emails are sent worldwide every year,[89] with the average employee sending or receiving 135 emails each day.[90] And email traffic is only the tip of the iceberg. Each day, close to 12 billion instant messages are sent worldwide.[91]

This surge in the creation of electronic documents is especially problematic because modern computer technology permits companies to retain vast records almost indefinitely. In 2005, ExxonMobil reported to the Federal Rules Advisory Committee that it was storing 500 terabytes of electronic information in the United States alone. This amounts to 250 billion typewritten pages.[92] Corporate defendants now face the dismaying prospect of combing

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86. *See* Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8, ¶ 1 (2008), http://jolt.richmond.edu/v14i3/article8.pdf ("An explosion in the amount and discovery of electronically stored information (ESI) threatens to clog the federal court system and make judicial determination of the substantive merits of disputes an endangered species.").

87. *See* Mia Mazza, Emmalena K. Quesada & Ashley L. Sternberg, *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, ¶ 2 (2007), http://jolt.richmond.edu/v13i3/article11.pdf ("Advances in computer software and hardware . . . have greatly increased the ability to generate, replicate, circulate, and accumulate electronic information.").

88. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 5 (2008) (citing PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? 2003, at 1 (2003), http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf), *available at* http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf.

89. *See* Paul & Baron, *supra* note 9, ¶ 12 (noting that "[p]robably close to 100 billion emails are sent daily").

90. Press Release, LiveOffice, LiveOffice Survey Reveals Organizations Are Unprepared for E-Discovery Requests (June 25, 2007), http://www.marketwire.com/mw/rel_us_print.jsp?id=745509.

91. Gene J. Koprowski, *Instant Messaging Grew by Nearly 20 Percent in 2005*, TECHNEWSWORLD (Nov. 10, 2005), http://www.technewsworld.com/story/47270.html.

92. Letter from Charles A. Beach, Coordinator, Corp. Litig., ExxonMobil Corp., to Peter G. McCabe, Secretary, Comm. on Rules of Practice and Procedure 2 (Feb. 11, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/e-discovery/04-CV-002.pdf.

through virtually limitless caches of electronic records every time they are threatened with litigation.

But an ever-growing volume of electronic documents is only part of the problem. The harsh reality is that the costs of producing electronic documents far exceed those of producing paper documents. Unlike paper documents, electronic data must be processed and loaded into a special database before they can even be reviewed for potential relevance.[93] Also, older electronic data are typically stored on backup tapes, which can be singularly time-consuming and costly to review. The data from such tapes must first be decompressed and then processed into a reviewable format.[94] Further, because the information contained on a backup tape may be recorded in a serpentine fashion, "the tape drive must shuttle back and forth through the entire tape repeatedly to get to the data."[95] This shuttling process occurs at a glacial pace when compared to the speed with which computers normally retrieve data. Additionally, because backup tapes often lack a directory or catalogue of the information they contain, a party may need to search an entire tape—or perhaps all of an opponent's tapes—to locate a single file.[96]

Restoring backup tapes for review can easily cost millions of dollars. In one case, the defendant estimated a cost of $9.75 million to restore backup tapes.[97] The cost of reviewing backup tapes can become higher still if the data they contain were created on obsolete software or hardware, an occurrence that is far from uncommon.[98]

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93. Among other things, electronic data must be subjected to a process known as de-duplication, in which identical copies of documents are removed prior to review. This process can greatly reduce review costs.

94. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE EMERGING CHALLENGE OF ELECTRONIC DISCOVERY: STRATEGIES FOR AMERICAN BUSINESSES 3 (2008), *available at* http://www.du.edu/legalinstitute/pubs/EDiscovery-Strategies.pdf (noting that "much of the information on the backup tapes is difficult to recover, meaning it must be specially processed or translated before it can be used").

95. CRAIG BALL, WHAT JUDGES SHOULD KNOW ABOUT DISCOVERY FROM BACKUP TAPES 2 (2007), *available at* http://www.craigball.com/What_Judges_Should_Know_About_Discovery_from_Backup_Tapes-corrected.pdf.

96. Sarah A.L. Phillips, Comment, *Discoverability of Electronic Data Under the Proposed Amendments to the Federal Rules of Civil Procedure: How Effective Are Proposed Protections for "Not Reasonably Accessible" Data?*, 83 N.C. L. REV. 984, 991 (2005).

97. *See* Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 425 (S.D.N.Y. 2002) ("If the emails on all of the back-up tapes were produced instead of a sample of eight sessions, the total cost would mushroom to almost $9,750,000.").

98. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 88, at 13. Businesses often find that older data cannot be easily retrieved because they were created with

These substantial costs have not, however, dissuaded courts from routinely ordering defendants to restore and search backup tapes for potentially responsive documents.[99]

Further escalating the costs of electronic discovery are the qualitative differences between electronic and paper documents. As the drafters of the Federal Rules observed, most people adopt a more informal style when drafting emails, text messages, and instant messages, a practice that tends to make privilege review "more difficult, and . . . correspondingly more expensive."[100] The casual milieu of email and other electronic communications also gives rise to linguistic ambiguities that further complicate the reviewer's task. Employees frequently devise their own abbreviations and shorthand terminology for such correspondence,[101] a convention that leaves reviewing attorneys unable to comprehend documents without guidance from the authors.[102]

The additional costs associated with production of electronic records can be considerable. One expert estimates the cost of producing a single electronic document to be as high as $4.[103] Verizon, which has devoted considerable attention to electronic discovery issues, has estimated that producing one gigabyte of data—the equivalent of between 15,477 and 677,963 printed pages[104]—costs between $5,000 and $7,000.[105] But far more than a single gigabyte of data will often be at issue. Commentators opine that even a typical midsize case now involves at least 500 gigabytes of data, resulting in costs of $2.5 to $3.5 million for electronic discovery alone.[106] Another study found that from 2006 to 2008, the average surveyed company

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software that is no longer in production or are stored on media that is no longer supported by the manufacturer. Restoring this type of data is a laborious and expensive process. *Id.*

99. Phillips, *supra* note 96, at 992.

100. FED. R. CIV. P. 26(f) advisory committee's note to 2006 amendment.

101. *See* Stephanie Raposo, *Quick! Tell Us What KUTGW Mean*s, WALL ST. J., Aug. 5, 2009, at D1 ("In many offices, a working knowledge of text-speak is becoming de rigueur.").

102. *See* Paul & Baron, *supra* note 9, ¶ 38 ("Thus, it is not surprising that lawyers and those to whom they delegate search tasks may not be particularly good at ferreting out responsive information through the use of simple keyword search terms."). These abbreviations also complicate the process of locating relevant documents in the first instance, as keyword searches may not incorporate these key terms.

103. Ann G. Fort, *Mandatory E-Discovery: Compliance Can Create David and Goliath Issues, Reminiscent of the Early Days of Sarbanes-Oxley*, DAILY REP., Mar. 19, 2007, at 13.

104. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 88, at 29 n.2.

105. *Id.* at 5.

106. *Id.*

spent between $621,880 and $2,993,567 per case on electronic discovery.[107] At the high end, companies in the study reported average per-case discovery costs ranging from $2,354,868 to $9,759,900.[108]

The costs of electronic discovery are continuing to rise. One report indicates that the volume of information, including electronically stored information, is growing at a rate of 30 percent annually.[109] The growing cache of electronic information drives up costs, as companies are forced to cull through ever-larger stockpiles of data to identify responsive documents. According to the influential Socha-Gelbmann Electronic Discovery Survey, expenditures for the collection and processing of electronic documents in the United States will reach $4.7 billion in 2010, an increase of 15 percent over the prior year.[110] Notably, this figure does not include the cost of reviewing these documents for responsiveness or privilege, a process that can comprise between 75 and 90 percent of the cost of producing electronic records.[111]

The rising costs associated with electronic discovery threaten to drive all but the largest cases out of the system.[112] A report released in 2008 by the RAND Institute for Civil Justice warns that in low-value cases, the costs of electronic discovery "could dominate the underlying stakes in dispute."[113] But even in large cases, the volume of electronic information is growing so fast that traditional techniques of identifying and reviewing documents are breaking under the strain.[114]

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107. LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES 3 (2010), *available at* http://civilconference.uscourts.gov (follow "Empirical Research, Pt. 2" hyperlink; then follow "Litigation Cost Survey of Major Companies" hyperlink).

108. *Id.*

109. *See* LYMAN & VARIAN, *supra* note 88, at 2 (estimating that "new stored information grew about 30% a year between 1999 and 2002").

110. George Socha & Tom Gelbmann, *Mining for Gold*, LAW TECH. NEWS (Aug. 1, 2008), http://www.law.com/jsp/lawtechnologynews/PubArticleLTNC.jsp?id=1202435497600&Mining_for_Gold&hbxlogin=1#.

111. JAMES N. DERTOUZOS, NICHOLAS M. PACE & ROBERT H. ANDERSON, RAND INST. FOR CIVIL JUSTICE, THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY: OPTIONS FOR FUTURE RESEARCH 3 (2008), *available at* http://www.rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf.

112. When Supreme Court Justice Breyer was informed at a conference several years ago that discovery in a routine case might cost $4 million, he remarked, "We can't do that . . . . If it really costs millions of dollars, then you're going to drive out of the litigation system people who ought to be there." Daniel Fisher, *The Data Explosion: Lawyers Charge a Lot for Discovery and Aren't Even Very Good at It. That Spells Opportunity for H5*, FORBES, Oct. 1, 2007, at 72, 73.

113. DERTOUZOS ET AL., *supra* note 111, at 3.

114. Ken Withers, *When E-Mail Explodes*, SAN DIEGO LAW., Nov.–Dec. 2008, at 36, 37.

Several cases have already involved more than one billion potentially relevant electronic documents.[115] Even if only 1 percent of the documents in such cases were reviewed for possible production, it would likely take 100 people nearly 7 months and $20 million to conduct an initial review.[116] In light of projected growth rates for electronic documents, it may soon become too expensive for lawyers merely to search through their clients' computer files to identify potentially responsive documents.[117]

Electronic data also present unique challenges with regard to collecting potentially responsive documents. Most companies have little idea what documents exist in their computer systems or precisely where those documents are located.[118] The sheer volume of electronic documents created by modern businesses simply makes cataloguing or organizing the documents too difficult and expensive. The ease with which computer records can be created further complicates document-collection efforts. For example, employees can save huge swaths of information on desktop computers, laptops, and portable storage devices without anyone else's knowledge. Merely identifying all versions of a particular document can be inordinately difficult because an employee may have forwarded the document to a large number of individuals, each of whom may have edited it and saved it

115. John H. Jessen, *Special Issues Involving Electronic Discovery*, 9 KAN. J.L. & PUB. POL'Y 425, 428 (2000).

116. Paul & Baron, *supra* note 9, ¶ 20.

117. *See id.* ¶ 1 (noting that "it is becoming prohibitively expensive for lawyers even to search through information").

118. As the Sedona Conference Working Group on Electronic Document Retention and Production notes,

> Neither the users who created the data nor information technology personnel are necessarily aware of the existence and locations of the copies. For instance, a word processing file may reside concurrently on an individual's hard drive, in a network-shared folder, as an attachment to an email, on a backup tape, in an internet cache, and on portable media such as a CD or floppy disk. Furthermore, the location of particular electronic files typically is determined not by their substantive content, but by the software with which they were created, making organized retention and review of those documents difficult.

SEDONA CONFERENCE WORKING GRP. ON ELEC. DOCUMENT RETENTION & PROD., THE SEDONA PRINCIPLES: SECOND EDITION: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 2 n.5 (2007), *available at* http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf; *see also* Ross Chaffin, Comment, *The Growth of Cost-Shifting in Response to the Rising Cost and Importance of Computerized Data in Litigation*, 59 OKLA. L. REV. 115, 123 (2006) (noting that, thanks to email, it is entirely possible that documents and correspondence may reside in "unexpected" places).

on a personal computer.[119] Cases in which companies have been sanctioned for failing to locate all responsive electronic documents abound.[120] In *Qualcomm, Inc. v. Broadcom Corp.*,[121] for example, the plaintiff's counsel failed to identify key emails until after trial had begun, resulting in an $8.5 million sanction.[122]

Preservation of electronic data also presents litigants with special challenges and costs. Once a lawsuit can be reasonably anticipated, both parties are obliged to preserve all potentially relevant evidence.[123] Although this is generally a simple task for hard-copy documents, it poses considerable difficulties for electronic files for several reasons: First, the sheer volume and diversity of electronic data make preservation a challenge. Second, electronic data can be—and, in some cases, are intended to be—ephemeral. Dynamic databases, in which data are constantly being added, modified, and removed, can be extremely difficult to preserve for an extended period of time.[124] Third, computer systems typically include housekeeping programs that automatically delete data that are no longer useful.[125] Unless suspended, these programs can destroy relevant evidence. Fourth, certain electronic information, such as deleted files and metadata,[126] is not visible to normal users.[127]

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119. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 94, at 2 ("Even information you know you have—such as emails—may be more challenging to produce because discovery requests frequently seek even slightly different copies of the same document, and the ability to forward email easily often makes it difficult to determine how many copies exist.").

120. *See, e.g.*, Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 469–72 (S.D.N.Y. 2010) (discussing cases involving sanctions for nonproduction of evidence). *See generally* Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010) (discussing sanctions for e-discovery violations).

121. Qualcomm, Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7), *vacated in part*, No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

122. *Id.* at *17.

123. *See, e.g.*, Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216–17 (S.D.N.Y. 2003) ("The authority to sanction parties for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's own inherent powers. . . . The duty to preserve attached at the time that litigation was reasonably anticipated.").

124. Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH. 9, ¶ 7 (2007), http://jolt.richmond.edu/v13i3/article9.pdf.

125. *See id.* ("[R]outine business processes are often designed to free up storage space for other uses without any intent to impede the preservation of potential evidence for use in discovery.").

126. "Metadata, commonly described as 'data about data,' is defined as 'information describing the history, tracking, or management of an electronic document.'" Williams v.

Although this invisible information can be the most vital evidence in a case,[128] it is frequently destroyed in the normal course of business.[129] For these reasons, the burdens (and costs) of preserving electronic information can be extreme. As ExxonMobil noted to the Federal Rules Advisory Committee, if a court ordered the company to interrupt the recycling of its backup systems, the annual cost of extra backup tapes for maintaining its electronic data in the United States alone would amount to $23.76 million.[130]

2. *Electronic Discovery Has Opened New Avenues for Abuse.* The massive amount of discoverable electronic material and the difficulties associated with its collection and preservation make discovery "unpredictable and increasingly subject to abuse."[131] Counsel now recognize that electronically stored information is useful not only as a litigation tool, but also as a litigation tactic. The marked rise in the use of spoliation claims as a tactical maneuver underscores this evolution.[132] Further, as one expert has noted, the intricacies of modern computer systems all but guarantee that some relevant electronic evidence will be lost or destroyed in any given case.[133] This

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Sprint/United Mgmt. Co., 230 F.R.D. 640, 646 (D. Kan. 2005) (quoting FED. R. CIV. P. 26(f) advisory committee's note to 2006 amendment). Metadata can reveal "how, when and by whom [a document] was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information)." SEDONA CONFERENCE WORKING GRP. ON BEST PRACTICES FOR ELEC. DOCUMENT RETENTION & PROD., THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE app. F at 94 (2005), *available at* http://www.thesedonaconference.org/content/miscFiles/TSG9_05.pdf.

127. When a user deletes a file, the document remains on the computer's hard drive until the space it occupies is needed for another document. *See* SHARON D. NELSON, BRUCE A. OLSON & JOHN W. SIMEK, THE ELECTRONIC EVIDENCE AND DISCOVERY HANDBOOK 293 (2006).

128. Kenneth Starr's team discovered "the infamous 'talking points' document" on Monica Lewinsky's computer even though she had deleted it. Shira A. Scheindlin & Jeffrey Rebkin, *Electronic Discovery in Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 329 (2000).

129. *See supra* note 125 and accompanying text. Notably, a document's metadata can be destroyed merely by opening or accessing the document. *See* SEDONA CONFERENCE WORKING GRP. ON BEST PRACTICES FOR ELEC. DOCUMENT RETENTION & PROD., *supra* note 126, app. E at 80 & n.1.

130. Letter from Charles A. Beach to Peter G. McCabe, *supra* note 92, at 2.

131. Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206, 206 (2001).

132. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 88, at 21.

133. Arthur L. Smith, *Responding to the "E-Discovery Alarm,"* BUS. L. TODAY, Sept.–Oct. 2007, at 27, 28.

admittedly anecdotal observation is bolstered by a recent survey, which found that more than 90 percent of companies have failed to adopt procedures to preserve electronic data in the event of litigation.[134] As a result, savvy plaintiffs' counsel have an incentive to request some electronic documents not because they are relevant but rather in hopes of securing a large sanction when the opposing party cannot produce them.[135] Spoliation claims have thus given plaintiffs' attorneys a "nuclear weapon" that can be used to force large organizations to settle frivolous cases.[136]

Some commentators have attempted to refute the widely accepted characterization of American civil discovery as disproportionately expensive and prone to abuse. But these scholars have erroneously asserted that claims of discovery abuse rest on unfounded perceptions that have been exaggerated by certain probusiness interests and reinforced by American media outlets.[137]

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134. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 88, at 9 (citing James Powell, *IT Dangerously Unprepared for E-Discovery, Survey Shows*, ENTERPRISE SYS. (Mar. 30, 2009), http://esj.com/articles/2007/03/20/it-dangerously-unprepared-for-ediscovery-survey-shows.aspx).

135. Although the 2006 Amendments to the Federal Rules of Civil Procedure created a safe harbor that precludes sanctions for electronic documents lost or destroyed through ordinary or good-faith computer use, courts have rarely invoked this provision and have construed it narrowly when they do. *See id.* at 12 ("In practice, however, the 'safe harbor' is vague and difficult to work with, and consequently has rarely driven the courts' spoliation and sanctions analysis. Some courts have warned that the 'safe harbor' addresses only rule-based sanctions; courts still retain inherent powers to impose sanctions for the loss of [electronically stored information]." (footnote omitted)).

136. *Id.* at 21. The risk that electronic discovery will be used as a weapon is particularly acute in cases such as employment disputes, in which the plaintiff possesses virtually no discoverable information. *Id.* at 23.

137. *See* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1398–99 (1994) (characterizing American "litigiousness" and "discovery abuse" as a myth that is largely attributable to misinformation disseminated by the media); Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 787 (2010) (agreeing with the "'myth' characterization"); *see also* Sorenson, *supra* note 85, at 702 ("In light of the attention discovery abuse has received for the last thirty years or so and the efforts that have been made to control abuse, the intractability and persistence of the abuse claims suggest either that the partisan incentives to engage in discovery abuse are very strong or that perhaps many abusive discovery practices identified by commentators and judges are not really considered abusive by a large number of lawyers."); Peggy E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform*, PUB. L. RESEARCH INST. (1995), http://w3.uchastings.edu/plri/fal95tex/discov.html (describing the findings of a 1978 Federal Judicial Center study, as affirmed by a 1990–93 study by the National Center of State Courts, that showed "that discovery abuse is not as prevalent as is otherwise assumed"); Amelia F. Burroughs, Comment, *Mythed It Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(b)(1)*, 33 MCGEORGE L. REV. 75, 91–92 (2001) (disputing that the empirical data

These commentators rely on empirical studies that appear to contradict the conventional wisdom that discovery is a costly and often abusive diversion from litigating the merits of a case.[138] According to these studies, discovery is efficient and cost-effective in the majority of cases, and instances of abuse and runaway costs are limited to a small number of highly complex and overly contentious lawsuits.[139] But most of these studies suffer from a common flaw: they were conducted well before the explosion of electronic discovery within the last decade.[140] The previously unimaginable volumes of information that are now commonplace in litigation have so shifted the discovery landscape that findings predating the email revolution are no longer valid.[141]

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on discovery rates in civil cases and resources expended on discovery adequately support a clear finding of discovery abuse).

138. Studies conducted by the Federal Judicial Center are an example. *E.g.*, PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, FED. JUDICIAL CTR., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/jcclpdis.pdf/$file/jcclpdis.pdf (reporting the results of a 1978 Federal Judicial Center study); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 800 (1998) (reviewing various economic and behavioral studies on discovery and commenting that "[i]n the vast majority of cases, discovery appears to be the self-executing system the rules contemplate"); Mullenix, *supra* note 137, at 1433 (arguing that "the 1978 [Federal Judicial Center] study is important because it found that discovery abuse was *not* a serious problem and consequently ended contemporaneous efforts to amend the discovery rules"); Lee & Willging, *supra* note 137, at 787 (relying on the FJC study and concluding that "discovery and overall litigation costs were largely proportionate to stakes, and that the stakes in a case were the single best predictor of overall costs"); *see also* Mullenix, *supra* note 137, at 1436 ("[D]iscovery abuse, to the extent it exists, does not permeate the vast majority of federal filings." (quoting CONNOLLY ET AL., *supra* note 138, at 35)).

139. Willging et al., *supra* note 5, at 527.

140. Indeed, a 2009 study by the Federal Judicial Center confirms that litigation costs "were higher in cases with electronic discovery . . . and in cases with more reported types of discovery." EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2, 35–37 (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf (reporting the results of a 2009 Federal Judicial Center study).

141. Indeed, the Federal Judicial Center has acknowledged as much and has launched a new study of the impact of electronic documents on the discovery process. *See* Letter from Judge Mark R. Kravitz, Chair, Judicial Conference Advisory Comm. for Civil Rules, to the Members of the ABA Litig. Section (July 21, 2009), *available at* http://www.abanet.org/litigation/survey/0709-FederalJudicialCenter.html (requesting Section members to respond to a questionnaire on civil litigation, particularly discovery, in the federal courts).

B. The Increased Costs of Electronic Discovery Far Outweigh Any Benefit to Keeping the Current Discovery System

A 2008 study of the fellows of the American College of Trial Lawyers conducted jointly by the American College of Trial Lawyers and the University of Denver's Institute for the Advancement of the American Legal System (ACTL-IAALS Report) confirms that efforts to rein in discovery costs and end discovery abuse have generally failed. The ACTL-IAALS Report concluded unequivocally that "[o]ur discovery system is broken."[142] The report further determined that some meritorious cases are never filed because "the cost of pursuing them fails a rational cost-benefit test," and that cases of "questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them."[143] Nearly 71 percent of the respondents believe "that discovery is used as a tool to force settlement,"[144] and nearly half of the respondents feel that "discovery is abused *in every case*."[145] The ACTL-IAALS Report also makes clear that electronic discovery has greatly exacerbated the cost and delay already inherent in the discovery process. The report concludes that "[e]lectronic discovery . . . needs a serious overhaul."[146] In fact, 75 percent of the respondents surveyed in the ACTL-IAALS Report agreed that "discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of [electronic discovery]."[147] Even more respondents, 87 percent, said that electronic discovery "increases the costs of litigation."[148] One of the survey's respondents described electronic discovery as a "morass."[149]

To the extent discovery is intended to aid the search for truth, these costs are not being offset by any discernible benefit. A 2008

142. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 12, at 9.

143. *Id.* at 2.

144. *Id.* at 9.

145. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM app. A at A-4 (2008) (emphasis added), *available at* http://www.actl.com/AM/TemplateRedirect.cfm?template=/cm/ContentDisplay.cfm&ContentID=3650.

146. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 12, at 2.

147. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 145, app. A at A-4.

148. *Id.*

149. *Id.* (internal quotation marks omitted).

survey of Fortune 200 companies found that, in cases with total litigation costs of more than $250,000, the ratio of the average number of discovery pages to the average number of exhibit pages—that is, pages actually utilized in some fashion at trial—was 1,044 to 1.[150] Similarly, in one survey of attorneys in Chicago, practitioners estimated that 60 percent of discovery materials did not justify the cost associated with obtaining them.[151] The Chicago study revealed that in more than 50 percent of complex cases, the opposition's discovery efforts had failed to disclose significant evidence.[152] This result led the study's author to wonder whether the civil discovery system is functioning acceptably when, "with considerable inefficiency and at great cost, it distributes information among the parties fairly evenly in less than half of the larger cases."[153]

C. Discovery Now Ranks as a Top Litigation Concern for Major Corporate Defendants

The unchecked rise in discovery costs has attracted the attention of corporations, which now list discovery as one of their most pressing concerns when litigation is imminent.[154] This concern is well founded. Discovery costs in U.S. commercial litigation are growing at an explosive rate; estimates indicate they reached $700 million in 2004, $1.8 billion in 2006, and $2.9 billion in 2007.[155] And these figures do not even account for the billions of dollars that corporations pay each year to settle frivolous lawsuits because the burdens of litigating until summary judgment or a favorable verdict are too onerous.

The costs of tort litigation in the United States also drive up the costs to consumers of purchasing a variety of goods. A study conducted in 2002 by the president's Council of Economic Advisers (CEA) concluded that the direct and indirect costs of excessive tort litigation in the United States drive up production costs, which must

150. LAWYERS FOR CIVIL JUSTICE ET AL., *supra* note 107, app. at 16.

151. Brazil, *Views from the Front Lines*, *supra* note 73, at 230 n.24.

152. *Id.* at 234.

153. *Id.*

154. *See* FULBRIGHT & JAWORSKI LLP, THIRD ANNUAL LITIGATION TRENDS SURVEY FINDINGS 18 (2006), *available at* http://www.fulbright.com/mediaroom/files/2006/FulbrightsThirdAnnualLitigationTrendsSurveyFindings.pdf (reporting that 81 percent of 422 international companies surveyed felt that they were not "well-prepared" for electronic discovery issues).

155. Robert H. Thornburg, *Electronic Discovery in Florida*, FLA. B.J., Oct. 2006, at 34, 34; Leigh Jones, *Faced with Data Explosion, Firms Tap Temp Attorneys*, NAT'L L.J. (Oct. 14, 2005), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1128947761813.

ultimately be borne by consumers and employees.[156] The recent survey of Fortune 200 companies found that their U.S. litigation costs ate up 0.51 percent of their U.S.-derived revenue, while their foreign litigation costs consumed a mere 0.06 percent of their non-U.S. revenue in 2008.[157] The CEA has concluded that these additional costs impose a 2 percent tax on consumer prices and a 3 percent tax on wages.[158] Inasmuch as discovery costs comprise the majority of litigation expenses,[159] discovery abuse is primarily responsible for this litigation tax.[160] And with the rapid escalation of discovery costs in the electronic age, this tax is set to increase considerably.

The litigation tax has a number of adverse effects on the American economy. First, it hampers productivity and innovation. Research shows that corporations expecting high litigation costs will forgo research and withhold new products from the market to conserve funds for legal expenses.[161] Indeed, under financial accounting rules applicable in the United States, public companies are obligated to create financial reserves when potential legal liabilities become sufficiently certain.[162] These litigation reserves divert significant funds from productive uses and can even drive major corporations into the red.[163] Further, the discovery-related delays

156. *See* COUNCIL OF ECON. ADVISERS, WHO PAYS FOR TORT LIABILITY CLAIMS? AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM 13 (2002), *available at* http://www.heartland.org/custom/semod_policybot/pdf/13266.pdf (reasoning that litigation costs will "ultimately be borne by individuals through job loss or a reduction in wages (workers), [or] an increase in consumer prices (consumers)").

157. LAWYERS FOR CIVIL JUSTICE ET AL., *supra* note 107, at 13 fig.9.

158. COUNCIL OF ECON. ADVISERS, *supra* note 156, at 1.

159. *See* Richard K. Herrman, Vincent J. Poppiti & David K. Sheppard, *Managing Discovery in a Digital Age: A Guide to Electronic Discovery in the District of Delaware*, 8 DEL. L. REV. 75, 75 (2005) ("Discovery traditionally proves to be the most expensive aspect of litigation.").

160. *See* COUNCIL OF ECON. ADVISERS, *supra* note 156, at 1, 7 (using the term "litigation tax" because "[t]o the extent that tort claims are economically excessive, they act like a tax on individuals and firms").

161. *See* John Engler & Lawrence J. McQuillan, Op-Ed., *Limiting Lawsuit Abuses Lowers Costs from Litigation, Creates Jobs in Long Run*, DETROIT NEWS, May 14, 2008, at 15A ("Fear of lawsuits . . . causes companies to withhold beneficial products from markets . . . .").

162. FIN. ACCOUNTING STANDARDS BD., STATEMENT OF FINANCIAL ACCOUNTING STANDARD NO. 5: ACCOUNTING FOR CONTINGENCIES ¶ 8 (1975). Under this standard, a company must create a litigation loss reserve if a loss is "probable" and the amount of the expected loss is material and reasonably estimable. *Id.*

163. *See* Ruthie Ackerman, *Hutchinson Hit by Litigation Charge*, FORBES (Jan. 30, 2008, 6:30 PM ET), http://www.forbes.com/2008/01/30/hutchinson-technology-diskdrive-markets-equity-cx-ra-0130markets27.html (reporting that Hutchinson posted a $2.5 million charge to settle class-action litigation); Steven E.F. Brown, *Lawsuit Settlement Pushes McKesson to $20M*

endemic to the American civil litigation system indicate that such economic deprivation can last for a considerable period.

The litigation tax also hampers the international competitiveness of U.S. companies, a crucial handicap in this era of increasing globalization. The U.S. tort liability system is now the most expensive in the world.[164] Costs associated with tort claims have risen almost continuously since 1950.[165] As a percentage of GDP, tort costs in the United States are triple those in France and at least double those in Germany and Japan.[166] Even the United Kingdom, after whose system of jurisprudence the American system was modeled, is seen by foreign investors as having a "significant cost advantage compared to the United States."[167]

Finally, the litigation tax and the uncertainties inherent in the U.S. tort liability system dissuade foreign companies from opening factories and otherwise doing business in the United States.[168] This is a keenly felt loss in an era of economic retrenchment and declining employment. One report goes so far as to conclude that rising

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Loss, S.F. BUS. TIMES (Jan. 26, 2009), http://sanfrancisco.bizjournals.com/sanfrancisco/stories/2009/01/26/daily12.html (reporting that McKesson Corp. took a $493 million charge to settle pending litigation and create a reserve against future claims); Sherri Begin Welch, *Kelly Services Blames Litigation Charge for 3Q Loss*, CRAIN'S DETROIT BUS. (Nov. 14, 2008, 2:46 PM), http://www.crainsdetroit.com/article/20081114/FREE/811149958 (noting that absent the $22.5 million litigation charge, Kelly Services's CEO said the company would have had a small quarterly profit); *Xerox Posts Loss on Litigation Charge*, L.A. TIMES, Apr. 18, 2008, at 4 (reporting that Xerox took a $491 million charge to cover the costs of a lawsuit).

164. *See* Ted Frank, *A Stimulus You Can Believe In*, THE AMERICAN (May 29, 2009), http://www.american.com/archive/2009/may-2009/a-stimulus-you-can-believe-in ("The direct costs to the United States of tort litigation are $252 billion a year, 1.8 percent of GNP, twice that of a typical industrialized nation.").

165. TILLINGHAST, TOWERS PERRIN, 2006 UPDATE ON U.S. TORT COST TRENDS 5 (2006), *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort_2006_FINAL.pdf.

166. U.S. DEP'T OF COMMERCE, THE U.S. LITIGATION ENVIRONMENT AND FOREIGN DIRECT INVESTMENT: SUPPORTING U.S. COMPETITIVENESS BY REDUCING LEGAL COSTS AND UNCERTAINTY 1 (2008), *available at* http://www.locationusa.com/USDepartmentOfCommerce/pdf/litigationFDI.pdf.

167. *Id.* at 4. Lord Leonard Hoffman, explaining why even the United Kingdom has lower tort costs than the United States, identifies several reasons—namely, "no punitive damages, limits on pain and suffering, no contingency fees, loser pays, no juries in most civil cases, and a trial bar with almost no political influence." *Id.*

168. *See* U.S. DEP'T OF COMMERCE, *supra* note 166, at 5–6 (noting survey data indicating that the litigation environment "is likely to impact important business decisions . . . such as where to locate or do business" and describing studies showing international investor concerns with the U.S. legal environment); Philip Howard, *Beyond Tort Reform*, N.Y. SUN, Feb. 5, 2007, at 9 ("Foreign companies are being scared away in part . . . by soaring costs of American law.").

litigation costs are even threatening the preeminence of the U.S. securities markets.[169]

III. RECENT EFFORTS TO CURB DISCOVERY ABUSE

Growing anxiety over the rapidly escalating costs and delay endemic to discovery in civil litigation has spawned two attempts over the last decade to reform federal discovery rules. These reforms included limiting the scope of discovery and addressing the new challenges posed by electronic documents. Unfortunately, both reform efforts have proven largely ineffectual.

A. The 2000 Amendments

Prior to 2000, parties were entitled to discovery into "any matter . . . relevant to the *subject matter* involved in the pending action."[170] But in 2000, amendments to the Federal Rules were introduced, seeking to narrow this broad scope of permissible discovery by establishing a new, two-tiered discovery protocol.[171] Under this new protocol, parties are initially entitled to discover only information that is "relevant to the *claim or defense* of any party."[172] Only if such discovery is inadequate may a court, "[f]or good cause," permit discovery into "any matter relevant to the subject matter involved in the action."[173] The two-tiered procedure was designed to prevent parties from using discovery "to develop new claims and defenses that are not already identified in the pleadings."[174]

The other main change effected by the 2000 Amendments involved pretrial disclosures—early disclosures that are intended to clarify what documents each party has and to diminish the need for formal discovery requests. Prior to 2000, courts could promulgate local rules setting forth whether parties were required to make initial disclosures. More than half of the federal district courts opted out of imposing the requirement, resulting in a "patchwork and fragmented

169. MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP 75–77 (2006), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

170. FED. R. CIV. P. 26(b)(1) (1993) (amended 2000) (emphasis added).

171. *See* Order Prescribing Amendments to the Federal Rules of Civil Procedure, 529 U.S. 1155, 1165 (1999) (amending Rule 26(b)(1) to create a two-tiered discovery system).

172. FED. R. CIV. P. 26(b)(1) (2000) (amended 2006) (emphasis added).

173. *Id.*

174. *Id.* advisory committee's note to 2000 amendment.

system."[175] To unify these divergent approaches, the 2000 Amendments implemented two changes. First, they required all parties (except in specified types of cases) to make initial disclosures, unless the parties agree or the court orders otherwise.[176] Second, they limited the information that must be disclosed to that which the disclosing party may use to support its position.[177]

Like their predecessors, the 2000 Amendments failed to rein in abusive discovery practices.[178] The bench and bar have largely ignored the Amendments' limitation on the scope of discovery, clinging instead to entrenched notions of liberal information gathering.[179] The reasons are numerous, but they stem in large part from an inability to discern a meaningful difference between the pre- and post-2000 discovery standards. Attempting to distinguish between information relevant to "the subject matter of the dispute" and information relevant to "a claim or defense" has been dismissed by one court as "the juridical equivalent to debating the number of angels that can

175. Peter J. Beshar & Kathryn E. Nealon, *Changing the Federal Rules of Civil Procedure*, N.Y. L.J., Dec. 1, 2000, at 1.

176. FED. R. CIV. P. 26(a)(1) (2000) (amended 2006) & advisory committee's note to 2000 amendment.

177. *See id.* advisory committee's note to 2000 amendment (explaining that initial disclosure obligation issues unrelated to expert witness testimony have "been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses").

178. In one sense, this should come as no surprise, given that the drafters of these amendments "determined expressly not to review the question of discovery *abuse*." Memorandum from Judge Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Judge Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000); *see also* AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 12, at 10 (noting that two-thirds of respondents believe that the amendments to the Federal Rules between 1976 and 2006 have not remedied the problem of discovery abuse).

179. *See* Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 126 (2005) ("What has been my experience with the concept of bifurcated discovery under the 2000 amendment? (1) Attorneys do not as a general rule attempt to limit discovery to that which is relevant to a claim or defense; and (2) attorneys do not as a general rule address the existence of good cause, either to argue for broader discovery as Rule 26(b)(1) contemplates or to counter such arguments."); Noyes, *supra* note 11, at 61 ("[D]espite the 2000 amendments, the Rule has been ignored."); Noyes, *supra* note 11, at 67 ("Instead, many lower courts have acknowledged the 2000 amendments but have interpreted them as having changed nothing."); Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 24–25 (2001) ("First, in nearly all instances it appears that the outcomes would have been the same under either version of the rule; indeed, it is striking how little the courts' opinions reflect any apparent serious effort by parties who are resisting discovery to make anything out of this new and perhaps still unfamiliar scope definition.").

dance on the head of a pin."[180] The 2000 Amendments also fail to provide any practical guidance as to when good cause exists for broadening discovery to include information relevant to the subject matter of the dispute.[181] Without such guidance, courts have generally ignored the two-tiered discovery system and applied the more familiar pre-2000 discovery standard.[182] As a result, plaintiffs can still routinely engage in fishing expeditions and compel the production of documents and information that are only tangentially related to the claims or defenses at issue.[183]

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180. Thompson v. Dep't of Hous. & Urban Dev., 199 F.R.D. 168, 172 (D. Md. 2001).

181. *See* Beckerman, *supra* note 15, at 541 ("[The amendment] offers no assistance in determining what constitutes 'good cause' that should be sufficient for a judge to justify granting discovery relevant to the subject matter of the action rather than simply to the claims and defenses of the parties.").

182. *See* Saket v. Am. Airlines, Inc., No. 02 C 3453, 2003 WL 685385, at *2 (N.D. Ill. Feb. 28, 2003) ("The Federal Rules of Civil Procedure contemplate liberal discovery, and 'relevancy' under Rule 26 is extremely broad."); Richmond v. UPS Serv. Parts Logistics, No. IP01-1412-C-K/H, 2002 WL 745588, at *2 (S.D. Ind. Apr. 25, 2002) ("The implementation of amended Rule 26 did not necessarily impact the so called 'liberal discovery' standard as evidenced by cases interpreting the post-amendment rule."); World Wrestling Fed'n Entm't, Inc. v. William Morris Agency, Inc., 204 F.R.D. 263, 265 n.1 (S.D.N.Y. 2001) ("The amendments to Rule 26(b)(1) do not dramatically alter the scope of discovery . . . ."); Noyes, *supra* note 11, at 61 ("[D]espite the 2000 amendments, the Rule has been ignored."). *But see* United States *ex rel.* Stewart v. Louisiana Clinic, No. Civ.A. 99-1767, 2003 WL 21283944, at *8 (E.D. La. June 4, 2003) (emphasizing that the 2000 Amendments to Rule 26(b)(1) narrowed the scope of discovery); Johnson Matthey, Inc. v. Research Corp., No. 01 CIV.8115(MBM)(FM), 2002 WL 31235717, at *2 (S.D.N.Y. Oct. 3, 2002) (upholding the denial of a discovery request and distinguishing a case allowing broad discovery on the ground that the 2000 Amendments to Rule 26(b)(1) had narrowed the scope of discovery); Hill v. Motel 6, 205 F.R.D. 490, 492–93 (S.D. Ohio 2001) (emphasizing that after the 2000 Amendments, "Rule 26(b)(1) now focuses discovery on the actual claims and defenses at issue in the case" and denying a discovery request because the documents sought would have been relevant only to a discriminatory-impact claim, not to the plaintiff's discriminatory-treatment claim).

183. In *Sheldon v. Vermonty*, 204 F.R.D. 679 (D. Kan. 2001), for example, an individual plaintiff sought discovery from the broker defendants in a securities fraud suit seeking proceeds data for a six-year period. *Id.* at 688–89. The defendants, however, argued the only relevant time period was the one year when the plaintiff contemplated and purchased the stock. *Id.* at 689. Ruling in favor of the plaintiff, the court declared its understanding of the scope of discovery in light of the new standard: "Relevancy is broadly construed, and . . . discovery should be allowed unless it is clear that the information sought can have *no possible bearing* on the claim or defense of a party." *Id.* (emphasis omitted and added) (internal quotation marks omitted). Similarly, in *Bryant v. Farmers Insurance Co*., No. 01-02390-CM, 2002 WL 1796045 (D. Kan. July 31, 2002), the plaintiff in an age and gender discrimination suit sought disciplinary and audit information regarding not only the supervisor in question, but also other supervisors and employees. *Id.* at *3. Rejecting the defendant's claims that the requests were overbroad and not limited in scope, the court stated that relevancy is established "under the amended rule if there is *any possibility* that the information sought may be relevant." *Id.* at *2 (emphasis added).

Moreover, plaintiffs have found it easy to circumvent the limitations imposed by the 2000 Amendments. For example, those amendments did not modify Federal Rule 11(b)(3), which provides that, by signing a court pleading, plaintiffs' attorneys certify that the pleading's "factual contentions have evidentiary support or, if specifically so identified, *are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery*."[184] This language essentially allows plaintiffs to make unfounded allegations if they will likely be able to develop support for them through discovery. Consequently, plaintiffs need only assert strategic claims to broaden discovery in any way they deem advantageous. The discovery system established by the 2000 Amendments thus continues to foster discovery abuse by encouraging plaintiffs to assert borderline claims to expand the scope of discovery.[185]

Moreover, even the 2000 Amendments' two-tiered approach to the scope of discovery has been largely ineffectual in preventing discovery abuse by plaintiffs.[186] The case law so far suggests that the second tier's good-cause element is an obstacle in name only,[187] such that plaintiffs are frequently able to convince the court that they should be entitled to the traditional subject-matter scope of discovery.

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184. FED. R. CIV. P. 11(b)(3) (emphasis added).

185. *See, e.g.*, CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., SUMMARY OF PUBLIC COMMENTS—PRELIMINARY DRAFT OF PROPOSED AMENDMENTS: CIVIL RULES REGARDING DISCOVERY 90 (1998–99), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Summary_CV_Comments_1998_1999.pdf ("[This change] will . . . put pressure on lawyers to assert thin or borderline frivolous claims or defenses. . . . Under the current rules plaintiff would file a breach of contract suit and take discovery about the possibility of fraud. Under the amended rule, one is pushing the plaintiff's lawyer into treading close to the Rule 11 line to file a fraud claim as a predicate for discovery.").

186. *See* Christopher Frost, Note, *The Sound and the Fury or the Sound of Silence?: Evaluating the Pre-Amendment Predictions and Post-Amendment Effects of the Discovery Scope-Narrowing Language in the 2000 Amendments to Federal Rule of Civil Procedure 26(b)(1)*, 37 GA. L. REV. 1039, 1071 (2003) (demonstrating that a plaintiff could use the good-cause provision to overcome a defendant's relevancy-based challenge to an overbroad discovery request).

187. *See* Anderson v. Hale, No. 00 C 2021, 2001 WL 503045, at *3 (N.D. Ill. May 10, 2001) ("The minimal showings of relevance and admissibility hardly pose much of an obstacle for an inquiring party to overcome, even considering the recent amendment to Rule 26(b)(1)."); Thompson v. Dep't of Hous. & Urban Dev., 199 F.R.D. 168, 172 (D. Md. 2001) (warning counsel that taking a "rigid view of the narrowed scope of discovery . . . would run counter to the underlying purpose of the rule changes"). In *Sanyo Laser Products, Inc. v. Arista Records, Inc.*, 214 F.R.D. 496 (S.D. Ind. 2003), the court granted subject-matter discovery without a meaningful discussion of how the requesting party demonstrated good cause. *Id.* at 500–02. Instead, the court highlighted that the 2000 rule change, "while meaningful, [was] not dramatic, and broad discovery remains the norm." *Id.* at 500.

The 2000 Amendments' other principal change—namely, mandating initial disclosures—has not had any noticeable impact, particularly in complex cases when abuse and delay are most severe.[188] This should come as no surprise. Critics have long observed that mandatory disclosure requirements can lead to the "overproduction of marginally relevant information," thus increasing delay and expenses for both sides,[189] particularly at the very beginning of a case. Such "front-loading" of costs has the potential to "impede settlement."[190]

B. The 2006 Amendments

The Federal Rules were amended again in 2006, this time to address the growing importance—and cost—of electronic discovery.[191] To alleviate the burdens imposed by electronic discovery, the 2006 Amendments implemented a two-tiered proportionality approach to the scope of electronic discovery.[192] As an initial matter, a party does not need to produce electronically stored information from sources that the party identifies as "not reasonably accessible because of undue burden or cost."[193] This includes, for example, electronic information stored on backup tapes or in offline legacy systems,[194] which can be time-consuming and expensive to restore. If a party wishes to obtain discovery of electronic data that are not reasonably accessible, the requesting party must demonstrate "good cause."[195]

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188. *See* Edward D. Cavanaugh, Twombly*, the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 886 (2008) (noting that mandatory automatic disclosure "never fulfilled its potential").

189. *E.g.*, Bell, *supra* note 3, at 41.

190. Michael J. Wagner, *Too Much, Too Costly, Too Soon? The Automatic Disclosure Amendments to Federal Rule of Civil Procedure 26*, 29 TORT & INS. L.J. 468, 477 (1994) (internal quotation marks omitted).

191. REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 22–28 (2005), *available at* http://federalevidence.com/pdf/FRE_Amendments/2006Amendments/ST09-2005.pdf.

192. *See* Order Prescribing Amendments to the Federal Rules of Civil Procedure, 547 U.S. 1233, 1242 (2006) (amending Rule 26(b)(1) to create a two-tiered "proportional" discovery system).

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

194. Legacy systems are older computer systems not connected to an entity's current computer network.

195. FED. R. CIV. P. 26(b)(2)(B). The Advisory Committee's notes include several examples of data that are not reasonably accessible, including information stored only for disaster-recovery purposes—for example, backup tapes—legacy data, and information that was deleted

The good-cause analysis incorporates a proportionality standard, requiring a court to "balance the costs and potential benefits of discovery."[196]

The 2006 Amendments also attempted to ease the burdens of preserving electronic information. To achieve this goal, the Amendments created a safe harbor provision, under which the destruction of electronic data through "routine, good-faith" business procedures—such as an email system that automatically deletes old emails after a certain period—cannot be sanctioned as spoliation unless there are "exceptional circumstances."[197]

Third, the 2006 Amendments sought to address the tremendous burden of reviewing unprecedented volumes of documents for privilege. The Amendments attempted to ease this burden by allowing the parties to agree beforehand that the inadvertent production of privileged materials does not automatically waive the privilege.[198]

It may still be too early to gauge the effectiveness of the 2006 Amendments,[199] but, for a number of reasons, many experts believe these changes will prove no more successful than the 2000 Amendments. First, the 2006 Amendments suffer from the same fatal flaws that undermined the 2000 Amendments—in particular the failure to define the term "good cause."[200] This omission leaves courts and practitioners alike with no useful guidance when grappling with whether discovery of data that are not reasonably accessible is appropriate.[201] Moreover, a similar proportionality requirement was incorporated into Rule 26 in the early 1980s in a futile effort to rein in the abuses that had become rampant in the wake of the "photocopier

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and is retrievable only with forensic techniques. *Id.* 26(b)(2) advisory committee's note to 2006 amendment.

196. *Id.* 26(b)(2) advisory committee's note to 2006 amendment.

197. FED. R. CIV. P. 37(e).

198. FED. R. CIV. P. 26(b)(5)(B).

199. *See* DERTOUZOS ET AL., *supra* note 111, at 11–12 (noting the lack of studies on the effects of the 2006 Amendments and proposing options for further research).

200. Noyes, *supra* note 11, at 71–72.

201. *See* Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 905 (2009) ("[T]he main problem with [the 2006 Amendments] is not that they are old news. Rather, the problem is that such limits [referring to the 2006 Amendment's cost-benefit proportionality approach] never have worked terribly well and appear unlikely to work well for e-discovery."); Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 181 (2006), http://thepocketpart.org/images/pdfs/82.pdf (describing the need to consider the "human costs" of discovery requests).

revolution" of the late 1960s.[202] Having proven largely ineffective in dealing with traditional discovery issues, a proportionality requirement can hardly be expected to have a significant impact on the far larger and more complex world of electronic discovery.[203] In reality, courts have historically ignored proportionality concerns, instead blaming companies for choosing to employ computer systems that make retrieving records more difficult or expensive.[204] These courts reason that, having benefited from the day-to-day convenience of modern computer systems, companies cannot complain when they must incur additional expenses to meet their discovery obligations.[205] This is a Hobson's choice, as competitive pressures leave companies no realistic alternative to utilizing modern computer systems.

The 2006 Amendments also do not insulate defendants from the rising costs associated with electronic discovery. In fact, the 2006 Amendments arguably worsen the problem by building additional costs into each case.[206] In particular, the Federal Rules' requirement that parties produce electronically stored information that is not reasonably accessible if the opposing party demonstrates good cause could have deleterious effects. Specifically, this rule encourages plaintiffs to seek broad electronic discovery from sources from which retrieving information will be costly, and to invent reasons why such information is necessary or reasonably accessible. The rules thus provide plaintiffs with an additional discovery mechanism to drive up the costs of litigation for defendants.

Critics of the 2006 Amendments have also expressed misgivings about the usefulness of the safe harbor provision that protects parties from sanctions if they destroy electronic data through "routine, good-faith" business procedures.[207] This provision provides no guidance

202. Moss, *supra* note 201, at 899–900.

203. *Id.* at 905.

204. *Id.* at 900–01.

205. *See* Linnen v. A.H. Robins Co., No. 97-2307, 1999 WL 462015, at *6 (Mass. Super. Ct. June 16, 1999) ("To permit a corporation . . . to reap the business benefits of such technology and simultaneously use that technology as a shield in litigation would lead to incongruous and unfair results."); *see also* Kaufman v. Kinko's, Inc., No. 18894-NC, 2002 WL 32123851, at *2 (Del. Ch. Apr. 16, 2002) ("Upon installing a data storage system, it must be assumed that at some point in the future one may need to retrieve the information previously stored.").

206. Gregory P. Joseph, *Federal Litigation—Where Did It Go off Track?*, LITIGATION, Summer 2008, at 62.

207. *See* Willoughby et al., *supra* note 120, at 828 (noting that only thirty federal court decisions have cited the safe harbor provision between its promulgation on December 1, 2006,

regarding what data must be preserved or the manner in which they must be maintained.[208] Further, the circumstances under which sanctions may be imposed are vague and discretionary. Some experts, for example, posit that the safe harbor provision would not apply in the absence of a formal discovery order or when judges are exercising their inherent power to manage cases.[209] In light of these uncertainties, companies facing even small lawsuits have little recourse but to continue to expend vast sums to preserve all potentially relevant evidence.

These numerous shortcomings indicate that, like the 2000 Amendments, the 2006 Amendments will not effect a radical shift in the case law.[210]

IV. PROPOSALS FOR REFORM

Part IV offers five reform proposals that aim to address the root causes of discovery abuse in the United States, taking into account the lessons learned from prior discovery-reform efforts. The goal of these proposals is to diminish incentives for engaging in discovery abuse and to increase court involvement in preventing potentially abusive discovery. Although some of these reforms will require amendments to the Federal Rules, others can be implemented by judges immediately—and have already been adopted by some courts.

A. Establish Clear Guidelines for Cost Shifting for Electronic Discovery

The most pernicious problem with the American discovery system is that it incentivizes parties to seek overbroad and

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and January 1, 2010—and of those, only "approximately two cases per year have met its requirements").

208. DERTOUZOS ET AL., *supra* note 111, at 11.

209. *Id.*

210. S*ee id.*, *supra* note 111, at 11 ("[D]espite the sweeping nature of these changes [referring to the 2006 Amendments], even some of the most ardent proponents of the new rules (typically from the corporate community) argue that they do not go far enough."); Richard L. Marcus, *E-Discovery & Beyond: Toward* Brave New World *or* 1984*?*, 25 REV. LITIG. 633, 660 (2006) ("[The 2006 Amendments] should contribute to the handling of this form of discovery, but they will hardly revolutionize it. Indeed, one strong objection to adopting several of them was that they don't really add a great deal to the current rules."); Phillips, *supra* note 96, at 986 ("Despite the protective language proposed for addition to Rule 26(b)(2), the amendment offers electronic data identified as not reasonably accessible no greater protection from discovery than the current version of the Rule provides because the good cause requirement in the proposed amendment is not strict enough.").

burdensome discovery.[211] The drafters of the Federal Rules have already recognized this issue, but their efforts to remedy the problem have failed. Attorneys continue to seek large numbers of documents and, especially, electronic data that bear only tangentially on the claims or defenses at issue, simply to burden the other side and improve the requesting party's prospect of a favorable settlement.

As discussed previously, the ubiquity of modern computer systems—and the ever-growing caches of information they contain—has led to a tremendous surge in the costs of electronic discovery. To check these rising costs and the abusive discovery tactics they have fostered, the Federal Rules should require courts to consider cost shifting whenever a party seeks electronic discovery. Such a requirement would place the burden of unusually large or tangential discovery requests on the party making the request, thereby creating incentives for parties to make requests that are better calculated to lead to the discovery of relevant evidence.

The rules should also set forth a series of factors for courts to consider in deciding whether cost shifting is warranted. A good starting point for establishing these factors is the opinion by Judge Shira Scheindlin in *Zubulake v. UBS Warburg LLC*,[212] which identified the following considerations:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.[213]

211. *See* Bruggman, *supra* note 137 (describing several factors that incentivize discovery abuse).

212. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).

213. *Id.* at 322.

Courts could also be directed to consider the factors set forth in the American Bar Association's *Civil Discovery Standards*.[214] Adopting a specific standard based on these or similar factors would help courts make cost-shifting decisions using identifiable criteria and would go a long way toward addressing the shortcomings of prior efforts to curb discovery abuses, which relied on nebulous standards such as good cause for seeking burdensome discovery.

Finally, parties requesting production of electronic documents that are not reasonably accessible should be required to bear the costs of doing so. In particular, parties seeking data from backup tapes and other forms of disaster-recovery[215] media should be made to bear the costs of retrieving, reviewing, and producing this information. This has been the rule for some time in Texas,[216] which has enjoyed considerable success in limiting discovery costs. Such a requirement would represent a significant step in reducing discovery abuse in connection with electronic discovery.

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214. ABA SECTION OF LITIG., CIVIL DISCOVERY STANDARDS (2004), *available at* http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf. These factors include

> A. The burden and expense of the discovery, considering among other factors the total cost of production . . . compared to the amount in controversy; B. The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; C. The complexity of the case and the importance of the issues; D. The need to protect the attorney-client privilege or attorney work product . . . ; E. The need to protect trade secrets, proprietary, or confidential information; F. Whether the information or the software needed to access it is proprietary or constitutes confidential business information; G. The breadth of the discovery request; H. Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; . . . J. Whether the requesting party has offered to pay some or all of the discovery expenses; K. The relative ability of each party to control costs and its incentive to do so; L. The resources of each party as compared to the total cost of production; M. Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information; . . . O. Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and [is] not justified by any legitimate personal, business, or other non-litigation-related reasons; and P. Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable . . . .

Id. standards 29b.iv.A–P.

215. Disaster-recovery systems are systems designed to deal with and prevent IT downtime.

216. *See* TEX. R. CIV. P. 196.4 (requiring the party who makes unreasonable discovery requests to pay for the discovery).

B. Adopt the English Rule for Discovery Disputes

The current discovery problems can be traced in large part to the American rule,[217] which generally requires parties to bear their own litigation costs, including the costs of discovery disputes. The American rule is perhaps the greatest single catalyst of discovery abuse, because it allows plaintiffs to impose tremendous costs on defendants at virtually no cost to themselves.[218] The perverse incentives to which the American rule gives rise have been exacerbated considerably in recent years by the rising costs associated with electronic discovery. The American rule also encourages fishing expeditions because nothing dissuades plaintiffs from requesting virtually limitless volumes of documents and evidence. In addition, the American rule contributes to excessive discovery by encouraging parties to request information and documents from opposing parties rather than undertaking their own investigative efforts.

In contrast to the American rule, the English rule requires the losing party to pay the winning party's reasonable attorneys' fees.[219] This rule, designed to dissuade meritless lawsuits, was rejected in the United States because of its propensity to limit access to the courts.[220] But the English rule could be adopted in the limited context of discovery disputes, such that the losing party in any discovery dispute

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217. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) (noting that "the presumption is that the responding party must bear the expense of complying with discovery requests").

218. *See* Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 726 (1983) ("[A] party can have as much discovery as it wants by paying only the costs of *seeking* that discovery; the costs of compliance are generally borne without recompense by the opposing party.").

219. CPR 44.3(2) (U.K.) ("If the court decides to make an order about costs . . . the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party . . . ."); CPR 44.4(1) (U.K.) (establishing that the court will not "allow costs which have been unreasonably incurred or are unreasonable in amount").

220. *See* Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 887 ("No one should be too surprised that in a society with fairly strong emphasis on easy access to the courts, the virtually unique American rule, particularly its aspect that denies recovery to prevailing defendants, has retained fairly strong roots."). The author articulates several negative effects of the English rule, including that it "may excessively discourage the pressing of plausible but not clearly winning claims, particularly when the prospective plaintiffs are strongly risk averse." *Id.* at 888. The author notes that "[t]his effect is especially likely to fall heavily on middle class people with something to lose but not so many assets that they can tolerably afford to lose much." *Id.*; *see also* Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 66 (1997) ("The demerit of this English rule in its application to final judgments is that it unduly chills the assertion of claims and defenses.").

has to pay the attorneys' fees incurred by the other side in litigating that particular dispute.[221] This limited risk of having to pay an adversary's fees is much less likely to close courthouse doors. At the same time, however, application of the English rule to discovery disputes would serve to ensure that neither party adopts an irrational position with regard to discovery issues. Further, the risk of having to pay the opposing party's expenses for contesting a discovery request would help attorneys resist clients who urge them to adopt unreasonable positions.[222] The rules should therefore be revised to mandate that the losing party in a discovery dispute bear the opposing party's attorneys' fees for that dispute.

C. Define Preservation Obligations Early in the Litigation Process

With the increasing prevalence of electronically stored information, data preservation has become one of the costliest aspects of litigation, in terms of both the expense of maintaining the physical media on which the data are stored and the expense of fighting spoliation motions. To mitigate these costs, the rules should require that the parties meet to discuss preservation issues as early as possible, even before the pretrial conference mandated by Rule 16 and its state counterparts.[223] And to ensure that preservation obligations are successfully defined at these early meetings, the rules should further mandate that the court hold an electronic-data conference early in the case if the parties cannot reach an agreement on their respective preservation obligations. Such early resolution would provide a significant advantage over waiting until the pretrial conference to address preservation issues. The parties' preservation obligations begin as soon as the suit can reasonably be anticipated, but pretrial conferences typically do not take place until several months after a case has been filed. By that time, the defendant, with only the complaint's broad allegations to serve as a guide, has been forced to guess at the extent of its preservation obligations.[224] This

221. *See* Carrington, *supra* note 220, at 66 (noting that the disadvantages of the English rule in the broader litigation context would be an advantage in the discovery context, helping to discourage discovery disputes).

222. *Id.*

223. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 12, at 12–14.

224. *See id.* (noting that the parties' obligation to "preserve all material that may prove relevant during a civil action, including electronic information. . . . is very difficult, if not

uncertainty puts a defendant in a bind. On the one hand, the defendant could err on the side of caution, preserving excessive numbers of documents and amounts of data. On the other hand, the defendant could preserve a narrower swath of information based on assumptions about the scope of the suit. But in doing so, the defendant would expose itself to possible sanctions. Defendants typically opt for the former approach, which produces significant costs and waste. Mandating early clarification of preservation obligations would avoid this waste.

Moreover, the Federal Rules should make clear that parties' preservation obligations do not extend to every last document or electronic file in their possession.[225] Rather, the rules should emphasize that "[r]esorting to sources that are not reasonably accessible, while certainly possible under some circumstances, should be required only on a showing of good cause, with the requesting party bearing the burden to show good cause on a motion to compel or in a hearing on a protective order."[226] The rules should also provide that, if a party desires its opponent to preserve inaccessible forms of electronic data, such as backup tapes and metadata, the party must demonstrate a particularized need for this information.[227] Finally, parties requesting the preservation of inaccessible data should be made to bear the reasonable costs of doing so. These modest changes would cabin the costs of document-preservation efforts and ensure that parties do not make outlandish demands for document preservation simply as a tool to oppress their opponents in litigation.

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impossible . . . in an environment in which litigants maintain enormous stores of electronic records").

225. In fact, a number of district courts have adopted local rules requiring the parties to discuss preservation issues. *See, e.g.*, *Default Standard for Discovery of Electronic Documents ("E-Discovery")*, DIST. OF DEL., U.S. DIST. COURT, http://www.ded.uscourts.gov/Announce/HotPage21.htm (last visited Nov. 3, 2010) (establishing default standards for discovery of electronic documents when parties were unable to proceed on a consensual basis).

226. SEDONA CONFERENCE WORKING GRP. ON ELEC. DOCUMENT RETENTION & PROD., *supra* note 118, at 45.

227. The Federal Rules make clear that a party can move for a protective order to clarify its preservation obligations. *See* FED. R. CIV. P. 26(b)(2)(B) ("On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost."). My proposal would shift the burden to the requesting party to demonstrate a need for preserving otherwise inaccessible data, rather than requiring parties to preserve all potentially relevant information unless and until they can convince the court that the cost and burden of doing so are unwarranted.

D. Limit Sanctions for Failure to Preserve Electronic Documents Only to Cases of Intentional Destruction or Recklessness

The task of preserving electronic information is fraught with pitfalls, even for the wary.[228] As noted previously, electronic information by its very nature is ephemeral, and it is routinely altered and deleted in the normal course of a company's operations. The ease with which it is created, transmitted, and stored also makes it difficult for companies to locate all electronic data that may require preservation. Indeed, given the large volumes of computer records that now exist in some companies, it may be virtually impossible to preserve all potentially relevant electronic data.[229] For these reasons, sanctions for spoliation should be imposed only when a party has intentionally destroyed evidence or has been demonstrably reckless in failing to preserve it.

The 2006 Amendments attempted to address this problem by creating a safe harbor for electronic-document preservation. Under new Rule 37(e), "absent exceptional circumstances," courts may not impose sanctions "on a party" if electronic documents are lost "as a result of the routine, good-faith operation of an electronic information system."[230] Although well-intentioned, this rule fails to

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228. As the Managing Director of the Sedona Conference noted in a recent article,

> [E]lectronically stored information can easily be rendered inaccessible though negligence, unfamiliarity of custodians with computer technology, or routine operations of computers and networks. The simple act of opening a file on a computer changes the information in the "date last accessed" field of that file's metadata, creates or overwrites various system files, and may change substantive information in the file itself. Computers are configured to run routine maintenance and "clean up" functions that will change or overwrite electronically stored information. Networks are configured to eliminate files that have not been accessed for a reasonable period of time, or automatically delete the oldest emails in a user's email box. Disaster recovery backup tapes regularly create electronically stored information by copying it from the computer hard drives, and regularly are recycled, thus destroying that information. Halting these routine operations in response to a "legal hold" may be difficult, impossible, unduly costly or unduly burdensome.

Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 189 (2006).

229. For example, in *Procter & Gamble Co. v. Haugen*, 427 F.3d 727 (10th Cir. 2005), an unfair trade practices case, the Tenth Circuit reversed the trial court's dismissal of the plaintiff's Lanham Act claims based on the plaintiff's failure to produce a database maintained by a nonparty contractor. *Id.* at 736–37. The Tenth Circuit held that the trial court's order compelling production would have resulted in substantial difficulties, such as purchasing a mainframe computer or paying the contractor close to $30 million for an archive of the database. *Id.* at 739. The circuit court held that given these circumstances, the plaintiff's duties were unclear regarding the preservation and production of the nonparty's database, and the violation of the order was not willful. *Id.* at 739–40.

230. FED. R. CIV. P. 37(e).

provide adequate protection for a variety of reasons. First, it does not account for the possibility that even the most careful attempts to locate and preserve electronic data may not succeed in preserving all potentially relevant information. For example, if a party deletes electronic data in good faith but not as part of routine operations, Rule 37(e) would not protect it. Second, the phrase "routine, good-faith operation of an electronic information system" is too vague to provide clear guidance as to a party's preservation obligations. It is unclear whether sanctions would be available against a party that fails to suspend a deleting or overwriting program that routinely rids the company's information system of data that are not reasonably accessible. Third, the rule fails to explain what exceptional circumstances might warrant the imposition of sanctions even when data are lost through the routine, good-faith operation of a computer system. Finally, the rule applies only to parties, and thus provides no protection to nonparties, who play an increasingly important role in litigation. Federal and state rules should adopt the approach recently implemented by California, in which a safe harbor is provided not only for destroyed evidence but also for evidence that has been "lost, damaged, altered or overwritten" in good faith.[231] Although there is a dearth of commentary concerning California's safe harbor provision, which was signed into law in June 2009, the new rule reflects a fair balance between the need for information and the costs of civil discovery.

Finally, the rules should require courts to consider the degree of prejudice resulting from a party's failure to preserve the electronic data in determining whether sanctions are warranted. This factor should also inform a court's decisionmaking when it determines the severity of a sanction.[232] Requiring a showing of prejudice will limit the parties' ability to exploit spoliation traps, such as discovery requests crafted simply to expose perceived imperfections in preservation efforts as a basis for sanctions or other forms of

231. CAL. CIV. PROC. CODE § 1985.8(l)(1) (West 2009). Unlike the federal rule, the California safe harbor provision is not limited to parties. *See id.* ("Absent exceptional circumstances, the court shall not impose sanctions on a subpoenaed person or any attorney of a subpoenaed person for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.").

232. *See* Withers, *supra* note 228, at 207–08 (noting that historically "the degree of prejudice to the requesting party's case due to the non-producing party's loss of the data" was "an important element in the judge's analysis").

litigation leverage that have no legitimate connection to the merits of a case. If a party cannot articulate any plausible prejudice, sanctions have no real compensatory or deterrent purpose, particularly in the case of inadvertent preservation failures.

E. Suspend Discovery During the Pendency of a Motion to Dismiss

Another critical reform is to stay all fact discovery during the pendency of any motions to dismiss. Such a rule already applies to securities class actions under the Private Securities Litigation Reform Act (PSLRA),[233] which codified a number of substantive and procedural provisions "designed to prevent abuses of federal securities class action lawsuits."[234] In passing the PSLRA, Congress sought to curtail the extensive discovery requests that plaintiffs' attorneys used to secure quick settlements and to launch fishing expeditions before a court had even determined that the plaintiff's legal claims were viable.[235] Recognizing that "[t]he cost of discovery often forces innocent parties to settle frivolous securities class actions,"[236] Congress imposed an automatic stay on discovery during the pendency of a motion to dismiss in private securities cases.[237]

This small but significant change has proven extremely effective in reining in vexatious lawsuits. "[D]efendants [in securities fraud class actions] are now extremely reluctant to settle before a motion to

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233. Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.).

234. Richard H. Walker & J. Gordon Seymour, *Recent Judicial and Legislative Developments Affecting the Private Securities Fraud Class Action*, 40 ARIZ. L. REV. 1003, 1023 (1998).

235. At congressional hearings debating the PSLRA,

> reform proponents alleged that nearly every stock price decline greater than 10% resulted in a strike suit. . . . [Public accounting firms] contended that "entrepreneurial lawyers" would find a publicly traded company with a red flag financial issue, such as a 10% drop in stock value, and name the auditing firm to the lawsuit for their 'deep pockets,' rather than blameworthiness. Lead plaintiff's counsel would then make voluminous discovery requests that were so expensive to comply with that it made sense economically to settle the lawsuit rather than protract litigation.

Brian S. Sommer, *The PSLRA Decade of Decadence: Improving Balance in the Private Securities Litigation Arena with a Screening Panel Approach*, 44 WASHBURN L.J. 413, 421–23 (2005) (footnotes omitted).

236. H.R. REP. NO. 104-369, at 37 (1995) (Conf. Rep.).

237. *See* 15 U.S.C. § 78u-4(b)(3)(B) (2006) (automatically staying discovery except when the judge finds it necessary to preserve evidence or to prevent undue prejudice to a party); *see also* Jeffrey T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws*, 55 AM. U. L. REV. 621, 635 (2006) (noting that the purpose of the mandatory stay provision is "to reduce the costs of meritless actions").

dismiss has been decided."[238] Because judges must now evaluate the merits of a securities class-action suit before subjecting a defendant to expensive civil discovery, there is little incentive for plaintiffs to file "frivolous claims."[239]

In light of this success, Congress and state legislatures should establish a similar requirement in all civil cases. Under the current system, even an entirely frivolous lawsuit can compel a defendant to expend millions of dollars collecting, reviewing, producing, and preserving records. Given the exponential rise in electronic discovery costs, this possibility exerts enormous pressure on defendants to settle cases quickly. An automatic stay would greatly reduce the *in terrorem* value of lawsuits and would ensure that lawsuits "stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed."[240] Such a stay would also be consonant with the Supreme Court's recent observations in *Bell Atlantic Corp. v. Twombly*[241] about the important role of motions to dismiss in limiting the potentially enormous costs of discovery.[242]

A number of federal courts have already adopted this approach, recognizing that because the very purpose of a motion to dismiss is to decide whether a complaint has enough merit to open discovery, it makes no sense to launch discovery before that threshold decision has been made.[243] As one court put it: if the parties begin discovery and a

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238. Richard H. Walker, David M. Levine & Adam C. Pritchard, *The New Securities Class Action: Federal Obstacles, State Detours*, 39 ARIZ. L. REV. 641, 665 (1997).

239. *See* Dae Hwan Chung, *Introduction to South Korea's New Securities-Related Class Action*, 30 IOWA J. CORP. L. 165, 177 (2004) (noting that the PSLRA "stay provision has had a great effect on curbing frivolous claims"); *see also* Walter C. Somol, *Dredging the Safe Harbor for Forward-Looking Statements—An Analysis of the Private Securities Litigation Reform Act's Safe Harbor for Forward-Looking Statements*, 32 SUFFOLK U. L. REV. 265, 297–98 (1998) (explaining that one of the "positive effects" of the PSLRA is that "companies . . . resist filing meritless claims").

240. S.G. Cowen Sec. Corp. v. U.S. Dist. Court, 189 F.3d 909, 912 (9th Cir. 1999) (quoting Medhekar v. U.S. Dist. Court, 99 F.3d 325, 328 (9th Cir. 1996)).

241. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

242. *Id.* at 558–59 (noting that the defendants faced the prospect of having to produce "reams and gigabytes of business records" in the event that the motion to dismiss was denied).

243. *See* Tostado v. Citibank (S.D.), N.A., No. SA-09-CV-549-XR, 2009 WL 4774771, at *1 (W.D. Tex. Dec. 11, 2009) (granting the defendant's motion to stay discovery pending adjudication of a motion to dismiss); West v. Johnson, No. C08-5741RJB, 2009 WL 2163565, at *1 (W.D. Wash. July 16, 2009) ("A short stay of discovery is appropriate until a decision can be made on the various Defendants' motions to dismiss . . . ."); Allmond v. City of Jacksonville, No. 3:07-cv-1139-J-33TEM, 2008 WL 2704426, at *2 (M.D. Fla. July 8, 2008) (granting a motion to stay discovery pending a ruling on a motion to dismiss because "upon cursory glance of

court ultimately grants a defendant's motion to dismiss, then the initial discovery "would constitute needless expense and a waste of . . . time and energy."[244]

CONCLUSION

Discovery abuse continues to be a serious problem in the American civil justice system and is rapidly growing more pernicious. Plaintiffs' counsel continue to rely on the same calculus: in other words, the time and expense defendants must devote to responding to voluminous discovery requests will make settlement more attractive. Burdensome discovery requests force defendants to devote considerable resources to identifying, collecting, and copying documents. Such requests also impose hefty legal fees because all documents must be reviewed by counsel prior to production to ensure that they do not contain privileged material. Plaintiffs can also impose substantial costs by seeking to depose the defendant's key employees. The time needed to prepare for, travel to, and participate in such depositions can distract these employees from their normal duties for extended periods.[245] Broadly worded interrogatories also sidetrack the defendant's employees, forcing them to spend considerable time gathering information and conveying it to their attorneys.

Plaintiffs' attorneys also continue to engage in unwarranted and ultimately useless fishing expeditions. Broad document requests and numerous depositions seeking mostly irrelevant information impose significant costs on defendants because employees must spend time searching for responsive documents and responding to interrogatories

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Defendants' motions to dismiss the resolution of the motions could dispose of the entire case"); Port Dock & Stone Corp. v. Oldcastle Ne., Inc., No. 05-4294 DRH ETB, 2006 WL 897996, at *1–2 (E.D.N.Y. Mar. 31, 2006) (granting the defendants' motion to stay discovery pending resolution of a motion to dismiss when defendants "raise[d] substantial issues with regard to the viability of plaintiffs' complaint"); Howse v. Atkinson, No. 04-2341 GTV DJW, 2005 WL 994572, at *1–2 (D. Kan. Apr. 27, 2005) (granting a motion to stay discovery pending a ruling on a motion to dismiss raising issues related to immunity defenses); *see also Twombly*, 550 U.S. at 563 n.8 (recognizing that courts must carefully scrutinize motions to dismiss because "before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct").

244. Thompson v. Ret. Plan for Emps. of S.C. Johnson & Sons, Inc., No. 07-CV-1047, 2008 WL 4964714, at *10 (E.D. Wis. Nov. 14, 2008).

245. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) (noting the high costs of discovery and discovery-related abuse); *see also* TASK FORCE ON CIVIL JUSTICE REFORM, BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 6–7 (1989) (estimating that 60 percent of litigation costs in federal cases can be attributed to discovery and abuse of the discovery process); Willging et al., *supra* note 5, at 530–31, 540, 547–50 tbls.3, 4 & 5 (detailing the costs of discovery).

seeking information of little, if any, relevance.[246] Even the Supreme Court has recognized the deleterious effects of fishing expeditions, denouncing them as "a social cost, rather than a benefit."[247] And the noxious effects of fishing expeditions are not limited to needless and excessive costs. Plaintiffs' attorneys also use fishing expeditions to uncover embarrassing information about the defendant or its employees, or to force a competitor to divulge trade secrets or other proprietary information.[248]

The tactical jockeying that is now commonplace during discovery has also given rise to more subtle forms of harassment. As one plaintiffs' attorney boasted, "'a nice way to tie up the other side' is to secure a protective order which limits the number of [the defendant's employees] with whom opposing counsel can share information and discuss the case." The attorney went on to explain that these protective orders "can impair an attorney's capacity to prepare for trial and can force him to spend time and money trying to justify a modification" to the order.[249] Such efforts to game the system serve no legitimate purpose.

Discovery abuses have profoundly negative consequences for American courts and, ultimately, the American economy. Justice is denied as defendants deem litigation too expensive to pursue. Cases languish as parties work to collect and review previously unimaginable volumes of documents. Judges are distracted from substantive matters to referee increasingly acrimonious discovery disputes. Consumers are harmed as the costs of companies' increased litigation exposure are passed on to them in the form of higher prices. The uncertainty and cost associated with frivolous lawsuits dissuade foreign companies from doing business in America, depriving the U.S. economy of a much-needed source of jobs and investment.

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246. *See* Janet Novack, *Control/Alt/Discover*, FORBES, Jan. 13, 1997, at 60, 60 ("[T]he more common problem is that companies are having to spend long hours and big dollars culling and retrieving data . . . .").

247. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975).

248. Brazil, *Views from the Front Lines*, *supra* note 73, at 236 ("[Attorneys would] demand[] that an opponent produce his income tax returns to capitalize on fears that disclosure of income could lead to difficulties with the government or a spouse, explor[e] politically sensitive subjects in suits against public agencies or officials to capitalize on fears of political repercussions, inquir[e] into the dating habits of a separated spouse or threaten[] to depose the third member of a relationship whose triangularity would best be kept secret, and focus[] discovery probes on arguably illegal and clearly embarrassing corporate 'contributions' to foreign governments or officials.").

249. *Id.* at 232 n.27.

Because the situation is deteriorating rapidly, an immediate and comprehensive response is necessary. Ultimately, our courts need to adopt new procedural rules that will allow parties to litigate matters in a timely and cost-efficient manner. In the meantime, however, even modest measures—such as more standardized case-management orders and increased, early attention to discovery issues by judges and magistrates—could significantly alleviate discovery abuse. In addition, courts must be given additional resources to manage cases, particularly the larger, more complex cases that are most susceptible to abuse. Although those changes would not completely resolve the issues present in the civil discovery process, they would provide a substantial improvement and a foundation for further reforms.