

“The Centre Cannot Hold”¹ — The Need for Effective Reform of the U.S. Civil Discovery Process

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“[T]he American civil justice system is indeed different, and the idea of discovery is a fairly novel one. [Discovery] came . . . with the 1938 experiment in revising the rules of [civil] procedure. It was an experiment when the civil rules were adopted . . . which still hasn’t been revisited.”³

Since its inception in 1938, pre-trial discovery has proven to be one of the most divisive and nettlesome issues in civil litigation in the United States. Discovery was designed to prevent trials by ambush and to ensure just adjudications, but it has fallen well short of these laudable goals.⁴ Instead, a broad consensus has emerged that the pre-trial discovery process is badly dysfunctional, with litigants utilizing discovery excessively and, all too often, abusively.⁵ Plaintiffs’ attorneys routinely burden defendants with costly discovery requests and engage in open-ended “fishing expeditions” in the hopes of coercing a quick settlement. As a result, discovery has become the focus of litigation, rather than a mere step in the adjudication process.⁶ By some estimates, discovery costs now comprise between 50 and 90 percent of the total costs of adjudicating a case.⁷ Discovery abuse also represents one of the principal causes of delay and

¹ William Butler Yeats, *The Second Coming* (1920) (“Things fall apart; the centre cannot hold”).

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³ Symposium, *Controversies Surrounding Discovery and Its Effect on the Courts*, Roscoe Pound Institute Conference, 33 (Summer 1999) (remarks of the Honorable Paul V. Niemeyer, Chair of the Advisory Committee on the Federal Civil Rules of Civil Procedure), available at <http://www.roscoepound.org/docs/papers99.pdf>.

⁴ Drafters of the initial Federal Rules of Civil Procedure believed that the discovery process would not only encourage parties to settle, but also assist litigants to reach a just outcome by making all relevant evidence available to both sides. See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique of Proposals for Change*, 30 VAND. L. REV. 1295, 1301-03 (1978); William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 701, 703 (1989).

⁵ Griffin D. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, GA. L. REV. 1, 2 (1992) (“Scholars, litigators, judges and, more recently, even politicians have joined in unusual consensus to urge that reform of the discovery process is needed.”).

⁶ *Id.* at 11.

⁷ Federal Judicial Center, T. Willging, J. Shapard, D. Stienstra, & D. Milfich, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases*, 15 (Table 4) (1997); see also HR Conf Rep No. 204-369, at 37 (1995) (stating that “discovery cost accounts for roughly 80 percent of total litigation costs in securities fraud cases”) (citations omitted); THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS, Vol. 31, No. 10, October 1999 (“Discovery represents 50 percent of the litigation costs in the average case and up to 90 percent of the litigation costs in cases in which it is actively used.”), available at <http://www.uscourts.gov/ttb/oct99ttb/october1999.html>.

congestion in the judicial system.⁸ These problems have led to perennial calls for discovery reform⁹ and resulted in amendments to the federal rules in 1980, 1983, 1993, 2000 and 2006.¹⁰ Anxiety over abusive discovery practices has also led many federal and state courts to experiment with local reforms. But such efforts have been largely unsuccessful in combating discovery abuse.

The exponential growth in the volume of electronic documents created by modern computer systems has exacerbated the problem and is jeopardizing our legal system's ability to handle even routine matters.¹¹ One recent case involved production of a volume of electronic documents equivalent to a stack of paper "137 miles high."¹² But the problem is not simply one of scope. Discovery of computer-based information costs more, takes more time and "creates more headaches" than conventional, paper-based discovery.¹³ Indeed, the effort and expense associated with electronic discovery are so excessive that settlement is often the most fiscally prudent course – regardless of the merits of the case.

The foregoing assertions cannot be dismissed as mere anecdote or hyperbole. A recent joint survey by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System concluded unambiguously that "our discovery system is broken,"¹⁴ and that "[e]lectronic discovery, in particular, is in need of a serious overhaul."¹⁵ Seventy-one

⁸ Louis Harris and Associates, Inc., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, Study No. 874017 (October – December 1987) (on file with author) (poll of 200 federal and 800 state judges finding that many judges believed that discovery abuse accounts for "most of the delays and excessive costs in litigation").

⁹ The growing call for discovery reform was addressed at the 1976 Roscoe Pound Conference, convened at the request of Chief Justice Warren E. Burger to assess growing problems in litigation. The Conference's final report observed that "[w]ild fishing expeditions . . . seem to be the norm," and lamented the "[u]nnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement" that had come to characterize the American legal system. See William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978). Two years later, in 1978, the Advisory Committee for the Federal Rules of Civil Procedure discussed "refining" the scope of discovery in civil litigation. See Fed. R. Civ. P. 26 Advisory Committee's note.

¹⁰ Fed. R. Civ. P. 26.

¹¹ George L. Paul and Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. AND TECH. 10, ¶ 1 (2007).

¹² *In re Intel Corp. Microprocessor Antitrust Litig.*, 2008 WL 2310288 (D. Del. June 4, 2008).

¹³ Kenneth J. Withers, *The Real Cost of Virtual Discovery*, Federal Discovery News at 3 (Feb. 2001); Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 67-68 (2007) ("[E]-discovery is more time-consuming, more burdensome, and more costly than conventional discovery."); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 592 (2001) ("[E]lectronic discovery can be predicted, as a general matter, to give rise to burdens and expense that are of a completely different magnitude from those encountered in traditional discovery.").

¹⁴ Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System, 9 (Mar. 11, 2009 (Revised Apr. 15, 2009)), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053> ("ACTL/IAALS Report").

¹⁵ *Id.* at 2.

percent of the survey's respondents – comprised of a group of trial attorneys from both the plaintiffs' and defense bars – believe that discovery is used as “a tool to force settlement.”¹⁶ These views are admittedly subjective, but they are confirmed by empirical evidence. The number of discovery disputes resolved by courts has risen precipitously in the past decade, an increase that coincides with the ascendancy of electronic discovery. A search of Westlaw's “Allfeds” database for cases containing the phrase “discovery dispute” yields a total of 3,128 opinions for the nearly three-decade period between 1969 through 1998, before electronic discovery became commonplace. The same search run this year revealed 7,207 such cases since 1999.¹⁷

The origins of the problems in our civil discovery system are varied and complex. One principal cause is the “American rule,”¹⁸ which obligates parties to bear their own litigation costs. This fosters the indiscriminate use of discovery and encourages parties to burden their opponents with costly and burdensome information requests. The tandem increase in cost and delay associated with discovery can also be traced to the failure of procedural rules to place reasonable boundaries on the scope and amount of discovery, a problem that has been exacerbated considerably by electronic discovery. The adversarial system itself is also a prime catalyst of discovery abuse. This system gives rise to compelling incentives to engage in abusive discovery tactics to gain a competitive advantage. Such tactics include coercing a settlement by requesting unnecessary information to increase the opponent's costs, or compelling the opponent to produce confidential, proprietary or embarrassing information. Fears of malpractice claims also lead attorneys to adopt a leave-no-stone-unturned approach to discovery. Finally, for a variety of reasons, courts have been reluctant to take a strong hand in managing the discovery process or to impose meaningful sanctions for abuses.

A recent case vividly illustrates how electronic documents, particularly email, are vastly altering the discovery landscape. In *In re Fannie Mae Securities Litigation*,¹⁹ the Office of Federal Housing Enterprise Oversight (OFHEO), was served with a third-party subpoena to produce certain emails.²⁰ OFHEO's in-house counsel, apparently untutored in the ways of electronic discovery, agreed to comply with the subpoena voluntarily. Unfortunately, this representation was made before OFHEO had any understanding as to the time and expense that full compliance would entail. After OFHEO missed numerous deadlines for production of the

¹⁶ *Id.* at 9.

¹⁷ The search was run on April 14, 2010. It updates a search first performed by Professor John S. Beckerman for his article, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 508 (2000). Professor Beckerman notes that his figures could potentially be overstated because he made no effort to exclude criminal cases, or cases in which the phrase “discovery dispute” is mentioned only in passing (*e.g.*, “this case was free of any discovery disputes”). *Id.* n.12. We have not attempted to correct for this potential flaw. Professor Beckerman justifies his approach by opining that “judges would rarely include the words ‘discovery dispute’ in a reported opinion unless pretrial litigation actually contained a discovery dispute that the judge thought noteworthy.” *Id.*

¹⁸ See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (“[T]he presumption is that the responding party must bear the expense of complying with discovery requests . . .”).

¹⁹ 552 F.3d 814 (D.C. Cir. 2008).

²⁰ *Id.* at 816.

emails, the district court held the federal agency in contempt, and ordered it to produce all documents responsive to the subpoena, even ones otherwise protected by privilege. Because many of the emails were no longer reasonably accessible, and because plaintiffs sought production of 80% of all of OFHEO's emails, the federal agency ultimately spent \$6 million to comply with the subpoena – approximately one-ninth of its entire annual budget. The DC Circuit upheld the contempt citation, rejecting OFHEO's arguments that it should not have been compelled to comply with the subpoena in light of the excessive costs involved.²¹

The *Fannie Mae* case provides an unsettling glimpse of the future of civil litigation in the United States. The burgeoning complexity and size of cases,²² coupled with the explosive growth of electronic records, is stretching the pre-trial discovery process beyond its breaking point. Resolving this problem is critical because discovery occupies such an important role in our legal system. Without reform, the delay, waste and expense signified by the *Fannie Mae* case will become routine.

Discovery is not only expensive; it is also inefficient and, increasingly, ineffective. In one survey of attorneys in Chicago, practitioners estimated that 60 percent of discovery materials did not justify the cost associated with obtaining them.²³ More troubling, however, is that the avalanche of documents and information common in larger cases can obscure the relevant facts. A recent survey of Fortune 200 companies found that the ratio of the average number of discovery pages to the average number of exhibit pages (that is, pages actually utilized in some fashion at trial) in cases with total litigation costs of more than \$250,000 was 1,044 to 1 in 2008.²⁴ The Chicago study revealed that in more than 50% of complex cases, the opposition's discovery efforts had failed to disclose significant evidence.²⁵ This result led the author of the Chicago survey to wonder whether the civil discovery system can be said to be functioning acceptably when “with considerable inefficiency and at great cost, it distributes information among the parties fairly evenly in less than half of the larger cases.”²⁶

Importantly, effective reform *is* possible, as some state courts have shown. For example, Oregon's rules of civil procedure require plaintiffs to plead a “plain and concise statement of the ultimate facts constituting a claim for relief.”²⁷ This fact-based standard is more stringent than the Federal Rules' notice-pleading standard. A recent survey of dockets in Oregon's Multnomah

²¹ *Id.* at 821-22.

²² *See, e.g.,* Bell, *supra*, at 6 (noting that “the United States has become a litigious society in which the courts are being asked to resolve an almost incomprehensible spectrum of problems.”).

²³ Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 230 n.24.

²⁴ *Litigation Cost Survey of Major Companies*, Survey designed by Lawyers for Civil Justice, Civil Justice Reform Group, and U.S. Chamber Institute for Legal Reform and administered by Searle Center on Law, Regulation, and Economic Growth, Appendix 1 at 16 (on file with author).

²⁵ Brazil, *Views from the Front Lines, supra*, at 234.

²⁶ *Id.*

²⁷ Or. R. Civ. P. 18A.

County court, however, found that motions to dismiss complaints based on the sufficiency of the allegations were filed less frequently than in Oregon federal court, and were granted less frequently as well.²⁸ Similarly, Oregon's discovery rules are more limited than the Federal Rules, with no more than 30 requests for admission permitted,²⁹ and interrogatories not permitted at all. As a result, the Multnomah County survey found that parties in Oregon state court rarely file discovery-related motions.³⁰ These data suggest that Oregon's stricter pleading and discovery standards actually result in higher-quality claims being pursued in state court, with less disputed motion practice impeding the orderly administration of cases.

Similar rule changes would be the most effective way to curb discovery abuse at the federal level. In the interim, however, some of the problems can be alleviated by judges and magistrates under the existing rules. If federal courts took a more rigorous approach to discovery, the opportunities for abuse would greatly diminish. Most notably, courts should institute more formalized case management orders that set clear guidelines for discovery early in the life of a case, and they should pay closer attention to discovery disputes when they first begin to percolate.

This paper examines the escalating problems in the U.S. civil discovery system and how it can be remedied. Part I discusses the origins and development of civil discovery in the U.S., which sowed the seeds for today's problems. Part II discusses how electronic discovery has led to increased abuses of the discovery system. Part III discusses prior efforts to reform civil discovery in the U.S. and why they have been largely ineffective. And Part IV discusses potential remedies to the problem, taking particular note of the relative merits of the approaches being adopted in various states, as well as reforms suggested by practitioners, such as the American College of Trial Lawyers.

I. BACKGROUND

A. The Origins Of Civil Discovery In The United States

Liberal pre-trial discovery is a fundamental component of the civil justice system in the United States. But it was not always so. American courts initially followed the approach of English courts of law, where pre-trial discovery was almost non-existent.³¹ In fact, under the Field Code,³² which served as the framework for the rules of civil procedure in most American

²⁸ Institute for the Advancement of the American Legal System, *Civil Case Processing in the Oregon Courts*, University of Denver (2010), at 2, 14-15.

²⁹ Or. R. Civ. P. 45F.

³⁰ Institute, *Civil Case Processing in the Oregon Courts*, *supra*, at 2, 14-15.

³¹ Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 B.C. L. REV. 691, 694 (1998) ("Historically, discovery had been extremely limited in both England and the United States."). Subrin explains that the notion of discovery was incongruous with early common law, which viewed litigation "not as a rational quest for truth, but rather a method by which society could determine which side God took to be truthful or just." *Id.* at 694-95.

³² The Field Code, which represented the first code of civil procedure in the United States, was drafted by David Dudley Field for New York, and subsequently adopted by other states. Distrustful of authority – particularly
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courts throughout the late 19th and early 20th centuries,³³ a plaintiff could not even begin discovery unless he or she could independently state facts to substantiate the claims set forth in the complaint.³⁴ Interrogatories were strictly prohibited.³⁵ Depositions, document requests and other discovery practices commonplace in modern litigation were rare, and could be undertaken only with leave of court.³⁶ Depositions, moreover, were not as we know them today – only the opposing party could be deposed, and only in open court.³⁷ The antagonism of the day to discovery was captured by a Supreme Court case rejecting an attempt to “pry into the case of [an] adversary to learn its strength or weakness” as an impermissible “fishing bill.”³⁸

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the unelected judiciary – and intent on protecting the privacy of individuals against unnecessary intrusion, the Field Code provided for extremely limited discovery. *Id.* at 696.

³³ By 1928, twenty-eight states had adopted the Field Code. *See* CHARLES CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, 19-20 (1928). Federal courts generally followed the Field Code, as well. Under the Conformity Act of 1872, federal courts were obligated to hew “as near as may be” to the civil procedure rules of the state in which they were located. *See* Judicial Conformity Act of June 1, 1872, ch. 255 §§ 5-6, 17 Stat. 196, 197 (repealed 1938); *see also* Subrin, *Fishing Expeditions*, *supra*, at 692.

³⁴ Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2241 (1937) (“Under the [Field] Code, a plaintiff could not even begin discovery, unless he or she could independently substantiate such suspicions, for substantiation had to be manifested in a complaint that stated facts.”); Subrin, *Fishing Expeditions*, *supra*, at 694-97.

³⁵ Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW AND HIST. REV. 311, 322 (1988).

³⁶ Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 59, 601 (2002).

³⁷ Subrin, *David Dudley Field and the Field Code*, *supra*, at 322 (the depositions permitted by the Code were “in lieu of calling the adverse party at the trial, and subject to ‘the same rules of examination’ as at trial. A pretrial deposition . . . was to be before a judge who would rule on evidence objections.”). The few federal statutes permitting depositions, however, were designed only to preserve the testimony of witnesses who could not appear at trial, rather than to uncover new information. At the time, a federal statute (28 U.S.C. § 639) permitted depositions *de bene esse*, but only when the witness resided more than 100 miles from the court, was at sea or about to leave the United States, or was old or infirm. *See* Subrin, *Fishing Expeditions*, *supra*, at 698. A second federal statute (28 U.S.C. § 644), permitted depositions *dedimus potestatem*, which could be taken only upon a showing that it was (i) necessary to avoid the failure or delay of justice, (ii) the witness was beyond the reach of the court’s process, (iii) the deposition could not be taken *de bene esse*, and (iv) the deposition was requested in good faith and not for discovery purposes. *Id.* at 698-99 (citing 6 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 26 App.100 (3d ed. 1997)).

³⁸ *Carpender v. Winn*, 221 U.S. 533, 540 (1911). The Massachusetts Supreme Court articulated a similar disdain for discovery:

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.

Fiske v. Slack, 38 Mass. 361 (1838), available at 1838 WL 2792.

States eventually began to liberalize the discovery process, and by 1932, some permitted depositions of witnesses, while others even permitted interrogatories.³⁹ Despite these changes, pre-trial discovery remained extremely rare.⁴⁰ This held true in federal courts as well.⁴¹

B. Adoption Of The Federal Rules

The Federal Rules of Civil Procedure were adopted in 1938.⁴² The drafters recognized that the absence of pre-trial discovery sometimes placed litigants at a serious disadvantage, leading to trials by ambush.⁴³ Concerned that the outcomes of trials often hinged not on the merits of the case, but on the skills of counsel or the financial resources of the parties, the drafters of the federal rules determined to implement a system that would allow the parties to have the “fullest possible knowledge of the issues and facts before trial.”⁴⁴ The drafters believed that wide-ranging discovery would help ensure a just determination in all matters and remedy the imbalance of power between the wealthy and the poor.⁴⁵

The shift to liberal discovery was also premised on two practical considerations. First, the drafters believed that pre-trial discovery would greatly reduce litigation costs. Without pre-trial discovery, parties could not easily discern what positions the opposition would assert at trial.⁴⁶ Prudent litigants therefore adopted an expensive and wasteful “be prepared for anything” approach to trial preparation.⁴⁷ The drafters believed that discovery would reveal the strengths

³⁹ Subrin, *Fishing Expeditions*, *supra*, at 702-04.

⁴⁰ *Id.*

⁴¹ *Id.* The sole discovery permitted in cases at law (aside from a bill of particulars) were depositions. Depositions were also available in equity, but only upon a showing of “good and exceptional cause” for departing from the general rule that pre-trial discovery was not permitted. *Id.* at 698 (citing GEORGE FREDERICK RUSH, EQUITY PLEADING AND PRACTICE 221 (1913) and Fed. Eq. R. 46).

⁴² The federal rules were enacted pursuant to the Rules Enabling Act. Curiously, the topic of discovery was entirely absent from the debate leading up to the passage of the Enabling Act. Instead, the principal impetus behind the reform was concern about the costs and uncertainty associated with a lack of uniformity in federal courts. See Subrin, *Fishing Expeditions*, *supra*, at 698 (citing GEORGE FREDERICK RUSH, EQUITY PLEADING AND PRACTICE 221 (1913) and Fed. Eq. R. 46).

⁴³ William W. Schwartzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?*, 74 JUDICATURE 178 (1991).

⁴⁴ Bell, *supra*, at 6.

⁴⁵ Schwartzer, *Slaying the Monsters*, *supra*; Kathleen L. Blaner, *Federal Discovery, Crown Jewel or Curse?*, No. 4 LITIG. 8, 8 (1998) (“Discovery was considered a crown jewel because it sought to open the courts to all elements of society. The drafters saw an imbalance of power between the wealthy and the poor. By mandating a full exchange of information, the drafters thought that they could help less powerful litigants prove their legal claims and thus redress the imbalance.”).

⁴⁶ Edson R. Sunderland, *Discovery Before Trial under the New Federal Rules*, 15 TENN. L. REV. 737, 737-38 (1939) (explaining that another problem with the pre-discovery era was that, even when the pleadings accurately revealed the parties’ exact positions, they did not reveal the nature or source of the proof that would be offered in support).

⁴⁷ *Id.*

and weaknesses of each party's case at an early stage, thereby facilitating early settlements.⁴⁸ Second, the drafters concluded that pre-trial discovery would be an efficient and self-regulating process.⁴⁹ Mutual self-interest, coupled with a desire to avoid wasting clients' time and money, would minimize discovery disputes and lead to the expeditious exchange of relevant information.⁵⁰

Importantly, however, the drafters of the original federal rules dismissed clear warning signs that these two key premises were deeply flawed. Abuse was already prevalent even under the limited discovery that some states permitted at that time. For example, a few states permitted depositions, but required that the deposition be suspended if the parties could not resolve an objection themselves. This led to various forms of mischief, as one commentator recounts:

In some of the smaller towns in Indiana, Kentucky and elsewhere, local lawyers sometimes take advantage of lawyers from the city who have come to conduct an examination for discovery. Knowing that their opponents are anxious to finish the examination and return to the city and are not apt to wait over until a rather tardy judge compels an answer, they instruct their clients to refuse to answer questions which clearly are proper.⁵¹

Other abusive tactics familiar to modern practitioners were also common by the time the federal rules were enacted. For instance, in states where parties were entitled to take depositions, it was not uncommon for parties to file a motion to reschedule or modify the scope of the deposition "in nearly every important case."⁵² In New York, where defendants were permitted discovery only as it related to their affirmative defenses, defendants regularly included in their answers "fictitious defenses for the sole purpose of securing an examination of [the] adversary."⁵³ Similarly, in states that permitted requests for admissions, parties would:

[C]all upon their opponents to admit practically every item of evidence. Several cases were found in which as many as one hundred specific admissions had been requested. The chief use of admission procedure in such a form is as a tactical weapon, rather than as a means of eliminating undisputed items of proof.⁵⁴

⁴⁸ Schwartzter, *Slaying the Monsters*, *supra*; Bell, *supra*, at 6-7.

⁴⁹ Maurice Rosenberg and Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 BYU. L. REV. 579, 581.

⁵⁰ *Id.*

⁵¹ Subrin, *Fishing Expeditions*, *supra*, at 703-04 (citing George Ragland, Jr., DISCOVERY BEFORE TRIAL, 100-01 (1932)).

⁵² *Id.* at 704 (citing George Ragland, Jr., DISCOVERY BEFORE TRIAL, 67 (1932)).

⁵³ *Id.* at 705 (citing George Ragland, Jr., DISCOVERY BEFORE TRIAL, 132 (1932)).

⁵⁴ *Id.* (citing George Ragland, Jr., DISCOVERY BEFORE TRIAL, 201 (1932)).

But it was interrogatories that provided the most fertile ground for abuse at that time. As one commentator notes, the tactic of overwhelming an opponent with vast numbers of generic interrogatories even predated the arrival of modern photocopiers:

In one case, 2258 interrogatories were filed. Gradually there came into use mimeographed and printed forms which contained two, three and four hundred interrogatories. These questions were not prepared with reference to the particular case in which they were to be used, but were stock forms entirely.⁵⁵

Respondents to interrogatories also engaged in abusive tactics. As interrogatories become more common, respondents quickly hit upon the ploy of providing vague or ambiguous answers.⁵⁶ In Massachusetts, the excessive use of interrogatories, combined with the prevalence of evasive answers, imposed a “surprisingly heavy burden” on courts, compelling them to devote “[a]lmost all of [their] motion hours . . . deciding objections to interrogatories.”⁵⁷

Despite the sounding of these alarms by state courts, the drafters of the 1938 federal rules radically expanded both the scope of permissible discovery and the arsenal of tools parties could use to obtain it.⁵⁸ In so doing, the drafters “went further than any single jurisdiction’s discovery provisions.”⁵⁹

C. Early Application Of The Federal Rules

Federal courts initially resisted the broad discovery provisions in the rules.⁶⁰ For example, some courts limited discovery only to admissible evidence.⁶¹ Other courts revived the limitation that discovery could be had only to build the requesting party’s own case, and not to

⁵⁵ *Id.* (citing George Ragland, Jr., *DISCOVERY BEFORE TRIAL*, 93 (1932)).

⁵⁶ *Id.* at 707 (citing George Ragland, Jr., *DISCOVERY BEFORE TRIAL*, 93 (1932)).

⁵⁷ *Id.* at 708 (citing George Ragland, Jr., *DISCOVERY BEFORE TRIAL*, 114, 119 (1932)).

⁵⁸ *Id.* at 698 (citing George Frederick Rush, *EQUITY PLEADING AND PRACTICE* 221 (1913) and Fed. Eq. R. 46). The new discovery tools included: depositions upon oral examination, depositions upon written examination, interrogatories to parties, requests for production of documents and things and entry upon land for inspection and other purposes, physical and mental examinations of persons and requests for admission. *See* Fed. R. Civ. P. 30-36.

⁵⁹ Subrin, *Fishing Expeditions, supra*, at 702. The federal rules essentially made available all discovery tools then in existence, which no state had done at that time. *See id.* Yet the federal rules also included significant limits. For example, documents could be examined only upon a court order, and a showing of “good cause” was necessary for the production of documents under the original Rule 34. *See* Moskowitz, *Rediscovering Discovery, supra*, at 603.

⁶⁰ Jonathan M. Redgrave, Ted S. Hiser, *The Information Age, Part I: Fishing In The Ocean, A Critical Examination Of Discovery In The Electronic Age*, 2 Sedona Conf. J. 195, 199 (2001).

⁶¹ Parties were therefore barred from seeking hearsay evidence during depositions. *See, e.g., Poppino v. Jones Store Co.*, 1 F.R.D. 215, 217 (W.D. Mo. 1940); *Maryland ex. rel. Montvila v. Pan-American Bus Lines, Inc.*, 1 F.R.D. 213, 214-15 (D. Md. 1940); *Rose Silk Mills, Inc. v. Ins. Co. of N. Am.*, 29 F. Supp. 504, 505-06 (S.D.N.Y. 1939).

test the adversary's claims or defenses. There was even a dispute as to whether the discovery devices set out in the federal rules could be used cumulatively.⁶²

In response to these disputes, the federal rules were amended in 1946. The amendments made clear that discovery extended even to inadmissible evidence, provided the evidence sought was likely to lead to admissible evidence.⁶³ The Supreme Court also lent its imprimatur to unfettered discovery. In the seminal case of *Hickman v. Taylor*,⁶⁴ the Court declared that the new discovery rules "were to be accorded a broad and liberal treatment" and that "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."⁶⁵ Although *Hickman* cautioned that discovery could not be employed to annoy, embarrass or oppress an adversary,⁶⁶ litigants were now free to trawl for evidence with few meaningful limitations.

The effect of *Hickman* was profound. Lower courts began to endorse fishing expeditions, subject only to a nominal and increasingly soft relevance requirement.⁶⁷ And this problem was not limited to federal courts. State courts generally fell in line with the federal approach to discovery.⁶⁸

D. 1970 Amendments To The Federal Rules

By many accounts, the discovery system in America functioned reasonably well for approximately the first thirty years.⁶⁹ But an increasing reliance on U.S. courts to address various social issues expanded litigation well beyond what the drafters of the federal rules could have imagined.⁷⁰ The passage of sweeping civil rights legislation,⁷¹ the enactment of harsher criminal penalties⁷² and the trend toward relying on private litigants (rather than government

⁶² *Kulich v. Murray et al.*, 28 F. Supp. 675, 676 (S.D.N.Y. 1939).

⁶³ Redgrave & Hiser, *supra*, at 199.

⁶⁴ 329 U.S. 495 (1947).

⁶⁵ *Id.* at 507.

⁶⁶ *Id.* at 507-08.

⁶⁷ See, e.g., *Reed v. Swift & Co.*, 11 F.R.D. 273, 274 (W.D. Mo. 1951); *Glick v. McKesson & Robbins, Inc.*, 10 F.R.D. 477, 479 (W.D. Mo. 1950).

⁶⁸ Moskowitz, *Rediscovering Discovery*, *supra*, at 604 ("In general, state procedure rules followed the federal developments.").

⁶⁹ Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 750 (1998); Blaner, *supra*.

⁷⁰ Blaner, *supra*, at 8. As one expert noted "the drafters [of the federal rules] would be amazed at how immense many cases now become and how prominent a role discovery plays in that process." Subrin, *Fishing Expeditions*, *supra*, at 743.

⁷¹ Robert L. Carter, *The Federal Rules in Practice: The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2181 (1989); Blaner, *supra*, at 8.

⁷² See Stuart Taylor, Jr., *A Quiet Crisis in the Courts*, Legal Times, Jan. 20, 1992, at 23 ("The courts have been deluged by criminal trials and appeals, in large part because harsh penalties have increased defendants' incentives to go to trial rather than plead guilty. The new sentencing process is so complex and hyper technical that
(cont'd)

agencies) to enforce certain laws⁷³ all combined to expand the societal role of federal and state courts and expand the overall volume of litigation.

The rise in litigation led to calls for still further expansions of pre-trial discovery. These calls were heeded in 1970, when the federal rules were amended to lift certain important restrictions. Crucially, the 1970 amendments did away with the requirement that a party demonstrate good cause before it could request the production of documents.⁷⁴ These amendments also allowed parties to use discovery devices as frequently as they wished.⁷⁵ The floodgates had been opened.

E. Early Reform Efforts

The 1970 amendments triggered an almost immediate backlash. A broad opposition to expansive discovery emerged within only a few years,⁷⁶ as confidence in the ability of litigants and courts to manage the discovery process began to deteriorate.⁷⁷ The 1976 Pound Conference, which had been “convened at the behest of Chief Justice Warren Burger to examine the troubled state of litigation,”⁷⁸ concluded:

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

(cont'd from previous page)

it takes judges roughly 25 percent more time than before.”). In an interview, federal District Judge Weinstein opined that the increasing criminal caseload made it “very difficult for any judge to find the time to try civil cases.” Kenneth P. Nolan, *Weinstein on the Courts*, LITIG., Spring 1992, at 24.

⁷³ Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 4-5 (1997). Judge Higginbotham notes (“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.”).

⁷⁴ See Blaner, *supra*, at 8; Fed. R. Civ. P. 26 (advisory committee notes to 1970 amendments).

⁷⁵ See Blaner, *supra*, at 8; Fed. R. Civ. P. 26 (advisory committee notes to 1970 amendments).

⁷⁶ Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 752 (1998). The growing dissatisfaction with the discovery process in the 1960s and 1970s is evidenced by the significant increase in the literature on the subject of discovery, and the number of conferences, reports, symposia, meetings, or studies devoted solely or primarily to the issue of discovery problems. See, e.g., Brazil, *Views from the Front Lines*, *supra*; Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787; Wayne D. Brazil, *Improving Judicial Controls over Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 875; David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979); William H. Speck, *The Use of Discovery in the United States District Courts*, 60 YALE L.J. 1132 (1951); David S. Walker, *Professionalism and Procedure: Notes on An Empirical Study*, 38 DRAKE L. REV. 759 (1988-89); Note, *Federal Discovery Rules: Effects of the 1970 Amendments*, 8 COLUM. J.L. & SOC. PROBS. 623 (1972).

⁷⁷ James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 624 (1998).

⁷⁸ Bell, *supra*, at 9.

to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy.⁷⁹

The growing problems with pre-trial discovery compelled state courts to begin experimenting with discovery reform as early as the late 1970s,⁸⁰ and prompted the American Bar Association to convene a study group to examine the problem of discovery abuse. The ABA study group's 1980 report led to a tightening of the federal discovery rules in 1980 and 1983.⁸¹ When these reforms proved inadequate, Congress passed the Civil Justice Reform Act (CJRA) of 1990, triggering a further round of study and reforms.⁸² In addition, in 1993, the federal discovery rules were amended to mandate that parties meet and prepare a proposed discovery plan early in the case, and that certain relevant information and evidence be produced automatically, regardless of whether it had been requested by the opposition. The 1993 amendments also imposed limits on the number of depositions and interrogatories.⁸³

These reforms, though well intentioned, failed to stem the delay and excessive costs that have become the hallmarks of pre-trial discovery. In fact, the discovery abuses common today differ little from those that so concerned the drafters of the federal rules.⁸⁴ The frequency and severity of these abuses, however, have changed considerably.

⁷⁹ William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978).

⁸⁰ Patricia A. Ebener Et Al., RAND INST. FOR CIVIL JUSTICE, COURT EFFORTS TO REDUCE PRETRIAL DELAY: A NATIONAL INVENTORY 30 (1981). This survey found that twenty-nine states and twenty-three of the nation's largest metropolitan trial courts had implemented reforms to expedite pretrial discovery, including using mail and telephone to expedite pretrial motions, requiring attorneys to attempt to settle their discovery disputes before requesting judicial intervention, delegating resolution of discovery motions to para-judicial employees, limiting the number of interrogatories, limiting the time allowed for discovery, holding conferences to schedule discovery and authorizing sanctions for frivolous discovery motions. *Id.*

⁸¹ See Edward D. Cavanaugh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 778 (1985). The 1983 amendments prohibited redundant discovery, required that discovery be proportional to the magnitude of the case and mandated court sanctions for violation of the Rules. They also explicitly provided for judicial discussion of discovery plans at pretrial conferences and for the issuance of an order scheduling discovery and other pretrial events. *Id.*

⁸² Kakalik, *supra*, at 624-25. The Civil Justice Reform Act ("CJRA") required each federal district court to submit a plan for improving civil case management. The CJRA encouraged courts to consider changes in discovery, including limitations on timing and amount of discovery and special programs to assist attorneys in better planning discovery activities. *Id.*

⁸³ *Id.* at 625.

⁸⁴ Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—Much Ado About Nothing?*, 46 HASTINGS L.J. 679, 701-02 (1995).

II. ELECTRONIC DISCOVERY DEEPENS THE PROBLEM

A. Electronic Discovery

1. Electronic Discovery Presents Unique And Urgent Challenges

The ascendancy of electronic discovery in recent years has brought to bear the need for fundamental changes to our discovery system.⁸⁵ Modern computer systems have increased exponentially the amount of documents that companies create and retain in the normal course of business.⁸⁶ As a result, discovery costs are rising, and the time required to conduct discovery is increasing rapidly. Some basic figures help to frame the scope and urgency of the problem. Experts believe that 99% of the world's information is now generated electronically.⁸⁷ Approximately 3.65 trillion emails are sent worldwide annually,⁸⁸ with the average employee sending or receiving 135 emails each day.⁸⁹ Email traffic, however, is only the tip of the iceberg. Each day, more than twelve billion instant messages are sent worldwide.⁹⁰

This surge in the creation of electronic documents is especially problematic because modern computer technology now permits companies to retain vast amounts of records almost indefinitely. In testimony before the federal rules advisory committee, ExxonMobil explained that, as of 2005, it was storing 500 terabytes of electronic information in the United States alone. This amounts to 250 billion typewritten pages.⁹¹ Corporate defendants now face the dismaying prospect of combing through virtually limitless caches of electronic records every time they are threatened with litigation.

An ever-growing volume of electronic documents is only part of the problem. The harsh reality is that the costs of producing electronic documents far exceed those for paper documents. Unlike paper documents, electronic data must be heavily processed and loaded into a special

⁸⁵ Douglas R. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8, ¶ 1, available at <http://richmond.edu/jolt/v14i3/article8.pdf>.

⁸⁶ Mia Mazza, Emmalena K. Quesada & Ashley L. Sternberg, *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, ¶ 3 (2007) (“the explosive growth of ESI has changed the very nature of discovery, with new electronic complexities making the preservation and production of evidence far more challenging”).

⁸⁷ Peter Lyman & Hal R. Varian, *How Much Information?*, 1 (2003), available at http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf.

⁸⁸ Paul & Baron, *supra*, at 9.

⁸⁹ Press Release, *LiveOffice Survey Reveals Organizations are Unprepared for E-Discovery Requests*, June 25, 2007, available at http://www.marketwire.com/mw/rel_us_print.jsp?id=745509.

⁹⁰ Gene J. Koprowski, *Instant Messaging Grew by Nearly 20 Percent in 2005*, TECH NEWS WORLD, Nov. 10, 2005, available at <http://www.technewsworld.com/story/47270.html>.

⁹¹ See Written Comments Submitted to the Committee on Rules of Practice and Procedure, Proposed E-Discovery Amendments to Federal Rules of Civil Procedure, February 11, 2005, available at www.lfcj.com/admin/document_administration/document.cfm?DocumentID=161.

database before it can even be reviewed for potential relevance.⁹² Also, older electronic data is typically stored on so-called backup tapes, which can be singularly time-consuming and costly to review. The data from such tapes must first be decompressed and then processed into a reviewable format.⁹³ Further, the information contained on a backup tape may be recorded in a serpentine fashion, such that the tape drive must physically shuttle back and forth through the entire tape repeatedly to retrieve the necessary data.⁹⁴ This shuttling process occurs at a glacial pace when compared to the speed with which computers normally retrieve data. Additionally, because backup tapes often lack a directory or catalogue of the information they contain, a party may need to search an entire tape – or perhaps all of its tapes – to locate a single file.⁹⁵

Restoring backup tapes for review can easily require millions of dollars in fees. In one case, the defendant spent \$9.75 million to restore only 20 backup tapes.⁹⁶ The cost of reviewing backup tapes can become higher still if the data they contain were created on obsolete software or hardware, an occurrence that is far from uncommon.⁹⁷ These substantial costs have not, however, dissuaded courts from routinely ordering defendants to restore and search backup tapes for potentially responsive documents.⁹⁸

Further escalating the costs of electronic discovery are the qualitative differences that exist between electronic and paper documents. As the drafters of the federal rules of civil procedure observed, most people adopt a more informal style when drafting emails, text messages and instant messages, a practice that tends to make privilege review “more difficult, and . . . correspondingly more expensive . . .”⁹⁹ The casual milieu of email and other electronic communications also gives rise to linguistic ambiguities that further complicate the reviewer’s task. Employees frequently devise their own abbreviations and shorthand terminology for such

⁹² Among other things, electronic data must be subjected to a process known as de-duplication, in which identical copies of documents are removed prior to review. This process can greatly reduce review costs.

⁹³ Institute for the Advancement of the American Legal System, *The Emerging Challenge of Electronic Discovery: Strategies For American Businesses*, 3 (2008).

⁹⁴ Craig Ball, *What Judges Should Know About Discovery from Backup Tapes*, at 2 (2007) available at http://www.craigball.com/What_Judges_Should_Know_About_Discovery_from_Backup_Tapes-corrected.pdf.

⁹⁵ Sarah A. L. Phillips, *Discoverability of Electronic data Under the Proposed Amendments to the Federal Rules of Civil Procedure: How Effective Are Proposed Protections for “Not Reasonably Accessible” Data?*, N.C.L.R. 984, 991 (2005).

⁹⁶ *Rowe Ent., Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002).

⁹⁷ Institute for the Advancement of the American Legal System, *Electronic Discovery: A View From the Front Lines*, Institute for the Advancement of the American Legal System, 13, available at <http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf>. Businesses often find that older data cannot be easily retrieved because it was created with software that is no longer in production, or is stored on media that is no longer supported by the manufacturer. Restoring this type of data is a laborious and expensive process.

⁹⁸ Phillips, *supra*, at 991.

⁹⁹ Fed. R. Civ. P. 26(f) (Advisory Committee’s note).

correspondence,¹⁰⁰ a convention that leaves reviewing attorneys unable to comprehend documents without guidance from the authors.¹⁰¹

The additional costs associated with production of electronic records can be considerable. One expert estimates the cost of producing a single electronic document to be as high as \$4.¹⁰² Verizon, which has devoted considerable attention to electronic discovery issues, has estimated the cost of producing one gigabyte of data – the equivalent of between 15,477 and 677,963 printed pages – to be between \$5,000 and \$7,000.¹⁰³ Of course, far more than a single gigabyte of data will often be at issue. Commentators opine that even a typical “midsize” case now involves at least 500 gigabytes of data, resulting in costs of \$2.5 to \$3.5 million for electronic discovery alone.¹⁰⁴ Another study found that from 2006 to 2008, the average surveyed company spent between \$621,880 and \$2,993,567 per case. At the high end, companies reported average per-case discovery costs ranging from \$2,354,868 to \$9,759,900.¹⁰⁵

The costs of electronic discovery are continuing to rise. One report indicates that the volume of electronically stored information is growing at a rate of 30% annually, a phenomenon that can be ascribed in large part to ever cheaper storage media.¹⁰⁶ This growing cache of electronic information drives up costs, as companies are forced to cull through ever larger stockpiles of data to identify responsive documents. According to the influential Socha-Gelbmann Electronic Discovery Survey, expenditures for the collection and processing of electronic documents in the United States will reach \$4.7 trillion in 2010, an increase of 15% over the prior year.¹⁰⁷ Notably, this figure does not include the cost of reviewing these documents for responsiveness or privilege, a process that can comprise between 75 and 90 percent of the cost of producing electronic records.¹⁰⁸

¹⁰⁰ Stephanie Raposo, *Quick! Tell Us What KUTGW Means*, THE WALL STREET JOURNAL, Aug. 6, 2009 (KUTGW stands for “keep up the good work”).

¹⁰¹ Paul & Baron, *supra*, at 10, ¶ 38. These abbreviations also complicate the process of locating relevant documents in the first instance, as word searches may not incorporate these key terms.

¹⁰² Ann G. Fort, *Mandatory E-Discovery: Compliance Can Create David and Goliath Issues, Reminiscent of the Early Days of Sarbanes-Oxley*, FULTON COUNTY DAILY REPORT, Mar. 19, 2007, at 13.

¹⁰³ Institute, *A View From the Front Lines*, *supra*.

¹⁰⁴ *Id.*

¹⁰⁵ *Litigation Cost Survey of Major Companies*, *supra*, at 3.

¹⁰⁶ Peter Lyman & Hal R. Varian, *How Much Information?*, 2003 (Executive Summary) 2, available at http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_execsum.pdf.

¹⁰⁷ George Socha and Tom Gelbmann, *Mining for Gold*, available at http://www.lawtechnews.com/r5/showkiosk.asp?listing_id=2117297.

¹⁰⁸ James N. Dertouzos et al., RAND INSTITUTE FOR CIVIL JUSTICE, *The Legal and Economic Implications of Electronic Discovery: Options for Future Research* 3 (2008), available at http://www.rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf.

2. Electronic Discovery's Wide-Reaching Effects

The rising costs associated with electronic discovery threaten to drive all but the largest cases out of the system.¹⁰⁹ A report released in 2008 by the RAND Institute for Civil Justice warns that in low-value cases, the costs of electronic discovery “could dominate the underlying stakes in the dispute.”¹¹⁰ But even in large cases, the volume of electronic information is growing so fast that traditional techniques of identifying and reviewing documents are breaking down under the strain.¹¹¹ Several cases have already involved more than 1 billion potentially relevant electronic documents.¹¹² Even if only 1 percent of the documents in such a case were reviewed for possible production, it would likely take 100 people seven months (and \$20 million) to conduct an initial review.¹¹³ In light of projected growth rates for electronic documents, it may soon become too expensive for lawyers merely to search through their clients' computer files to identify potentially responsive documents.¹¹⁴

Electronic data also present unique challenges with regard to collecting potentially responsive documents. Most companies have little idea what documents exist in their computer systems, or precisely where those documents reside.¹¹⁵ The sheer volume of electronic documents created by modern businesses simply makes it too difficult and expensive to catalogue or organize them. The ease with which computer records can be created further complicates document collection efforts. For example, employees can save huge swaths of information on desktop computers, laptops and portable storage devices without anyone else's knowledge. Merely identifying all versions of a particular document can be inordinately difficult because an employee may have forwarded the document to a large number of individuals, each

¹⁰⁹ When Supreme Court Justice Stephen Breyer was informed at a conference several years ago that discovery in a routine case might cost \$4 million, he remarked, “[w]e can't do that If it really costs millions of dollars, then you're going to drive out of the litigation system people who ought to be there.” See Daniel Fisher, *The Data Explosion*, FORBES, Oct. 1, 2007, available at <http://www.forbes.com/business/global/2007/1001/052.html>.

¹¹⁰ Dertouzos, *supra*, at 3.

¹¹¹ Ken Withers, *E-Discovery and the Combative Legal Culture: Finding a Way Out of Purgatory*, available at <http://www.thesedonaconference.org/content/miscFiles/SDJournal.pdf>.

¹¹² John H. Hessen, *Special Issues Involving Electronic Discovery*, 9 KAN. J.L. & PUBL. POL'Y 425, 428 (2000).

¹¹³ Paul & Baron, *supra*, at ¶¶ 19-20 & n.56.

¹¹⁴ *Id.* at ¶ 1.

¹¹⁵ Neither the users who create the data nor the company's information technology personnel are necessarily aware of the existence and locations of documents. A document may reside concurrently on an individual's hard drive, in a network-shared folder, as an attachment to an email, on a backup tape, in an internet cache, and on portable media such as a CD or floppy disk. Furthermore, the location of particular electronic files typically is determined not by their substantive content, but by the software with which they were created, making organized retention and review of those documents difficult. See *The Sedona Principles: Second Edition Best Practices Recommendations & Principles for Addressing Electronic Document Production*, 2 n.5 (June 2007), available at http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf; see also *The Growth of Cost-Shifting in Response to the Rising Cost and Importance of Computerized Data in Litigation*, 59 OKLA. L. REV. 115, 123 (2006) (noting that, thanks to email, it is entirely possible that documents and correspondence may reside in “unexpected” places).

of whom may have edited it and saved it on his or her own computer.¹¹⁶ Unsurprisingly, cases in which companies have been sanctioned for failing to locate all responsive electronic documents abound.¹¹⁷ In *Qualcomm, Inc. v. Broadcom Corp.*¹¹⁸ for example, plaintiff’s counsel failed to identify key emails until after trial had begun, resulting in an \$8.5 million sanction.¹¹⁹

Preservation of electronic data also presents litigants with special challenges – and costs. Once a lawsuit can be reasonably anticipated, both parties are obliged to preserve all potentially relevant evidence.¹²⁰ While this is generally a simple task for hard-copy documents, it poses considerable difficulties for electronic files, for several reasons. First, the sheer volume and diversity of electronic data makes preservation a challenge. Second, electronic data can be (and, in some cases, is intended to be) ephemeral. Dynamic databases, in which data are constantly being added, modified and removed, can be extremely difficult to preserve for an extended period of time.¹²¹ Third, computer systems typically include housekeeping programs that automatically delete data that are no longer useful.¹²² Unless suspended, these programs can destroy relevant evidence. Fourth, certain electronic information, such as deleted files and metadata,¹²³ are not visible to normal users.¹²⁴ This invisible information can be the most vital evidence in a case,¹²⁵ yet it is frequently destroyed in the normal course of business.¹²⁶ The cost

¹¹⁶ Institute, *The Emerging Challenge*, *supra*, at 2.

¹¹⁷ See, e.g., *Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Secs., LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) (discussing cases).

¹¹⁸ 2008 WL 66932, at *1 (S.D. Cal. Jan. 7, 2008), *vacated in part* by 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

¹¹⁹ *Id.*

¹²⁰ See, e.g., *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (noting that “the authority to sanction parties for spoliation arises jointly under the Federal Rules of Civil Procedure and the court’s inherent powers. . . . The duty to preserve attached at the time that litigation was reasonably anticipated”).

¹²¹ Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH. 3, ¶ 7 (2007), available at <http://law.richmond.edu/jolt/v13i3/article9.pdf>.

¹²² *Id.*

¹²³ Metadata, commonly described as “data about data,” is defined as “information describing the history, tracking, or management of an electronic document.” See *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646 (D. Kan. 2005). Metadata can reveal how, when and by whom a document was created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information). *Appendix F to The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*, (Sept. 2005), available at http://www.thesedonaconference.org/content/miscFiles/TSG9_05.pdf.

¹²⁴ When a user deletes a file, the document remains on the computer’s hard drive until the space it occupies is needed for another document. See Sharon D. Nelson, Bruce A. Olson, & John W. Simek, *THE ELECTRONIC EVIDENCE AND DISCOVERY HANDBOOK*, 293 (2006) (noting that “[u]ntil portions of the unallocated space are used for new data storage, in most instances, the old data remains and can be retrieved using forensic techniques”).

¹²⁵ Kenneth Starr’s team discovered the infamous “talking points” document on Monica Lewinsky’s computer, even though she had deleted it. See Shira A. Scheindlin & Jeffrey Rebkin, *Electronic Discovery in Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 329 (2000).

¹²⁶ Notably, a document’s metadata can be destroyed merely by opening or accessing the document.

of preserving electronic information can be extreme. In its testimony before the federal rules advisory committee, ExxonMobil advised that the annual cost of maintaining its electronic data in the U.S. alone is \$23.76 million.¹²⁷

3. Electronic Discovery Encourages Abuse

The massive amounts of discoverable electronic material and the difficulties associated with its collection and preservation are making discovery “unpredictable and increasingly subject to abuse.”¹²⁸ Counsel now recognize that electronically stored information is useful not only as a litigation tool, but also as a litigation tactic. This is borne out by the marked rise in the use of spoliation claims as a tactical maneuver.¹²⁹ As one expert has noted, the intricacies of modern computer systems make it all but a certainty that some relevant electronic evidence will be lost or destroyed in any given case.¹³⁰ This admittedly anecdotal observation is bolstered by a recent survey, which found that more than 90 percent of companies have failed to adopt procedures to preserve electronic data in the event of litigation.¹³¹ As a result, savvy plaintiffs’ counsel have an incentive to seek out some electronic documents, not because they are relevant, but rather in hopes of securing a large sanction when the opposing party cannot produce them.¹³² Spoliation claims have given plaintiffs’ attorneys a “nuclear weapon” that can be used to force large organizations to settle frivolous cases.¹³³

The recent experience of one company involved in a multi-district product liability litigation vividly illustrates the unique problems presented by electronic discovery.¹³⁴ The defendant in that case initially hired a vendor to handle the preservation and collection of electronic data for the lawsuit, but the vendor quickly found itself in over its head. Technologically savvy plaintiffs’ counsel seized on isolated problems with the defendant’s electronic production efforts and exaggerated them in order to undermine the legitimacy of the defendant’s entire electronic discovery process. Convincing the court that the defendant’s problems were far more severe and wide-spread than was actually the case, the plaintiffs

¹²⁷ See Written Comments Submitted to the Committee on Rules of Practice and Procedure, Proposed E-Discovery Amendments to Federal Rules of Civil Procedure, February 11, 2005, *available at* www.lfcj.com/admin/document_administration/document.cfm?DocumentID=161

¹²⁸ Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206, 207 (2001).

¹²⁹ Institute, *A View From the Front Lines*, *supra*.

¹³⁰ Arthur L. Smith, *Responding to the “E-Discovery Alarm”*, ABA BUSINESS LAW TODAY, September/October 2007, at 27-29.

¹³¹ Institute, *A View From the Front Lines*, *supra*.

¹³² Although the 2006 amendments to the Federal Rules of Civil Procedure created a safe harbor that precludes sanctions for electronic documents lost or destroyed through ordinary or good-faith computer use, courts have rarely invoked this provision, and have construed it narrowly when doing so. *See id.*

¹³³ The risk that electronic discovery will be used as a weapon is particularly acute in cases such as employment disputes where the plaintiff possesses virtually no discoverable information. *Id.*

¹³⁴ Example supplied by Adam Cohen, Senior Managing Director of FTI Technology, Inc.

persuaded the court both to impose sanctions and to appoint a special master to oversee electronic discovery issues.

Unfortunately, the defendant's problems were only beginning. Plaintiffs' counsel argued that prior production efforts were so shoddy that the defendant should have to begin the process from scratch. The company was forced to hire a new vendor to review the prior vendor's work and to remedy any errors that had occurred. Further, because the company had no comprehensive directory of its electronic records, the new vendor had to create one, at considerable expense. Additionally, plaintiffs' counsel also succeeded in calling into question the adequacy of the defendant's preservation efforts, and was able to compel the defendant to undertake a massive effort to restore several years' worth of backup tapes. Finally, derivative litigation led to requests from numerous parties seeking production of electronic documents in different formats than those that the defendant originally produced. The defendant was compelled to create a secure website to act as a repository for all these documents so that various parties could access the documents.

The rising costs and uncertainties occasioned by electronic discovery have had another important consequence – they have lain to rest any claims that discovery abuse is a myth. Some commentators have asserted that claims of discovery abuse rest on unfounded perceptions that have been exaggerated by certain “pro-business” interests.¹³⁵ These commentators rely on empirical studies, such as ones conducted by the Federal Judicial Center,¹³⁶ that appear to contradict the “conventional wisdom . . . that discovery is abusive, time-consuming, unproductive and too costly.”¹³⁷ According to these studies, discovery is efficient and cost-effective in the majority of cases, and instances of abuse and runaway costs are limited to a small number of highly complex and overly contentious lawsuits.¹³⁸ Yet all of these studies suffer from a common flaw: they were conducted well before the explosion of electronic discovery within the last decade. The previously unimaginable volumes of information that are now commonplace in litigation have shifted the discovery landscape to such a degree that the results of these studies are no longer valid. Indeed, the Federal Judicial Center has acknowledged as much, and has launched a new study of the impact of electronic documents on the discovery process.¹³⁹

¹³⁵ See Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994); see also Sorenson, *supra*; Peggy E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform*, Public Law Research Institute 1 (1995); F. Burroughs, *Mythed it Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(B)(1)*, 33 M.C.G.L.R. 75 (2001).

¹³⁶ Judith A. McKenna and Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. Rev. 785 (1998); see also TASK FORCE ON CIVIL JUSTICE REFORM, BOOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989).

¹³⁷ Thomas E. Willging, Donna Stienstra, John Shapard and Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525, 527 (1998).

¹³⁸ *Id.*

¹³⁹ See Request from Federal District Judge Mark Kravitz, Chair, Judicial Conference Advisory Committee for Civil Rules, available at <http://www.abanet.org/litigation/survey/0709-FederalJudicialCenter.html>.

B. **A Recent Study Confirms That Discovery Abuse And Excessive Discovery Costs Remain A Significant Problem, Particularly In Connection With Electronic Discovery.**

A 2008 study conducted jointly by the American College of Trial Lawyers and the University of Denver's Institute for the Advancement of the American Legal System (the "ACTL/IAALS Report") confirms that efforts to rein in discovery costs and end discovery abuse have generally failed. The ACTL/IAALS Report concluded unequivocally that "[o]ur discovery system is broken."¹⁴⁰ The report found that the discovery process too often lacks focus and, as a result, "can cost far too much and can become an end in itself."¹⁴¹ The report further determined that some meritorious cases are never filed because "the cost of pursuing them fails a rational cost-benefit test," and that cases of questionable merit and smaller cases "are settled rather than tried because it costs too much to litigate them."¹⁴² Other notable findings from the ACTL/IAALS Report include the following:

- Nearly 71% of the respondents believe that discovery is used as a tool to force settlement.¹⁴³
- Forty-five percent of the respondents believe that discovery is abused *in every case*.¹⁴⁴
- The respondents overwhelmingly agreed that the current system is too expensive and time-consuming, and that potential costs impact access to the courts.¹⁴⁵
- More than 87% of the respondents indicated that electronic discovery has increased the costs of litigation, and over 75% of the respondents agreed that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of electronic discovery.¹⁴⁶
- A strong majority of respondents agreed that "courts do not understand the difficulties in providing [electronic] discovery," and that electronic discovery "is being abused by counsel."¹⁴⁷

¹⁴⁰ ACTL/IAALS Report at 9.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Interim Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System A-4 (Aug. 1, 2008) ("Denver Study Interim Report") (on file with author).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at A-2.

¹⁴⁶ *Id.* at A-4.

¹⁴⁷ *Id.*

- “83% of Fellows believed that litigation costs drive cases to settle that should not settle on the merits.”¹⁴⁸

The ACTL/IAALS Report makes clear that electronic discovery has greatly exacerbated the cost and delay already inherent in the discovery process. In fact, the ACTL/IAALS Report concludes that “[e]lectronic discovery . . . needs a serious overhaul.”¹⁴⁹ One of the survey’s respondents described electronic discovery as a “morass,” while another characterized the 2006 Amendments to the federal rules as a “nightmare.”¹⁵⁰ In fact, seventy-five percent of the respondents surveyed in the ACTL/IAALS Report agreed that “discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of [electronic discovery].”¹⁵¹ An even greater number of respondents, eighty-seven percent, said that electronic discovery “increases the costs of litigation.”¹⁵² Importantly, the ACTL/IAALS Report indicates that the additional costs associated with electronic discovery have, in fact, led to an increase in abusive tactics. Sixty-three percent of the respondents indicated that electronic discovery is being abused to gain a tactical advantage.¹⁵³

C. **Discovery Now Ranks As The Top Litigation Concern For Major Corporate Defendants.**

The unchecked rise in discovery costs has attracted the attention of corporations, which now list discovery as their most pressing concern when litigation is imminent.¹⁵⁴ This concern is well founded. Discovery costs in U.S. commercial litigation are growing at an exponential rate; estimates indicate they reached \$700 million in 2004, \$1.8 billion in 2006 and \$2.9 billion in 2007.¹⁵⁵ Of course, these figures do not account for the billions of dollars that corporations pay each year to settle frivolous lawsuits owing to discovery abuse.

A study conducted by the President’s Council of Economic Advisers (“CEA”) concluded that the direct and indirect costs of excessive tort litigation in the United States drive up production costs, which must ultimately be borne by consumers and employees.¹⁵⁶ The recent survey of Fortune 200 companies found that their U.S. litigation costs ate up 0.51% of their U.S.-derived revenue, while their foreign litigation costs consumed a mere 0.06% of their non-U.S.

¹⁴⁸ *Id.* at A-6.

¹⁴⁹ ACTL/IAALS Report at 2.

¹⁵⁰ *Id.*

¹⁵¹ Denver Study Interim Report at A-4.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See* Fulbright and Jaworski LLP, LITIGATION TRENDS SURVEY FINDINGS 2 (2006).

¹⁵⁵ *See Faced With Data Explosion, Firms Tap Temp Attorneys*, FULTON CO. DAILY REPORT, Oct. 17, 2005.

¹⁵⁶ *See* Council of Economic Advisers, WHO PAYS FOR TORT LIABILITY CLAIMS? AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM (2002) available at http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf.

revenue in 2008.¹⁵⁷ The CEA has concluded that these additional costs impose a 2 percent tax on consumer prices, and a 3 percent tax on wages.¹⁵⁸ Inasmuch as discovery costs comprise the majority of litigation expenses, it is clear that discovery abuse bears the brunt of the responsibility for this “litigation tax.”¹⁵⁹ And with the rapid escalation of discovery costs due to electronic documents, this tax is set to increase considerably.

The litigation tax has a number of adverse effects on our economy. First, it hampers productivity and innovation. Research has shown that corporations facing high expected litigation costs will forgo research and withhold new products from the market in order to conserve funds for legal expenses.¹⁶⁰ Indeed, under financial accounting rules applicable in the United States, public companies are obligated to create financial reserves when potential legal liabilities become sufficiently crystallized.¹⁶¹ These litigation reserves divert significant funds from productive purposes, and can even drive major corporations into the red.¹⁶² Further, this deprivation can last for a considerable period in light of the discovery-related delays endemic to our civil litigation system.

The litigation tax also hampers the competitiveness of United States companies, a crucial handicap in this era of increasing globalization. The U.S. tort liability system is now the most expensive in the world.¹⁶³ Costs associated with tort claims have risen almost continuously since 1951.¹⁶⁴ Tort costs in this country as a percentage of GDP are triple those of France, and almost double those of Germany and Japan.¹⁶⁵ Even the United Kingdom, whose system of

¹⁵⁷ *Litigation Cost Survey of Major Companies*, *supra*, Figure 9.

¹⁵⁸ *See* Council of Economic Advisers, WHO PAYS, *supra*.

¹⁵⁹ *See Managing Discovery in a Digital Age: A Guide to Electronic Discovery in the District of Delaware*, 8 DEL. L. REV. 75, 75 (2005).

¹⁶⁰ Council of Economic Advisers, WHO PAYS, *supra*.

¹⁶¹ ACCOUNTING FOR CONTINGENCIES, Statement of Financial Accounting Standard No. 5, ¶ 8 (Financial Accounting Standards Bd. 1975). Under this standard, a company must create a litigation loss reserve if a loss is “probable” and the amount of the expected loss is material and reasonably estimable.

¹⁶² *See, e.g., Xerox Posts Loss on Litigation Charge*, LOS ANGELES TIMES, Apr. 18, 2008; Steven E.F. Brown, *Lawsuit Settlement Pushes McKesson To \$20M Loss*, SAN FRANCISCO BUSINESS TIMES, Jan. 26, 2009; *HealthSouth Takes 2Q Loss On Litigation Charge*, BUSINESSWEEK, Aug 10, 2009; Sherri Begin Welch, *Kelly Services Blames Litigation Charge for 3Q loss*, CRAIN’S DETROIT BUSINESS, Nov. 14, 2008; Ruthie Ackerman, *Hutchinson Hit By Litigation Charge*, FORBES, Jan. 30, 2008.

¹⁶³ *See The Economics of U.S. Tort Liability: A Primer*, 20, Congressional Budget Office (Oct. 2003), available at <http://www.cbo.gov/ftpdocs/46xx/doc4641/10-22-TortReform-Study.pdf>.

¹⁶⁴ Tillinghast Insurance Consulting, *2006 Update on U.S. Tort Cost Trends*, Towers Perrin, Stamford, Conn. p.5, available at http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort_2006_FINAL.pdf.

¹⁶⁵ United States Department of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty*, 1, available at <http://www.locationusa.com/USDepartmentOfCommerce/pdf/litigationFDI.pdf>.

jurisprudence served as the model for our own, is seen by foreign investors as having a “significant cost advantage compared to the United States.”¹⁶⁶

Finally, the litigation tax and the uncertainties inherent in the U.S. tort liability system dissuade foreign companies from opening factories and otherwise doing business in the United States. This is a keenly felt loss in this era of economic retrenchment and declining employment.¹⁶⁷ One report concludes that rising litigation costs are even threatening the preeminence of the U.S. securities markets.¹⁶⁸

III. RECENT EFFORTS TO CURB DISCOVERY ABUSE

Growing anxiety over the rapidly escalating costs and delay endemic to civil litigation has spawned two attempts to reform federal discovery rules over the last decade. These reforms include limits on the scope of discovery and attempts to address the new challenges posed by electronic documents. But both reform efforts have proven largely ineffectual.

A. The 2000 Amendments

Prior to the 2000 Amendments to the Federal Rules of Civil Procedure, parties were entitled to discovery into “any matter . . . relevant to the *subject matter* involved in the pending action.”¹⁶⁹ The 2000 Amendments sought to narrow the scope of permissible discovery by establishing a new two-tiered discovery protocol. Under this new protocol, parties are initially entitled to discover only information that is “relevant to the *claim or defense* of any party.”¹⁷⁰ If such discovery is inadequate, the court can – “[f]or good cause” – permit discovery into “any matter relevant to the subject matter involved in the action.”¹⁷¹ The two-tiered procedure was designed to prevent parties from using discovery “to develop new claims and defenses that are not already identified in the pleadings.”¹⁷²

The other main change effected by the 2000 Amendments involved pretrial disclosures – early disclosures that are intended to clarify what documents each party has and diminish the

¹⁶⁶ *Id.* at 4 (as this article notes, Lord Leonard Hoffman has offered a pithy explanation of the reasons that even the U.K. has lower tort costs than the United States: “no punitive damages, limits on pain and suffering, no contingency fees, loser pays, no juries in most civil cases, and a trial bar with almost no political influence”).

¹⁶⁷ *Beyond Tort Reform*, THE NEW YORK SUN, Feb. 5, 2007 (“Foreign companies are being scared away in part . . . by soaring costs of American law.”); United States Department of Commerce, *The U.S. Litigation Environment*, *supra*, at 5-6.

¹⁶⁸ McKinsey & Company, *Sustaining New York’s and the U.S.’ Global Financial Services Leadership*, REPORT FOR NEW YORK CITY MAYOR MICHAEL BLOOMBERG AND NEW YORK SENATOR CHARLES SCHUMER, pp.75, 77 (New York: McKinsey & Company, 2006).

¹⁶⁹ Fed. R. Civ. P. 26(b)(1) (prior to the 2000 Amendments).

¹⁷⁰ Fed. R. Civ. P. 26(b)(1) (2000).

¹⁷¹ *Id.*

¹⁷² *Id.* (Advisory Committee’s note).

need for formal discovery requests. Prior to 2000, courts could promulgate local rules setting forth whether or not parties were required to make initial disclosures. More than half of the federal district courts opted out of the requirement, resulting in a “patchwork and fragmented system.”¹⁷³ The 2000 Amendments implemented two changes with respect to initial disclosures. First, they required all parties (except in specified types of cases) to make initial disclosures, unless the parties otherwise agree or the court otherwise orders.¹⁷⁴ Second, they limited the information that must be disclosed to information that the disclosing party may use to support its position.¹⁷⁵

Like its predecessors, the 2000 Amendments failed to rein in abusive discovery practices.¹⁷⁶ The bench and bar have largely ignored the amendments’ limitation on the scope of discovery, clinging instead to entrenched notions of liberal information gathering.¹⁷⁷ The reasons are numerous, but they stem in large part from an inability to discern a meaningful difference between the pre- and post-2000 discovery standards. Attempting to distinguish between information relevant to “a claim or defense” and information relevant to “the subject matter of the dispute” has been dismissed by one court as “the juridical equivalent to debating the number of angels that can dance on the head of a pin”¹⁷⁸ The 2000 Amendments also fail to provide any practical guidance as to when “good cause” exists for broadening discovery to include information relevant to the subject matter of the dispute.¹⁷⁹ The absence of such

¹⁷³ Peter J. Beshar & Kathryn E. Nealon, *Changing the Federal Rules of Civil Procedure*, New York L.J. at 1 (Dec. 1, 2000).

¹⁷⁴ Fed. R. Civ. P. 26(a)(1), 26(a)(1)(E) (2000) (Advisory Committee’s note).

¹⁷⁵ Fed. R. Civ. P. 26(a)(1) (2000) (the advisory committee’s note explains that initial disclosure obligation issues unrelated to expert witness testimony have “been narrowed to identification of witnesses and documents that the disclosing party may use to support its claim or defenses”).

¹⁷⁶ In one sense, this should come as no surprise, given that the drafters of these amendments “determined expressly not to review the question of discovery abuse” Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules to Hon. Anthony J. Scirica, Chair, Committee on Rule of Practice and Procedure, 192 F.R.D. 354 (May 11, 1999); *see also* Denver Study Interim Report at 10 (noting that two-thirds of respondents believe that amendments to the federal rules of civil procedure between 1976 and 2006 have not remedied the problem of discovery abuse).

¹⁷⁷ *See* Noyes, *Good Cause*, *supra*, at 61 (“despite the 2000 amendments, the Rule has been ignored”); *Id.* at 67 (“Instead, many lower courts have acknowledged the 2000 Amendments but have interpreted them as having changed nothing.”); Ronald J. Hedges, *A View From the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 126 (2005) (“What has been my experience with the concept of bifurcated discovery under the 2000 amendment? (1) Attorneys do not as a general rule attempt to limit discovery to that which is relevant to a claim or defense; (2) attorneys do not as a general rule address the existence of good cause, either to argue for broader discovery under Rule 26(b)(1) or to counter such arguments.”); Thomas D. Rowe, *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 24-25 (2001) (“First, in nearly all instances it appears that the outcomes would have been the same under either version of the rule; indeed it is striking how little the courts’ opinion reflect any apparent serious effort by the parties who are resisting discovery to make anything out of the new and perhaps still unfamiliar scope definition.”).

¹⁷⁸ *Thompson v. Dep’t of Hous. & Urban Dev.*, 199 F.R.D. 168, 171 (D. Md. 2001).

¹⁷⁹ John S. Beckerman, *Confronting Civil Discoveries Fatal Flaw*, 84 MINN. L. REV. 505, 541 (2000) (“[the amendment] offers no assistance in determining what constitutes ‘good cause’ that should be sufficient for a judge to
(cont’d)

guidance has led courts to generally ignore the two-tiered discovery system and apply the more familiar pre-2000 discovery standard.¹⁸⁰ As a result, plaintiffs can still routinely engage in fishing expeditions and compel the production of documents and information that are only tangentially related to the claims or defenses at issue.¹⁸¹

Moreover, plaintiffs have found it easy to circumvent the limitations imposed by the 2000 Amendments. For example, those amendments did not modify Federal Rule 11(b)(3), which provides that, by signing a court pleading, plaintiffs' attorneys certify that the pleading's "factual contentions have evidentiary support or, if specifically so identified, *will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.*" Thus, the rule allows plaintiffs to make unfounded allegations if they will likely be able to develop support for them through discovery. Consequently, plaintiffs need only assert strategic claims to broaden discovery in any way they deem advantageous. The discovery system established by the 2000 Amendments thus fosters discovery abuse by encouraging plaintiffs to assert borderline claims to expand the scope of discovery.¹⁸²

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justify granting discovery relevant to the subject matter of the action rather than simply to the claims and defenses of the parties"); Noyes, *Good Cause*, *supra*, at 21 ("despite the 2000 amendments, the Rule has been ignored").

¹⁸⁰ For example, in *World Wrestling Federation Entertainment, Inc. v. William Morris Agency, Inc.*, the court declared, "the amendments to Rule 26(b)(1) do not dramatically alter the scope of discovery..." 204 F.R.D. 263, 265 n.1 (S.D.N.Y. 2001). Similarly, in *Richmond v. UPS Service Parts Logistics*, the court declared that "[t]he implementation of amended Rule 26 did not necessarily impact the so called 'liberal discovery' standard as evidenced by cases interpreting the post-amendment rule." 2002 WL 745588, at *2 (S.D. Ind. 2002). And in *Saket v. American Airlines, Inc.*, the court remarked that "the Federal Rules of Civil Procedure contemplate liberal discovery, and 'relevancy' under Rule 26 is extremely broad." 2003 WL 685385, at *2 (N.D. Ill. Feb. 28, 2003); *see also United States v. Louisiana Clinic*, 2003 WL 21283944 (E.D. La. June 4, 2003); *Johnson Matthey, Inc. v. Research Corp.*, 2002 WL 31235717 (S.D.N.Y. Oct. 3, 2002); *Hill v. Motel 6*, 205 F.R.D. 490 (S.D. Ohio 2001); Noyes, *Good Cause*, *supra*, at 61 (citing Written Statement, Ronald J. Hedges, U.S. Magistrate Judge, Comments on Proposed Amendments to Rules 26 and 37 of the Federal Rules of Civil Procedure 4 (Feb. 8 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-169.pdf>).

¹⁸¹ In *Sheldon v. Vermonty*, for example, an individual plaintiff sought discovery from the broker defendant in a securities fraud suit seeking proceeds data for a five year period. *See* 204 F.R.D. 679 (D. Kan. 2001). The defendants, however, argued the only relevant time period was one year when the plaintiff contemplated and purchased the stock. *Id.* at 689. Ruling in favor of the plaintiff, the court declared its understanding of the scope of discovery in light of the new standard. "Relevancy is broadly construed, and . . . discovery should be allowed unless it is clear that the information sought can have *no possible bearing* on the claim or defense of a party," the court concluded. *Id.* (emphasis added). Similarly, in *Bryant v. Farmers Insurance Co.*, the plaintiff in an age and gender discrimination suit sought disciplinary and audit information regarding not only the supervisor in question, but other supervisors and employees. 2002 WL 1796045, *3 (D. Kan. July 31, 2002). Rejecting the defendant's claims that the requests were overbroad and not limited in scope, the court stated that relevancy is established "under the amended rule if there is *any possibility* that the information sought may be relevant . . ." *Id.* at *2.

¹⁸² *See, e.g.,* Summary of Public Comments-Preliminary Draft of Proposed Amendments: Civil Rules Regarding Discovery 90 (1998-99), available at <http://www.uscourts.gov/rules/archive/1999/summary.pdf>. ("This change will . . . put pressure on lawyers to assert thin or borderline frivolous claims or defenses . . . Under the current rules plaintiff would file a breach of contract suit and take discovery about the possibility of fraud. Under the amended rule, one is pushing the plaintiff's lawyer into treading close to the Rule 11 line to file a fraud claim as a predicate for discovery.").

Moreover, even the two-tiered approach to the scope of discovery, which the 2000 Amendments imposed, has been largely ineffectual in preventing discovery abuse by plaintiffs.¹⁸³ The case law so far suggests that the second tier's "good cause" element is an obstacle in name only,¹⁸⁴ such that plaintiffs are frequently able to convince the court that they should be entitled to the traditional "subject matter" scope of discovery.

The 2000 Amendments' other principal change – namely, to make initial disclosure mandatory – has failed to have a noticeable impact, particularly in complex cases where abuse and delay are most severe.¹⁸⁵ This should come as no surprise. Critics have long pointed out that mandatory disclosure requirements can lead to the overproduction of marginally relevant information, thus increasing delay and expenses for both sides.¹⁸⁶ An empirical study of mandatory disclosure in Arizona state courts confirms this. According to that study, mandatory disclosure did not significantly reduce costs or delay in complex cases.¹⁸⁷ In fact, sixty-three percent of the attorneys participating in the Arizona study said that mandatory disclosure actually increased costs.¹⁸⁸

B. The 2006 Amendments

The federal rules were amended again in 2006, this time to address the growing importance – and costs – of electronic discovery.¹⁸⁹ In an effort to alleviate the burdens imposed by electronic discovery, the 2006 Amendments implemented a two-tiered, "proportionality" approach to the scope of electronic discovery. As an initial matter, a party does not need to produce electronically stored information from sources that the party identifies as "not

¹⁸³ See Christopher Frost, *Note, The Sound and The Fury or The Sound of Silence?: Evaluating the Pre-Amendment Predictions and Post-Amendment Effects of The Discovery Scope-Narrowing Language in the 2000 Amendments to Federal Rule of Civil Procedure 26(b)(1)*, 37 GA. L. REV. 1039, 1071 (2003).

¹⁸⁴ See *Thompson v. Dep't of Hous. & Urban Dev.*, 199 F.R.D. 168, 172 (D. Md. 2001) (warning counsel that taking a "rigid view of the narrowed scope of discovery . . . would run counter to the underlying purpose of the rule changes"). One court succinctly noted, "[t]he minimal showings of relevance and admissibility hardly pose much of an obstacle for an inquiring party to overcome, even considering the recent amendment to Rule 26(b)(1)." See *Anderson v. Hale*, 2001 WL 503045, at *3 (N.D. Ill. May 10, 2001). In *Sanyo Laser Products, Inc. v. Arista Records, Inc.*, the court granted subject matter discovery without a meaningful discussion of how the requesting party demonstrated good cause. 214 F.R.D. 496 (S.D. Ind. 2003). Instead, the court highlighted that the 2000 rule "change, while meaningful, [was] not dramatic, and broad discovery remains the norm." *Id.* at 500.

¹⁸⁵ Edward D. Cavanaugh, *Twombly, The Federal Rules Of Civil Procedure And The Courts*, 82 ST. JOHN'S L. REV. 877, 886 (2008) (noting that mandatory automatic disclosure "never fulfilled its potential . . .").

¹⁸⁶ Bell, *supra*, at 41.

¹⁸⁷ Hon. Robert D. Meyers, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11, 20-26 (1993).

¹⁸⁸ William T. Birmingham and Charles D. Onofry, *Mandatory Disclosure of Information: One State's Experience*, FOR THE DEFENSE, 7, 12 (July 1994).

¹⁸⁹ COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, 22-23 (2005), available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf.5>; Adoption and Amendments to Civil Rules, U.S. Order 06-20, 2006 C.O. (Apr. 12, 2006).

reasonably accessible because of undue burden or cost.”¹⁹⁰ This includes, for example, electronic information stored on backup tapes or in off-line legacy systems, which can be time-consuming and expensive to restore. If a party wishes to obtain discovery of electronic data that is not reasonably accessible, the requesting party must demonstrate “good cause.”¹⁹¹ The good-cause analysis incorporates a proportionality standard, requiring the court to “balance the requesting party’s need for the information against the burden on the responding party.”¹⁹²

The 2006 Amendments also attempted to ease the burdens of preserving electronic information. This was done by creating a “safe harbor” provision, under which the destruction of electronic data through “routine, good-faith business procedures,” such as an email system that automatically deletes old emails after a certain period, cannot be sanctioned as spoliation unless there are “exceptional circumstances.”¹⁹³ The 2006 Amendments also sought to address another key problem associated with electronic documents: the tremendous burden of reviewing unprecedented volumes of documents for privilege. The 2006 Amendments sought to ease this burden by allowing the parties to agree beforehand that the inadvertent production of privileged materials does not automatically waive the privilege.¹⁹⁴

It may still be too early to gauge the effectiveness of the 2006 Amendments,¹⁹⁵ but many experts believe these changes will prove no more successful than the 2000 Amendments, for a number of reasons. One reason for this is that the 2006 Amendments suffer from the same fatal flaws that undermined the 2000 Amendments, including the failure to define the term “good cause.”¹⁹⁶ This omission leaves courts and practitioners alike with no useful guidance when grappling with the question whether discovery of data that is not reasonably accessible is appropriate.¹⁹⁷ Moreover, a similar proportionality requirement was incorporated into Rule 26 in the early 1980s in a futile effort to rein in the abuses that had become rampant in the wake of the “photocopier revolution” of the late 1960s.¹⁹⁸ Having proven largely ineffective in dealing with traditional discovery issues, a proportionality requirement can hardly be expected to have a

¹⁹⁰ Fed. R. Civ. P. 26(b)(2)(B) (2006).

¹⁹¹ *Id.* The Advisory Committee’s notes include several examples of data that is not reasonably accessible, including information stored only for disaster-recovery purposes (*i.e.*, backup tapes), legacy data and information that was deleted and is retrievable only with forensic techniques. *Id.*

¹⁹² *Id.* (Advisory Committee’s note).

¹⁹³ Fed. R. Civ. P. 37(f) (2006).

¹⁹⁴ Fed. R. Civ. P. 26(b)(5)(B) (2006).

¹⁹⁵ *See* Dertouzos, *supra*, at 11 (noting the lack of studies on the effect of the 2006 Amendments and proposing options for further research).

¹⁹⁶ Noyes, *Good Cause*, *supra*, at 71-72.

¹⁹⁷ *See* Scott A. Moss, *Litigation Discovery Cannot be Optimal But Could be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 905 (2009) (“[T]he main problem with [the 2006 Amendments] is not that they are old news. Rather, the problem is that such limits [referring to the 2006 Amendment’s cost-benefit proportionality approach] never worked terribly well and appear unlikely to work well for e-discovery.”); Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 181 (2006), available at <http://thepocketpart.org/2006/11/30/rosenthal.html>.

¹⁹⁸ Moss, *Litigation Discovery Cannot Be Optimal*, *supra*, at 899-900.

significant impact on the far larger and more complex world of electronic discovery.¹⁹⁹ In reality, courts have historically ignored proportionality concerns, and have instead blamed companies for choosing to employ computer systems that can make it more difficult or expensive to retrieve records.²⁰⁰ These courts reason that, having benefited from the day-to-day convenience of modern computer systems, companies cannot complain when they must incur additional expense to meet their discovery obligations.²⁰¹ In reality, of course, this is a Hobson's choice, as competitive pressures leave companies no realistic alternative to utilizing modern computer systems.

The 2006 Amendments also do not insulate defendants from the rising costs associated with electronic discovery. In fact, the 2006 Amendments arguably worsened the problem by building additional costs into each case.²⁰² In particular, because the Federal Rules provide that parties must produce electronically stored information that is not reasonably accessible in the event the opposing party demonstrates "good cause," the Rules encourage plaintiffs to seek broad electronic discovery from sources from which it will be costly for defendants to retrieve information, and invent reasons why such information is necessary or reasonably accessible. The rules thus provide plaintiffs an additional mechanism to use discovery to drive up the costs of litigation for defendants.

Critics of the 2006 Amendments have also expressed misgivings about the usefulness of the safe-harbor provision that protects parties from sanctions if they destroy electronic data through "routine, good-faith business procedures," such as an email system that automatically deletes old emails after a certain period. This provision provides no guidance regarding what data must be preserved, or the manner in which it must be maintained.²⁰³ Further, the circumstances under which sanctions may be imposed remain vague and discretionary. For example, some experts posit that the safe harbor provision would not apply in the absence of a formal discovery order, or when judges are exercising their inherent power to manage cases.²⁰⁴ In light of these uncertainties, companies facing even small lawsuits have little recourse but to continue to expend vast sums to preserve all potentially relevant evidence.

These numerous shortcomings lead inexorably to the conclusion that, like the 2000 Amendments, the 2006 Amendments will not give rise to a radical shift in the case law. As one

¹⁹⁹ See *id.* at 900.

²⁰⁰ See *id.* at 900-01.

²⁰¹ *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 1991 WL 111040, at *8-9 (E.D. Pa. June 17, 1991); see also *Kaufman v. Kinko's, Inc.*, 2002 WL 32123851, at *2 (Del. Ch. Apr. 16, 2002) ("Upon installing a data storage system, it must be assumed that at some point in the future one may need to retrieve the information previously stored."); *Linnen v. A.H. Robins Co.*, 1999 WL 462015 (Mass. Super. Ct. June 16, 1999) (stating that, by using certain technology, the defendant assumed the risk that it would have to produce the information).

²⁰² Gregory P. Joseph, *Federal Litigation-Where Did It Go Off Track?* SN058 ALI-ABA 587, 592 (Feb. 2008).

²⁰³ Dertouzos, *supra*, at 11.

²⁰⁴ *Id.*

commentator put it: “Whatever the theoretical possibilities, the [2006 Amendments] created only a ripple in the case law . . . no radical shift has occurred.”²⁰⁵

IV. PROPOSALS FOR REFORM

Below we offer five reform proposals that aim to address the root causes of discovery abuse in the United States, taking into account the lessons learned from prior discovery reform efforts. These proposals attempt to diminish incentives for engaging in discovery abuse and to increase court involvement in preventing potentially abusive discovery. While some of these reforms will require amendments to the rules of civil procedure, others can be implemented by judges immediately – and have already been adopted by some courts.

A. Establish Clear Guidelines For Cost-Shifting For Electronic Discovery

The most pernicious problem with our discovery system is that it incentivizes parties to seek overbroad and burdensome discovery.²⁰⁶ The drafters of the federal rules have already recognized this, but their efforts to remedy the problem have failed. Attorneys on both sides continue to seek large amounts of documents and – especially – electronic data that bear only tangentially on the claims or defenses at issue, simply to burden the other side and improve their prospects of a favorable settlement.

As discussed above, the ubiquity of modern computer systems – and the ever-growing caches of information they contain – has led to a tremendous surge in the costs of electronic discovery that shows no signs of abating.²⁰⁷ To check these rising costs – and the abusive discovery tactics they have fostered – the rules should require courts to consider cost-shifting every time a party seeks electronic discovery. The rules should also set forth a series of factors for courts to consider in deciding whether cost shifting is warranted. A good starting point for establishing these factors are the factors identified by Judge Shira Scheindlin in *Zubulake v. UBS Warburg LLC*: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its

²⁰⁵ 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2008.1 at 121 (2d ed. Supp. 2008). *See also* Dertouzos, *supra*, at 11 (“despite the sweeping nature of these changes [referring to the 2006 Amendments], even some of the most ardent proponents of the new rules (typically from the corporate community) argue that they do not go far enough”); Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?* 25 REV. LITIG. 633, 661 (2006) (“Those amendments [referring to the 2006 Amendments] will contribute to the handling of this form of e-discovery, but they will hardly revolutionize it. Indeed, one strong objection to adopting several of them was that they do not really add a great deal to the current rules.”); Phillips, *supra*, at 986 (“This comment argues that despite the protective language proposed for addition to Rule 26(b)(2), the amendment offers electronic data identified as not reasonably accessible no greater protection from discovery than the current version of the Rule provides because the good cause requirement in the proposed amendment is not strict enough.”).

²⁰⁶ Bruggman, *supra*, at 2.

²⁰⁷ ACTL/IAALS Report at 16.

incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.²⁰⁸ Courts could also be directed to consider the factors set forth in the American Bar Association’s Civil Discovery Standards.²⁰⁹

Finally, parties requesting production of electronic documents that are not reasonably accessible should be required to bear the costs of doing so. In particular, parties seeking data from backup tapes and other forms of disaster recovery media should be made to bear the costs of retrieving, reviewing, and producing this information. This has been the rule for some time in Texas, which has enjoyed considerable success in limiting discovery costs.²¹⁰ Such a requirement would represent a significant step in reducing discovery abuse in connection with electronic discovery.

B. Adopt the English Rule For Discovery Disputes

The current discovery problems can be traced in large part to the “American Rule,”²¹¹ which generally requires parties to bear their own litigation costs, including the costs of discovery disputes. This rule is perhaps the greatest single catalyst of discovery abuse, as it allows plaintiffs to impose tremendous costs on defendants, at virtually no cost to themselves.²¹² The perverse incentives to which the American Rule gives rise have been exacerbated considerably in recent years by the rising costs associated with electronic discovery. The

²⁰⁸ 217 F.R.D. 309 (S.D.N.Y. 2003). The Advisory Committee Notes to Rule 26(b)(2) (2006) reference these factors for determining whether cost-shifting is appropriate for data that is not reasonably accessible. But because the notes are not binding, courts are free to go their own way, leading to greater uncertainty for parties.

²⁰⁹ These factors include: (a) the burden and expense of the discovery, considering among other factors the total cost of production compared to the amount in controversy; (b) the need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; (c) the complexity of the case and the importance of the issues; (d) the need to protect the attorney-client privilege or attorney work product; (e) the need to protect trade secrets, proprietary, or confidential information; (f) whether the information or the software needed to access it is proprietary or constitutes confidential business information; (g) the breadth of the discovery request; (h) whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; (i) whether the requesting party has offered to pay some or all of the discovery expenses; (j) the relative ability of each party to control costs and its incentive to do so; and (k) the resources of each party as compared to the total cost of production; (l) whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information; (m) whether the responding party stores electronic information in a way that makes it more costly or burdensome to access the information than is reasonably warranted by legitimate personal, business, or other non-litigation-related reasons; and (n) whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable. American Bar Association Civil Discovery Standards, Standard 29, available at <http://www.abanet.org/litigation/discoverystandards/>.

²¹⁰ TEX. R. CIV. P. 196.4 (2009).

²¹¹ See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (noting that “the presumption is that the responding party must bear the expense of complying with discovery requests”).

²¹² Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN’S L. REV. 680, 726 (1983).

American Rule also encourages fishing expeditions, as there is nothing to dissuade plaintiffs from requesting virtually limitless volumes of documents and evidence. In addition, the American Rule also contributes to excessive discovery by encouraging parties to request information and documents in lieu of performing their own diligent preparation and research.

In contrast to the American Rule, the losing party in English courts is required to pay the winning party's reasonable attorneys' fees. This rule, designed to dissuade meritless lawsuits, was rejected in this country because of its propensity to limit access to the courts. But there is no such risk when discovery motions are involved.²¹³ In the limited context of discovery disputes, the English rule would serve to ensure that neither party adopts an irrational position with regard to discovery issues. Further, the risk of having to pay the opposing party's expenses for contesting a discovery issue would help attorneys resist clients' urging them to adopt unreasonable positions.²¹⁴ The rules should therefore be revised to mandate that the losing party in a discovery dispute bear the opposing party's attorneys' fees for that dispute.

C. Define Preservation Obligations Early in the Litigation Process

With the increasing prevalence of electronically stored information, data preservation has become one of the costliest aspects of litigation, both in terms of the expense of maintaining the physical media on which the data are stored, and of the expense of fighting spoliation motions. To mitigate these costs, the rules should require that the parties meet to discuss preservation issues as early as possible, even before the pretrial conference mandated by Federal Rule of Civil Procedure 16 and its state counterparts.²¹⁵ The parties' preservation obligations begin as soon as the suit can reasonably be anticipated, but pretrial conferences typically do not take place until several months after a case has been filed. By that time, the defendant, with only the complaint's broad allegations to serve as a guide, has been forced to guess at the extent of its preservation obligations.²¹⁶ This uncertainty typically fuels a costly and wasteful preservation of excessive amounts of documents and data. Mandating an early meeting between the parties to discuss this topic would obviate this waste. Further, the rules should mandate that the court hold an electronic-data conference early in the case if the parties cannot reach an agreement on their respective preservation obligations.

Moreover, the rules of procedure should make clear that parties' preservation obligations do not extend to every last document or electronic file in their possession.²¹⁷ Rather, the rules should emphasize that the parties' preservation obligations generally extend only to actively

²¹³ Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 66 (1997).

²¹⁴ *Id.* at 66.

²¹⁵ ACTL/IAALS Report at 12-14.

²¹⁶ *Id.*

²¹⁷ In fact, a number of district courts have adopted local rules requiring the parties to discuss preservation issues. See, e.g., District of Delaware, Default Standard for Discovery of Electronic Documents ("E-Discovery"); available at <http://www.ded.uscourts.gov/Announce/HotPage21.htm>.

maintained files and sources of electronic data, and not to metadata.²¹⁸ The rules should also provide that, in the event a party desires its opponent to preserve inaccessible forms of electronic data, such as backup tapes and metadata, the party must demonstrate a particularized need for this information.²¹⁹ Finally, parties requesting the preservation of inaccessible data should be made to bear the reasonable costs of doing so.

D. Limit Sanctions For Failure To Preserve Electronic Documents Only To Cases Of Intentional Destruction Or Recklessness

The task of preserving of electronic information is fraught with pitfalls, even for the wary.²²⁰ As noted above, electronic information by its very nature is ephemeral, and is routinely altered and deleted in the normal course of a company's operations. Further, the ease with which it is created, transmitted and stored makes it surpassingly difficult for companies to locate all electronic data that may require preservation. Indeed, given the large volumes of computer records that now exist in some companies, it may be virtually impossible to preserve all potentially relevant electronic data.²²¹ For these reasons, sanctions for spoliation should be imposed only in the event that a party has intentionally destroyed evidence, or has been demonstrably reckless in failing to preserve it.

²¹⁸ The Sedona Principles: Second Edition Best Practices Recommendations & Principles for Addressing Electronic Document Production, 45 (2007).

²¹⁹ The federal rules make clear that a party can move for a protective order to clarify its preservation obligations. Fed. R. Civ. P. 26(b)(2)(B). Our proposal would shift the burden to the requesting party to demonstrate a need for preserving otherwise inaccessible data, rather than requiring parties to preserve all potentially relevant information unless and until they can convince the court that the cost and burden of doing so is unwarranted.

²²⁰ As the Managing Director of the Sedona Conference noted in a recent article:

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

Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. OF TECH. & INTELL. PROP. 171, ¶ 55 (2006).

²²¹ For example, in *Procter & Gamble Co. v. Haugen*, an unfair trade practices case, the Tenth Circuit reversed the trial court's dismissal of the plaintiff's Lanham Act claims, based on the plaintiff's failure to produce a database maintained by a non-party contractor. The Tenth Circuit held that the trial court's order compelling production failed to take into account the logistical difficulties of doing so, which would have involved the purchase of a mainframe computer or paying the non-party an estimated \$30 million to maintain an archived version of the database. The circuit court held that the violation of the order was not willful and the prejudice to the defendant was not clearly established. 427 F.3d 727, 736-740 (10th Cir. 2005).

The 2006 Amendments to the federal rules attempted to address this problem by creating a so-called “safe harbor” for electronic document preservation. Under new Rule 37(e), “absent exceptional circumstances,” courts may not impose sanctions “on a party” if electronic documents are lost “as a result of the routine, good-faith operation of an electronic information system.” Although well-intentioned, this rule fails to provide adequate protection for a variety of reasons. First, it fails to take into account the possibility that even the most careful attempts to locate and preserve electronic data may not succeed in preserving all potentially relevant information. Second, the term “routine, good-faith operation of an electronic information system” is too vague to provide clear guidance as to a party’s preservation obligations. For example, it is unclear whether sanctions would be available against a party that fails to suspend a routine operation of its information system that deletes or overwrites data that is not reasonably accessible, such as backup tapes. Third, the rule fails to explain what “exceptional circumstances” might warrant the imposition of sanctions even when data is lost through the routine, good-faith operation of a computer system. Finally, the rule applies only to parties, and thus provides no protection to non-parties, who play an increasingly important role in litigation. Federal and state rules should adopt the approach recently implemented by California, in which a safe harbor is provided not only for destroyed evidence but also for evidence that has been “lost, damaged, altered or overwritten” in good faith.²²²

Finally, the rules should require courts to consider the degree of prejudice resulting from a party’s failure to preserve the electronic data in determining whether sanctions are warranted. This factor should also inform the court’s decision-making when it determines the severity of a sanction.²²³

E. Suspend Discovery During The Pendency Of A Motion To Dismiss

Another critical reform is to stay all fact discovery during the pendency of any motions to dismiss. Such a rule already applies to securities class actions under the Private Securities Litigation Reform Act (“PSLRA”). In passing the PSLRA, Congress sought to curtail the broadside discovery requests that plaintiffs’ attorneys used to secure quick settlements and to launch fishing expeditions before a court had even determined that the plaintiff’s legal claims were viable.²²⁴ Recognizing that “[t]he cost of discovery often forces innocent parties to settle

²²² CAL. CIV. PROC. CODE § 1985.8(1)(1) (2009).

²²³ Withers, *Electronically Stored Information*, *supra*, at ¶ 106.

²²⁴ At congressional hearings debating the PSLRA, proponents of reform alleged that nearly every stock price decline greater than 10% resulted in a strike suit. Further, public accounting firms contended that “entrepreneurial lawyers” would identify public companies with some sort of financial anomaly, such as a 10% drop in stock value, and name the auditing firm to the lawsuit not for its culpability, but for its “deep pockets.” Lead plaintiffs’ counsel would then make voluminous discovery requests that were so expensive to comply with that the only rational course of action for the company was to settle the lawsuit. *See* Brian S. Sommer, *The PSLRA Decade of Decadence: Improving Balance In The Private Securities Litigation Arena With A Screening Panel Approach*, 44 WASHBURN L.J. 413, 422-23 (2005).

frivolous securities class actions,”²²⁵ Congress imposed an automatic stay on discovery during the pendency of a motion to dismiss in private securities cases.²²⁶ This small but significant change has proven extremely effective in reining in vexatious lawsuits.

In light of this success,²²⁷ Congress and state legislatures should establish a similar requirement in all civil cases. Under the current system, even an entirely frivolous lawsuit can compel a defendant to expend millions of dollars collecting, reviewing, producing and preserving records. Given the exponential rise in electronic discovery costs, this exerts enormous pressure on defendants to settle cases quickly. An automatic stay would greatly reduce the *in terrorem* value of lawsuits, and would ensure that lawsuits “stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed.”²²⁸

A number of federal courts have already adopted this approach, recognizing that since the very purpose of a motion to dismiss is to decide whether a complaint has enough merit to open discovery, it makes no sense to launch discovery before that threshold decision has been made.²²⁹ As one court put it: if the parties begin discovery – and a court ultimately grants a defendant’s motion to dismiss the complaint – then the initial discovery “would constitute needless expense and a waste of [] time and energy.”²³⁰

²²⁵ H.R. Conf. Rep. No. 104-369, at 37 (1995).

²²⁶ 15 U.S.C. § 78u-4(b)(3)(B).

²²⁷ The success of the ban is perhaps best illustrated by the fact that Congress later had to extend it to parallel actions filed in state courts when there was a likelihood that granting discovery to the state court plaintiffs would operate as an end-run around the PSLRA’s stay in the federal securities action. 15 U.S.C. § 78u-4(b)(3)(D) (the Securities Litigation Uniform Standards Act).

²²⁸ *S.G. Cowen Sec. Corp. v. United States Dist. Ct.*, 189 F.3d 909, 912 (9th Cir. 1999) (noting that, in enacting the PSLRA’s automatic stay, “Congress clearly intended that complaints in these securities actions should stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed”).

²²⁹ See *West v. Johnson*, 2009 U.S. Dist. LEXIS 74996, at *3 (W.D. Wash. July 16, 2009) (“[a] short stay of discovery is appropriate until a decision can be made on the various Defendants’ motions to dismiss”); *Tostado v. Citibank (S.D.), N.A.*, 2009 U.S. Dist. LEXIS 116032, at *3 (W.D. Tex. Dec. 11, 2009) (granting defendant’s motion to stay discovery pending adjudication of motion to dismiss); *Allmond v. City of Jacksonville*, 2008 U.S. Dist. LEXIS 57389, at *6 (M.D. Fla. July 8, 2008) (granting motion to stay discovery pending a ruling on a motion to dismiss because “upon cursory glance of Defendants’ motions to dismiss the resolution of the motions could dispose of the entire case”); *Port Dock & Stone Corp. v. OldCastle N.E., Inc.*, 2006 U.S. Dist. LEXIS 94944, at *3-5 (E.D.N.Y. Mar. 31, 2006) (granting defendant’s motion to stay discovery pending resolution of motion to dismiss where defendants “raise[d] substantial issues with regard to the viability of plaintiffs’ complaint”); *Howse v. Atkinson*, 2005 U.S. Dist. LEXIS 7511, at *4-5 (D. Kan. Apr. 27, 2005) (granting motion to stay discovery pending ruling on motion to dismiss raising issues related to immunity defenses). See also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007) (recognizing that courts must carefully scrutinize motions to dismiss because “before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct”).

²³⁰ See *Thompson v. Retirement Plan for Employees of S.C. Johnson & Sons, Inc.*, 2008 U.S. Dist. LEXIS 96902, at *31 (E.D. Wis. Nov. 14, 2008).

CONCLUSION

Discovery abuse not only continues to be a serious problem in our civil justice system; it is rapidly growing more pernicious. Plaintiffs' counsel continue to rely on the same calculus: *i.e.*, that the time and expense defendants must devote to responding to voluminous discovery requests will make settlement more attractive. Responding to burdensome discovery requests forces defendants to devote considerable resources to identifying, collecting and copying documents. These requests also impose hefty legal fees because all documents must be reviewed by counsel prior to production to ensure that they do not contain material protected by the attorney-client privilege or the work-product doctrine. Plaintiffs can also impose substantial costs by seeking to depose the defendant's key employees. The time needed to prepare for, travel to and participate in such depositions can distract these employees from their normal duties for extended periods.²³¹ Broadly worded interrogatories also sidetrack the defendant's employees, forcing them to spend considerable time gathering information and conveying it to their attorneys.

Plaintiffs' attorneys also continue to engage in fishing expeditions. Broad document requests and numerous depositions seeking mostly irrelevant information impose significant costs on defendants, as employees must spend time searching for responsive documents and responding to interrogatories seeking information of little, if any, relevance.²³² Even the Supreme Court has recognized the deleterious effects of fishing expeditions, denouncing them as "a social cost, rather than a benefit."²³³ And the noxious effects of fishing expeditions are not limited to needless and excessive costs. Plaintiffs' attorneys also use fishing expeditions in an attempt to uncover embarrassing information about the defendant or its employees, or to force a competitor to divulge trade secrets or other proprietary information.²³⁴

²³¹ See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) (noting the high costs of discovery and discovery-related abuse); see also Federal Judicial Center, *Discovery and Disclosure Practice*, *supra*, at 1-2, 4, 8, 14-16 (Tables 3-5) (study detailing the costs of discovery); The Brookings Institution, *Justice For All: Reducing Costs and Delay in Civil Litigation, Report of a Task Force*, 6-7 (1989) (lawyers surveyed estimated that 60% of litigation costs in federal cases can be attributed to discovery and abuse of the discovery process).

²³² See Janet Novack, *Control/Alt/Discover*, FORBES, Jan. 13, 1997, at 60.

²³³ See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) ("But to the extent that [the discovery process] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.").

²³⁴ Brazil, *Views from the Front Lines*, *supra* (the respondents of this survey of Chicago-area attorneys offered a number of examples of this type of harassment: "demanding that an opponent produce his income tax returns to capitalize on fears that disclosure of income could lead to difficulties with the government or a spouse, exploring politically sensitive subjects in suits against public agencies or officials to capitalize on fears of political repercussions, inquiring into the dating habits of a separated spouse or threatening to depose the third member of a relationship whose triangularity would best be kept secret, and focusing discovery probes on arguably illegal and clearly embarrassing corporate 'contributions' to foreign governments or officials").

The tactical jockeying that is now commonplace during discovery has also given rise to more subtle forms of harassment. As one plaintiff’s attorney boasted, “a nice way to tie up the other side” is to secure a protective order that limits the number of the defendant’s employees with whom opposing counsel can share information and discuss the case. Such orders, this attorney explained, “can impair an attorney’s capacity to prepare for trial and can force him to spend time and money trying to justify a modification” to the order.²³⁵ Such efforts to game the system clearly serve no legitimate purpose.

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

More troubling still is that this situation is deteriorating rapidly. An immediate and comprehensive response is therefore necessary. The system needs new procedural rules that will allow parties to litigate matters in a timely and cost-efficient manner. In the meantime, however, even modest measures, such as more standardized case management orders and increased, early attention to discovery issues by judges and magistrates, could have a significant impact in alleviating discovery abuse. In addition, courts must be given additional resources to manage cases, particularly the larger, more complex cases that are most susceptible to abuse.

²³⁵ *Id.* at 232 n.27.