Rediscovering Discovery: State Procedural Rules and the Level Playing Field

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REDISCOVERING DISCOVERY: STATE PROCEDURAL RULES AND THE LEVEL PLAYING FIELD

Seymour Moskowitz*

In the modern era of few trials, the pretrial process is critical to the disposition of most cases. Discovery has been a fiercely debated subject for many years. Many commentators believe that discovery has become too expensive, very time consuming, and often abusive. Others disagree, and articulate an entirely different diagnosis of the problems in our civil justice system. Regardless, the scope of discovery, and the process for undertaking it, create predictable advantages and disadvantages for many types of litigants. Although state courts dispose of the vast majority of cases in the United States, academic writings on procedural matters, particularly discovery, often overlook this area. This Article focuses on the state court aspects of discovery and examines the discovery rules in state courts. The Author identifies dramatic changes taking place in these courts. The Author summarizes major trends in state rules, and discusses changes and experiments in four states—Texas, Arizona, Illinois and Colorado—in detail. The Article also analyzes whether changes in discovery are likely to create even further increases in the growing numbers of summary judgments granted, and whether voluntary sharing of information is likely to be successful in our adversary litigation system.

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I. INTRODUCTION

The courts are an integral part of American society. Millions of individual Americans and businesses rely upon the civil justice system to resolve issues—personal injuries, family law matters, commercial disputes—that are of immense importance in their lives. In 1999, nearly ninety-one and a half million new cases were filed in state courts, together with more than two million in the federal courts. In addition to private cases, courts are a frequent venue for issues in the public square. De Tocqueville noted in the 1840s that law, lawyers and the legal system are central ingredients in our American democracy: “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” Major public policy issues are routinely decided within the context of civil litigation in the United States. Brown v. Board of Education, and its progeny, is a classic example. More recent battles have included litigation, primarily in the state courts, about the liability of tobacco companies to smokers and states to cover costs for

2. Id.
4. 347 U.S. 483 (1954) (holding that racially segregated schools are unconstitutional).
smoking related illnesses, as asbestos manufacturers, cases attempting to ameliorate degradation of the environment, as well as numerous other decisions impacting entire industries.

Litigation in the United States has yet another important political or societal dimension. At least since the time of Andrew Jackson, persistent skepticism about the ability of public officials to protect the interests of ordinary citizens from either their government or from damage at the hands of those with wealth and economic power has been expressed. As Jackson acknowledged, "[i]t is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes... There are no necessary evils in government. Its evils exist only in its abuses."

Procedure matters in litigation. As Leonard Levy has noted, "the history of both liberty and constitutional government is in large part the history of procedure." Moreover, procedural rules allocate power between litigants and thus affect substantive results. Although first year law students in civil procedure courses across the United States study the Federal Rules of Civil Procedure (the "Federal Rules") in depth, this is often the extent of serious study of civil procedure in American legal education. Once in practice, however, these lawyers


7. See, e.g., Vander Bloemen v. Wis. Dep't of Natural Res., No. 95-1761, 1996 WL 346266, at *2 (Wisc. Ct. App. June 26, 1996) (holding that the public trust doctrine applies to the protection of lakeside ecology); Selkirk-Priest Basin Ass'n v. Idaho ex rel. Andrus, 899 P.2d 949, 953-55 (Idaho 1995) (holding the public trust doctrine conferred standing to an environmental group to challenge a timber sale on state forest lands because sediment from the logging would harm fish spawning grounds and the bed of an appurtenant creek); State v. Ventron Corp., 468 A.2d 150 (N.J. 1983) (suit by the Department of Environmental Protection against corporations and individuals based on mercury pollution of state waterway); Village of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824 (Ill. 1981) (deciding a nuisance action to enjoin operator of chemical waste disposal site from continued operation); Clark Curriden, Power of 12: Jurors Increasingly are Sending Loud Messages of Censure with Megabuck Verdicts. But Critics Charge That a Jury is the Least Qualified Body to Decide Public Policy, 87 ABA J., Aug.-Sept. 2001, at 36 (cataloging and describing litigation involving HMOs, Fenphen, Tylenol, and other drugs, children's pajamas, and numerous other cases forcing businesses and government to change the way they operate).


9. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT ix (1968); see also Fay v. Noia, 372 U.S. 391, 401 (1963) (noting that even though "in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty").
quickly recognize the significance of state procedural rules. The vast majority of legal matters in the United States concern state law and the vast majority of these matters entering the court system are filed in state venues.\textsuperscript{10} Civil filings in state courts of general jurisdiction increased by thirty-two percent between 1984 and 1999.\textsuperscript{11} In the federal courts, new cases filed actually decreased in the same time period.\textsuperscript{12}

In the modern era, the pretrial process is critical to the disposition of most cases. The vast majority of cases never go to trial. Seventy-five percent of tort cases in state courts, for example, are disposed of through settlement or voluntary dismissal.\textsuperscript{13} Those which are contested at trial and upon appeal are often decided upon the results of the information gathering conducted before trial. This is true in both private litigation and in public interest cases where “private attorneys-general” may only function effectively with court-enforced discovery.\textsuperscript{14}

The core function of discovery is to seek the truth so disputes may be settled by what the facts reveal rather than what facts are concealed.\textsuperscript{15} Legal disputes should be resolved on a level playing field.

This Article examines the state of state court pretrial discovery. Although in the past state procedure was often patterned after the Federal Rules many state rules have now escaped the gravitational pull of the federal rules. Some now utilize different discovery procedures in different types of cases, a departure from the “trans-substantive” nature of the federal rules.\textsuperscript{16} Mandatory disclosure is a

\begin{itemize}
\item \textsuperscript{10} The number of state cases dwarfs the federal caseload. While approximately 91.5 million cases were filed in state courts in 1999, only 2.1 million cases were filed in the federal courts in that year. NAT'L CTR. FOR STATE COURTS, supra note 1, at 14.
\item \textsuperscript{11} Id.
\item \textsuperscript{12} Id.
\item \textsuperscript{13} Roselyn Bonanti, Tort ‘Reform’ in the States, TRIAL, Aug. 2000, at 28; see also N.Y. State Bar Ass’n, Public Policy Report, A Rising Tide of Torts, 71 N.Y. STATE BAR J., Apr. 1999, at 41. In New York, only 3.5 percent of all tort cases filed went to trial. Id.
\item \textsuperscript{14} At the federal level, Patrick Higginbotham has observed the following: 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. In the main, the plaintiff in these suits must discover his evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress. Patrick Higginbotham, Foreward, 49 ALA. L. REV. 1, 4-5 (1997).
\item \textsuperscript{15} See, e.g., Computer Teaching Corp. v. Courseware Applications, Inc., 556 N.E.2d. 816, 818 (Ill. App. Ct. 1990) (finding that “[d]iscovery is to be a mechanism for the ascertainment of truth” and for creating conditions for a fair trial or a fair settlement).
\item \textsuperscript{16} William W. Schwarzer, In Defense of “Automatic Disclosure in Discovery,” 27 GA. L. REV. 655, 657 (1993) (rebuiting previous opposition to the provisions of Rule 26
central pretrial concept in many jurisdictions, with requirements far beyond those mandated in federal courts. A significant number limit the traditional discovery tools—depositions, interrogatories, requests for production of documents, etc.—in important ways. Some states now explicitly require judges to "manage" the pretrial process, and mandate or encourage the use of court drafted "standard discovery" in lieu of party-controlled information gathering.

In the treatise portions of Matthew Bender's *Forms of Discovery*—Volumes 11 to 14—I annually update a detailed analysis of all fifty state rules of discovery. This Article does not duplicate the mass of information presented in the treatise analyzing developments in all fifty states. Rather, this Article sets out general trends and highlights specific state initiatives that offer fresh perspectives on pretrial gathering of information in the civil justice system.

Part II of this Article provides a brief history of the development of pretrial discovery and its significance in modern litigation. In Parts III and IV, I discuss the controversy which surrounds discovery practice in civil cases and changes in state procedure rules which were initiated in the past decade. Part V presents an overview of general trends in state discovery rules together with vignettes of four specific states—Texas, Arizona, Illinois and Colorado. These states are engaged in a variety of procedural experiments attempting to make civil litigation cheaper, faster and more efficient. Part VI looks at the interplay between dispositive pretrial motions, particularly summary judgment, and discovery rights. Part VII discusses whether changes in rules and judicial exhortations to share information between parties can be expected to change contemporary pretrial practice and, if not, why not.

II. THE IMPORTANCE OF PRETRIAL INFORMATION GATHERING

"Mutual knowledge of all of the relevant facts gathered by both

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17. *See discussion infra* notes 362-82 and accompanying text.

18. *See discussion infra* notes 127-55 and accompanying text.

19. *See discussion infra* notes 127-55 and accompanying text.

20. The rules are summarized in charts or presented in full text and are annually compared to the comparable federal discovery rules. *See* 11 BENDER'S FORMS OF DISCOVERY app. B (2001) (Comparison of State Rules with Federal Rules of Civil Procedure 26 Through 33) [hereinafter BENDER'S DISCOVERY FORMS]; *id.* at app. C (State Rules Governing Discovery at Variance with the Federal Rules); 12 BENDER'S DISCOVERY FORMS app. E (Comparison of State Rules with Federal Rule of Civil Procedure 34); *id.* at app. F (State Rules at Variance with Federal Rule 34); 13 BENDER'S DISCOVERY FORMS app. H (Comparison of State Rules with Federal Rules of Civil Procedure 35 and 36); *id.* at app. I (State Rules at Variance with Federal Rules 35 and 36); 14 BENDER'S DISCOVERY FORMS app. K (Comparison of State Rules with Federal Rules of Civil Procedure 37 and 45).
parties is essential to proper litigation."

Generations of American lawyers have now been educated and practiced law under modern discovery concepts and rules. Pretrial information gathering under party control has become an integral part of our legal culture. Disputes must be decided by courts on the facts and the law, after an opportunity for each side to inform itself and its opponent of its version of fact and law. Professor Geoffrey Hazard has expressed the view that such a right has a "virtually constitutional foundation" in modern American litigation. Professor Hazard’s point, perhaps expressed hyperbolically, is correct. The American civil justice system could not function without opportunity for each side to gather information to present to each other and to a court, if necessary. Indeed, although the vast majority of cases filed in the United States never go to trial, discovery is an essential part of the process by which parties negotiate their own resolution of the dispute, and upon which courts dispose of cases by dispositive pretrial motions. Without the information gathering devices that civil procedure rules provide, neither side could effectively evaluate the strength of its own or its opponent’s position. Moreover, if the parties were not gathering potential evidence, the huge caseloads in American civil courts could scarcely be managed by the courts.

Pretrial information gathering is critical, not only to individual cases, but also to the political role litigation plays in the United

24. Depositions, for example, may often be a means of conveying the strength of a party’s case to the opponents so that a more realistic appraisal of the probability of success may occur. See James W. McElhaney, Should You Hide the Flag? It Can Pay to Reveal Case Strengths During Depositions, 84 A.B.A. J., Oct. 1998, at 74 (counseling that it may pay to reveal case strengths during a deposition because this is the only occasion when witnesses will ordinarily testify and it pays to make it clear how strong they can be).
25. See In re Convergent Tech. Sec. Litig., 108 F.R.D. 328, 331 (N.D. Cal. 1985) (“The whole system of Civil adjudication would be ground to a virtual halt if the courts were forced to intervene in even a modest percentage of discovery transactions.”).
States. Dean Carrington has noted that discovery is the American alternative to a bureaucratic state: “The superiority of private litigation over the administrative process was recognized in the years following 1938, when modern discovery was introduced.” Progressively, civil procedure has become the instrument for creating public reforms and for challenging existing institutional practices. As Mirjan Damaška notes, “the objectives of civil litigation became complex and multiple . . . . Effective tools of partisan investigation were developed with an eye toward litigation as an instrument of ‘public policy.’”

But this access to pretrial information has not always been available. The English common law system was characterized by rigid, writ-dominated pleadings, limited parties, and single-issue cases. These limitations undergirded a process structurally antithetical to information gathering tools. On the other hand, the practices in equity courts provided the basis for modern discovery devices. In “legal” cases, the investigating party generally had to identify specific materials as to which discovery was sought. Even under “Field” Codes in American states, a plaintiff could not even begin discovery unless he or she could independently substantiate “facts” stated in a complaint. There was 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. In 1911, the U.S. Supreme Court denounced as a “fishing bill” any effort by a party to “pry into the case of his adversary to learn its strength or weakness.” An example of this same attitude in the state courts is found in a Massachusetts


29. See generally GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL (1932) (describing discovery devices and procedures used in various American jurisdictions in 1932).


31. See, e.g., In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1155 (N.D. Ill. 1979) (“[T]he heart of any American antitrust case is the discovery of business documents. Without them, there is virtually no case.” (citation omitted)).

case where the Massachusetts Supreme Court denied a litigants petition for discovery, reasoning the following:

It seems that the real purpose of taking the deposition is merely to fish out in advance what the testimony will be . . . . 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. \(^{34}\)

The adoption of the Federal Rules marked a new approach and epoch. Charles Clark, former President of the Association of American Law Schools, and the drafter of the Federal Rules was fond of quoting Frankfurter: “New winds are blowing on old doctrines. The critical spirit infiltrates traditional formulas . . . .” \(^{35}\) The Federal Rules simplified pleading, \(^{36}\) liberalized joinder of parties and claims, \(^{37}\) and emphasized ease of litigation rather than technical legal pleading. In the seminal case of Conley v. Gibson, \(^{38}\) the Supreme Court reaffirmed that Federal Rule 8 only required a plaintiff to give fair notice to the defendant by way of a “short and plain statement of the claim.” \(^{39}\) The different phases of the pretrial process were mutually reinforcing. Another major theoretical and practical feature of the 1938 procedural revolution was elimination of differing pleading requirements for different types of cases. Professor Clark insisted that the concepts of uniformity and simplicity and the decision to merge law and equity required the same rules for all cases. \(^{40}\) State procedure rules soon followed the federal model as a majority of the states adopted the main features of the new federal procedure. \(^{41}\)


34. Id. at 4-5; see also In re Abeles, 12 Kan. 451, 453 (1874); In re Cubberly, 18 P. 173, 173 (Kan. 1888) (“The taking of the deposition of a party in a pending case, merely to fish out in advance what his testimony will be, and to annoy and oppress him, and not for the purpose of using the same as evidence, is an abuse of judicial authority and process . . . .”).


36. FED. R. CIV. P. 8.


39. Id. at 47; see also Taylor, 329 U.S. at 501 (“The new rules, however, restrict pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial”).


Most scholars give the credit for the innovative discovery concepts embodied in the Federal Rules to Professor Edson R. Sunderland. A scholar much engaged in the real world, he had consistently advocated expanding discovery techniques. Professor Subrin notes that the initial draft of the Federal Rules distributed for public comment “included every type of discovery that was known in the United States and probably England up to that point.” Sunderland’s draft went beyond the rules of any particular jurisdiction:

If one adds up all of the types of discovery permitted in individual state courts, one finds some precursors to what later became discovery under the Federal Rules; but . . . no one state allowed the total panoply of devices. Moreover, the Federal Rules, as they became law in 1938, eliminated features of discovery that in some states had curtailed the scope of discovery and the breadth of its use.

Responding to the spirit of the new rules, the Supreme Court wrote in 1946: “No longer can the time-honored cry of “fishing expedition” serve to preclude a party from inquiring into the facts underlying his opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”

The original Federal Rules, however, had significant limits upon discovery. Examination and production of documents, for example, were only available if ordered by the judge. “[I]nspections [of documents] had always been strictly regulated by the court and the potential for invasion of files had always been feared.” “Good cause” was required to allow production of documents under the original Rule 34. Over time, these restraints on access to documents were


43. See, e.g., Edson R. Sunderland, Scope and Method of Discovery Before Trial, 42 YALE L.J. 863, 872-73 (1933) (describing the benefits of “unrestricted mutual discovery.”).

44. Subrin, Historical Background, supra note 42, at 718.

45. Id. at 719.

46. Taylor, 329 U.S. at 507; see also United States v. Procter & Gamble Co., 356 U.S. 677, 682-83 (1958) (discovery together with the fair trial procedures make trial less a game of blindman’s bluff and more a fair contest).

47. WILLIAM GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 33 (1968).

gradually limited. In 1970, the requirement for prior judicial approval for document discovery was removed entirely in the federal courts.49

Other changes similarly liberalized discovery. In 1946, the Federal Rules were amended to make clear that even inadmissible material was discoverable so long as it was "reasonably calculated to lead to the discovery of admissible evidence."50 In 1948 a number of reforms were instituted. The requirement of leave of court for taking depositions was eliminated.51 Arbitrary limits on the number or scope of interrogatories were eliminated;52 the standard for document production and inspection was eased from documents "material" to the case to documents "related" to the case.53 In 1970, insurance policies were explicitly made discoverable54 and the motion to compel was widened to apply to all discovery devices except mental and physical exams under Rule 35.55

In general, state procedure rules followed the federal developments. In 1935, Judge Clark and Professor Moore had expressed the hope that the federal rules might "properly be a model to all the states."56 Arizona was the first state in the nation to change its rules of civil procedure to follow the newly adopted Federal Rules.57 Norman Hull, a Phoenix lawyer, argued in favor of Arizona's adoption of the federal rules because they were well-reasoned and desirable, and because "lawyers practicing before the state courts would be governed by the same rules and, when practicing before any federal court in the United States they could walk into the courtroom and feel at home."58 Although states accommodated to wider discovery at different times, a current survey of fifty state procedure rules shows

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50. This language is now found at the end of FED. R. CIV. P. 26(b)(1).
52. Id. at 461.
53. Id. at 463.
55. See id. at 488. The proposal states that Rule 35 was excluded in this expansion for two reasons: only a small percentage of exams needed motions, and, more significantly, the concern for "the interest of the person to be examined in the privacy of his person." Id.
57. Oakley & Coons, supra note 41, at 1381.
all have incorporated the discovery devices—depositions, interrogatories, etc.—codified in the federal rules, sometimes modified to meet specific state procedure.\textsuperscript{59} Substantial differences in discovery between federal and state rules do, however, exist and these variations are increasing.

An opportunity to engage in meaningful pretrial information gathering is the counterpart to notice pleading\textsuperscript{60} and an essential element in a just dispute resolution system. Liberal discovery is essential to pursue factual support for claims and defenses pleaded in a nonspecific manner.\textsuperscript{61} Almost all states have replaced fact or code pleading with a “short and plain statement of the claim”\textsuperscript{62} by the plaintiff or another party. The Supreme Court noted in Conley that “[s]uch simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”\textsuperscript{63}

Improved discovery is defended on the basis that it creates better access to courts and facilitates greater social justice. Cases are no longer decided on “sporting” rules that allow surprise evidence and hidden traps for the unwary or misled.\textsuperscript{64} Just results are more likely if both sides have access to information relating to their opponent’s contentions.\textsuperscript{65} The long struggle regarding the liability of the tobacco companies for damages caused to smokers, their public and private insurers, and the public would have been inconceivable without ac-


\textsuperscript{60} Taylor, 329 U.S. at 507-08 (distinguishing the discovery process, which provides information for trial, from pleadings, which merely give notice). The term “notice pleading” may well be inaccurate because in actual court practice complaints (and counterclaims) must give “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” 5 CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 472-73 (5th ed. 1994) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

\textsuperscript{61} See, e.g., FED. R. CIV. P. 8(a); Conley, 355 U.S. at 47-48 (describing how pretrial information gathering and issue defining are critical to the structure of modern litigation and these rest upon appropriate discovery methods).

\textsuperscript{62} See, e.g., ALA. R. CIV. P. 8; ALASKA R. CIV. P. 8; ARIZ. R. CIV. P. 8; COLO. R. CIV. P. 8; DEL. SUPER. CT. CIV. R. 8; DEL. C.P. CT. CIV. R. 8; HAW. R. CIV. P. 8; IDAHO R. CIV. P. 8(a)(1); IND. TRIAL R. 8; IOWA R. CIV. P. 70(a); KAN. STAT. ANN. 60-208(a) (1999); KY. R. CIV. P. 8/01; ME. R. CIV. P. 8; MASS. R. CIV. P. 8; MINN. DIST. CT. GEN. R. 8.01; MISS. R. CIV. P. 8; MONT. R. CIV. P. 8(a); NEV. R. CIV. P. 8; N.D. R. CIV. P. 8; OHIO R. CIV. P. 8; R.I. R. CIV. P. 8; S.D. CODIFIED LAWS § 15-6-8(b); TENN. CIV. P. R. 8; UTAH. R. CIV. P. 8; VT. R. CIV. P. 8; WASH. CIV. P. R. 8; W. VA. R. CIV. P. 8; WYO. R. CIV. P. 8.

\textsuperscript{63} Conley, 355 U.S. at 47-48.

\textsuperscript{64} See, e.g., Subrin, How Equity Conquered Common Law, supra note 37, at 945.

cess to information possessed mainly by the industry. One aspect of the case for comprehensive information sharing is thus based on the need to formulate and prove claims on behalf of previously unknowing and damaged individuals. The production of documents and/or electronically stored information is typically a plaintiff’s best means of obtaining evidence to prove a case that would be otherwise unproveable or to transform merely compensatory damages into a punitive award. Professor Green describes plaintiffs’ attorneys in product liability cases, for example, relying on “civil discovery . . . [as] their best hope of obtaining information that would reveal whether their clients had meritorious claims and, if so, provide the evidence to enable their clients to prevail.”66 Equity-derived liberal access to information allows equity-derived remedies, developed for this purpose in institutional reform cases.67

Some have even argued that developments in substantive law areas such as products liability and consumer protection have been the result, at least partly, of broad ranging discovery rights.68 The Supreme Court has occasionally invoked the existence of broad discovery as pertinent to its handling of substantive issues of employment discrimination law. In holding that plaintiffs must demonstrate that challenged employment practices actually caused racial imbalances in the work place,69 it rejected arguments that this was unfair by pointing to discovery. The Court contended that “[s]ome will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers’ records in an effort to document their claims.”70

Similarly, when the Court placed the burden of rebutting an employer’s non-discriminatory justification on employees, it observed that its ruling would not “unduly hinder the plaintiff” because of “the


70. Wards Cove, 490 U.S. at 657. The Court added that employers are required to maintain records that would provide the sort of information needed to prove causation. Id. at 657-58.
liberal discovery rules applicable to any civil suit in federal court. Thus, the very structure of employment discrimination statutes as interpreted by the Court has, at times, been founded on the availability of broad discovery.

Since 1970, the tide has changed. The thrust of the amendments to the federal rules since then has been toward containing the cost and time expended on the exchange of pretrial information. In 1980, discovery conferences in federal court were first introduced. In 1983, other amendments followed. The sentence of Rule 26(a), which provided that the frequency of use of discovery mechanisms was not to be limited, was deleted and a sentence was added to Rule 26(b) permitting courts to limit discovery. New Rule 26(g), which encourages judges to impose appropriate sanctions for discovery abuse, was also added, together with an explicit barring of disproportionate discovery. In 1993, new automatic disclosure provisions were introduced and explicit limits on discovery (depositions and interrogatories) were codified. Amendments to the federal rules expanded the roles of judges early in lawsuits by requiring the approval of discovery plans.

III. THE DISCOVERY “ABUSE” CONTROVERSY

While liberal discovery was one of the major innovations of the 1938 Federal Rules and the state rules that soon modeled themselves upon them, dissenting views as to its propriety and costs have always been present. Even before the rules were completed, Robert Dodge of Boston and Senator Claude Pepper were fearful that unsavory plaintiffs’ lawyers would use discovery to “blackmail” corporations and their officers. In 1936, Judge Edward Finch of the New York Court of Appeals criticized the discovery provisions, warning that the pro-

71. Tex. Dept’ of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981). The Court also pointed out that the claimant would have access to the investigative file compiled by the Equal Employment Opportunity Commission. Id.
72. FED. R. CIV. P. 26 cmt. 3.
74. See FED. R. CIV. P. 26(b)(2).
75. See FED. R. CIV. P. 26(d), 26(f). Rule 30 was revised to require leave of court if more than ten depositions were desired. Amended Rule 33 limited the number of interrogatories to thirty. See Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 40 (1993).
76. See FED. R. CIV. P. 26(f).
77. See Proceedings of the Meeting of the Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States (Feb. 22, 1936) (statement of Senator George Wharton Pepper) [hereinafter Proceedings of the Advisory Committee], quoted in Subrin, Historical Background, supra note 42, at 720-22.
posed rules would “increase so-called speculative litigation or litigation based upon suspicion rather than facts, with the hope that such fishing may reveal a good cause of action as alleged or otherwise.”

In his view, the rules gave so many tools to the person asserting a claim “that it will be cheaper and more to the self-interest of the defendant to settle for less than the cost to resist.”

William D. Mitchell, Chairman of the Federal Rules Advisory Committee, predicted: “We are going to have an outburst against this discovery business unless we can hedge it about with some appearance of safety against fishing expeditions.”

These statements in the pre-Federal Rules 1930’s sound decidedly contemporary. There have been a plethora of recent articles and surveys in which prominent critics describe discovery practice as a major problem. In the view of these detractors, discovery has become too expensive, too time consuming, and often abusive. Thomas Zlaket, author of Arizona’s new discovery rules, articulates this indictment and argues the previous rules encouraged lawyers to act in an overly aggressive and adversarial manner.

Professor Arthur Miller writes that discovery has become both an unnecessary expense and a major cause of delay in modern litigation. Judge William W. Schwarzer, an ardent proponent of change at the federal level, views the pretrial process as out of control: “Discovery, originally conceived as the servant of the litigants to assist them in reaching a just outcome, now tends to dominate the litigation and inflict disproportionate costs and burdens.”

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79. Id. at 810.
While many perceive discovery practice as a serious problem, others maintain there is little empirical evidence to support what they label as the “pervasive myth of pervasive discovery abuse.” As Professor Sorenson concludes:

[L]ittle empirical research has been done to objectify and quantify discovery abuse. . . . [C]laims of discovery abuse have rested largely on nonevidence and may well be generally exaggerated. Frequently the assertions of the extent of discovery abuse do not rest on evidence, but only cite to another writer making a similar claim or simply make a conclusory statement that derives its strength from the fact that it has been repeated so frequently.

These commentators conclude that “discovery normally works well, and that liberal discovery is on balance a functioning system used effectively in more than half of lawsuits filed.”

Defenders of party-controlled liberal pretrial information gathering point to empirical studies that challenge the discovery abuse hypothesis. One study of Iowa state trial courts reported that only twenty-five percent of all cases had any formal discovery and few of those involved extensive discovery. Most Iowa judges and attorneys surveyed felt abuse existed only in a small minority of cases. The National Center for State Courts examined discovery activity in trial courts in Boston, New Haven, Kansas City, Seattle, and Shelton (Washington). It found that no discovery at all was generated in forty-two percent of 2,190 cases sampled, but that discovery was significantly higher in some courts than others. Discovery was more frequent and higher in volume in tort cases, particularly malpractice and product liability cases, in contrast to almost no discovery initiated in contract and property cases. The Civil Litigation Research Project (the “CLRP”), at the University of Wisconsin studied “ordi-

86. Sorenson, supra note 81, 703-04.
89. Mullenix, supra note 85, at 1440-42.
90. See Susan Keilitz et al., Is Civil Discovery in State Trial Courts Out of Control?, 17 ST. CT. J., Spring 1993, at 8-17 (summarizing relevant data); see also Susan Keilitz et al., Attorneys' Views of Civil Discovery, 32 JUDGES' J., Spring 1993, at 2-6 (reporting the results of the study). The number of requests per case showed a mean of 6.4 and a median of 4. Id. This suggests that most of the cases are clustered together in the lower range of discovery volume.
nary litigation": cases in which more than $1,000 was in controversy, but excluding "mega cases." In these cases, the CLRP found that "relatively little discovery occurs in the ordinary lawsuit. We found no evidence of discovery in over half our cases." ⁹¹

The Federal Judicial Center (the "FJC") used a case-based methodology to examine discovery activity in 3,000 terminated cases in six urban federal district courts in 1978. The purpose of the FJC study was to provide data about federal discovery practice. This investigation again confirmed the results reported by the National Center for State Courts. The study reported that no discovery requests were filed in fifty two percent of the cases, and that fewer than five percent of the cases had more than ten discovery requests. ⁹² Over three decades, empirical research has shown "the typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation, and... discovery generally—but with notable exceptions—yields information that aids in the just dispositions of cases." ⁹³

While there are sharp disagreements on the merits and costs of pretrial information gathering, there is also spirited debate about precisely what constitutes "abuse." As discussed above, many complain of excessive, inappropriate, and overly expensive discovery. This view posits that parties, principally plaintiffs, use discovery as a tactical weapon to impose excessive costs on the other side, thus imposing unfair settlements. Unnecessary, numerous and lengthy depositions and voluminous interrogatories are employed to exhaust

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⁹³. See Thomas E. Willging et al., An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments, 39 B.C. L. REV. 525, 527 (1998). Another study by the Rand Corporation was based on 5,222 cases filed in 1992-93 in 20 federal districts. See James S. Kakalik et al., Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data, 39 B.C. L. REV. 613, 618 (1998). Excluded from its sample were the cases which usually involved little or no discovery or management: prisoner cases, administrative review of social security cases, bankruptcy appeals, foreclosures, forfeiture and penalty cases, and debt recovery. 55% of the remaining cases had little or no discovery. Id. at 635-36. In more than a third of these cases, there was no lawyer discovery activity. Similarly, the Federal Judicial Center studied 1,000 cases closed in the last quarter of 1996 that were likely to involve discovery. This FJC study excluded social security appeals, student loan collections, foreclosures, default judgments and cases terminated within 60 days of filing. See Willging, supra, at 528. This excludes about 55% of the civil docket. Id. at 595. The FJC concluded the median cost of discovery was about $6,500 per client (about half of median litigation costs). Relative to the stakes involved in these cases, the FJC found that discovery expenses were quite low. Id. at 531.
the opponent.94 A contrary view, however, defines abuse as resistance to legitimate information requests in the hope of either avoiding disclosure or simply buying time and increasing costs for the opponent. These tactics include: refusing to provide or hiding information, raising frivolous claims of privilege, intentionally construing discovery requests narrowly, coaching witnesses to avoid disclosing information, and providing deliberately evasive answers to legitimate requests.95

Inextricably intertwined with this debate about the existence of "abuse" of the discovery process is the tendency to conflate "discovery reform" with "tort reform".96 Some maintain arguments in favor of reduced cost and greater efficiency in discovery are disguised attempts to promote the interests of repeat corporate defendants and their insurers.97

IV. THE CONSTRICTION OF DISCOVERY

Similar to developments in federal procedure, the trend to limitations on discovery in state courts began in the 1970s. By 1980, at least eleven states had placed express limits on the use of interrogatories.98 In 1981, the Texas Supreme Court ordered that, without agreement or leave of court, only two sets of interrogatories were permitted, each having a number of questions including subdivisions "so as not to require more than thirty answers." 99 California limited interrogatories to thirty-five in 1986.100

The increasing volume of cases was a major factor contributing

94. Zlaket, supra note 82, at 3 (recognizing that "huge numbers of interrogatories, marathon depositions, voluminous document requests and other similar tactics have become today's norm").

95. Sorenson, supra note 81, at 699-700. Professor Wolfson summarizes this problem by noting that the cause of discovery abuse inheres in a litigation approach characterized by the maxim: "never be candid, never be helpful, and make your opponent fight for everything he seeks." Michael E. Wolfson, Addressing the Adversarial Dilemma of Civil Discovery, 36 CLEV. ST. L. REV. 17, 45 (1988).

96. See Carrington, supra note 26, at 53.


98. See, e.g., GA. CODE § 81A-133(a); IDAHO R. CIV. P. 33(a)(3); IOWA R. CIV. P. 126(a); KAN. S. CT. R. 135(b); ME. R. CIV. P. 33; MD. R. CIV. P. 417(a)(2); MA. R. CIV. P. 33; MINN. R. CIV. P. 33.01; OR. R. CIV. P. 36(A) (does not permit use of interrogatories); R.I. R. CIV. P. 33(b); S.C.R. CIR. CT. PRAC. 90 (limits to 6 standard interrogatories).

99. TEX. R. CIV. P. 186(5).

to checks on open-ended information gathering.\textsuperscript{101} The large number of state court cases and their inability to be handled expeditiously was already noted in 1986 when the Massachusetts Supreme Judicial Court ordered that civil cases (with the exception of family law cases) be disposed of “within 24 months after filing.”\textsuperscript{102} The order noted that the need to attack the “excessive delay and excessive cost” of litigation\textsuperscript{103} Chief Justice Edward F. Hennessey noted this was largely “a product of a chronic shortage of judges . . . .”\textsuperscript{104} The priority given to criminal cases intensifies the problem of backlogged civil cases and further decreases resources available for them.

The high volume of cases, shortage of judges and courtrooms, and other deficiencies in the infrastructure needed to handle cases are widely acknowledged today. In 1999, more than ninety-one million new cases were filed in state courts nationwide, almost the exact number filed in 1998.\textsuperscript{105} Two-thirds of states experienced difficulty in maintaining the flow of criminal and civil cases.\textsuperscript{106} For example, the number of tort suits pending in the New York Supreme Court—a trial court in New York—increased by fifty-eight percent between 1988 and 1996.\textsuperscript{107} The average case took forty-seven months to be processed to final disposition.\textsuperscript{108} Many Colorado trial judges currently have an active case docket of from 800 to 1,300 cases\textsuperscript{109} which, if handled equally, would allow the judge in a 2,000-hour work year to spend less than three hours on each case. The average case processing time from filing of the complaint to final verdict or judgment in cases actually tried in the seventy-five largest counties in the United States was 25.6 months in 1996.\textsuperscript{110}

\begin{footnotes}
\item[101.] Steven Shavell, \textit{The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System}, 26 J. Legal Studies. 575, 612 n.1 (1997) (“The volume of cases filed in 1994 in state courts was approximately 86.4 million . . . .”).
\item[103.] \textit{Id.}
\item[105.] NAT'L CTR. ON STATE COURTS, \textit{supra} note 1, at 14.
\item[106.] Jennifer L. Reichert, \textit{Tort Filings Decline in State Courts, Study Shows}, TRIAL, May 1999, at 100.
\item[107.] N.Y. State Bar Ass'n, \textit{supra} note 13, at 40.
\item[108.] \textit{Id.} at 42.
\item[109.] Colorado State Court Admin.'s Office, \textit{Third Quarterly Report, Fiscal Year 1999}.
\end{footnotes}
V. THE STATES AS "LABORATORIES"

A. General Trends

Justice Brandeis praised the ability of states to be "laboratories" in which experiments in the law might be conducted.\(^\text{111}\) Procedure rules illustrate this. Analysis of the changes in the discovery provisions of the fifty state rules of civil procedure over the past fifteen years reveals a very complex situation. Most state rules follow the general outlines of federal procedure; numerous differences, however, exist. A number of trends are noticeable. First, many state rules now employ different procedures for information gathering in different types of cases.\(^\text{112}\) Second, party-initiated and controlled discovery is now qualified in many states. Judges often now actively manage this process. The type and amount of discovery is often explicitly governed by court, with some states creating court-drafted and initiated discovery.\(^\text{113}\) Third, while only some states use mandatory disclosure of information by parties, a very large number of states have placed limits on the amount of discovery parties may employ.\(^\text{114}\)

One of the express goals of previous procedural reform in both federal and state courts was to create "trans-substantive" rules of civil procedure, i.e., uniform standards for all types of cases.\(^\text{115}\) That concept is under sharp attack today. Should discovery in simple slip-and-fall tort cases be processed in the same fashion as complex product liability matters or class actions? This issue has been the subject of ongoing debate.\(^\text{116}\) Disparate cases may involve different numbers of parties, potential witnesses, complexity of damage calculations, and other factors.

Many states now divide cases by subject matter or other characteristics. In Arizona, medical malpractice cases have their own rules.\(^\text{117}\) In New York, interrogatories and depositions are mutually exclusive, except with leave of court, in cases seeking recovery for personal injury, property damage, or wrongful death based solely on

\(^{111}\) New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

\(^{112}\) See discussion infra notes 117-26 and accompanying text.

\(^{113}\) See discussion infra notes 127-36 and accompanying text.

\(^{114}\) See discussion infra notes 157-68 and accompanying text.

\(^{115}\) See, e.g., Hazard, supra note 29, at 2244-46.

\(^{116}\) See, e.g., infra note 243 and accompanying text.

\(^{117}\) ARIZ. R. CIV. P. 26.2 (requires exchange of all relevant medical records; exchange of uniform interrogatories and a request for production of specified documents prior to the Rule 16(c) comprehensive pretrial conference).
negligence. Some states limit discovery by prisoners. Colorado and Alaska have special rules for discovery in domestic relations matters.

Cases are often differentiated by the amount in controversy. Alaska Rule 26(g) permits only limited discovery and requires expedited calendaring for personal injury or property damages cases involving less than $100,000. In South Carolina, Rule 35(a) bans physical or mental examinations unless the case involves more than $100,000. Texas and Illinois have chosen $50,000 in controversy as the dividing point for discovery rights. Some states bar all discovery except by agreement of parties or leave of court where the action is in a particular court or involves less than a stipulated amount. Categorizing cases based on the amount in controversy is common and familiar in a society which values efficiency, but raises questions of fairness.

State court judges now “manage” the pretrial process in numerous ways. In addition to the now standard discovery and pretrial conferences, many state rules of procedure explicitly give judges the power to determine how much discovery will be allowed, when, and by what means. In many states, judges now immerse themselves in the pretrial process. They learn a great deal about the litigants, their claims, and the evidence long before a trial begins. This raises legitimate concerns about fairness and impartiality, because discre-

118. N.Y. C.P.L.R. 3130(1).
119. See, e.g., WIS. R. CIV. P. 804.015.
120. COLO. R. CIV. P. 26.2.
121. ALASKA R. CIV. P. 26.1.
122. ALASKA R. CIV. P. 26(g).
123. S.C. R. CIV. P. 35(a).
124. TEX. R. CIV. P. 190.2(a).
125. ILL. S. CT. R. 222(a).
126. E.g., Mich. Ct. R. 2.302(A)(2) (providing that in District Court no discovery is permitted). Under Michigan Compiled Laws Section 600.8301, Michigan District Courts have exclusive jurisdiction in civil actions when the amount in controversy does not exceed $25,000.00. S.C. R. CIV. P. 33 likewise prohibits depositions for cases under $10,000.00 and interrogatories if the value of the case is not more than $25,000.00.
tion is almost without bounds at this stage.\textsuperscript{129} Appellate courts will not ordinarily overturn such rulings.\textsuperscript{130} Indeed, many pretrial decisions, especially discovery disputes, are made off the record, or simply announced and entered into the record without supporting opinions or reasons. As Professor Malot recognizes: "Judges deciding how to manage cases on their dockets have a wide array of tactics available and, indeed, choose to exercise their supervisory discretion in widely disparate ways, even when handling the same exact case."\textsuperscript{131} The discretionary and often irreviewable power of trial courts in the pretrial process is aptly described by a Colorado Supreme Court Justice: "While an appellate court may have the opportunity to reverse any individual trial judge once every few years, I know that trial judges, in their numerous workday rulings, reverse appellate courts every day."\textsuperscript{132} Moreover, decisions directing compliance with discovery orders are typically not final, appealable orders.\textsuperscript{133}

Very broad sanctions, including contempt, are available\textsuperscript{134} and a trial court's determination of sanctions will likewise not be disturbed absent abuse of discretion.\textsuperscript{135} Dean Carrington, referring to the federal district courts, characterizes judges with such powers as "chancellors sitting on the woolsack of autocratic power and less like offi-


\textsuperscript{130} Compare D.C. v. S.A., 687 N.E.2d 1032, 1041 (Ill. 1997) (holding that a "trial court did not err in determining that the subject matters were to be discussed"), and Ruane v. Amore, 677 N.E.2d 1369, 1376 (Ill. App. Ct. 1997) (holding that a circuit court "did not abuse its discretion in denying plaintiffs' motions to reopen discovery and to disclose an expert witness"), with Vitacco v. Eckberg, 648 N.E.2d 1010, 1013, 208 Ill. Dec. 88 (Ill. App. Ct. 1995) (holding that a "trial court abused its discretion when it denied plaintiff's motion to compel a more complete answer to the interrogatory").


\textsuperscript{133} See, e.g., In re Marriage of Young, 614 N.E.2d 423, 425-426 (Ill. App. Ct. 1995) (finding that discovery orders imposing sanctions are not final and appealable); Brown v. Department of Mental Health & Developmental Disabilities, 484 N.E.2d 369, 370 (Ill. App. Ct. 1985) (finding that an enforcement order by trial court for production of records is not final and thus not appealable).

\textsuperscript{134} See discussion \textit{infra} notes 268-72 and accompanying text.

cers of the law accountable for their exercise of official power." In the federal courts, much of pretrial litigation is overseen by magistrates who will not preside at the trial unless the parties consent. The use of magistrates or similar personnel is far less common in state courts.

Without pressing the analogy, some of these rules nudge state trial judges closer to a civil law approach to the pretrial stage. As Professor Hazard finds, "[t]he practice of judicial gathering of evidence, in distinction to party generated efforts, is a major distinction between civil law and other systems of litigation and our own [common law] modern civil procedure." A number of states allow judges to determine what is a "complex" case and then to determine the course of discovery. In Colorado, all discovery is under the control of a "case management order."

An accelerating trend in state civil procedure rules is the promulgation and use of court created, rather than lawyer-initiated, discovery. In Arizona, there are currently twenty-two standard uniform interrogatories for personal injury actions and twenty-three standard uniform interrogatories for contract actions. Connecticut uses form interrogatories in cases of personal injury actions arising from the operation or ownership of a motor vehicle or the ownership, maintenance, or control of real property. New Jersey, Colorado, Florida...
ida, Maryland, South Carolina and others likewise encourage or require the use of pattern discovery in specific types of cases. California has uniform sets of interrogatories for different types of cases.

Powerful incentives are employed to encourage the use of these court-initiated forms. Numerical limits are placed, for example, on the number of interrogatories, requests for admission and other discovery. Party initiated interrogatories must typically count each subpart as a single interrogatory. Uniform interrogatories, on the other hand, even those containing subparts, are counted as one.

In some states, automatic discovery is in effect. A party is deemed to have been automatically served with applicable form interrogatories or other requests for information without any actual request. New Jersey utilizes “pattern” interrogatories in this manner. The opposite party, once a case is filed, must automatically respond to the court-created discovery without service of any paper.

A number of states require mandatory disclosure of certain information by the parties within a specified period of time. Just as significant, there are often limits on particular discovery tools. At least thirty-four states limit interrogatories; many permit thirty

146. COLO. R. CIV. P. Form 21.2 (providing uniform Requests for Production in domestic relations matters).
147. FLA. R. CIV. P. 1.340(a) (requiring that “if the Supreme Court has a form of interrogatories for the type of action, the initial interrogatories shall be in the form approved by the Court”).
148. MD. R. CIV. P. 2-421(a) (counting court “form” interrogatories only as a single interrogatory).
149. S.C. R. CIV. P. 33(b)(1)-(b)(7) (setting out standard form interrogatories to be used).
150. See, e.g., ARIZ. R. CIV. P. 26.2; CAL. CIV. PROC. CODE §§ 2030(c), 2033.5; CONN. SUPER. CT. R. §§ 13-6, 13-9.
151. See Mark A. Neubauer, Check-the-Box Pleadings, 11 LITIG. No. 2, at 28, 29, 54 (Winter 1985) (discussing California’s form complaints).
152. See, e.g., MD. R. CIV. P. 2-421(a).
153. N.J. CIV. PRAC. R. 4:17-1(b)(2); CONN. SUPER. CT. R. § 13-6 (allows service of Notice of Interrogatories in lieu of actually serving the interrogatories set forth in the forms); CONN. SUPER. CT. R. § 13-8(a) (provides no objection may be filed with respect to interrogatories set forth in the form).
155. Id.
156. See, e.g., ALASKA R. CIV. P. 26; ARIZ. R. CIV. P. 26.1(a); ILL. S. CT. R. 222(d); UTAH R. CIV. P. 26(a)(1).
157. ALASKA R. CIV. P. 33(a); FLA. R. CIV. P. 1.340(a); ILL. S. CT. R. 213(c) (except for standard forms of interrogatories for different classes of cases under Rule 213(j)); IOWA R. CIV. P. 126(a); KY. R. CIV. P. 33.01(3); ME. R. CIV. P. 33(a); MD. R. CIV. P. 2-421(a); MASS. R. CIV. P. 33(a); MISS. CT. R. 33(a); OKLA. STAT. ANN. tit. 12, § 3233A (West Supp. 2001); R.I. CT. R. 33(b); VA. S. CT. R. 4:8(g); WYO. R. CIV. P. 33.
but some allow more and some less. State rules often restrict the number and length of depositions. California, Iowa, and Oklahoma all limit requests for admissions. Numerical limits are imposed on all parties to a suit, without regard for which party has the burden of proof, or the feasibility of other discovery devices. In many cases, this may create inequities.

Maine is experimenting with a new informal process for quickly resolving discovery disputes. In this jurisdiction, such disputes are not handled via the normal and traditional in court motions to compel, but rather through alternate means. Maine Rule 26(g) emphasizes the oral resolution of discovery issues. If written materials must be examined in order to resolve a discovery dispute, the moving party must briefly describe the dispute in a letter and provide limited written materials to the judge. No written argument is allowed without prior leave of court.

Time limits for the completion of discovery are commonly imposed. Utah Rule 26(d) requires no more than 240 days to complete

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158. ALA. R. CIV. P. 33(a) (allowing 40); ARIZ. R. CIV. P. 33.1(a) (allowing 40); CAL. CIV. PROC. CODE. § 2030(c) (allowing 35); D.C. SUPER. CT. R. CIV. P. 33(a) (allowing 40); GA. R. CIV. P. 9-11-33 (allowing 50); HAW. R. CIV. P. 26(b)(1) (allowing 60) (cross referencing Haw. R. Cir. Ct. 30(b)); IDAHO R. CIV. P. 33(a)(3) (allowing 40); LA. CODE CIV. PROC ANN. art 1457B (West Supp. 2001) (allowing 35); MINN. R. CIV. P. 33.01(a) (allowing 50); MONT. R. CIV. P. 33(a) (allowing 50); NEB. R. CIV. P. 33 (allowing 50); NEV. R. CIV. P. 33(d) (allowing 40), N.H., SUPER. CT. R. 36 (allowing 5); N.C. R. CIV. P. 33 (allowing 50); OHIO R. CIV. P. 33(A) (allowing 40); S.C. R. CIV. P. 33 (up to 50 interrogatories where the amount in controversy is greater than $25,000); W.VA. R. CIV. P. 33(a) (allowing 40); see also N.J. CIV. PRAC. R. 4:17-1(b)(1) (interrogatories in specified cases are limited to Uniform Interrogatories in Appendix II, plus 10 supplemental questions without subparts).

159. TEX. R. CIV. P. 190.2(c)(3) (limiting to 25 the number of Level 1 discovery interrogatories); TEX. R. CIV. P. 190.3(b)(3) (Level 2 discovery); UTAH R. CIV. P. 33 (limiting interrogatories to 25).

160. ALASKA R. CIV. P. 30, 31(a)(2)(A); ARIZ. R. CIV. P. 30(a) (no depositions upon oral examination except for document custodians); D.C. SUPER CT. R. CIV. P. 30, 31; ME. R. CIV. P. 30(a), 31; S.C. R. CIV. P. 30 (no depositions allowed for cases of less than $10,000); UTAH R. CIV. P. 30, 31; VA. S. CT. R. 4:6A; WYO. R. CIV. P. 30(a)(2), 31.

161. ILL. S. CT. R. 206(d); ME. R. CIV. P. 30(d)(2); TEX. R. CIV. P. 190.2(c)(2) (Level 1 discovery), 190.3(b)(2) (Level 2 discovery), 199.5(c) (individual witness).

162. CAL. CIV. PROC. CODE §§ 2033(c)(1), (2), (3) (West 1999); IOWA R. CIV. P. 127(a); OKLA. STAT. ANN. tit. 12, § 3236A. (West 1993).

163. ME. R. CIV. P. 26(g).

164. Id.

165. Id.

166. ME. R. CIV. P. 26(g)(1). The Advisory Committee Notes state that "[p]rior to the amendment, it was not unusual for a discovery motion to wait several months to be reached on the civil motion list and for the case to be completely stalled during that period." See 14 ME. B. J. 110, 112 (1999).
discovery after an answer is filed. A number of jurisdictions have gone even further in transforming the pretrial process. I turn now, with closer examination, to these experiments.

B. Specific Case Studies

1. Texas

Reform of the civil discovery rules in Texas began in 1991. Over a period of eight years, a variety of study groups drafted, solicited comments, and debated proposed revisions. The new Texas discovery rules became effective January 1, 1999, and applied to pending cases as well as newly filed cases after that date. The overall purpose of the changes was to make pretrial information gathering consistent with Rule 1 of the Texas Rules of Civil Procedure (the “Texas Rules”)—“to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law.” The revisions were to reduce “costs, delays and misuse” associated with discovery practice. The scope of discovery was left unaltered; parties may obtain discovery of any matter that is not privileged and is relevant or reasonably calculated to lead to the discovery of admissible evidence.

The revision’s most salient characteristic is limits on the volume

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167. UTAH R. CIV. P. 26(d).
168. See, e.g., KAN. R. CIV P. 26.1 (requiring discovery to be “completed four months after the case becomes at issue”); VA. LOC. R. 26(D)(3) (asserting that “parties shall complete all forms of expert disclosure and discovery not later than 30 days after the date upon which the plaintiff [must] . . . disclose a contradictory or rebuttal evidence”).
169. The revisions of the discovery rules followed similar procedural reforms in other aspects of Texas court practice. The Texas Rules of Appellate Procedure were revised and became effective September 1, 1997. In March of 1998, a new combined set of evidence rules for civil and criminal cases were jointly promulgated by the Texas Supreme Court and the Texas Court of Criminal Appeal. TEX. R. EVID. 101. The developments in the new discovery system in Texas are exhaustively detailed in Kenneth E. Shore, A History of the 1999 Discovery Rules: The Debates and Compromises, 20 REV. LITIG. 89 (2000).
171. A few exceptions were made in order to avoid unfairness to parties in previously filed cases. See, e.g., TEX. R. CIV. P. 193 (concluding material, which exempted parties from updating existing discovery responses to comply with the new rules).
172. TEX. R. CIV. P. 1.
174. TEX. R. CIV. P. 192.3(a). This standard, however, must be read in light of recent cases concerning scope of law discovery under the former rules. Rule 192, cmt. 1 (incorporating recent cases including Texaco v. Sanderson, 898 S.W. 3d. 813 (Tex. 1995) and Loftin v. Martin, 776 S.W.2d 145, 148 (Tex. 1989).
of discovery. Texas Rule 190 divides cases into categories and codifies limits on discovery in each category. Three tiers of "discovery control plans" are created denominated Levels 1, 2, and 3. Each civil case must be in one category at all times. 176 While assignment to Level 1 or 2 is determined by rule, Level 3 may only be activated by court order. 176 The limits imposed by Rule 190 complement other specific limits in the discovery rules. 177 Parties are permitted, except where prohibited, to modify any procedure or limitation by agreement. 178

Level 1 cases involve monetary relief of $50,000 or less and divorces that do not involve children where the value of the marital estate is less than $50,000. 180 Discovery is limited severely in these cases: for example, each party is restricted to six hours of oral depositions, 181 interrogatories may not exceed twenty-five, 182 and all other limitations set by other rules apply. 183 The choice to place a case in Level 1 is made by the plaintiff's pleadings, but they may later be amended to invoke Level 2 later. Additional discovery in Level 1 is only permitted by agreement or court order. 184 If a timely filed pleading later renders placement in Level 1 inapplicable, discovery reopens, and the rules governing the new discovery level will apply. 185 Defendants may transfer a case to Level 2 by asserting their own affirmative claim for relief that falls outside the scope of Level 1 or by seeking a court order. 186

Level 2 is the default category. It applies when Level 1 is inapplicable and when a court has not entered a Level 3 discovery plan. 187 Under Level 2, parties use the ordinary Texas discovery rules with specified limits. In non-family law matters, discovery must be completed within a "discovery period," i.e., thirty days before the set trial date or nine months after the earlier of the date of the first oral deposition or the due date of the first response to a written discovery

176. Id.
177. See TEX. R. CIV. P. 190.6 & cmt. 5 (1999).
178. E.g., TEX. R. CIV. P. 190.2(c)(2) & cmt. 1 (determining that parties in Level 1 cases cannot agree to permit more than ten hours of deposition per party).
181. TEX. R. CIV. P. 190.2(c)(2). This may be extended to ten hours by agreement. Id.
182. TEX. R. CIV. P. 190.2(c)(3).
183. TEX. R. CIV. P. 190.2.
184. TEX. R. CIV. P. 190.2(b); see also TEX. R. CIV. P. 191.1. Plaintiff is, however, required to obtain leave of court to amend pleadings to change discovery levels within 45 days of trial, which may be granted only for good cause. TEX. R. CIV. P. 190.2(b).
185. TEX. R. CIV. P. 190.2(d).
186. TEX. R. CIV. P. 190.2(b)(2)-(3).
request in the case. An aggregate limit of fifty hours is imposed on each side to depose parties, persons subject to those parties' control, and experts retained by opponents. Interrogatories are limited to twenty-five.

Discovery in Level 3 cases (complex cases that do not fit Levels 1 and 2) is overtly managed by the court. The trial judge determines discovery periods, limitations on the amount of discovery, deadlines for pleading, and any other matter that may be addressed in a pretrial scheduling order under Rule 166. The court may modify any discovery procedure or limit information gathering for "good cause." The trial judge has wide latitude in managing the pretrial phase.

The revised Rules make explicit new demands. Parties and their attorneys are admonished to cooperate in discovery and to make reasonable agreements for the efficient disposition of the case. A signed certificate that such a reasonable attempt was "made to resolve the dispute" without court intervention must accompany "[a]ll discovery motions or requests for hearings." Civility in pretrial proceedings is expected. All depositions are to be conducted as if they were in court. Counsel are enjoined to "be courteous to each other and to the witnesses;" witnesses are admonished not to be evasive or delaying. Private conferences between a witness and his or her lawyer are strictly limited. Coaching and colloquy are prohibited, and restrictions are imposed about how objections are to be presented. "Argumentative or suggestive objections or explanations" are prohibited. In addition, Rule 192.4, modeled on Rule 26(b)(2) of the Federal Rules, gives the trial court power to limit any discovery if it is

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188. Tex. R. Civ. P. 190.3(b)(1)(B). The exception for Family Code cases recognizes that the size of the marital estate and the other issues inherent in disposition of such cases are often in flux until the time of trial. Id.
189. Tex. R. Civ. P. 190.3(b)(2).
190. Tex. R. Civ. P. 190.3(b)(3).
195. Id. The signature of an attorney on a discovery request, notice, response, or objection is required, which certifies that, based on the signer's knowledge, information and belief formed after reasonable inquiry, the document is consistent with the rules, has a good faith factual basis, is made for a valid purpose, and is not unreasonably or unduly burdensome. Tex. R. Civ. P. 191.3(c).
196. Tex. R. Civ. P. 199.5(d).
197. Id.
198. Id. Conferences are prohibited except for the purpose of determining whether a privilege should be asserted. Id
199. Tex. R. Civ. P. 199.5(e), 199.5(f) cmt. 4 (1999).
200. Id.
it is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive or [if] the burden or expense of the proposed discovery outweighs its likely benefit." 201 The new rules thus establish a "proportionality" limit upon discovery.

Aside from the trifurcation of cases, the most important innovation of the revised the Texas Rules was a new discovery device, "requests for disclosure," by which parties may obtain basic discoverable information without objection, work product claims, unnecessary expense, or inconvenience. 202 In Texas, requests for disclosure, unlike Rule 26(a)(1) of the Federal Rules, are obtainable only on demand. 203 By this tool, parties may obtain "the legal theories and factual bases of the responding parties' claims or defenses," as well as basic damage theory. 204

Failure to fully respond is an abuse of the discovery process. 205 The Rules state that "[n]o objection or assertion of work product is permitted . . . ." 206 The following items may be discovered with a request for disclosure: "correct names of the parties to the lawsuit [and identity of potential parties]; legal theories and, in general, the factual bases of . . . claims or defenses; the amount and any method of calculating economic damages; [identity] of persons having knowledge of relevant facts, and a brief statement of each person's connection with the case;" testifying expert's identity, general substance of opinions, documents, and resume; insurance agreements and settlement agreements; witness statements; medical records and bills. 207 Documents must be served with the disclosure response, unless voluminous, in which case the time and place for production must be stated. 208 Responses that have been amended or supplemented may be used for impeachment, except for disclosure of legal theories, factual bases of claims or defenses, and damages. 209 [need to

In an attempt to respond to criticisms that the disclosure requirements violate the ethical and practical obligations of attorneys to clients, responding parties are not required to marshal evidence or brief legal positions. 210 The rule also provides that responses to disclosures concerning liability and damages contentions cannot be used

201. TEX. R. CIV. P. 192.4 (a)-(b).
203. See TEX. R. CIV. P. 194.1.
204. TEX. R. CIV. P. 194.2.
206. TEX. R. CIV. P. 194.5.
207. TEX. R. CIV. P. 194.2.
208. TEX. R. CIV. P. 194.4.
209. TEX. R. CIV. P. 194.6, cmt. 3 (1999).
as admissions if a response is later changed by amendment or supplemen-
tation.\textsuperscript{211} This presumably encourages parties to disclose and
discuss their basic legal and factual assertions early in the case.

2. Arizona

Historically, Arizona civil procedure followed federal practice.\textsuperscript{212}
That congruence has now disappeared in many important subjects.\textsuperscript{213}
In September of 1990, a special committee, chaired by Thomas
Zlaket,\textsuperscript{214} proposed major revisions to the discovery provisions of the
Arizona Rules of Civil Procedure (the “Arizona Rules”) to make them
“more efficient, more expeditious, less expensive, and more accessible
to the people.”\textsuperscript{215} The committee concluded that existing practice in
civil cases was causing undue expense and delay.\textsuperscript{216} Justice Zlaket
wrote later, “huge numbers of interrogatories, marathon depositions,
multiple experts, voluminous document requests, and other similar
tactics have become today’s norm.”\textsuperscript{217} While the new rules were to
eliminate unnecessary discovery, the committee was also explicit
about the need to encourage greater professionalism among attor-
neys. “In recent years there has also been an increase in abusive, ob-
structive and contentious behavior by members of the bar. Such con-
duct, unfortunately, is often expected and seemingly rewarded.”\textsuperscript{218}
The ultimate goal of the Arizona amendments was to increase volun-
tary cooperation and exchange of information. After soliciting public
comment, and conducting an experiment with the proposed rules in a
few trial courts in Maricopa County, the Arizona Supreme Court en-
acted the proposals effective July 1, 1992.\textsuperscript{219}

The new Arizona Rules embrace the concept of disclosure. Dis-
covery has largely been relegated to a process for filling gaps in the

\begin{flushright}
211. \textit{TEX. R. CIV. P. 194.6, cmt. 3 (1999).}
212. \textit{See Oakley & Coon, supra note 41, at 1381.}
213. The Federal Rules were amended in 1993 and in 2000, and the difference be-
tween the two sets of rules has now become less stark. The 1993 Amendments to Rule
26, for example, included (a)(1)-(4), mandatory duty to disclose basic information about
witnesses, documents, and exhibits without request; (b)(2), power of court to limit
depositions and interrogatories; (b)(4), right to depose expert witnesses; (b)(5), notice
and specific basis for claimed protective order; (c) certification of efforts to resolve dis-
putes; (d) and (f) meeting before commencement of discovery; (g)(1) signatures on all
disclosures. \textit{FED. R. CIV. P. 26.}
11, 11-13, n.6 (1993). In 1992, Mr. Zlaket was appointed to the Arizona Supreme
Court. \textit{Id.} at n.6. The rules are commonly called the “Zlaket Rules.” \textit{Id.} at 12-13.
216. Zlaket, \textit{supra} note 82, at 3.
217. \textit{Id.}
218. \textit{Id.} at 4.
219. \textit{Id.}
\end{flushright}
disclosure statements. The traditional discovery tools—deposition, interrogatories, etc.—are still available under new Arizona Rule 26.1, but they are subject to strict numerical limits. Moreover, the standard for disclosure, "any information that the party believes may be relevant to the issues in the case," is purposefully broad. It accords with the general premise of the new rules that disclosure should remove the adversarial component from the pretrial exchange of information, confining the adversary process to trial. Attempts to avoid disclosure of information may trigger severe judicial sanctions. Indeed the Court Comment to Rule 26.1 stresses the need to deal with abuses in a "strong and forthright fashion."

All parties are to disclose voluntarily all information necessary to process the case. This includes the factual and legal basis of each claim or defense, information about each witness, including experts, tangible evidence, relevant documents and more. Rule 26.1(a)(4) requires the disclosure of all witnesses who the party "believes" may have relevant knowledge, while Rule 26.1(a)(9) requires the production of documents that the party "believes may be relevant." Additional or amended disclosures are required "in no event more than thirty days after the [new or different] information is revealed to or discovered by the disclosing party . . ." This includes simultaneous disclosure of all experts "expected to testify" at trial, together with "the subject matter," "substance of the facts and opinions," "summary of the grounds for each opinion," and "qualifications" of the expert. Any report prepared by the expert must also be disclosed. The rule is to be enforced by sanctions imposed based on a "disclose it or lose it" philosophy; any information not timely disclosed is barred from trial except by leave of court for good cause shown.

Party-initiated discovery has been overtly limited. With the exception of "complex cases," depositions of persons other than parties and expert witnesses are disallowed, and no deposition may exceed

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222. Id.
225. ARIZ. R. CIV. P. 26.1(a). Probably to ensure that clients were also involved and appraised of the new rules, disclosure statements were required to be signed under oath by the party making the disclosure. ARIZ. R. CIV. P. 26.1(d).
226. Id.
228. ARIZ. R. CIV. P. 37(c). Rule 26.1(c) was deleted in 1996 but a modified rule was incorporated into Rule 37(c)(1)-(2).
229. Zlaket, supra note 82, at 7.
four hours in length.\textsuperscript{230} Interrogatories, both uniform and non-uniform, are limited to a total of forty, with each subpart to a non-uniform interrogatory counted as a separate interrogatory.\textsuperscript{231} Requests for production are limited to one set, containing not more than ten categories of items,\textsuperscript{232} and each side is restricted to twenty-five requests for admissions.\textsuperscript{233} Only one expert witness per side per issue is permitted to testify.\textsuperscript{234}

In theory, the Arizona Rules should accelerate the resolution of cases and decrease cost. Information is available sooner and without the necessity for formal discovery devices. However, no statistical confirmation of these premises is available and no studies have been performed regarding the effect of the rules despite the fact that the rules have been in effect for more than nine years. Prior to adopting the disclosure-discovery changes statewide, however, Arizona implemented the rules in a test program in a single county.\textsuperscript{235} The superior court was assigned 8,288 cases under the proposed revised rules during an eighteen-month period,\textsuperscript{236} and reported the results were promising. Cases using the new procedures were terminated almost two months earlier on average than cases using traditional discovery methods, and depositions and other discovery devices were used far less.\textsuperscript{237} In complex cases, however, disclosure seemed to make no difference in the use of the traditional discovery devices.\textsuperscript{238} Attorneys who handled cases under the new system commented that disclosure significantly reduced the amount of time needed to exchange information for appropriate resolution of cases.\textsuperscript{239}

Application of the new Arizona Rules has lead to a series of appellate decisions tempering the disclosure requirement. In \textit{Bryan v. Riddell},\textsuperscript{240} a trial court barred certain witnesses who had not been disclosed from testifying. The Arizona Supreme Court reversed, because, although the disclosure “statement” was incomplete, the relevant information had been given to the opposing counsel in other discovery.\textsuperscript{241} The Court noted:

The disclosure rules must be interpreted in harmony with their

\begin{footnotesize}
\textsuperscript{230} See ARIZ. R. CIV. P. 30(a), (d).
\textsuperscript{231} See ARIZ. R. CIV. P. 33.1(a).
\textsuperscript{232} See ARIZ. R. CIV. P. 34(b).
\textsuperscript{233} See ARIZ. R. CIV. P. 36(b).
\textsuperscript{234} See ARIZ. R. CIV. P. 43(g).
\textsuperscript{235} Myers, \textit{supra} note 214, at 11-13 & n.6.
\textsuperscript{236} \textit{Id.} at 20.
\textsuperscript{237} Id.
\textsuperscript{238} Id.
\textsuperscript{239} Id. at 23.
\textsuperscript{240} 875 P.2d 131 (Ariz. 1994).
\textsuperscript{241} Id. at 135 & n.5.
\end{footnotesize}
underlying philosophy and purpose.... Ordinarily, therefore, the disclosure statement is the primary vehicle by which the parties are informed of their opponent’s case.... Here, however, the disclosure statements was not so critical, as discovery was essentially complete.242

A similar situation was presented in Allstate Insurance Co. v. O’Toole.243 Although the disclosure statement of the plaintiff was not timely, the Supreme Court construed the “good cause” exception for application of sanctions liberally. No trial date had yet been set in the case, and the court affirmed the trial court’s refusal to exclude untimely disclosed information.244 Subsequently, Rule 37(c) was amended to allow trial courts considerable discretion whether to allow untimely disclosed material to be used.245

3. Illinois

The Illinois Supreme Court significantly amended its state’s civil discovery rules effective January 1, 1996. The Illinois Supreme Court Rules (the “Illinois Rules”) were modeled on the Discovery Guidelines adopted by the National Conference of State Trial Judges. The new rules provide for much greater judicial involvement and discretion in managing the pretrial phase. In addition, for selected cases, a new set of rules requiring mandatory disclosure and limiting discovery is imposed. These rule changes were intended to curb unnecessary expenses, delays and abuses.

a. Pretrial Management

Illinois Supreme Court Rule 218 requires pretrial management of cases by trial judges to an extent previously unseen in Illinois practice. Although traditional discovery devices are still available, trial courts have broad authority to supervise the process.246 Each trial judge is required to hold an initial case management conference within thirty-five days after the case is at issue.247 At this conference, the trial court and parties are to first evaluate the case and consider

242. Id. at 136.
244. Id. at 258-59; see also Aguirre v. Forrest, 923 P.2d 859, 863 (Ariz. Ct. App. 1996) (affirming the trial court’s decision to allow an untimely disclosed expert to testify).
245. ARIZ. R. CIV. P. 37(c); see also State Bar Committee Notes (1996 & 1997 Amendments).
246. ILL. S. CT. R. 201(c).
247. ILL. S. CT. R. 218(a). No more than 182 days after the filing of the complaint to hold this conference. Id. The Rule requires that the conference be attended by “counsel familiar with the case and authorized to act.” Id.
its “nature, issues, and complexity.” The type and amount of pretrial information gathering permitted is to reflect the specific nature of each case. The order issued after this conference controls all pretrial processes.

Under Rule 218, the trial court may determine what discovery will be permitted, including specific limits on the number and duration of depositions and the number of opinion witnesses that can be called to testify. The trial court is to set a date for a subsequent management conference to adjust the process as warranted by intervening developments. Deadlines for the completion of all discovery and the setting a trial date are mandated. The deadlines for the completion of discovery must be at least sixty days before the date on which the “trial court reasonably anticipates the trial will commence.” Continuing judicial supervision of the pretrial process is also envisioned. As the Committee Comments to the Rule state: "By regulating discovery on a case-specific basis, the trial court will keep control of the litigation and thereby prevent the potential for discovery abuse and delay which might otherwise result."

b. Pretrial Limitations and Sanctions

Under Illinois Rule 201(k) the parties are admonished to “facilitate discovery under these rules and...make reasonable attempts to resolve differences over discovery.” The Rule also requires that the attorneys ultimately responsible for trying the case be involved in personal consultation about discovery matters. Trial and discovery are thus seen as an integrated process, although this may be at odds

248. ILL. S. CT. R. 218(a)(1). The Committee Comments to Rule 218(a)(1) describe the goals as follows:
The new rule recognizes that each case is a composite of variable factors including the nature, number and complexity of the substantive and procedural issues which are involved, the number of parties and potential witnesses as well as the type and economic value of the relief sought. Less complex cases with limited damages and fewer parties require less discovery and involve less time to prepare than do cases with multiple complex issues involving numerous parties and damages or other remedies of extraordinary economic consequence. By focusing upon each case within six months after it is filed, the court and the parties are able to formulate a case management plan which avoids both the potential abuses and injustices that are inherent in the previous “cookie cutter” approach.

249. Id. 218(c).

250. ILL. S. CT. R. 218(a)(5).

251. ILL. S. CT. R. 218(b) & comm. cmts.

252. ILL. S. CT. R. 218(c).

253. Id.

254. ILL. S. CT. R. 218(c) & comm. cmts.

255. ILL. S. CT. R. 201(k).

256. Id.
with much contemporary practice.\textsuperscript{257}

Significant restrictions are placed on discovery. Illinois Rule 206(d) limits any deposition to three hours, except by agreement of the parties or order of the court.\textsuperscript{258} In multi-party litigation, this requires coordination among attorneys for clients that may have conflicting interests. All objections at depositions must "be concise, stating the exact legal nature of the objection."\textsuperscript{259} No more than thirty interrogatories are permitted,\textsuperscript{260} a limitation apparently in response to complaints of "needless, repetitious and burdensome interrogatories."\textsuperscript{261} A duty is imposed to supplement or amend prior answers to interrogatories "seasonably."\textsuperscript{262} Simultaneously, the Supreme Court adopted form interrogatories by administrative order,\textsuperscript{263} which were accompanied by incentives to encourage their use.\textsuperscript{264} Each form interrogatory used counts as one, notwithstanding the fact that it might have numerous subparts.\textsuperscript{265} If a non-form interrogatory containing subparts is propounded by a party, each of those subparts is counted against the allotted thirty interrogatories.\textsuperscript{266} The identity of all opinion witnesses, whether expert or lay, must be disclosed together with their conclusions and opinions.\textsuperscript{267} This requirement is applicable to all cases, regardless of the amount of damages demanded.

In the event that the parties or counsel do not comply with the new rules, a series of sanctions are enumerated,\textsuperscript{268} such as barring

\begin{footnotes}
\item \textsuperscript{257} ILL. S. CT. R. 201(k) & comm. cmts.
\item \textsuperscript{258} ILL. S. CT. R. 206(d).
\item \textsuperscript{259} ILL. S. CT. R. 206(c)(3). Rule 207(a) was amended to permit a deponent to make only those corrections to the transcript which are "based on errors in reporting or transcription." ILL. S. CT. R. 207(a) ("The deponent may not otherwise change either the form or substance of his or her answers.").
\item \textsuperscript{260} ILL. S. CT. R. 213(c).
\item \textsuperscript{261} ILL. S. CT. R. 213 (c) & comm. cmts.
\item \textsuperscript{262} ILL. S. CT. R. 213(i).
\item \textsuperscript{263} ILL. S. CT. R. 213(j).
\item \textsuperscript{264} The Illinois procedure is similar to that employed in other states. See, e.g., CONN. SUPER, CT. R. § 73-6(b); MD. R. CIV. P. 2-421(a); S.C. R. CIV. P. 33(b) (I)-(b)(7).
\item \textsuperscript{265} ILL. S. CT. R. 213(j) & Standard Interrogs. under S. CT. R. 213(j).
\item \textsuperscript{266} ILL. S. CT. R. 213(j) & Standard Interrogs. under S. CT. R. 213(j).
\item \textsuperscript{267} ILL. S. CT. R. 213(g), 213(g) cmt., 218(a)(5).
\item \textsuperscript{268} ILL. S. CT. R. 219(c). In the event of discovery abuse, it appears that Illinois courts have available to them any sanction thought to be properly exercisable by a trial court. Rule 219(c) specifically authorizes the imposition of the following sanctions: (i) That further proceedings be stayed until the order or rule is complied with; (ii) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates; (iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;
\end{footnotes}
testimony, striking pleadings, entering judgment, together with a catchall power to enter “such orders as are just.”269 The trial court is authorized to impose an “appropriate sanction” upon a party, a party’s attorney, or both.270 In addition, Rule 219(a) and (b) provide for the payment of reasonable expenses and attorney’s fees when an abuse of discovery is found.271 The trial judge may impose against a party or a party’s attorney “a monetary penalty” where the conduct is found to be willful and may also conduct contempt proceedings.272

c. Mandatory Disclosure and Discovery Limits in Cases Involving Less Than $50,000

Another major reform in Illinois was the imposition of mandatory disclosure requirements and strict limitations on discovery in civil actions seeking money damages not in excess of $50,000,273 a limit particularly significant given that more than ninety percent of cases filed in Illinois are estimated to fall within this category.274 If a judgment is rendered in excess of that amount, Rule 222(b) requires a post-trial reduction of judgment “to an amount not in excess of $50,000.” Any party seeking damages may invoke the mandatory disclosure rules as well as the limitations on traditional discovery procedures. On the other hand, the party from whom damages are sought is afforded the protection of a damage cap.275 Disclosure of information and documents is to occur automatically; no request is needed.276 The requirement for disclosure is im-

(iv) That a witness be barred from testifying concerning that issue;
(v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party’s action be dismissed with or without prejudice; or
(vi) That any portion of the offending party’s pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.
(vii) That in cases where a money judgment is entered against a party subject to sanctions under this subparagraph, order the offending party to pay interest at the rate provided by law for judgments for any period of pretrial delay attributable to the offending party’s conduct.

Id.
269. ILL. S. CT. R. 219(c).
270. Id.
271. ILL. S. CT. R. 219(a)-(b).
272. ILL. S. CT. R. 219(c).
273. ILL. S. CT. R. 222. (“[The] [r]ule does not apply to small claims, ordinance violations, actions brought pursuant to 750 ILCS, and actions seeking equitable relief.”).
275. ILL. S. CT. R. 222(b).
276. ILL. S. CT. R. 222(c).
posed immediately upon the filing of a party's affidavit stating whether the total of money damages requested exceeds $50,000. Disclosure must be accomplished "within 120 days after the filing of a responsive pleading to the complaint, counter-complaint, third party complaint, etc." unless otherwise agreed to by the parties or ordered by the court. The information and documents to be disclosed include: (1) the factual basis of each claim or defense; (2) the legal theory upon which each claim or defense is based including citations of pertinent legal or case authorities where necessary for a reasonable understanding of the claim or defense; (3) the names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a designation of the subject matter about which each witness might be called to testify; (4) the names, addresses, and telephone numbers of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of that knowledge or information; (5) the names, addresses, and telephone numbers of all persons who have given statements, and the custodian of the copies of those statements; (6) the names, addresses, and telephone numbers of each person whom the disclosing party expects to call as an opinion witness at trial, the subject matter, conclusions, and opinions of the opinion witness and the bases therefore, the qualifications of the opinion witness, and copies of any reports prepared by the opinion witness; (7) a computation and measure of damages alleged by the disclosing party, and the basis for the computation; (8) the existence, location, custodian, and general description of any tangible evidence or documents to be used at trial and relevant insurance agreements; (9) a list of the documents that are known by a party to exist, whether or not in the party's possession, custody, or control and that that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence. A copy of each document listed shall be served with the disclosure. Rule 222(c) imposes a continuing duty "seasonably supplement or amend disclosures whenever new or different information or documents become known to the disclosing party."

Intertwined with these automatic disclosures are the strict limits on the traditional discovery procedures codified in Illinois Rule 222. In each case valued at $50,000 or less, the number of interrogatories may not exceed thirty. No discovery deposition may exceed three

277. ILL. S. CT. R. 222(b).
278. ILL. S. CT. R. 222(c).
279. Id.
280. ILL. S. CT. R. 222(d)(1)-(9).
hours without agreement of the parties. Discovery depositions may be taken only of parties and treating physicians and opinion witnesses identified as testifying at trial. No evidence depositions are permitted except where a trial witness is likely to be unavailable or where “exceptional circumstances exist.” Under Rule 222, the parties must disclose the identity of trial witnesses and of trial documents or tangible evidence. Under the prior rules, these were beyond the scope of discovery. The disclosure requirements are enforced under a “disclose it or lose it” philosophy; non-complying evidence is to be excluded at trial. In addition to this remedy, a trial court may impose “any other sanction.” Whether such judicial action is enough to force a party to disclose unfavorable evidence will be tested by actual practice.

4. Colorado

Colorado was the second state in the country to adopt the Federal Rules as its own state rules in 1941. Over the intervening period, Colorado has generally followed the changes introduced in the federal rules. Completing a process initiated in 1992, the Colorado Supreme Court adopted revised discovery rules with the Colorado Rules of Civil Procedure (the “Colorado Rules”), effective January 1, 1995. The most dramatic change in the Colorado Rules was the addition of a new disclosure system, patterned largely after the 1993 Amendments to Federal Rule 26. Differences between the state and federal rules are to accommodate the state disclosure/discovery requirements in the new case/trial management system set forth in Colorado Rule 16. Colorado, however, applies different rules in different types of cases; domestic relations, juvenile and other proceedings have their own sets of rules. Moreover, in 2000, Rule 26.3 was adopted, providing special procedures for disclosure, alternate dis-

284. ILL. S. CT. R. 222(f)(3).
285. See ILL. S. CT. R. 222(d).
286. ILL. S. CT. R. 222(g).
287. Id.
288. Oakley & Coon, supra note 41, at 1384.
290. COLO. R. CIV. P. 26 & comm. cmt.
291. COLO. R. CIV. P. 26.2 (General Provisions Governing Discovery; Duty of Disclosure (Domestic Relations)); COLO. R. CIV. P. 16.2 (Case Management (Domestic Relations)).
pute resolution, and discovery and trial procedures for "civil actions in which the claimant seeks monetary damages not exceeding $50,000." In another exception, special "Simplified Rules" for cases involving less than $100,000 were implemented in 2000 in two counties as an experiment designed to promote quick and economical disposition of such claims.

Mandatory disclosure and explicit limits on traditional discovery are the central themes of the 1995 amendments to the Colorado Rules. The triggering mechanism for disclosure is the date when a case is "at issue," defined as when "all parties have been served[,] all pleadings permitted filed, or when the court directs." Once a case is at issue the lawyers must confer within fifteen days, transmit all mandatory disclosure within thirty days, and submit a proposed case management order within forty-five days. Once a case management order is entered, it controls the subsequent course of the pretrial process until a trial management order is entered. The Colorado Rules also require counsel to "certify that they have advised their clients of the estimated costs and fees" of conducting discovery. Clients are thus presumably better-informed consumers of the legal services they are purchasing and may better calculate the costs and benefits of litigating the claim.

The disclosure required, without formal request, includes the identity of every individual "likely to have discoverable information," a list of all relevant documents, a computation of damages and any relevant insurance agreements. In the case management order, if documents have not been attached, parties are required to provide dates when the disclosures will be made. The parties must also establish a date for identifying witnesses and exhibits to be introduced at trial that have not been disclosed and a discovery schedule including the timing and number of paper discovery to be used.

The 1995 revisions to the Colorado Rules also implemented strict numerical limitations on the quantity of discovery. "A party may take one deposition of each adverse party and of two other persons; interrogatories may not exceed thirty; requests for production and

292. COLO. R. CIV. P. 26.3 (Limited Monetary Claim Actions).
293. COLO. R. CIV. P. 16(b).
294. Id.
295. COLO. R. CIV. P. 16(b)(3).
296. COLO. R. CIV. P. 16(b)(1)(IV).
297. COLO. R. CIV. P. 26(a)(1), 16(b); see also COLO. R. CIV. P. 16(b)(1)(III).
298. COLO. R. CIV. P. 16(b)(1)(II).
299. COLO. R. CIV. P. 16(b)(1)(III)-(IV).
300. COLO. R. CIV. P. 26(b)(2)(A).
301. COLO. R. CIV. P. 26(b)(2)(B).
requests for admissions are both limited to twenty. Pattern interrogatories were adopted and encouraged. Subparts of non-pattern interrogatories count as separate interrogatories for purposes of calculating numerical limits, whereas subparts in pattern interrogatories are not counted. Colorado Rule 37, the sanctions provision, was amended to include the disclosure procedures as well as the discovery process. Failure to provide disclosure bars presentation of undisclosed evidence at trial or on a summary judgment motion "unless such failure is harmless." The court may impose reasonable expenses and attorney’s fees for such failure as well.

Effective July 1, 2000, in cases "in which the claimant seeks monetary damages not exceeding $50,000," new procedures are implemented in all Colorado District Courts for "Limited Monetary Claim Actions." In such cases, "the disclosure rules of Colorado Rule 26(A)" apply except: the parties make disclosures "no later than 21 days after the case is at issue[; in] personal injury cases, the plaintiff [must] disclose all healthcare providers and employers for the past ten years and the defendant [must] disclose the present claim case file [and] ... any evidence supporting affirmative defenses." The parties must attend a non-binding alternate dispute resolution meeting within 120 days of the date the case is at issue and may agree to a binding form of ADR. Prior to the ADR, the only deposition a party may take is that of the adverse party and the deposition of an expert may be used at trial without a showing of unavailability.

a. Simplified Procedure Rules

The Colorado Supreme Court recently adopted Simplified Procedure Rules (the “Colorado Simplified Rules”) for a pilot project in two Colorado counties for cases filed after March of 2000. The experiment is expected to last from eighteen to twenty-four months and is...

303. COLO. R. CIV. P. 33(e).
304. Id.
305. COLO. R. CIV. P. 37(a); COLO. R. CIV. P. 37(a)(2)(A).
306. COLO. R. CIV. P. 37(c)(1).
307. Id.
308. COLO. R. CIV. P. 26.3.
309. COLO. R. CIV. P. 26.3(c).
310. COLO. R. CIV. P. 26.3(d)(e).
312. COLO. R. CIV. P. 26.3(g).
313. Because the Colorado Rules of Simplified Procedure are part of a pilot program, they are as of yet unpublished. They can be obtained from the Colorado Office of the State Court Administrator. A copy is on file with the author.
designed to test the effectiveness of a pared down pretrial process. These new Colorado rules carry the logic of prior changes in pretrial procedure in Colorado and other states several steps further.\textsuperscript{314} They separate classes of cases by the amount of recovery sought (the Simplified Rules are used if less than $100,000 is sought) and substitute a limited mandatory disclosure regime for almost all discovery rights of the parties. In return, those choosing to use the new pretrial system are given early trial settings and speedy trials. The Colorado Simplified Rules are premised on a diagnosis of current ills in the civil justice system, such as its failure to distinguish between major, complicated disputes and those that might be tried effectively with little or no pretrial discovery, its high costs, and its slow processing of cases. Together these faults rob civil litigants of an opportunity for a “just, speedy, and inexpensive determination of every action.”\textsuperscript{315}

As the name implies, the goal of the “simplified procedure” is to dramatically reduce the flow of paper between the parties, the meetings required to create case and trial management orders under Colorado Rule 16, and the time and expense of pretrial litigation. Almost all of the by-now traditional discovery devices of the Colorado Rules (and the rules of all other states, plus the Federal Rules) including depositions, interrogatories, requests for production of documents and requests for admission, are barred.\textsuperscript{316} In place of the standard discovery devices, the simplified rules retain the mandatory disclosure provisions of Rule 26(a)(1), which require disclosure of witnesses or persons likely to have discoverable information; relevant documents, data compilation and tangible things; a computation of damages claimed; and insurance policies concerning “disputed facts alleged with particularity in the pleading.”\textsuperscript{317} Such disclosures must be completed within thirty days after the case is at issue.\textsuperscript{318} Additional exchange of information, in addition to normal disclosure requirements included under Colorado Rule 26(a)(1), is also required. Thus, for example, in tort actions seeking damages, plaintiffs must disclose medical information and sign waivers allowing defendants to obtain the medical records.\textsuperscript{319} For employment cases, plaintiffs must

\textsuperscript{314}. See generally Richard P. Holme, Just, Speedy and Inexpensive: Possible Simplified Procedure for Cases Under $100,000, 29 COLO. LAW. 5 (2000).

\textsuperscript{315}. COLO. R. CIV. P. 1(a).

\textsuperscript{316}. It should be noted that aside from the provisions that are made inapplicable, i.e., Rules 16, 26-34 and 36, all of the remaining standard Colorado Civil Procedure Rules continue to apply. Thus, pleading requirements, Rule 12 motions, third-party practice, and other rules regarding pretrial practice, trial, and post-trial matters are unchanged. COLO. R. SIMPLIFIED P. 1.1(c).

\textsuperscript{317}. COLO. R. SIMPLIFIED P. 1.1(c)(1); COLO R. CIV. P. 26(a).

\textsuperscript{318}. Id.

\textsuperscript{319}. COLO. R. SIMPLIFIED P. 1.1(c)(1)(B)(I).
provide prior employment history documentation, demonstrate efforts to find work since the unfavorable employment action, and sign waivers allowing access to their prior personnel files.\textsuperscript{320} The defendant in such an action must produce the plaintiff's personnel file.\textsuperscript{321} Colorado Simplified Rule 1.1(c)(1)(B)(iii) also allows either party to designate additional specific information and documentation that the party believes should be disclosed. Such demands must be made in writing, and a refusal by the opponent to provide the requested information or a response thereto may be subject to a motion for disclosure or sanctions under Colorado Simplified Rule 37.\textsuperscript{322}

Although a large number of normal discovery devices are discarded by the Colorado Simplified Rules, some are retained. Existing provisions of Colorado Rule 26 that remain in effect include the form and filing of disclosures,\textsuperscript{323} claims of privilege,\textsuperscript{324} protective orders\textsuperscript{325} and supplementation of disclosures.\textsuperscript{326} Requests for document production are permitted, but only for the purpose of inspecting documents and other evidentiary materials disclosed under the mandatory disclosure requirements.\textsuperscript{327}

The Colorado Simplified Rules also alter practice with respect to depositions.\textsuperscript{328} Because recovery is capped at $100,000 for cases under these rules, the use of expert witnesses is not likely to be frequent. The provisions of Colorado Rule 26(a)(2)(A) and (B) requiring written disclosures for expert witnesses are retained, however, and Colorado Simplified Rule 1.1(c)(4) allows depositions of expert witnesses to be used at trial. The parties would thus have to conduct their examinations of the expert deponent as if it were at the trial; no second appearance would occur. This undoubtedly decreases the cost for expert fees, but increases the risks and stakes of the deposition. Once such a deposition is taken, any party may introduce it into evidence even though the noticing party may have changed its mind and decided it did not want to introduce the expert's testimony.

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The only other depositions allowed are those taken in the event a party knows that a necessary witness will be unavailable at trial. Even if the witness is later available, the deposition must still be introduced. Depositions for the sake of obtaining documents from third parties are still available, and these documents may still be subpoenaed under Colorado Simplified Rule 45.

The Colorado Simplified Rules make important changes in other ways. They require an exchange of a "detailed statement of the expected testimony" for each witness the party intends to call at trial if that party's deposition has not been taken. Surprise testimony is ruled out; testimony by a witness that is outside the scope of the matter disclosed in this written disclosure is to be excluded. These detailed statements regarding plaintiff's witnesses are equivalent to the information exchanged regarding experts and are due at least ninety days before trial; the corresponding disclosure of testimony of witnesses for the defendant is due sixty days before trial and the disclosure for rebuttal witnesses, forty-five days before trial. If a party were to call an adverse party or hostile witness, the only limitation on the scope of such testimony would be a limitation to those matters that had been previously disclosed. If there had been no agreement regarding the authenticity of exhibits, witnesses could be presented on that narrow issue alone. It should also be noted that any voluntary discovery agreed to by all parties is permitted under the Simplified Rules.

The parties, well in advance of the trial date, would then possess all testimony of witnesses, whether lay or expert, documents, and other materials and could then be expected to make an informed assessment of their own and their opponent's claims in time to avoid last-minute settlement negotiations "on the courthouse steps." Trial exhibits are to be identified and exchanged thirty days before trial, and the authenticity of such documents is unquestioned unless written objection is filed twenty days before trial.

The Colorado Simplified Rules provide a choice for litigants. Discovery rights are exchanged for speed and limitations on discovery expense. The new rules represent a sharp departure from prior Colo-

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329. **COLO. R. SIMPLIFIED P.** 1.1(c)(4).
330. *Id.*
331. **COLO. R. SIMPLIFIED P.** 1.1(c)(5).
332. **COLO. R. SIMPLIFIED P.** 1.1(c)(3).
333. **COLO. R. SIMPLIFIED P.** 1.1(c)(7).
334. **COLO. R. SIMPLIFIED P.** 1.1(c)(3).
335. **COLO. R. SIMPLIFIED P.** 1.1(c)(7).
336. *Id.*
337. **COLO. R. SIMPLIFIED P.** 1.1(c)(9).
338. **COLO. R. SIMPLIFIED P.** 1.1(c)(6).
rado civil procedure which has long modeled itself closely with the Federal Rules. In effect the procedure normally used in state criminal prosecutions is applied to selected civil cases. To avoid disadvantaged parties in the counties in which they are applied, parties may simply opt out of the Colorado Simplified Rules and elect to have their cases proceed under the normal Colorado Rules.

VI. THE RELATIONSHIP BETWEEN DISCOVERY AND SUMMARY JUDGMENT

Summary judgment provides the opportunity to terminate litigation without trial. Summary judgment rules use the fruits of discovery and the provisions of relevant affidavits as the basis for a pretrial disposition of the case. Judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show no genuine issue as to material fact and the movant is entitled to judgment as a matter of law. A final determination without the opportunity for meaningful discovery, however, undermines many aspects of our current pretrial system. It is patently unfair to grant judgment without affording the losing party the opportunity to gather and submit evidence on his or her behalf. Fair and accurate disposition of cases still remains dependent upon information gathering by parties.

At the federal level, the relationship between the progress of discovery and a trial court’s consideration of summary judgment motions was stressed by the Supreme Court in Celotex Corp. v. Catrett. The Court found that “[a]ny potential problem with such premature motions can adequately be dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the non-moving party has not had an opportunity to make full discovery.” There is a clear link between pretrial dispositive motions and the status of discovery. The Chief Justice has noted that parties must have an opportunity for “full discovery” before a court may enter judgment. The Supreme Court in Anderson v. Liberty Lobby, Inc. again emphasized that summary judgment must not be granted prematurely. Although that case emphasized that the non-movant must come forward with specific facts

339. See supra note 289 and accompanying text.
340. See Holme, supra note 314, at 8.
342. See, e.g., ME. R. CIV. P. 56(c); FLA. R. CIV. P. 1.510(c); KAN. CODE CIV. P. § 60-256.
344. Id. at 326.
345. Id.
that demonstrate the existence of an issue for trial, the Court noted that this was “qualified by Rule 56(f)’s provision that summary judgment be refused where the non-moving party has not had the opportunity to discover information that is essential to his opposition.”

It is difficult to determine whether the use of summary judgment in the state courts has increased since the onset of limits on discovery. Reported appellate decisions are clearly an inexact measure. The vast majority of cases ended by motion practice at the trial court level are never appealed, and thus rarely appear in published opinions. Reading reported state appellate cases over a considerable period of time leaves me with the impression that many more cases and issues are now decided without trial than before. I candidly admit no statistical proof of this observation is available at the moment with respect to the state courts.

At the federal level, attempts have been made to document the premise that proportionately fewer cases are tried in the district courts than a generation ago, and that summary dispositions, especially by Federal Rule 56, of cases has increased. The percentage of civil cases proceeding to trial in the federal courts plunged from 8.5% of all pending civil cases in 1973 to just 2.3% in 1999. This is particularly noteworthy because summary judgment is typically a weapon for defendants and the district courts are now highly receptive to such motions. An analysis of all published federal court decisions in the first quarter of 1988 concluded “summary judgments were awarded to defendants in whole or in part in ninety-eight cases and denied in only twenty-four.”

347. Id. at 250 n.4.
348. See, e.g., Paul W. Mollica, Federal Summary Judgment at High Tide, 84 MARQ. L. REV. 141 (2000). The author reviewed twenty volumes of the Federal Reporter during 1973 and during 1997 to 1998 and reported a marked increase in summary dispositions of civil cases. Id. at 143. He found that “[i]n the later sample, Rule 56 decisions predominate the reported civil cases and Rule 56 is used far more integrally to resolve claims.” Id. at 165.
349. Id. at 140.
350. Judge Morton Denlow, Summary Judgment: Boon or Burden, 37 JUDGE’S J., Summer 1998, at 26 (federal magistrate judge posits that summary judgment provides defendants with several tactical advantages: it forces plaintiff to present her case before trial, to incur substantial additional expense, and to delay resolution or settlement of the case).
351. Patricia M. Wald, Summary Judgment at Sixty, 76 TEX. L. REV. 1897, 1938 (1998) (D.C. Circuit Judge decries “unseemly rush to summary judgment”); see also, Mollica, supra note 348, at 87-94 (surveying post-Celotex decisions in the lower federal courts and concluding summary judgment by federal district judges is no longer rare or uncommon).
352. Professors Issacharoff and Loewenstein surveyed 140 contested summary judgment motions. Samuel Issacharoff and George Loewenstein, Second Thoughts...
trial dispositive motions tend to favor repeat players and more affluent parties—largely employers, corporations, insurers, etc—typically defendants.\footnote{353} Professor Risinger stresses this point:

[L]ook at the practical position of plaintiffs. Something close to a one page form motion by defendant can throw on the plaintiff the responsibility to dredge, structure, collate and cross-reference all materials in the file to make them available to the judge before trial. Because the material must be reduced to a coherently structured written form, this task can sometimes take as long or longer than actually trying the case.\footnote{354}

As Professor Thornburg has pointed out “[d]iscovery in particular is an area in which decisions about the scope of discovery and the process for undertaking it create predictable advantages and disadvantages for predictable types of litigants.”\footnote{355} Limits on information gathering, together with increased use of summary judgment, provide defendants with major tactical advantages. First, a plaintiff is forced to engage in a paper mini-trial, just to ensure that her case goes forward. Repeat player-defendants typically have the resources to make motions that plaintiff’s attorneys do not.\footnote{356} Second, summary judgment motions allow defendants to view the critical elements of plaintiff’s claim in advance of trial. Even is such a motion is lost, defendant may still prevail at trial; a losing plaintiff has no such “second chance.” Third, such motions may force plaintiff to complete discovery at unfavorable or inopportune times, in order to ensure plaintiff has put her best case forward. Fourth, very often defendants will not commence settlement negotiations until the plaintiff has survived a motion for summary judgment. As a result, cases are often delayed, and delay typically favors defendants.

It is true that often changes in state pretrial practice provide for mandatory disclosure of information by both sides as well as limits on discovery. But many of the state disclosure rules apply to a restricted base of information, i.e., “disputed facts pleaded with par-

\footnote{About Summary Judgment, 100 YALE L. J. 73, 92 (1990). Of these, 122 were made by defendants and only 18 by plaintiffs. \textit{Id.} They concluded that “courts are encouraging the filing of summary judgment motions.” \textit{Id.}}

\footnote{Id. See generally Denlow, supra note 350.}


\footnote{The use of summary judgment on behalf of defendants in employment discrimination and civil rights cases has often been noted. See, e.g., Mark S. Dichter and Debra L. Casey, Practicing Law Inst., Litigating Employment Discrimination Cases: 1995 at 1 (1995); RICHARD T. SEYMOUR, ALI-ABA, ADVANCED EMPLOYMENT LAW AND LITIG. 169 (1993).}
ticularity in the pleadings."357 Under such rules, plaintiffs will be pro-
vided information only in areas in which they are able to allege spe-
cific facts before discovery. For most plaintiffs, this may not be much
help. The restrictive scope of disclosure, combined with the limited
availability of traditional discovery mechanisms may thus operate in
tandem to disadvantage them. Initial disclosure rules may also be a
back door to more intensively fact-dominated pleadings, where law-
suits can only be brought by those with pre-suit ability to marshal
important facts.358

VII. INFORMATION SHARING IN AN ADVERSARY SYSTEM

As described earlier, a number of states have revised their pre-
trial rules to mandate information sharing, restrict discovery be-
tween parties, and legislate civility in the pretrial process.359 The
process is to be less adversarial, less costly, and less time consuming;
information is to be available to parties sooner and exchanged with
less formality than at present. Trial judges are urged to use san­
cctions and address abuses in a "strong and forthright fashion."360 In
effect, the changes seek to limit an attorney's use of adversarial skills
to trial, i.e., arguing the implications and consequences of facts al­
ready revealed. While disclosure of information is generally not con­
clusive—it "may be contradicted by other evidence,"361 or even inad­
missible at trial—providing information to an opponent is substan­
tively and psychologically difficult in our system.

Arizona,362 Illinois,363 and other states364 require a voluntary dis­
closure of information by parties to their opponents. The Arizona
rules are the broadest and may well be the harbinger of future devel­

357. See, e.g., COLO. R. CIV. P. 26(a)(1).

Disclosures. Except to the extent otherwise directed by the court, a party
shall, without awaiting a discovery request, provide to other parties: (a) the
name, the address . . . of each individual likely to have discoverable infor­
mation relevant to disputed facts alleged with particularity in the pleadings . .
(b) a listing, together with a copy of . . . all documents, data compilations,
and tangible things relevant to disputed facts alleged with particularity in
the pleadings.

Id. Contra ARZ. R. CIV. P. 26(a) (which contains no such limitation to "facts alleged
with particularity in the pleadings" regarding disclosure, witnesses, documents and
other information).

358. See, e.g., Transcript of the "Alumni" Panel on Discovery Reform, 39 B.C. L. REV.

359. See, e.g., discussion supra notes 215-28 and accompanying text.


361. See, e.g., ILL. S. CT. R. 201(j).


363. ILL. S. CT. R. 222(d) (imposing mandatory disclosure requirements and strict
limits on discovery in actions seeking money damages not in excess of $50,000).

opments. Arizona Rule 26.1(a) provides that all parties are to disclose voluntarily all information necessary to process the case. Included are nine specific items: (1) "[t]he factual basis of each claim or defense," 365 (2) "[t]he legal theor[ies] upon which each claim or defense is based," 366 (3) information concerning each witness, along "with a fair description of the substance of . . . expected testimony," 367 (4) information concerning other persons who may have knowledge and the nature of that knowledge; 368 (5) information concerning persons who have provided statements; 369 (6) information concerning expert witnesses, including the content of their testimony and their qualifications; 370 (7) "a computation and measure of damage[s] . . . " 371 (8) "[t]he existence . . . of any tangible evidence or relevant documents" intended to be used as exhibits and production thereof; 372 and (9) a list of other documents that may be relevant. 373

The initial disclosure is to be made "as fully as then possible" 374 and must include all information then "in the possession, custody, or control" of the party, as well as information that can be "ascertained, learned or acquired by reasonable inquiry and investigation." 375 The parties are required to disclose information relevant not only to their claim or defense but to the opponents' contentions as well. This duty to disclose is ongoing, and parties must supplement their disclosures seasonably. 376 The parties are admonished to facilitate discovery. 377 Arizona Justice Zlaket has written:

[At the outset of a case the parties must make a full, mutual and simultaneous disclosure of all relevant information known by or available to them and their lawyers. In other words, no more "hide the pea." No longer will it be advantageous to play games of semantics ("If he'd have just asked the right question . . . "). Hopefully, Rule 26.1 will eliminate the need for extensive discovery in most cases . . . . 378

The goal is to achieve less expensive, faster and more equitable liti-

377. Id.
378. Zlaket, supra note 82, at 5.
But can rule changes and exhortations from appellate judges bring about these results? I am dubious for a number of reasons. First, there is considerable dispute regarding the proposition that it is discovery that is the “problem” in civil cases. As discussed earlier, empirical data from studies of federal and state cases do not confirm the “discovery abuse” hypothesis. Nor is there compelling evidence that mandatory disclosure and concomitant restrictions on traditional discovery will bring about quicker and less expensive resolution of cases. The only large-scale study of which I am aware, that of the RAND Institute for Civil Justice in the federal courts, did not “support strongly the policy of mandatory early disclosure as a means of significantly reducing lawyer work hours and thereby reducing the costs of litigation, or as a means of reducing time to disposition.” A survey of 1000 lawyers by the ABA’s Litigation Section likewise “provided no evidence that . . . disclosure had reduced discovery costs or delays” or that it decreased conflict between adversaries in the discovery process. Indeed, by moving the time and cost of information gathering to an earlier phase, these changes may actually impede settlement. The resources already expended may deter parties from compromising later. Moreover, while many agree that the resolution of civil cases in state courts is far too slow, the causes may well lie elsewhere: the number and priority of criminal cases in state judicial systems, and the lack of judges and infrastructure—courtrooms, personnel, etc.—to promptly handle cases.

Second, an even deeper problem may be the nature of our judicial process. A system that promotes adversarial resolution of cases through the efforts of client-dedicated legal representatives cannot be expected to readily accommodate procedures that quickly and efficiently provide information to the opponent. The roots of this are in the perception that the rules of professional conduct mandate aggressive resistance to the opponent’s interests. A lawyer “should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf” according to the official comment to Rule 1.3 of the ABA’s Model Rules of Professional

379. See discussion supra notes 88-93 and accompanying text.
380. See James S. Kakalik et al., Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data, 39 B.C. L. Rev. 613, 678 (1998); Willing et al., supra note 93, at 525.
383. See discussion infra notes 385-96 and accompanying text.
Conduct (the "Model Rules").

The pretrial process is not an exception to this system, but is viewed as an integral part of the process, a collection of weapons to be used to help control the outcome of the dispute and promote the interest of one's own clients. The lawyer "may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." The Supreme Court has even recognized that a lawyer's job is not necessarily to secure the truth and that, "[w]ithin the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty." Attempts to increase voluntary cooperation and "limit the adversarial nature of the proceedings" are understood to compromise the advocate's duty to "zealously assert[ ] the client's position" and to jeopardize the client's interests. Rules requiring, for example, disclosure of witnesses who the party "believes" have relevant knowledge appear to be an invasion into the mental processes of the attorney and client in violation of the "work product" doctrine. Given this cultural context, are attorneys more likely to behave differently with respect to required disclosures than in responding to traditional interrogatories or other discovery demands?

The ABA Section of Litigation Special Task Force on Ethics interviewed a variety of lawyers and trial judges in two cities. A fair conclusion from its data is that "the basic, overriding, dominant norm of the legal profession, especially among litigators, is the norm of zealous advocacy of client's interests." In this context, lawyers consider it legitimate to use tactics to throw opponents off balance and raise costs to the other side, so long as there is some arguably legitimate purpose is served. Each request for information is treated as

385. Schwarzer, supra note 84, at 714-16.
386. Model Rules of Prof'L Conduct R. 1.3, cmt. 1 (1999). Many lawyers understand this to permit any conduct on the client's behalf that is not explicitly prohibited. The comparable provision of the Model Code of Professional Responsibility, Canon 7, stated: "A lawyer should represent a client zealously within the bounds of the law." Model Code of Prof'L Responsibility Canon 7 (1980). Although the Model Rules are less explicit, its advocacy and confidentiality provisions seem similar to the Code.
390. If the materials sought contain "mental impressions, conclusions, opinions, or legal theories of an attorney" opinion work product, the materials are deserving of special protection. Moore's Federal Practice, supra note 28, § 26.64.
392. Id. at 733.
narrowly as possible, every claim of privilege or irrelevance is asserted as broadly as possible.\textsuperscript{393}

The general principle guiding discovery requests for documents is that defense counsel may not flatly lie or hide documents, but they are entitled to be "aggressive," making the plaintiff's lawyer "work for what he wants," and withhold from relieving the plaintiff's lawyer of the burden of preparing his own case.\textsuperscript{394}

In this culture, counsel seek to use the pretrial process to maximize information gathering and admissions from the opponent, while at the same time resisting the information obtained by, or given to, the adversary.\textsuperscript{395} "Where the object always is to beat every plowshare into a sword, the discovery procedure is employed variously as weaponry."\textsuperscript{396}

Third, lawyers typically view their obligations and behavior in the context of specific cases. A client in a weak position in terms of the law and facts, or one determined to deter future litigation and resist disclosures that might harm it in later lawsuits, is more likely to be obstructive and determined to raise costs for the other side than a client willing to settle a matter or one that appraises its legal and factual position differently.\textsuperscript{397} These particular factors may well outweigh general rules mandating information sharing.

Fourth, lawyers are, of necessity, also intensely practical. Many see rules requiring cooperation and disclosure as a threat to business interests. They believe clients prefer attorneys who use rules and procedures to the client's advantage and fear potential clients will be reluctant to hire a lawyer who is viewed as "cooperative."\textsuperscript{398} When their interests are disadvantaged, clients may choose not to believe that this was the result of neutrally applied rules, but rather of the lawyer's lack of zeal. Concern about income and business has been reinforced by the increasing competition among firms for clients and among lawyers within firms who provide rewards based upon attracting clients.\textsuperscript{399} The contingent fee lawyer has a strong incentive to construe strictly what is considered "relevant" because the lawyer's fi-

\textsuperscript{393} Gordon, supra note 391, at 712-13.
\textsuperscript{394} Id. at 712.
\textsuperscript{395} See, e.g., Ralph K. Winter, In Defense of Discovery Reform, 58 BROOK. L. REV. 263, 264 (1992) (concluding that discovery can be used to impose costs on opponents and avoid decision); Wolfson, supra note 95, at 18-19 (stating that discovery "gives impetus and opportunity to the baser litigational instincts of delay, deception, and unbridled confrontational advocacy").
\textsuperscript{396} MARVIN E. FRANKEL, PARTISAN JUSTICE 18 (1980).
\textsuperscript{397} Gordon, supra note 391, at 714.
\textsuperscript{398} P.N. Harkins III, Sanctions for Failure to Disclose, 59 DEF. COUNS. J. 161, 162 (1992).
\textsuperscript{399} Gordon, supra note 391, at 717, 730-731.
Financial interest are at stake in addition to the client’s. Attorneys on hourly retainer agreements may view protracted pretrial conflict as profit enhancing. Although some clients oversee discovery to assess costs, many do not.

Fifth, lawyers are also trained to be skeptical; they fear that an opponent’s failure to disclose will not be uncovered, perhaps due to limitations on traditional discovery methods. Although some, clients oversee discovery to assess costs, many do not.

In this climate, rules are not likely to be complied with unless they are vigorously enforced. However, most trial judges intensely dislike getting involved in such disputes. Gordon contends that “[d]iscovery disputes are a nuisance . . . . If a lawyer seeking to compel seeks sanctions, there is a litigation within the litigation, cross-motions for sanctions . . . . If we award sanctions, we are saying, lets keep this pettifogging game going.”

The failure of federal judges, for example, to sanction attorneys and parties for violation of discovery rules has been widely discussed. Only the most egregious violations seem to result in effective sanctions. “The whole system of Civil adjudication would be ground to a virtual halt if the courts were forced to intervene in even a modest percentage of discovery transactions.”

Some argue that the changes in discovery rules in Arizona, Illinois, Colorado, and other states have now created an ethical duty on

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400. See, e.g., ARIZ. R. CIV. P. 33.1(a) (limiting interrogatories to forty); ARIZ. R. CIV. P. 34(b) (limiting parties to one request for production not to include more than 10 distinct items or categories of items); ARIZ. R. CIV. P. 30(d) (limiting depositions to four hours in length).

401. See e.g., ARIZ. R. CIV. P. 30(d) (imposing a four hour limitation); ILL. SUPER. CT. R. 206(d) (imposing a three hour limitation).


403. See, e.g., Wayne D. Brazil, Ethical Perspectives on Discovery Reform, 3 REV. LITIG. 51, 62-67 (1982) (describing the lack of sanctions for discovery abuse under Rules 11, 26(c), & 37; Frank F. Flegal, Discovery Abuse: Causes, Effects and Reform, 3 REV. LITIG. 1 (1983) at 15, 17-19, 24-25 (same); Wolfson, supra note 95, at 47-48 (same).

404. See, e.g., Dudley, supra note 81, at 217-218 (explaining that severe sanctions are only used in the most extreme cases); see also MASS. CONTINUING LEGAL EDUC., THE U.S. DISTRICT COURT SPEAKS 145-46 (1992) (providing a survey of judges of the District Massachusetts indicating that discovery sanctions are rarely imposed except in the most egregious cases).

the part of attorneys to the court to seek a full presentation of the facts, and that this trumps the attorney's duty of zealous representation of the client's interest. The contention is that new rules create for attorneys in private civil cases duties and status akin to that of the criminal prosecutor in criminal matters.


407. The alleged "unlawfulness" is the violation of the disclosure requirement. Rule 3.4(d) likewise imposes a duty of fairness to opposing party and counsel. Since lawyers are also under a duty to comply with prevailing rules of procedure, Rule 3.4(d) might also be said to be a specific application of Rule 3.4(c), Obedience to Rules of a Tribunal.

408. See ABA STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION, Standard 3-3.11.


410. Id. at 87.

411. United States v. Bagley, 473 U.S. 667, 674 (1985); see also United States v. Hawkins, 78 F.3d 348, 351 (8th Cir. 1996); United States v. Manning, 56 F.3d 1188, 1198 (9th Cir. 1995).

412. Spicer v. Roxbury Correctional Inst. 194 F.3d 547, 556 (4th Cir. 1999) ("[I]mpeachment evidence is unequivocally subject to disclosure."); United States v. Wilson, 160 F.3d 732, 741 (D.C. Cir. 1998) (extending the Brady requirements to evidence drawing into doubt credibility of witness when witness' reliability may be determinative of guilt or innocence). The Supreme Court has consistently held that evidence which the defense can use to impeach a witness falls within the purview of
prosecution to examine the files to ascertain if there is anything exculpatory in nature, and this duty cannot be delegated.\textsuperscript{413} The responsibility of a public prosecutor is to seek justice, not merely to convict.\textsuperscript{414}

Most civil lawyers feel no comparable obligation.\textsuperscript{415} The traditional discovery provisions in civil litigation were intended to create a level playing field; each side had equal access to all relevant information. Through interrogatories, depositions, and other information gathering devices, each party had the opportunity to develop its case, and fueled by the lawyer's duty to act with "reasonable diligence and promptness in representing a client,"\textsuperscript{416} truth would presumably emerge in the courtroom. The discovery rules were essentially akin to a referee in a prizefight; each party would do its best to win under the rules prescribed, as determined by the neutral judge or jury. I personally incline to an expansive interpretation of disclosure rules but it remains to be seen whether such provisions truly alter the shape of the American pretrial system, or whether they merely provide for more efficient dissemination of information that competent counsel would have sought anyway.

\section*{VIII. Conclusion}

The importance of pretrial processes in contemporary litigation ensures that procedural rules impact both society as a whole and millions of individuals and business entities. State procedural rules governing pretrial information gathering are in flux. While many states continue to follow the model of the Federal Rules, others are experimenting with innovations that follow quite different paths. These developments may be the harbinger of a future procedural regime, changing the traditional roles of both attorneys and judges in civil litigation.


\textsuperscript{414} \textit{ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function}, Standard 3-3.11.

\textsuperscript{415} Gordon, \textit{supra} note 391, at 710-18.

\textsuperscript{416} \textit{Model Rules of Prof'l Conduct R. 1.3} (1999).