The Adversary Character of Civil Discovery: A Critique and Proposals for Change

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The Adversary Character of Civil Discovery: A Critique and Proposals for Change

Wayne D. Brazil*

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"[W]e need to study whether our elaborate struggles over discovery . . . may be incurable symptoms of pathology inherent in our rigid insistence that the parties control the evidence until it is all 'prepared' and packaged for competitive manipulation at the eventual continuous trial."

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1. Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031, 1054 (1975). While Judge Frankel was focusing in the quoted passage on criminal cases, he obviously intended his concerns and criticisms to embrace both civil and criminal litigation.

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I. INTRODUCTION

In his Cardozo Lecture to the New York City Bar in December 1974, Judge Marvin E. Frankel raised some disturbing and fundamental questions about the adversary character of American litigation. After years of participating in various roles in our principal system of dispute resolution, Judge Frankel concluded that "our adversary system rates truth too low among the values that institutions of justice are meant to serve." I share Judge Frankel's concern about the ways particular aspects of our adversary process militate against fair and efficient resolution of legal disputes. This essay is an effort to respond to that concern and, hopefully, to contribute to the "study" of "elaborate struggles over discovery" called for by Judge Frankel.

The thesis I explore is that the adversary character of civil discovery, with substantial reinforcement from the economic structure of our legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed. The adversary structure of the discovery machinery creates significant functional difficulties for, and imposes costly economic burdens on, our system of dispute resolution. Because these difficulties and burdens are an inevitable consequence of adversary relationships and competitive economic pressures, they cannot be removed by the kind of limited, nonstructural discovery re-

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2. District Judge, United States District Court for the Southern District of New York.
3. Frankel, supra note 1, at 1032.
4. Since I use terms like "fairness," "justice," and "truth" with some frequency in this essay, a few words about what I intend to communicate through the use of these terms are in order. I appreciate that terms like these carry numerous value connotations and contain no self-evident meaning. The meaning I ascribe to these terms, however, is identical, relatively simple, and grounded in fundamentals of the existing system of dispute resolution. "Fairness," "justice," or "truth" in any given case is a functional concept. It is whatever result a duly constituted trier of fact (jury or judge) would reach if it had full access to all the evidence and law that is arguably relevant to the issues in question. "Justice," then, like "fairness" or "truth" is a social product, a product that can result only from a process that reliably exposes all the potentially relevant data.
5. My focus is on the discovery stage of civil litigation. Discovery in criminal matters is an altogether different question. The values and institutions that are relevant and sometimes in conflict in criminal litigation are so different from those pertaining to civil suits that the two systems cannot be evaluated intelligently and constructively within one analytical framework. Since criminal procedure already has developed into an independent body of law, there is no need to treat "litigation" monolithically and to insist that all reforms proceed in tandem in both the civil and criminal arenas.

It is worth noting that both of the contemporaneously published responses to Judge Frankel's Cardozo Lecture found the primary weapons for their attacks in arsenals of concerns about criminal litigation. See Freedman, Judge Frankel's Search for Truth, 123 U. Pa. L. Rev. 1060 (1975); Uviller, The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea, 123 U. Pa. L. Rev. 1067 (1975).
forms that have been made in the past and are once again under consideration. To come to terms with these problems will require an assault on their sources; effective reform consequently must include institutional changes that will curtail substantially the impact of adversary forces in the pretrial stage of litigation. In the final section of this essay I propose the tentative outlines of an

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6. This essay will discuss in detail the major efforts that have been made in discovery reform. One should be aware at the outset, however, that a major review of the federal rules of discovery is presently underway and could result in at least modest changes. The current reform effort was formally launched after the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Members of the Conference had noted that abuse of discovery techniques was widespread, resulting in escalation of litigation costs, delays in adjudication, and coercion of unfair settlements. Responding to these criticisms, the American Bar Association's Section of Litigation appointed a Special Committee for the Study of Discovery Abuse. The Special Committee published its report in October 1977. The American Bar Association, acting through its Board of Governors, officially approved the report on December 2, 1977. A second revised printing of the report appeared in that month [hereinafter cited as Report of the Special Committee].

The Section of Litigation presented the Report of the Special Committee to the Advisory Committee on Civil Rules (which had been appointed by the Chief Justice of the United States Supreme Court as part of the Judicial Conference program). After considering the Special Committee's proposals, the Advisory Committee submitted a Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Because the Standing Committee wanted to receive comments on these proposals before considering them, it published the Preliminary Draft of Proposed Amendments in March 1978. 77 F.R.D. 613 [hereinafter cited as Preliminary Draft]. The Standing Committee established a November 30, 1978, deadline for submission of written comments on the proposed changes. The Standing Committee indicated that detailed consideration of the proposals would commence sometime after November 30, 1978, and that whatever proposals emerged from that body would be evaluated in turn by the Judicial Conference of the United States and the United States Supreme Court.

While the Advisory Committee's Preliminary Draft adopts most of the Special Committee's recommendations, its proposals differ in two major respects. The Advisory Committee "particularly" has invited responses from the professional community about these "points of disagreement between it and the Section of Litigation." Preliminary Draft, supra, at 627. Because most of the Advisory Committee's proposals substantially are identical to the recommendations of the Special Committee, however, most of the discussion in this essay of the reforms currently under consideration will focus on the Special Committee's report. In addition, I will identify and evaluate the two potentially significant differences between the Advisory Committee's proposals and those made by the Special Committee.

7. Before alienating all loyalists to the adversary system, I hasten to add that the purpose of the changes I propose is limited. They would not remove all vestiges of adversary proceedings from discovery, but they would seek to confine adversary forces to those aspects of discovery where they have uniquely valuable contributions to make. Moreover, the changes would leave the adversary heart of civil trials firmly in its traditional place.

The adversarial process seems particularly well-suited to the following crucial trial-stage endeavors: (1) determining which components of the data that were collected and organized during the pretrial stage constitute admissible evidence; (2) determining the ultimate facts from the admissible evidence; and (3) determining the legal implications of those ultimate facts. A vigorous dialectic between adversary minds is most likely to produce reliable resolution of the issues these endeavors generate.
alternative system for gathering evidence and defining issues—a system designed to accomplish the purposes for which civil discovery was intended, while lowering the social cost of our current discovery process.

II. THE PURPOSES OF DISCOVERY

The purposes that modern civil discovery is designed to accomplish are crucial to a system of dispute resolution committed to justice. In its seminal opinion about the scope of discovery, the United States Supreme Court declared that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Discovery is designed to serve as the principal mechanism by which such "[m]utual knowledge of all the relevant facts" will be achieved. As the Supreme Court of Illinois forthrightly stated, the overriding purpose of discovery is nothing less than to promote "the ascertainment of the truth and ultimate disposition of the lawsuit in accordance therewith . . . ." Six years earlier Judge Irving R. Kaufman had articulated this same view in noting that "[t]he federal rules are designed to find the truth and to prepare for the disposition of the case in favor of the party who is justly deserving of a judgment."

The means the discovery rules provided for achieving this end was the mutual disclosure of evidence or information regarding the existence of relevant facts. In the words of Judge Kaufman, "[t]he clear policy of the rules is toward full disclosure." Nor are these views about the primary purposes of discovery confined to the courts. The draftsmen of and commentators on the original federal rules of discovery shared the conviction that the overriding objective civil discovery was designed to accomplish was the location and disclosure of all the unprivileged evidentiary data that might prove

9. Id. at 501.
11. Kaufman, Judicial Control Over Discovery, 28 F.R.D. 111, 125 (1962). At the time he wrote the quoted material, Judge Kaufman, who currently sits on the United States Court of Appeals for the Second Circuit, was a judge in the United States District Court for the Southern District of New York.
12. 329 U.S. at 501.
useful in resolving a given dispute.\textsuperscript{15}

Minimal reflection reveals a fundamental antagonism between the goal of truth through disclosure and the protective and competitive impulses that are at the center of the traditional adversary system of dispute resolution. While drafters and early proponents of the rules of discovery were not oblivious to that antagonism, they seem to have assumed that the rules themselves would reduce the size of the litigation arena in which adversary instincts and tactics would predominate. They apparently believed the discovery machinery would reduce the role of adversary pressures and tactics in the pretrial process of gathering relevant evidentiary data.

The literature that emanated from the academic and judicial proponents of discovery during the decades surrounding the 1938 adoption of the Federal Rules of Civil Procedure is replete with optimistic forecasts about the beneficial changes discovery would bring to the adversary system. Edson R. Sunderland, who is credited with drafting the discovery components of the 1938 Federal Rules,\textsuperscript{16} wrote that the new procedural rules:

mark the highest point so far reached in the English speaking world in the elimination of secrecy in the preparation for trial. Each party may in effect be called upon by his adversary or by the judge to lay all his cards upon the table, the important consideration being who has the stronger hand, not who can play the cleverer game.\textsuperscript{17}

Six years earlier, while advocating the discovery reforms that culminated in the Federal Rules, Sunderland had declared that:

Lawyers who constantly employ [discovery] in their practice find it an exceedingly valuable aid in promoting justice. Discovery procedure serves much the same function in the field of law as the X-Ray in the field of medicine and surgery; and if its use can be sufficiently extended and its methods simplified, litigation will largely cease to be a game of chance.\textsuperscript{18}


\textsuperscript{16} W. GLASER, supra note 15, at 11.

\textsuperscript{17} Discovery Before Trial, supra note 15, at 739.

\textsuperscript{18} Improving the Administration, supra note 15, at 76 (emphasis added).
Similarly, James A. Pike and John W. Willis stated during the year the Federal Rules were promulgated that the federal discovery procedure constituted a major contribution to "the general course of procedural reform" in that it would "strongly stamp the entire federal judicial process with a character of frankness and fairness that will go far in aiding our legal system to overcome the effects of its rather crude heredity."19

James William Moore and Joseph Friedman, co-authors of the first major treatise elucidating the new Federal Rules of Civil Procedure, were equally optimistic about the salutary effects discovery would have on the troublesome features of traditional adversary litigation. Among the benefits anticipated from the mutual discovery provisions of the Rules were "great assistance in ascertaining the truth," "safeguards against surprise at the trial," and detection of "false, fraudulent, and sham claims and defenses."20 Moore and Friedman also reported optimistically that "abuses of the discovery procedure in jurisdictions where full and equal mutual discovery is permitted appear to be quite exceptional and isolated."21

Alexander Holtzhoff, who in 1939 and 1940 was Special Assistant to the Attorney General charged with responsibility for monitoring all federal court decisions interpreting the new Federal Rules of Civil Procedure,22 declared that the "extremely liberal provisions for discovery" were formulated "with a view to departing as far as possible from 'the sporting theory' of justice and to fulfilling that concept of litigation which conceives a lawsuit as a means for ascertaining the truth, irrespective of who may be temporarily in possession of the pertinent facts."23 Fourteen years later and from the vantage point of the federal bench,24 Holtzhoff reiterated these views with even less restraint. The Federal Rules of Civil Procedure, he wrote, had "entirely demolished" the "ancient walls" that had been erected in the adversary system of litigation to protect relevant evidence from disclosure. The new procedure, he declared enthusiastically,

effectively carried out the basic concept that the purpose of litigation is not to conduct a contest or to oversee a game of skill but to do justice as between

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20. MOORE & FRIEDMAN, supra note 15, § 26.01, at 2443-44.
21. Id. at 2444.
23. A. Holtzhoff, supra note 22, at 7 (emphasis added). See also Instruments, supra note 15, at 205, 224.
24. In the interim, Holtzhoff was appointed United States District Judge for the District of Columbia.
the parties and to decide controversies on their merits. For this purpose the
courts are entitled to have laid before them all available and pertinent mate-
rial.

This array of quotations suggests that the scholars who drafted,
critiqued, and promoted the modern rules of discovery expected
those rules to reduce dramatically the impact of adversary forces in
the trial preparation stage of litigation. As William Glaser noted,
the "authors of the Federal Rules consequently intended to use
discovery to reform the adversary system; they intended litigation
to proceed with both sides in full possession of all facts and with
each aware of the other's tactical strengths and weaknesses." These lofty visions of the primary purpose of discovery were not
confined to scholars and commentators, but were shared by the
courts as well.

As early as September 30, 1938, only two weeks after the Fed-
eral Rules of Civil Procedure became effective, the United States
District Court for Massachusetts stated that the rules had been
framed for the purpose of helping to "secure the just, speedy, and
inexpensive determination of every action, and [assuring] that
cases might be settled on their merits . . . ." Since 1938, the
courts of many jurisdictions have adopted similar views. The Su-
preme Court of Illinois, for example, has declared that one of mod-
ern discovery's primary purposes is to reduce the power of doctrines
that, in the past, "unduly emphasized the adversary quality of liti-
gation . . . ." The California Supreme Court sounded a similar
theme when it insisted that the rules of discovery were intended to
"take the 'game' element out of trial preparation" and "to do away
with the sporting theory of litigation—namely, surprise at trial . . . ." The court observed that while discovery procedures con-
templated "retaining the adversary nature of the trial itself," they
were designed to make that trial "more a fair contest with the basic
issues disclosed to the fullest possible extent."

Thus, according to both the intentions of the framers and the
interpretations of the courts, the primary purpose of the modern
rules of discovery was to secure complete disclosure of all relevant
evidentiary information and to do so by altering the nature of the

27. A. HOLTZHOFF, supra note 22, at 6.
Rptr. 90, 99 (1961).
relationship between the parties during the trial preparation period. While even the most utopian of the reformers could not have expected to root out all vestiges of adversary behavior during this stage of a civil dispute, it seems fair to infer that both the framers and the courts expected litigators to undertake a more elevated, less competitive, and less self-protective stylistic approach during discovery. The unarticulated premise that seems to underlie much of the work of discovery's most vocal proponents is that the process of gathering, organizing, and sharing evidentiary information should take place in an essentially nonadversarial context.

While disclosing the data needed to ascertain the truth was clearly the paramount objective of the discovery process, its proponents expected discovery to promote other ends as well. Perhaps the most important of these goals was "the realization of just settlements without the necessity of protracted litigation . . . ." The theory was that if opposing parties and counsel knew before trial what the evidence would be with respect to all important issues, they would feel capable of predicting reasonably the outcome of the litigation. Therefore, the parties would decide to settle their dispute in order to avoid the expense, inconvenience, and risk of the trial itself. The crucial premise on which this theory rests is that discovery would result in full disclosure of the relevant evidence. If disclosure was only partial, or if there was reason to fear it was only partial, opposing parties and counsel would either miscalculate the strength of their positions or feel incapable of predicting reasonably what the outcome at trial would be. Although at least one commentator has suggested that greater uncertainty about the outcome would increase the parties' interest in settlement, the proponents of broad discovery have clearly rejected that view and have concluded that a realistic assessment of the likelihood of success generally will be a much stronger inducement to settle than would be fear of the unknown. This conclusion is supported by the obvious fact that fear is not the only response to uncertainty; lack of information also can provoke an interest in gambling. While uncertainty may intimidate some litigants into settlement, it will inspire others to gamble for victory.

33. W. Glaser, supra note 15, at 11-12; Moore & Friedman, supra note 15, § 26.01, at 2444; Speck, supra note 15, at 1132.
34. Watson, supra note 32, at 489, 490. See also Frank, Pretrial Conferences and Discovery—Disclosure or Surprise?, 1965 Ins. L.J. 661.
Regardless of the outcome of this debate about the psychology of settlement, there is an overriding policy consideration in this area that commands full disclosure. Discovery was not intended to promote settlements of all kinds. It was intended instead to promote only "just" settlements. Partial, highly manipulated disclosure can provide no assurance that the settlements it generates will be just. That assurance can arise only in the context of full disclosure.

Proponents of discovery have identified an additional purpose they expect discovery to serve. By making all the potential unprivileged evidence available to both sides well in advance of trial, discovery predictably would shorten and streamline the trial process by narrowing the issues and organizing the "mass of undigested and undifferentiated data" into an orderly package for efficient and meaningful presentation. These improvements simultaneously would promote the ascertainment of truth and the conservation of the resources of both litigants and the courts. Thus it was expected that discovery would contribute significantly to the protection of ever-precious judicial resources both by encouraging settlement and by making trials more efficient.

III. ADVOCACY INSTINCTS AND THE UNDOING OF THE NONADVOCATIONAL ASSUMPTION

The academic and judicial proponents of the modern rules of discovery apparently failed to appreciate how tenaciously litigators would hold to their adversarial ways and the magnitude of the antagonism between the principal purpose of discovery (the ascertainment of truth through disclosure) and the protective and competitive instincts that dominate adversary litigation. Neither the architects of the discovery machinery nor the judges who embraced their work would have endorsed the central premise of this essay: that adversary pressures and competitive economic impulses inevitably work to impair significantly, if not to frustrate completely, the attainment of the discovery system's primary objectives.

As previously noted, the unarticulated assumption underlying the modern discovery reform movement was that the gathering and sharing of evidentiary information should (and would) take place in an essentially nonadversarial environment. That assumption was not well made. Instead of reducing the sway of adversary forces in

36. Kaufman, supra note 11, at 125.
37. Id. See also Hickman v. Taylor, 329 U.S. 495, 501 (1947); Moore & Friedman, supra note 15, § 26.01, at 2442-45; Instruments, supra note 15, at 205-06; Pike & Willis, supra note 15, at 1459; Discovery Before Trial, supra note 15, at 737-39.
litigation and confining them to the trial stage, discovery has greatly expanded the arenas in which those forces can operate. It also has provided attorneys with new weapons, devices, and incentives for the adversary gamesmanship that discovery was designed to curtail. Rather than discourage "the sporting or game theory of justice," discovery has expanded both the scope and the complexity of the sport. Modern discovery also has removed most of the decisive plays from the scrutiny of the court. Because so many civil cases are settled before trial and because the conduct of attorneys is subject only to fitful and superficial judicial review during the discovery stage, much of the decisive gamesmanship of modern litigation takes place in private settings.

Such factors as traditional professional loyalties, deeply ingrained lawyering instincts, and competitive economic pressures assured that the process of gathering and organizing evidence would not take place in an essentially nonadversarial context. Escape from this outcome would have required substantial changes in the institutional context within which discovery is conducted. However, no such changes have been made. Attorneys conducting discovery still are commanded by the rules of professional responsibility and by their own economic self-interest to commit their highest loyalty to their clients' best interests. By contrast, there is generally no ethical pressure or financial incentive for attorneys voluntarily to disclose the fruits of their investigations or in any way make ascertainment of the truth easier for opposing counsel or the trier of fact. In short, all the well-established institutional pressures that for generations have operated to make attorneys partisan advocates and to make them view each other as committed adversaries have remained intact. In this context, it is indeed naive to expect that discovery, armed only with its own executional rules, could somehow resist the inroads of the adversarial and competitive pressures that dominate its surroundings.

One of the principal aims of this essay is to demonstrate how these same professional and economic institutional pressures are responsible for frustrating to a significant extent the accomplishment of the principal purposes of discovery. The following sections describe the manner in which adversarial pressures and the tactics they encourage systematically operate to limit and distort the flow

39. Canon 7 of the Code of Professional Responsibility mandates that a lawyer should "represent his client zealously within the bounds of the law." ABA Code of Professional Responsibility and Code of Judicial Conduct (as amended Aug. 1977) [hereinafter cited as ABA Code]. This duty is owed simultaneously to the client and to the legal system.
of evidentiary information to parties and the trier of fact and contribute significantly to the increased cost of litigation.

IV. PRIOR STUDIES AND NOTES ON METHODS

There is no consensus in the professional literature regarding whether discovery is achieving the purposes for which it was intended, or the effect of the adversary process upon discovery. The literature focusing on discovery, most of which is impressionistic or meagerly empirical, is replete with inconsistent perspectives and contradictory assessments. The only large-scale empirical effort to evaluate discovery in operation was conducted in the early 1960's and resulted in two monographs: William Glaser's *Pretrial Discovery and the Adversary System*, and the Columbia University School of Law's *Field Survey of Federal Pretrial Discovery*. The *Field Survey* included no direct and systematic effort to evaluate the impact of adversary and competitive economic pressures on the attainment of discovery's principal purposes. It did attempt to determine, however, the extent to which discovery procedures were having the salutary effects their proponents had predicted. The managers of the study concluded that their data could not support the propositions that discovery increased the likelihood of settlement (no effort was made to determine whether the settlements that followed discovery were "just") or that it narrowed issues or otherwise streamlined and shortened trials. The study did lead its managers to conclude, however, that more relevant evidence tended to be made available to counsel (but not necessarily to the trier of fact) in cases in which discovery was used than in cases in which there was no discovery. This hardly surprising conclusion misses the

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40. Probably the best resource for locating many of the articles and monographs on this subject is the extensive footnoting of William Glaser's *Pretrial Discovery and the Adversary System*. For example, the notes on pages 6, 8, 35-37, 120-23, and 130 of that work are particularly helpful. Two earlier pieces that also contain extensive references to the literature in this area are *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940 (1961) and Speck, *The Use of Discovery in United States District Courts*, 60 Yale L.J. 1132 (1951). Two interesting articles that are relevant to this topic but not referenced in the works cited above are Griffin, *Discovery: A Criticism of the Practice*, 1 Forum 1 (July 1966) and Comment, *The Decline and Fall of Sanctions in California Discovery: Time to Modernize California Code of Civil Procedure Section 2034*, 9 U.S.F. L. Rev. 360 (1974).

41. W. GLASER, supra note 15.

42. COLUMBIA UNIVERSITY SCHOOL OF LAW PROJECT FOR EFFECTIVE JUSTICE, *FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY* (1965) [hereinafter cited as *FIELD SURVEY*].


target of my concern, which is not whether a system with adversary discovery is preferable to a system with no discovery at all, but whether "nonadversary" discovery would better accomplish the function of gathering and sharing evidence than does the current adversary procedure.

The two monographs based on the 1962-1963 Columbia Field Survey merit attention because they articulate some general conclusions that are quite inconsistent with my analysis. The authors of these monographs were, in general, more confident than I am about the overall operation of the discovery system. They concluded, for example, that the costs of discovery, at least in smaller cases, were not unreasonable, and that the system as a whole was not unduly burdened with obstructive, uncooperative, or harassing tactics. The Field Survey's data base and the quality of the inferential processes that were applied to it in reaching these conclusions, however, do not seem reliable. While a thorough and systematic effort to analyze the quality of the Field Survey's support for these conclusions is beyond the scope of this essay, a few of its problems and limitations should be pointed out.

The Field Survey's authors initially concluded that the "actual burdens of responding to discovery in terms of effort, time and money for lawyers and their clients appear well tolerated, judging by the great mass of attorneys' reactions." The qualifying phrase at the end of the passage suggests one important reason for viewing with skepticism the Field Survey's conclusions about the impact of discovery costs. Those conclusions were based primarily on information supplied by lawyers and secondarily on limited materials available from judicial opinions. No opinions of clients, the people who paid for the discovery, were solicited. Another reason to be skeptical about the Field Survey's economic analysis is that the size and character of the cases studied may well have skewed the project's results. The Field Survey's tables of statistics suggest that about two-thirds of the cases in the major sample group were personal injury matters. In about 57 percent of these cases less than $10,000 was in issue, and less than $20,000 was in issue in approximately 75 percent of these suits. The fact that the second and much smaller

47. W. Glaser, supra note 15, at 44-49; Field Survey, supra note 42, III-2; Rosenberg, supra note 15, at 481, 483.
49. Id. at VII-20.
sample group contained larger cases\textsuperscript{50} undoubtedly offset this small-case bias in the main group to some degree. Since the Field Survey's results showed that discovery activity, and therefore cost, varied directly with the size and complexity of the cases, however, more reliable findings obviously would have required evaluation of a greater number of cases in which more money was at stake.\textsuperscript{51}

A final factor that raises doubts about the Field Survey's findings regarding discovery cost is that the cases studied were litigated during the 1962-1963 period, a full 15 years ago. Since 1962 there has been a staggering rate of inflation in all aspects of litigation-related costs, including attorneys fees, transportation, document reproduction, and transcripts of oral depositions. How that inflation has affected the relative cost of litigation is not clear, but my experience strongly suggests that clients increasingly are questioning the cost of dispute resolution. Another explanation for the increased cost of litigation since 1962 is the fear of being sued for malpractice. Many experienced attorneys bemoan what they perceive as an explosion in the number of malpractice suits and in the rates of malpractice insurance. This development has increased the cost of litigation in at least two ways. First, attorneys pass along to clients as much of the burden of increased insurance premiums as possible. Moreover, they also pass on the costs of the more thorough work and more careful documentation they feel constrained to perform in order to avoid malpractice liability. Finally, some inferential support for the proposition that cost has become a more serious litigation problem since 1962 derives from the fact that one of the concerns that prompted the appointment of the ABA's Special Committee for the Study of Discovery Abuse was the claim that widespread misuse of discovery is "serving to escalate the cost of litigation."\textsuperscript{52}

The second conclusion by the authors of the Field Survey that requires some critical attention was that discovery was not widely abused, that its machinery was not employed primarily for tactical or harassment purposes, and that discovery processes were not unduly cluttered with adversarial conflicts.\textsuperscript{53} Like the Field Survey's conclusions about cost, the structure of the data base here impairs the reliability of these generalizations. The weighting of that base in favor of the smaller cases in which relatively little discovery took place is especially troublesome in light of the study's finding that

\textsuperscript{50} W. GLASER, supra note 15, at 47, 49.
\textsuperscript{51} Id. at 192-202.
\textsuperscript{52} Report of the Special Committee, supra note 6, at ii.
\textsuperscript{53} W. GLASER, supra note 15, 117-61, 182-87; FIELD SURVEY, supra note 42, I-20.
discovery generated more conflicts, complaints, harassments, and costs in the larger cases.54

The Field Survey's almost total reliance for its data on inputs from practicing attorneys also raises an important question: do lawyers who have been influenced by the specialized adversarial values of the current system retain sufficient objectivity and sensitivity to perceive subtle abuses of discovery devices? Is the moral vision of most litigators so dominated by the peculiarities of the "professional" ethic that they do not define certain conduct that is designed to conceal evidence or disguise its implications as abusive or objectionable? If attorneys suffer from such professional myopia, relying exclusively on them to determine whether adversarial weapons are being misused may not be wise. It also seems fair to ask whether attorneys responding nonanonymously to questions concerning personal misuse of discovery devices will be completely honest. Moreover, many of the most successful abuses of discovery, such as nondisclosure of arguably privileged, irrelevant, or unsolicited information, probably escape detection by opposing counsel.

There are also less subtle and debatable problems with the Field Survey's methods. One problem relates to the effort to determine whether discovery devices were being used for the "legitimate" purpose of acquiring information rather than for less laudable "tactical" considerations. To answer this question, the primary research tool employed in the Field Survey was an interview question which asked about the purposes for conducting "your side's first discovery step."55 The designers of the study insisted that the answer to this question would indicate "at least to some extent" responding counsels' "purposes for conducting discovery in general," even though the study's authors simultaneously conceded that the "purposes behind the first step seemed from the data less likely to reflect particular tactical circumstances . . . ."56 In addition, the responses by the interviewees were confined to a preselected group of nineteen specific alternatives, only seven of which were considered "tactical." More importantly, this group of seven alternatives did not include such obvious tactical purposes as "fishing," burdening opponents' resources (time and money), or trying to build a favorable record for settlement leverage.57 In this context, the frequency with which tactical purposes were admitted seems striking:

55. Field Survey, supra note 42, at III-34 (emphasis added).
56. Id.
50 percent of the respondents declared that freezing an adversary's story was a very important purpose of their first step in discovery; 37 percent made the same admission regarding the purpose of developing weaknesses for use in cross-examination. Even though the question was presented with a built-in bias against strong showings of tactical purposes, two of the five most frequently cited purposes for the first discovery step were tactical.

Other aspects of the Field Survey's findings strongly suggest that the quantified results of this structured question substantially understated the extent to which discovery devices were used for tactical purposes and to impair full disclosure. After concluding that the responses to this structured question about the first discovery step showed that the discovery machinery was "in the main used for the right reasons," the authors of the Field Survey were compelled to add:

But analysis of attorneys' free comments or replies to "unstructured" questions in the interview reveals that discovery is more than occasionally used as a costly instrument of warfare and not merely as a means of getting needed information. In many cases burdens of time and money emerged as major considerations. A few attorneys candidly reported that they "had this adversary tied up" by discovery. Others said it was "deliberately made as slow and lengthy" as possible. More frequent were complaints that discovery is so costly it is beyond reach for some parties and actually favors wealthy litigants.

Significantly, the most common suggestions attorney-respondents volunteered for improving the rules centered around making the sanctioning machinery more effective. In the concluding paragraph of the section devoted to reporting unstructured inputs, the authors conceded that "the comments do intimate, in a way the machine tables cannot, the vestiges of close to the vest advocacy . . . ."

The intimation that litigators had not abandoned close-to-the-vest tactics was supported by other Field Survey findings as well. Even though the authors of the Field Survey declared that the "principle of open disclosure appears to command wide approval," their statistics failed to confirm that the use of discovery reduced surprise or improved the probability that all the relevant evidence

59. Id.
60. Id. at III-41. See also id. at VI-1 to VI-3.
61. Id. at III-41.
62. Id. at VI-6.
63. Id. at VI-7.
64. Id. at X-1.
would be brought out at trial. Moreover, while the *Field Survey* suggested that discovery promoted some voluntary and informal sharing of information, 65 percent of the responding lawyers stated that in such informal exchanges their opponent was not "unusually candid and open" but instead "disclosed only what he wanted to . . . ." After observing that "for every 100 users of Rule 33 interrogatories, 81 complaints were inspired," the authors proceeded to report that "an astonishing 42 percent of those who served interrogatories complained that they were answered 'evasively' and 39 percent that the answers were tardy." Finally, the statistics showed that in "61 out of every 100 cases in which discovery was used at least one side had a discovery complaint against the other side." It is not at all clear how the authors of the reports based on the *Field Survey* reconciled these findings with their general conclusion that discovery was working well and that its use was not significantly impeded by the noxious debris of adversary activity.

A more sophisticated and current empirical evaluation of discovery is in order. Indeed, one of the purposes of this essay is to encourage such a project by delineating the structure of the pressures and incentives that shape discovery practice and by demonstrating how these factors inevitably lead to significant abuse of the discovery process and frustration of its primary purposes. My approach in this essay will be primarily qualitative and psychological. My generalizations are based in part on the research reflected in the footnotes, but primarily on my experience as a litigator in a moderate sized (25 lawyers) urban firm, together with observations of and conversations with other, more experienced attorneys. Like most generalizations, those that appear herein certainly admit to numerous exceptions. Not all attorneys experience the pressures I describe in the ways I suggest; nor do all litigators employ all the tactics I discuss. Since most of my exposure to litigation has been in urban San Francisco, with cases of moderate size involving claims ranging from $20,000 to $500,000, I cannot guarantee that my generalizations are applicable to rural settings or to smaller scale cases. Social pressures within the legal and lay communities in less populous settings may limit the excesses to which freewheeling adversary instincts may otherwise arise. Similarly, the economic constraints of small case litigation may leave no room for extensive tactical

65. *Id.* at X-2.
66. *Id.* at X-13.
67. *Id.* at I-12.
68. *Id.* at I-13. *See also id.* at III-61.
69. *Id.* at III-52. *See also id.* at I-9.
maneuvering. This concession is not as broad as it might seem, however, because a substantial percentage of the total volume of discovery is conducted in the larger, more complex cases traditionally associated with more populous areas.70

V. DISCOVERY'S PSYCHOLOGICAL AND INSTITUTIONAL ENVIRONMENT

An appropriate way to begin an examination of the psychological and institutional environment within which discovery is conducted is by identifying the goals that motivate the attorneys who use discovery procedures. The process of identifying those goals must begin with acknowledgment of one controlling fact: attorneys who use discovery procedures are attorneys engaged in litigation. Discovery is a tool whose purposes are fixed by the purposes of the larger process of which it is a part. That larger process is litigation. Attorneys in litigation have five primary objectives: (1) to win; (2) to make money; (3) to avoid being sued for malpractice; (4) to earn the admiration of the professional community; and (5) to develop self-esteem for the quality of their performances. These objectives are not born simply of cynicism and selfishness. They are institutionalized commands that emanate from a system of combat within a competitive economic structure. It is not difficult to perceive that these goals make the purposes of discovery for individual litigators quite different from the purposes which the architects of the discovery system contemplated.

The pursuit of victory psychologically dominates all other objectives of litigation. Judge Frankel succinctly observed that "[t]he business of the advocate, simply stated, is to win if possible without violating the law."71 This preoccupation with winning is not simply a product of competitive instincts or self-selected personality traits; it cannot be dismissed as a peculiarity that is congenital to the personalities of the kinds of people who become litigators. It is, rather, compelled by professional prescriptions and reinforced by strong economic pressures and incentives. The rules of professional responsibility, for example, impose no direct obligation on counsel to pursue the truth or voluntarily to disclose information that might help establish the truth.72 Instead, these rules command the advocate to vest his primary loyalty in his client, to resolve all litigation doubts in the client's favor, and to pursue as vigorously as possible the client's best interests.73 These commandments of fealty to client

70. See W. Glaser, supra note 15, at 78-82, 176, 201-02.
71. Frankel, supra note 1, at 1037.
72. Id. at 1038.
73. ABA Code, supra note 39, Canon 7, EC 7-1 to EC 7-4, EC 7-7, EC 7-19.
and the absence of ethical directives to make full disclosures or to pursue justice result in a professional ethic that compels advocates to pursue the best resolution possible for their clients without regard to the merits of the dispute. To act otherwise is to court professional and economic disaster.

Litigators who disclose relevant but damaging information about their clients, without being required to do so, run a substantial risk of being sued for malpractice and of being disciplined by their profession. The legal community has made it clear that it is a breach of professional responsibility for a litigator to elevate full disclosure above partisan interests by revealing, unless clearly compelled to do so, probative evidence that is damaging to the client. Strong professional sanctions can be imposed against litigators who follow such a course. Marketplace economics further reinforce these pressures. The system rewards winners. Clients pay counsel not to uncover and divulge all the evidence, but to get the best possible monetary result. To survive in a competitive market that measures success primarily in terms of how much money was earned or saved for the client, litigators must do whatever is necessary and not clearly proscribed to get their clients the best deal. Since lawyers have no economic or competitive incentive to pursue the truth as such, and since clients have no incentive to pressure their attorneys to disclose all relevant information, full disclosure becomes a luxury few lawyers can afford to pursue.

Nor does the desire to secure the admiration of other attorneys or to develop professional self-esteem induce litigators to pursue the truth. The litigation community too often measures success not by the fairness of a result, but by how much more was achieved for the client than other attorneys might have secured under the same circumstances. If litigators secured nothing more for their client than what disclosure of all the evidence would show the client deserved, their professional achievement would likely be described only in the negative. In order for trial lawyers to believe that they have made a positive contribution to their client's position, they must feel that through the exercise of their professional skills, their client has emerged from the trial process better off than the mere facts would have warranted. These considerations tend to make professional self-esteem and the admiration of colleagues turn not so much on success in establishing the truth as on using adversarial skills to get more for the client than he would be entitled to if all the evidence were produced and impartially evaluated.

74. Id. Canon 4, EC 4-1 to EC 4-6, DR 4-101.
In sum, adversary litigation and competitive economics offer no institutionalized rewards for disclosure of potentially relevant data. They instead offer many institutional deterrents to full disclosure. Review of the primary means by which litigators seek to earn the rewards of the legal system graphically illustrates this generalization. Litigators generally believe they will win the primary forms of recognition our system offers not through full disclosure, not through relentless efforts to secure just results, not through honesty, openness, and uncalculating cooperation, nor even necessarily through efficiency and superior work quality, but rather by tailoring the most clever package of tactics and stratagems to fit the needs of a given case.

The means employed by litigators to achieve victory for their clients regularly involve manipulating people and the flow of information in order to present their clients' positions as persuasively and favorably as possible. This manipulation may involve any or all of the following general techniques: not disclosing evidence that could be damaging to the client or helpful to an opposing party; not disclosing persuasive legal precedents that could be damaging to the client; undermining or deflating persuasive evidence and precedents that are damaging to the client and are introduced by opposing counsel, by such means as upsetting or discrediting honest and reliable witnesses or by burying adverse evidence under mounds of obfuscating evidentiary debris; overemphasizing and presenting out of context evidence and precedents that appear favorable to the client; pressuring or cajoling witnesses, jurors, and judges into adopting views that support the client's position; deceiving opposing counsel and parties about the weaknesses of the client's case and the strengths of opposing cases; aggravating and exploiting to the fullest extent possible vulnerabilities of the opposing party and counsel that have nothing to do with the merits of a given dispute by such means as intimidating an anxious opponent, spending a poor opponent into submission, or "soaking" in settlement an opponent who has public image problems or who for other reasons cannot endure the risk and public exposure of a trial. None of these techniques is illegal or violates the letter of the ethical rules of the profession. Indeed, the refusal to resort to at least some of these devices may be construed as a breach of an attorney's obligation "to represent his client zealously within the bounds of the law."

75. See Brazil, The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice, 3 J. LEGAL PROFESSION 107 (1978).
76. ABA CODE, supra note 39, EC 7-23.
77. Id. EC 7-1.
Unfortunately, many attorneys believe that these tactics and stratagems that obstruct and distort the flow of relevant information are most likely to secure the best result for their clients and to provide the most money for themselves. Lawyers are creatures of the economic system within which they must compete for financial rewards and security. Following the classic capitalist paradigm, their economic goal is to make the difference between their income and the resources they expend as great as possible. There are two principal means to this end. One is to have the largest possible number of clients. Since conventional economic wisdom supports the view that "results" are what attract large numbers of clients, the litigator's inclination is to employ those tactics and stratagems that will produce the best results. Moreover, corporate and other business clients tend to measure results almost exclusively in economic terms. From the perspective of such clients, the best outcome an attorney can achieve is one in which the client's judgment or settlement exceeds by as much as possible its payment of attorney's fees. The pressure exerted by such a client on its lawyer will not be to establish the truth or to uncover all the evidence, but rather to win as much or to lose as little as possible. Thus both the lawyer's own sensitivity to competitive economic pressures and the client's definition of results reinforce the lawyer's interest in victory and dilute whatever interest there may be in achieving resolution on the merits.

Pressure from clients to cut litigation costs probably is not sufficient to discourage attorneys from resorting to expensive, obfuscating tactical devices that seem to promise a competitive advantage. There are several reasons such economic pressure from clients will remain largely ineffective as a means of controlling litigation costs and discouraging adversarial maneuvering during discovery. One is the ever-present and increasingly intense fear of malpractice. A litigator simply cannot afford to risk full disclosure and efficient exchange of information if other more cumbersome and costly methods will improve the likelihood of a favorable result.

Moreover, sophisticated obstructionist maneuvering during discovery, which is difficult to monitor and evaluate, can be very lucrative for lawyers. Since discovery constitutes such a significant percentage of most litigation activity, lawyers understand that they must make money during discovery. For the lawyer being paid

78. Even the Field Survey, conducted 15 years ago with a data sample that was weighted in favor of smaller cases, concluded that discovery consumed a significant percentage of all litigation resources and that the percentage tended to increase in direct proportion to the size and complexity of the case. W. GLASER, supra note 15, at 179, 191-97, 201-02.
by the hour, there is a great economic temptation to protract and complicate discovery. Most clients, furthermore, are completely incapable of determining which tactical ploys by attorneys are wise and justified and which are simply ways to increase the attorney's fee. Since most clients do not have the ability to evaluate individual maneuvers by attorneys, or the opportunity to compare different legal products, the controls over the marketplace that consumer pressures are supposed to exert must largely fail. Thus litigators remain relatively free of traditional market constraints when deciding how to approach discovery problems. It is quite likely that attorneys will select those costly and obstructionist devices which simultaneously seem to promise them the most profit, the least risk of malpractice, and the greatest probability of victory. As the following detailed discussion of discovery devices will show, these two powerful incentives at work in litigation—the desire to win and to make as much money as possible—conspire against full disclosure far too regularly to justify any confidence that the structure of our civil litigation system will provide a fair and efficient framework for conflict resolution.

VI. THE USE OF SPECIFIC DISCOVERY TOOLS TO LIMIT AND DISTORT THE FLOW OF INFORMATION

In this section I will discuss how attorneys, responding to the adversarial and economic pressures discussed above, can use specific discovery tools to limit and distort the flow of relevant data to their opponents and to the trier of fact, to increase the cost of gathering and organizing that data, and to reduce the likelihood that settlements or judgments after trial will be just. My goal, in short, is to illustrate the various ways contemporary adversarial discovery practices can defeat the principal purposes for which discovery was designed.

A. The Investigation Stage

The first major component of the pretrial process of gathering and organizing evidentiary data consists of private investigations by counsel. The conduct of such investigations generally is not governed by the formal rules of discovery. Nonetheless, the character and quality of discovery depends so much on the investigative processes that precede and parallel it that discovery cannot be intelligently evaluated without examining these processes. Litigators shape the strategy and tactics of their discovery on the basis of their investigations.
One primary purpose of investigation is to form a preliminary evaluation of the strengths and weaknesses of the client’s case. The criteria applied by counsel during such evaluations have little to do with truth and justice. Counsel generally are less concerned about the merits of the case, per se, than they are about such factors as the discoverability, admissibility, and persuasiveness of the evidence; the political, psychological, and economic resources available; the vulnerabilities of the parties and their attorneys; and the potential extent of damages. Of the many factors involved in a preliminary evaluation that can affect discovery, the one with perhaps the most far-reaching implications is the attorney’s conclusion regarding whether the case will be settled before trial. The strategy and tactics of discovery that are appropriate for such a case can be quite different from those that are appropriate for a matter that is likely to go to trial.

Counsel’s conclusions about the likelihood of settlement may determine which of two different tactical approaches will dominate their discovery plans and decisions. Discovery whose clear purpose is to prepare for trial should be designed to identify and evaluate all the data that the trier of fact might consider. During trial discovery, counsel seek to uncover and confront in intricate detail the full scope of their opponent’s case. The litigators’ discovery goals in this context are to reduce to an absolute minimum the chances of being surprised during trial and to prepare themselves to rebut and undermine their opponent’s evidence. Counsel have no interest in disclosing any more than they must about their client’s case, but their objective vis-à-vis their opponent is full disclosure.

The objectives of litigators during the kind of discovery that is oriented toward settlement are strikingly different. Settlement discovery is essentially a process of record building. It is a private trial without judge, jury, or the rules of evidence. Counsel’s goal is to build in their opponent’s mind the most favorable impression possible of their client’s case in order to secure the best settlement. To build this favorable impression, counsel will attempt to manipulate the flow of information about both sides of the dispute. Litigators in this situation are not interested in openly exploring the strength of the evidence against their client. Instead, they will attempt to avoid devices that might alert their opponent to the existence of such evidence. Settlement discovery is designed to emphasize all the data that is favorable to counsel’s client and to undermine the

79. This is true even though inability to predict settlement as a certainty usually compels litigators to do some discovery that is specifically tailored to trial preparation.
credibility and create doubts about the admissibility of the evidence that supports the opposing party. In short, the primary purpose of such discovery efforts is not education but persuasion. That the purposes of settlement discovery are so inconsistent with the purposes that the architects of discovery envisioned is especially significant since a vast majority of civil lawsuits are settled before trial. Since it is well known in the legal community that most civil cases are settled, there is a strong probability that most counsel will formulate discovery strategies that are largely tailored for settlement rather than trial objectives.

Litigators’ preoccupation with persuasion also can affect the way they respond to discovery questions directed at their clients. Unlike the attorney who assumes the case will go to trial, lawyers who assume their cases will end in settlement are not necessarily interested in preventing disclosure of all the evidence about their client’s position. Instead, they may selectively disclose evidence that makes their client’s case seem stronger. Since their goal is to formulate in their opponent’s mind as positive an impression of their client’s position as possible, they will not feel any incentive to disclose voluntarily information that might weaken that impression. If anything, their instinct to hide incriminating evidence as long as possible will be reinforced by their record-building purposes.

One function of investigation, then, is to gather the information that is necessary to define the strategic purposes of, and the tactical means for, manipulating the flow of information during discovery or trial. Toward that end, investigating litigators must identify all the evidence that is favorable to their clients and determine how to use this material. If, for example, an attorney has concluded that a matter is likely to go to trial and, thereafter, interviews witnesses who have favorable testimony to offer, he probably will take statements from them but will not notice their depositions. The lawyer will disclose the witnesses’ identity only if clearly compelled to do so and will hope to surprise his opponent with this testimony at trial. By contrast, a litigator engaged in settlement discovery probably would take statements from such witnesses and notice their depositions as part of his record-building strategy. The litigator’s treatment of any favorable documents and other tangible evidence that his investigation uncovered would follow a similar pattern. If

a trial is foreseeable the lawyer will try to save these materials for
surprise, but if settlement is likely his goal will be to decide how and
when to present the favorable evidence so as to maximize its dra-
matic impact on opposing counsel and parties.

The investigating litigator is also concerned about identifying
and deciding what to do with evidence that is damaging to his
client. Unlike favorable evidence, there is rarely any reason volun-
tarily to disclose damaging information. When deciding what to do
with damaging evidence, therefore, counsel's primary objective is to
device means to reduce the likelihood that the evidence will be
discovered. The litigator, for example, may begin preparing his
client to interpret narrowly all inquiries that seem directed toward
sensitive material and to guard aggressively against providing any
more information during discovery than is clearly and properly
demanded.

If investigation results in locating a nonparty witness whose
testimony would be damaging, one of counsel's first efforts will be
to ascertain the likelihood that the witness will be discovered by the
opponent and will testify at trial. If there is a real chance that the
damaging witness will not be discovered by the opposition, counsel
probably will take a statement, for possible use in impeachment and
in preparation of other witnesses, and will hope the opponent never
learns about the witness or his testimony. If it is likely that the
opposing attorney will discover the witness, the investigating lawyer
will take a detailed statement and will conduct an aggressive search
for ways to assault the witness' credibility and to counter his testi-
mony. If the investigating attorney assumes the case will be settled,
he will not notice the deposition of the hostile witness and will
attempt to negotiate the settlement before the opponent learns
about the damaging testimony. If the matter appears likely to go to
trial, however, and the witness will probably be called, the investi-
gating attorney will notice the witness' deposition and will use it to
explore fully not only the damaging testimony but also ways to
influence, impeach, intimidate, confuse, pressure, disarm, and de-
flate the witness.

Counsel's responses to damaging documents and other tangible

81. Exceptions to this generalization sometimes arise when an attorney is seeking credi-
bility during settlement negotiations or attempting to deflate the impact of adverse informa-
tion he knows opposing counsel has discovered. Sometimes in such circumstances tactics
suggest admitting some of a client's problems. The pursuit of settlement credibility and
efforts to steal an opponent's thunder, however, rarely (if ever) inspire competent counsel
voluntarily to disclose their clients' greatest vulnerabilities or more inculpating evidence than
they have reason to believe their opponent is likely to discover anyway.
evidence uncovered during private investigations will follow a similar pattern. If possible, the attorneys will try to acquire control over the evidence and to prevent their opponents from discovering it. In addition to attempts to mislead opposing counsel by creating false, diversionary leads and generating obfuscating clouds of irrelevant information, there are several more clearly ethical devices available for use in concealing damaging evidence.

If counsel's private investigation reveals that their client has major and potentially discoverable problems, they not only must fashion a strategy to reduce the chances of those problems being discovered, but also must consider ways to terminate the litigation before the severity of those problems makes escape by their client very expensive. One tactical approach to this problem is to initiate discovery that is designed to evaluate the resources and psychological staying power of opposing parties and their counsel. If the investigating lawyer discovers a vulnerability, he will feel considerable pressure to exploit it for the purpose of establishing an early, favorable settlement. He may consider, for example, trying to smother a relatively impecunious adversary with extensive discovery costs.

Another strategy employed by litigators whose clients have serious problems is to focus intensive early discovery efforts on reducing the size of, or undermining the evidentiary support for, the opposition's damage claims. If counsel can use aggressive discovery to create doubts in an opponent's mind about the strength of his damage claims, they may be able to orchestrate a settlement before their opponent discovers the full extent of their client's difficulties.

Investigation that is dominated by adversarial objectives generates at least two kinds of substantial costs—costs that might be greatly reduced under an alternative system of discovery. One is the cost to justice. The principal purpose of the present system of adversarial investigation is not to ascertain the truth, but to establish the informational basis for strategies to control the flow of relevant data and to secure the best settlement. In short, adversarial investigation, accompanied as it is with no compulsion to disclose voluntarily its results, enables counsel to play the games of deception, concealment, and manipulation that defeat the purposes discovery was intended to serve. The second major cost of adversarial investigation is economic. An investigation with the simple purpose of identifying and organizing all potentially relevant data would be substantially less expensive than an investigation in which that purpose is accompanied by the present adversarial objectives. The significant amount of time currently committed by lawyers to strategizing
about how to structure and manipulate the flow of testimonial and tangible evidence substantially increases the cost of dispute resolution.

B. The Formal Discovery Stage

The informal, private investigation stage is followed in the typical civil lawsuit by formal, "public" discovery. An analysis of the impact of adversary pressures on the use of each principal tool of formal discovery reveals how these tools are used to limit and distort the flow of information to opponents and to increase the cost of litigation.

(1) Interrogatories and Document Productions

Written interrogatories frequently are the first discovery device used by counsel. According to the attorneys who responded to a recent questionnaire by the Litigation Section's Special Committee for the Study of Discovery Abuse, written interrogatories also result in more abuse than any other discovery tool.8 Such abuse takes place both in propounding and in answering interrogatories.

Attorneys drafting interrogatories do not view them primarily as a means of openly exploring the data that is relevant to a given dispute. Rather, attorneys perceive interrogatories in the same manner they perceive other litigation procedures—as weapons to be used in the manner that best advances the competitive interests of their client. Since attorneys tailor the way they use interrogatories to fit particular adversarial and economic purposes, and since those purposes rarely include the exposition of the truth, there is little institutionalized assurance that the use of interrogatories will result in the disclosure of all the data that is relevant to a dispute. Specific examples are in order at this point.

In settlement discovery, sophisticated counsel draft interrogatories, requests for production of documents, and requests for admissions that are calculated to build a record that is most favorable to their client. They are careful not to frame questions that will

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8. Report of the Special Committee, supra note 6, at 20. That interrogatories have been the most frequently abused discovery tool is confirmed by the findings of the Columbia University Field Survey, supra note 42, at I-12 and I-13, and in the Advisory Committee's Note to Rule 33 in the Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, in which the Committee observed that "[t]here is general agreement that interrogatories spawn a greater percentage of objections and motions than any other discovery device." 48 F.R.D. 487, 522 (1970) [hereinafter cited as Proposed Amendments]. See also Speck, supra note 15, at 1142-44, 1151; Developments in the Law—Discovery, supra note 15, at 960, 963-64.
encourage their opponent to investigate in areas that are likely to yield evidence that is damaging to the propounding counsel's client. Similarly, propounding attorneys will try to avoid questions that will compel their opponent to review the positive aspects of his case or encourage him to do additional analytical thinking or legal research that will improve his preparation. Even in trial-oriented discovery, counsel drafting interrogatories attempt to frame questions that do not reveal their theory of the case, their view of the evidence, their tactical plans, or the aspects of the dispute that cause them the greatest concern. In short, the drafting litigator is constantly under pressure not to initiate discovery that could help educate the opponent. The search process for relevant data is thus circumscribed by the fear that offensive discovery efforts will disclose something new and useful to opponents. This fear distorts the process of information acquisition until settlement is secured.

The preceding examples are relatively subtle ways in which adversary pressures distort and complicate what could be a more straightforward and less expensive pursuit of information. It is the less subtle distortions of the process of drafting interrogatories, however, that are most commonly perceived as abuses of the discovery process. That the ABA's Special Committee proposed only one major change in the rules governing the propounding of interrogatories and that this change would consist of limiting to thirty the number of interrogatories which a party may serve without a special showing of need, suggests that the abuse of this discovery tool that most concerns today's bar is the practice of propounding a burdensome number of written questions to party opponents.

Many litigators feel compelled to use written interrogatories as weapons for purely tactical purposes if doing so might promote their client's interests and generate greater fees for themselves. Some attorneys serve lengthy sets of "canned" interrogatories if they perceive some advantage to be gained by psychologically or economically harassing an opposing party or counsel. Litigators also may

83. See note 82 supra. See also W. GLASER, supra note 15, at 136-37, 149-53.

84. Report of the Special Committee, supra note 6, at 18. In its Preliminary Draft, the Advisory Committee on Civil Rules recommends against a nationwide imposition of the 30 interrogatory limitation. As an alternative, the Advisory Committee recommends an addition to Rule 33 that explicitly would empower a district court, by action of a majority of its judges, to formulate a local rule that would limit the number of interrogatories that may be used by a party. Preliminary Draft, supra note 6, at 645-49. Some of the implications of these proposals are explored in Part VII infra.

85. Even though the Columbia University Field Survey data suggested that greater use of form interrogatories was not associated with greater numbers of conflicts over discovery, it is clear that lengthy sets of canned interrogatories force respondents to consider many
use interrogatories to pressure or manipulate opposing counsel into doing such initial case preparation as factual investigation and legal research and analysis that properly should be undertaken by the propounding counsel and paid for by that counsel's client. One additional abuse of interrogatories about which lawyers frequently have complained is the "fishing expedition," which involves serving numerous and far-reaching questions, not for the purpose of obtaining information about matters already in dispute, but in order to search for evidence that might support new types of claims, uncover competitors' business secrets, or harass an opponent into a favorable settlement. More than half of the attorneys polled in the Columbia University Field Survey "accused their opponents of 'fishing' for a case," provoking the author of the published monograph interpreting the Field Survey data to concede that this result seemed "to corroborate the fears of skeptics that sham suits can be filed and then built up by discovery." 86

The costs generated by interrogatories obviously will tend to increase as their purposes proliferate. Clients must pay for the time attorneys spend considering and carrying out various ways to use interrogatories for purposes other than obtaining relevant data. Moreover, canned interrogatories present tempting opportunities for litigators to increase their profit margins. An attorney may charge many different clients the full cost of drafting the original set of questions, even though the use of the set in a given case requires only editing and copying, both of which often can be done by nonlegal personnel. Lengthy, multipurpose interrogatories also force opposing parties to commit extra resources in order to evaluate the objectives of the questions they receive and to tactfully answer or avoid improperly motivated inquiries.

Like interrogatories, requests for documents and for admissions suffer from obvious abuses. Demands for document production, for

questions that may be wholly irrelevant to matters in dispute in a given case and easily lend themselves to abusive tactical purposes. W. Glaser, supra note 15, at 158-60.

86. Id. at 122. In another context, however, Glaser asserted that the data "show that one of the principal fears about discovery [using interrogatories to "fish"] is not being realized." Id. at 62. The way Glaser reached this conclusion does not inspire confidence. He chose to bestow more significance on the fact that few of the questioned lawyers would admit they commenced discovery with no purpose in mind than on the high percentage of attorneys who complained that their opponents used discovery for fishing purposes. Why self-serving denials of purposeless activity are entitled to more credibility than complaints about opponents is anything but clear. This inferential procedure is especially disconcerting because the Field Survey question designed to establish counsel's purposes for using discovery asked only about the first discovery step and did not include any reference to "fishing" among the 19 possible answers. See Field Survey, supra note 42, at III-36 to III-37. See also W. Glaser, supra note 15, at 279.
example, can be used to impose great economic burdens upon or to harass or intimidate opposing parties and lawyers, to disrupt normal business operations or professional schedules, to steal trade secrets, or to fish for evidence to support new claims. Moreover, the pressures generated by such abusive tactics can be exploited to coerce a settlement that bears no relation to the merits of the dispute.

The disfunctional effects that adversary pressures have on discovery are even more obvious in the ways litigators respond to interrogatories, demands for documents, and requests for admission. The principal goals of the responding attorney tend to be completely adversarial: to provide as little information as possible, and to make the process of acquiring that information as expensive and difficult as possible for the opposing party and lawyer. To do otherwise might be considered a breach of the ethical obligation owed to a client, thereby exposing counsel to the risk of a malpractice suit. Volunteering information rather than resisting its production may also deprive the litigator of opportunities to demonstrate his adversarial skills and to increase the size of his fee.

There are many standard devices used by litigators to resist the disclosure of information and to mislead the opponent through their responses to interrogatories, requests for admissions, and demands for documents. The responding adversary’s first impulse is to construe all inquiries and requests as narrowly as possible, thereby limiting the amount of useful information that must be divulged. The rules of professional responsibility lend important support to responding counsel in such exercises of semantic narrowness. Ethical Consideration 7-3 to Canon 7 of the ABA Code of Professional Responsibility directs litigating attorneys to resolve all “doubts as to the bounds of the law” in favor of their clients.\(^7\) Thus it appears that any ambiguity about the scope of an interrogatory or a document production demand must be resolved in favor of narrowness and against disclosure. Moreover, in the absence of judicial intervention it is the responding attorney who decides what constitutes a doubt. The attorney will feel considerable pressure to adopt an aggressively broad definition of the term “doubt” whenever doing so might benefit the client—by revealing less information or misleading an opponent—or inflate the fee—by necessitating a costly effort to resist a motion to compel.

The narrow reading of inquiries and demands is by no means the only semantic ploy that litigators use to frustrate the discovery

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\(^7\) ABA Code, supra note 39, Canon 7, EC 7-3.
efforts of opponents. An aggressive counsel also will refuse to respond to written requests that are not free of virtually all ambiguity, imprecision, overbreadth, irrelevance, or other technical deficiency. Counsel's instinct is to object to the form or substance of any discovery request whenever an objection is arguably reasonable and if failure to respond might secure some competitive or self-serving economic advantage. Here, as elsewhere in litigation, institutional rules and pressures invite counsel to conclude that doubts must be resolved against disclosure, and that opponents must be forced to expend as much of their resources as possible to obtain data favorable to their cause.

Nor will litigators necessarily answer a request even after they have construed it as narrowly as possible and have objected to every arguable technical deficiency. Responding counsel's next line of defense is built on the use of privileges and the work product doctrine. Conscientious litigators will scrutinize every probe from an adversary to determine whether it is directed at material that is arguably shielded from disclosure. Counsel also will evaluate every item of information they feel constrained to divulge to determine whether its disclosure may constitute a waiver of any privilege possibly held by their client.

Counsel can manipulate privileges and the work product doctrine with especially pernicious effects when responding to requests for documents. The first stage of such manipulation may consist of efforts to include as many documents as possible within the arguable scope of some privilege or the work product doctrine. These efforts will be especially intense with regard to documents that could damage a client's position. Next, counsel will omit any reference in their response to documents they have decided might be considered privileged or might fall within the work product doctrine. The lawyers' hope, of course, is that their opponent will either forget to press for information about the withheld documents or will assume the privileges in fact apply. In other words, responding counsel will identify the withheld documents only if their opponent or the court so compels. Moreover, if compelled to identify withheld documents, the information counsel will submit will be as meager as possible. At each stage in what can become a tortuous and very expensive process, resisting counsel hope the opponent will abandon pursuit of the damaging material. It is worth emphasizing that these tactics of resistance fall short of such overtly unethical conduct as destroying or hiding incriminating documents.

When responding to document production demands, litigators sometimes resort to the obstructive device of burying significant
documents in mounds of irrelevant or innocuous materials. This practice is sufficiently widespread to have provoked an unusually explicit condemnation in the report by the ABA's Special Committee for the Study of Discovery Abuse. One of the proposed changes in Rule 34 would compel a party responding to a document production request to produce its documents "as they are kept in the usual course of business or . . . [to] organize and label them to correspond with the categories in the request . . . ." 88 In its comments, the Special Committee stated that this proposal is intended to be "responsive to a reprehensible practice much discussed by the Committee—the deliberate attempt by a producing party to burden discovery with volume or disarray." 89 The Committee went on to observe that "[i]t is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance." 90

An additional obstructionist purpose can be served by burying crucial documents in mounds of irrelevant material—a massive document production forces opponents to spend a great deal of time and money copying and ferreting through the produced papers. The Special Committee's proposal would help deter only deliberate efforts to disguise and disorganize documents; it would do nothing to curb the massive overproductions that are designed to exert economic pressure on parties making requests. Nor would the proposal reduce the considerable pressure exerted on responding attorneys to find some excuse not to produce any material that might weaken their client's position.

If the tactics discussed above fail to conceal damaging information, counsel may feel constrained to refuse to respond to interrogatories or document production requests until compelled to do so. The first ploy is to ignore the original discovery probe and its deadline. At least among seasoned litigators the fear of sanctions for missing one deadline is not great. 91 If the opposing attorney then presses for a response, the next defensive maneuver is to make excuses, play on sympathies, and seek extensions. When the deadline

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88. Report of the Special Committee, supra note 6, at 22.
89. Id. Citing the Special Committee's observation that deliberate efforts to impair access to critical documents by mixing them with others apparently are not unusual, the Preliminary Draft recommends adoption of the same addition to Rule 34. Preliminary Draft, supra note 6, at 651.
90. Id.
91. See, e.g., Proposed Amendments, supra note 82, at 538-40; W. Glaser, supra note 15, at 154-56, 210-11; Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Colum. L. Rev. 480, 494-96 (1958); Developments in the Law—Discovery, supra note 15, at 990-91; Comment, supra note 40, at 361, 365-66, 382, 389.
for the first extension approaches, additional extensions are sought. Such self-conscious and systematic efforts at procrastination impose additional financial strains on opponents, may undermine their will to pursue the litigation, and give the defensive attorney time to negotiate a favorable settlement before the damaging evidence is disclosed.

Unfortunately, the economics and tactics of adversary litigation occasionally make calculated, systematic resistance of the kind described above virtually inevitable. Especially in major commercial litigation, the stakes may be so high and the economic benefits to be gained by delay so great that litigators intent on serving the best interests of their clients, will feel compelled to resist discovery by every available ploy short of wilful bad faith. Each day’s profit from a legally vulnerable operation, or each day’s interest on the money that might be lost in a judgment, could far exceed the cost of counsel’s delaying services and any likely sanctions imposed for failing to cooperate fully in discovery.

One recent illustration of the kind of resistance to disclosure of documents that appears to be attributable, at least in part, to the intense pressures that adversary proceedings and high economic stakes can impose on litigators occurred in an antitrust action brought by Berkey Photo, Inc. against the Eastman Kodak Company. This suit, which from the outset carried a threat that some of Kodak’s subdivisions might be severed, resulted in an initial monetary judgment against Kodak of almost $113,000,000. The litigation spawned several major battles over discovery, some of which had to be confronted by both the magistrate and the federal district court judge, who was, ironically, the Honorable Marvin E. Frankel.

These relatively predictable struggles over discovery, however, are not what make this case especially instructive. That quality stems from events that came to public light in the closing days of the six-month trial when it was learned then that one of Kodak’s attorneys had concealed the existence of a large group of copies of Kodak documents. During the discovery stage of the litigation, counsel for Berkey had deposed one of Kodak’s experts, a professor of economics at Yale University. During that deposition the economist disclosed that he had reviewed the copies of the documents in

92. The trial judge later reduced the initial judgment to approximately $81,000,000. See 1978-1 Trade Cas. (CCH) ¶ 62,092; Kiechel, The Strange Case of Kodak’s Lawyers, FORTUNE, May 8, 1978, at 188; Wall St. J., March 23, 1978, at 5, col. 1.

93. See Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (1977); 1976-1 Trade Cas. (CCH) ¶ 60,832; 1974-1 Trade Cas. (CCH) ¶ 75,021.
question and, thereafter, had returned them to one of the lawyers representing Kodak. After the expert declared that he could not recall whether he had made any marks or marginal notes on the copies, counsel for Berkey insisted that Kodak produce the documents. The lawyer representing Kodak at the deposition declared that the documents had been destroyed. He reaffirmed that declaration a short time thereafter in a sworn affidavit.

Kodak's lawyer was not telling the truth. As he admitted much later during the final days of the trial, first to the senior trial lawyer for the case and then to Judge Frankel, he had known all along that the documents had not been destroyed. When the documents were finally produced they provided Berkey with little or no new information, but the dramatic, eleventh hour revelation that they had been hidden for so long gave Berkey's counsel considerable ammunition for arguments to the jury.94

The failure by Kodak's counsel to produce the copies of the Kodak documents until the close of the trial appears to have been primarily responsible for Judge Frankel's declaration on the record that the way Kodak's lawyers had conducted the litigation seemed to reflect "a kind of single-minded interest in winning, winning, winning, without the limited qualification of that attitude that the court, I think, is entitled to expect and which . . . has infected certain aspects of this case from time to time in ways I find upsetting."95 Judge Frankel referred the matter to the United States Attorney, who has begun an official investigation.96

It is unlikely that the will to win, cited by Judge Frankel, or any other single factor is solely responsible for the regrettable conduct by the lawyer representing Kodak. As I have argued above, it is the confluence of so many mutually reinforcing pressures and incentives, all militating against disclosure, that makes the invitation to the kind of errors made in the Kodak case so compelling. One additional indication of the power of these pressures warrants comment: the lawyer who succumbed to them was not a neophyte, more vulnerable because of ignorance and inopportunity to learn to cope, but rather an experienced, fifty-nine year-old full partner in a large and well-respected New York law firm.97

96. The Kodak attorney recently pleaded guilty to criminal contempt charges that were filed against him by the United States Attorney for the Southern District of New York. He faces a maximum penalty of five years in prison or a fine up to $10,000. Nat'l L.J., October 2, 1978, at 3, col. 1.
Like the written tools of discovery, oral depositions can be used not only to gather data about events and witnesses but also as adversarial weapons designed to place burdens on opponents and to manipulate the flow of information. The manipulative and competitive purposes for which depositions can be used generally begin evolving during counsel’s private investigation into the background of the dispute. It is during this stage of the litigation that the attorney frequently decides who to depose and for what purpose. It is also during this stage that the litigator will begin identifying the persons whom he will try to prevent from being deposed. Such people may include percipient witnesses or, perhaps more frequently, experts who have been retained by parties or lawyers to form opinions about some aspect of a case. The incentive to resist efforts by an opponent to depose experts is especially strong when the experts have reached conclusions that are equivocal or damaging to the party on whose behalf they were retained. Such conclusions are at least occasionally reached, even though some lawyers attempt to manipulate their experts psychologically and to orchestrate the flow of information to the experts in order to maximize the likelihood of receiving favorable opinions.

A very recent California case offers a striking example of resistance by counsel to the taking of depositions of experts who have reached damaging conclusions. The action was for personal injuries that plaintiff alleged were caused by a defective tire-changing machine or by a defective tire. The machine manufacturer’s investigator concluded, not surprisingly, that the injury was attributable to a defect in the tire. That defendant consequently designated its investigator as an expert who would testify at trial. Apparently the tire manufacturer’s counsel found this expert’s probable testimony persuasive and dangerous. After reading the expert’s report, counsel for the tire manufacturer entered an agreement with its codefendant that it would indemnify the machine manufacturer for any liability for plaintiff’s injuries provided the expert was withdrawn as a witness, the expert’s report was withheld from plaintiff’s counsel, and plaintiff’s attorney was not permitted to depose the expert. In the

98. See 59 YALE L.J. 117 (1949).
99. See Brazil, supra note 75, at 110.
100. Williamson v. Superior Court of Los Angeles, 582 P.2d 126, 148 Cal. Rptr. 39 (1978). For another relatively recent example of attorneys attempting to use the work product doctrine to prevent the deposition of an expert who had formed a potentially very damaging opinion, see Petterson v. Superior Court of Merced County, 39 Cal. App. 3d 267, 114 Cal. Rptr. 20 (1974).
ensuing litigation plaintiff’s counsel sought an order requesting that the expert be made available for deposition. Counsel for the machine manufacturer insisted that because he was professionally obligated to pursue the best interests of his client, he should be permitted to use his expert’s opinion in whatever manner seemed most likely to produce the best result at trial for his client. The majority of the justices of the California Supreme Court rejected this argument and concluded that the purported indemnification agreement was an illegal conspiracy among defendants to suppress relevant evidence. After a battle that went through three levels of the judiciary, plaintiff was granted an opportunity to depose the expert.

The fact that plaintiff finally succeeded in gaining access to defendant’s expert, however, should not obscure the additional basic questions which this case provokes. How frequently are such conspiracies to suppress damaging expert opinions entered? If an expert has not been formally identified as a witness for trial, how can opponents learn that conspiracies to suppress his testimony have been entered? Even if the existence of such a conspiratorial agreement in theory is discoverable, how likely are most litigators to suspect that a conspiracy has been entered and to press for its disclosure?

Such wholesale resistance is, of course, not the only discovery problem associated with depositions. Depositions, like other discovery devices, are expensive and thus can be used to exert economic pressure on opposing parties and counsel. An aggressive litigator bent on straining the resources and testing the will of an adversary can notice numerous depositions and can prolong each examination for extended periods. Because depositions can be used to require the presence of the deponent for lengthy periods of time, they also have great adversarial potential for harassing and embarrassing adverse parties or witnesses and for disrupting their lives and businesses.

These, however, are only the obvious abusive purposes for which depositions can be used. Adversarial pressures also account for more subtle forms of manipulation that can be used to restrict and contort the disclosure of evidence in depositions. The more subtle means, moreover, cannot be policed effectively by the courts.

101. The Report of the Special Committee noted: “According to the Survey of Court Reporters’ Fees printed in Litigation News (Oct. 1976), the costs of stenography vary from state to state but range from $10-$150 per hour for attendance and 45¢ to $3 per page of original transcript. Daily copy costs are most often more than double.” Report of the Special Committee, supra note 6, at 11. These figures, of course, do not include the costs of counsel’s or witness’ time in preparation for and during the depositions, travel, food, lodging, reproducing documents, and other exhibits for use during depositions, or of other incidental (but not inconsequential) expenses.
One of the most pronounced distortions of the data flow is likely to occur not during pure discovery depositions, which make adversarial sense only when it seems virtually certain that the matter will go to trial, but rather in depositions taken to preserve the testimony of a witness who will not be available for trial or to build a favorable record for leverage in settlement. Attorneys responding to adversarial impulses during the latter types of depositions will not ask open-ended questions covering the whole spectrum of the witness' potential knowledge. These attorneys are not interested in exposing the whole story on the public record. Instead, they will use every device available to develop the deponent's testimony in the direction most favorable to their client. If possible, they will use leading and misleading questions, ingratiation, intimidation, and confusion to develop the story they want. Seeking the same objective, they will limit and obstruct as much as possible—through objections, distractions, intimidations, and whatever other tactics promise success—opposing counsel's efforts to elicit testimony that is unfavorable to their client.

Another tactic employed during settlement-oriented depositions that limits even more severely the ascertainment of truth is the skillful determination of which questions not to ask. Before a deposition is taken, conscientious litigators frequently have identified the key weaknesses of their case from a source to which their opponent is denied access: their client. Armed with what often may be exclusive information about their client's vulnerabilities, litigators will structure their questions so as to avoid those areas of the witness' knowledge that might be damaging and to emphasize testimony that strengthens their client's position. If their efforts result in a transcript that on balance is helpful, they will do nothing to impair the credibility of the witness. If, however, opposing counsel somehow has identified weaknesses or stumbled into damaging areas of testimony, resourceful litigators will do all they can to destroy the credibility of the witness or to camouflage the significance of the testimony. With both sides of a dispute so intent on exposing only what is favorable to their client, and therefore shaping their questions to elicit only selected portions of the evidence, there is no assurance that the depositions will disclose all the potentially relevant information the witness may have. Again, fortuity rather than institutional design is truth's most consistent ally.

Aggressive litigators can also limit and distort the flow of information during discovery through the manner in which they prepare their clients and witnesses to be deposed. The adversarial objective of attorneys whose clients or witnesses are being deposed is to limit
to the greatest extent possible the information divulged. To maximize their control over the flow of information from their clients, attorneys may conduct mock depositions in which they pose dangerous questions to their clients and coach them as to the least troublesome answers. Short of such rehearsals, attorneys can instruct their clients in the art of nondisclosure. A recitation of the standard admonitions attorneys give their clients before depositions graphically illustrates how preoccupied litigators can be with resisting disclosure: (1) never volunteer information or help attorneys who are posing questions; (2) ignore the long silences and expectant faces attorneys will use to pressure you into continuing to speak; (3) answer questions with the fewest words and least elaboration that is consistent with self-serving consistency; (4) never interrupt the examining attorney before he has completed a question (to do so might provide an answer to a question the attorney had not thought to ask); (5) never edit or help clarify a confusing question (instead, simply say you do not understand); (6) always pause before answering in order to think and to give your attorney an opportunity to object; and (7) always listen carefully to your attorney’s objections because they may contain directives or clues about how to respond to a line of questions. The purpose of such instructions to witnesses obviously is not to ensure that all the relevant information they have will be disclosed during their depositions.

Counsel may use many other devices to regulate and restrict the evidence their client or witness provides during deposition. Counsel can assert privileges whenever they arguably apply and can direct the witness not to answer questions that might invade protected spheres. They also may attempt to pressure the examining attorney into abandoning sensitive areas of inquiry by aggressively interposing disruptive objections to the form or relevance of questions. Counsel even may try to delay indefinitely the taking of their witness’ deposition or to manufacture excuses to limit the scope of permissible questions. Such tactics will communicate quickly to an opponent that he will have to work very hard, withstand unpleasant pressures, spend considerable money, and seek aid from the bench if he intends to pursue what may or may not be fruitful lines of inquiry. My point here is not simply that such obstructionist devices are available and employed, but that the intense competitive pressures of the adversary system make resort to them a constant temptation. Indeed, some lawyers might argue that a thoroughgoing adversarial professionalism commands the use of such obstructive devices whenever they appear to promise significant advantages for a client.
VII. PENDING PROPOSALS FOR CHANGE

Concern within the professional community over current discovery practices has inspired the ABA's Special Committee for the Study of Discovery Abuse and the Judicial Conference's Advisory Committee on Civil Rules to suggest several changes in the Federal Rules of Civil Procedure.\textsuperscript{102} It seems fair to infer from the nature of the reform proposals contained in the Report by the Special Committee and the Preliminary Draft of Proposed Amendments by the Advisory Committee that their primary concern was not with the failure of the current rules to assure maximum disclosure of potentially relevant information. Neither the Report nor the Preliminary Draft acknowledge such a failure. Nor does either document discuss the many adversarial and economic pressures which systematically militate against full disclosure during discovery.

The proposals made by the Special Committee and embraced by the Advisory Committee suggest that both groups are interested primarily in curbing the cost of discovery and reducing the ways discovery can be abused for purposes of harassment and delay. These are important problems. They are not as important, however, as the failure of the current discovery process to accomplish the primary purposes for which discovery was designed: pretrial disclosure to all parties of all nonprivileged relevant evidence and encouragement of just settlements. Moreover, I believe that the abuses that rightfully trouble both committees cannot be reduced significantly without restructuring the professional pressures which in large measure provoke these abuses. Because the Report and the Preliminary Draft fail to examine the environmental causes of the problems they address, their proposals are incapable of effecting the fundamental reforms that are necessary to ensure that discovery will achieve its essential purposes.

Even more disconcerting is the direction the Special Committee's Report takes in proposing its most important changes. Instead of encouraging a more open sharing of evidence and combating the already considerable pressures against disclosure, two of the Special Committee's most important proposals would further limit the acquisition of discoverable information.\textsuperscript{103} It appears that the Special

\textsuperscript{102} See notes 84 & 89 supra.

\textsuperscript{103} The Advisory Committee on Civil Rules has not fully embraced either of these two proposals. As discussed in note 84 supra, the Advisory Committee does not favor nationwide imposition of a thirty question limitation on the number of interrogatories a party may serve as of right. Instead, it favors conferring a power on district courts to set whatever limits they feel are appropriate. Preliminary Draft, supra note 6, at 645-49. Nor does the Advisory Committee agree that the term "issues" should replace the phrase "subject matter" in Rule
Committee and, to a lesser extent, the Advisory Committee are seeking to reduce costs and curb abuses at the expense of a wider flow of information between parties and to the trier of fact. This action provides a false economy, however, because it erects additional barriers to the accomplishment of discovery's primary purposes and even may increase the costs of litigation.

Of the changes proposed in its Report, the Special Committee believes that the most significant is the rewording of Rule 26(b)(1), which defines the limits of permissible discovery. Under the current rule, parties may seek discovery of unprivileged matter "which is relevant to the subject matter involved in the pending action . . . ." The Committee's proposal would permit discovery only of unprivileged matter "which is relevant to the issues raised by the claims or defenses of any part." As its comments to this proposal expressly state, the purpose of this change would be "to narrow the scope of permissible discovery" and "to direct courts not to continue the present practice of erring on the side of expansive discovery."

The change in the wording of Rule 26(b)(1) proposed by the Advisory Committee also would eliminate the phrase "subject matter" from the description of the scope of discovery, but it would not replace that phrase with the term "issues." In its note to the proposed Rule 26, the Advisory Committee expressed fear that the substitution of the term "issues" for "subject matter" would invite litigation about the meaning of the new term. The Committee also doubted that the substitution would discourage "sweeping and abusive discovery . . . ." The Advisory Committee endorsed the Special Committee's goal of eliminating phraseology that might "persuade courts to err 'on the side of expansive discovery,'" but concluded that the best way to pursue that goal was to delete the reference to "subject matter" in Rule 26(b)(1). Because the Advisory Committee's version of the new rule would eliminate the broad
concept of "subject matter" from the definition of the scope of discovery, and because its note to the rule would make clear the Advisory Committee's hostility to "expansive" discovery, it appears likely that its impact on judicial attitudes would be virtually identical to the impact of the Special Committee's proposal.

The fundamental difficulty with the proposals by both committees and the comments that support them is that they would further constrict the flow of information between parties and to the trier of fact. Litigators would pounce upon either the new language suggested by the Special Committee or the deletion of the subject-matter concept as strong support for even more intense efforts to resist disclosure of potentially damaging evidence. In addition, the changes would further dilute the litigation bar's fear of sanctions\(^\text{112}\) by increasing the likelihood in any given case that an attorney could persuade the court that it was not clearly unreasonable to conclude the information the lawyer decided not to disclose was not discoverable under the narrower, new rule. Thus, by further constricting the flow of information produced during the pretrial period, these proposed changes would abet the forces that already operate to frustrate the primary purposes of discovery.

Nor is it apparent that the change in Rule 26(b)(1) proposed by either committee would reduce the costs or complexity of litigation. The Special Committee concedes in its comments that "[d]etermining when discovery spills beyond 'issues' and into 'subject matter' will not always be easy."\(^\text{113}\) If the adversary and economic pressures that currently dominate discovery remain intact, attempting to draw an illusive line between "issues" and "subject matter" will provoke many out-of-court disputes and much expensive case-by-case pretrial litigation. While the Advisory Committee's proposal would not necessitate elaborate efforts to define the term "issues," it undoubtedly would generate litigation directed toward interpreting the significance of the deletion of the term "subject matter" from the rule.

The committees' efforts to narrow the scope of discovery would generate other costs as well. Because the scope of discovery would be confined either by "issues" or by claims and defenses, resourceful counsel soon will begin expanding their pleadings in order to create the issues or to present the claims or defenses that are necessary to justify the kind of discovery they need or desire to conduct. The

\(^{112}\) This dilution might more than offset the impact of the expanded sanctioning powers that the Special Committee and the Advisory Committee propose through revision of Rule 37. Id. at 652-53; notes 134-40 infra and accompanying text.

\(^{113}\) Report of the Special Committee, supra note 6, at 3.
threat of narrowed discovery, then, would inspire an expansion of pleadings, which in turn would increase the cost of litigation. This increased cost would not be confined to the expense of drafting. Defenses to these pleadings would necessarily provoke more rejoinders. Motions to dismiss, to strike, and for more definite statements would proliferate. Preparing and responding to such rejoinders also would consume much attorney time and client money. Similarly, evaluating these efforts would consume valuable judicial resources. The ultimate irony is that this costly expansion of pleadings might result in extensions of the scope of discovery beyond its current range.

This scenario raises another disturbing question. Could a court fairly evaluate the propriety of expanded claims and defenses without permitting some expansive discovery to determine whether evidence existed to support them? Is there not a fundamental incompatibility between the concept of notice pleading and the committees' efforts to cut back the scope of permissible discovery? A key purpose of the Federal Rules of Civil Procedure was to simplify pleadings and to preclude courts and counsel from using a party's failure to comply with the elaborate technicalities of prenotice pleading as a means of preventing consideration of claims and defenses on the merits. The committees' proposals, however, seem to ignore that these modern rules of notice pleading and broad discovery were developed not only in chronological tandem, but also, and much more importantly, in self-conscious functional interdependence. One purpose of broad discovery, in other words, was to flesh out the general assertions made in a complaint or answer.

Confining discovery to issues or to claims and defenses would result in either (1) a substantial general expansion and elaboration of pleadings followed by no net reduction in the scope of discovery, or (2) a general proliferation of costly disputes about the existence of bases for pleadings—disputes the courts would have insufficient data, absent liberal early discovery, to resolve fairly. Of the two most obvious responses to the recommendations by the committees, then, one would result in greater costs and no change in the scope of discovery, while the other would result in irrational judicial resolution of pleading disputes. Neither result is satisfactory.

Another disconcerting change proposed by the Special Committee is intended to curb misuse of written interrogatories. The Special Committee's proposal would change Rule 33, which in its

114. See Clark & Moore, supra note 80.
115. See, e.g., Moore & Friedman, supra note 15, § 26.01, at 2441-42.
present form contains no limitation on the number of interrogatories a party may propound, so that a party could serve no more than thirty interrogatories without the court's permission, which would be granted only after "a showing of necessity." Like the Special Committee's effort to change the scope of discovery, however, this proposal seems to elevate the interest in reducing financial and investigative burdens over the interests in maximizing disclosure and assuring fair results. This change would make it even more difficult and costly for parties to acquire evidence and leads from each other. By making the process of acquiring information from other parties more difficult and costly, the proposal would restrict even further the flow of information to the trier of fact, would increase the probability of surprise at trial, and would reduce the likelihood of fair judgments and settlements.

Moreover, limiting the number of interrogatories that a party could serve without a showing of necessity would place a greater premium on tactics in drafting and responding to interrogatories and would provoke more frequent litigation of pretrial disputes. Any increase in the premium on tactics would result in a decrease in the percentage of resources committed to dispute resolution that would be consumed by efforts to establish the truth. The requirement of a showing of necessity to justify more than thirty interrogatories consequently would increase pretrial consumption of the resources of courts and counsel by compelling parties to formally litigate their efforts to serve and to resist additional written inquiries. The costs of court resolution of such disputes might well offset any savings that otherwise might be secured by limiting the use of interrogatories.

Apparently the Advisory Committee reached the same conclusion about the costs and benefits that would accompany a nationwide limitation on the number of interrogatories a party may serve. In its Preliminary Draft the Advisory Committee recommends against any such limitation and proposes, as an alternative, that Rule 33 be amended to empower explicitly the majority of the judges of any district court to establish a local rule that would "limit the number of interrogatories that may be used by a party." There are, however, several difficulties with the Advisory Committee's proposal. First, it does not make clear whether parties should have the right, in all districts, to petition the court for permission to serve

116. FED. R. CIV. P. 33.
117. Report of the Special Committee, supra note 6, at 18.
118. Preliminary Draft, supra note 6, at 646-49.
more interrogatories than the number permitted under the applicable local rule. Nor does the Advisory Committee’s formulation of the amendment suggest what standard local courts should apply in deciding whether to permit the serving of additional interrogatories. Absent some description of these standards, different district courts might well develop very different criteria for resolving these questions. This in turn could lead to increased litigation over venue disputes. Moreover, the Advisory Committee’s amendment establishes no minimum number of interrogatories which all district courts would be required to permit. Thus, it would be possible for a court that was hostile to discovery to effectively eliminate the written interrogatory as a discovery tool. Removing one of the most widely used discovery devices obviously would not increase the amount of information available to parties and to the trier of fact.

In addition, it is not clear that limiting the number of interrogatories will reduce discovery costs or the aggregate amount of discovery abuse. Prodded by perennial adversarial and economic pressures, litigators are not likely to permit a limit on their use of interrogatories to produce an overall reduction in their discovery efforts. Instead, they may well spend the resources they would have committed to interrogatories on other discovery vehicles. In addition, litigators would continue to feel the intense competitive pressures that are primarily responsible for the abuse of interrogatories. With the primary cause of abuse persisting, it is not unreasonable to predict that attorneys would look for other discovery outlets for their abusive purposes. Thus, it would appear that reforms designed to restrict discovery would do a disservice to its purposes and would create no real reduction in costs or abuses.

The Special Committee and the Advisory Committee further proposed that a sentence be added to the end of Rule 33(c), which in its present form gives a party responding to interrogatories the option to specify, and provide for examination, those business records which contain answers to the submitted interrogatories. The added sentence would read: “The specifications provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.”119 According to the comments by the Special Committee, this additional sentence is intended to compel the responding party “to specify precisely, by category and location, which documents apply to which question” and, thereby, to eliminate “the mechanical response of an invitation to ‘look at all my docu-

119. Id. at 648; Report of the Special Committee, supra note 6, at 19-20.
ments.'"\textsuperscript{120} The Special Committee also hopes that by forcing responding parties to specify under oath which documents relate to the subjects of given interrogatories, this change would "eliminate subsequent evasive use of additional documents at trial on issues confronted by the interrogatory request."\textsuperscript{121} While this proposed addition to Rule 33(c) promises some salutary effect, that effect obviously would be limited and would not reach the more fundamental problem of nondisclosure of damaging documents that are judged by the interested and self-serving minds of the answering party and its counsel not to be precisely responsive to an inquiry or request.

Although the Special Committee and the Advisory Committee join in recommending several other changes in the federal rules of discovery, only two of these recommendations are potentially significant and responsive to the disclosure problems that frustrate the purposes of discovery.\textsuperscript{122} The first of these changes would broaden and make more flexible the sanctioning process for discovery abuses.\textsuperscript{123} Under the changes recommended by both committees, Rule 37\textsuperscript{124} would permit the imposition of sanctions when attorneys or clients are uncooperative in the framing of a discovery plan, when counsel seek unnecessary discovery, and when the traditionally recognized forms of obstruction and deception are used.

Like the proposed change in Rule 33(c), these elaborations of the courts' sanctioning powers would have limited long-range significance. The Special Committee freely concedes that Rule 37 as currently written "has not been effective in curbing discovery abuse."\textsuperscript{125} The Special Committee is mistaken, however, in placing responsibility for this ineffectiveness on the structure of the rule. It is unlikely that the failure of present sanctions to curb discovery abuse
is attributable primarily to Rule 37 being "too narrow, fragmented and cumbersome" or to its requirement that "each failure to respond to a discovery request be dealt with by a separate motion." Had they been so inclined, judges probably could have relied on their general authority to control the litigation process and the more specific powers conferred by Rules 26 and 37 to justify using the kinds of disciplinary measures that the changes in Rule 37 would make available.

The history of efforts to curb discovery abuse by improving the machinery for sanctions firmly supports this skepticism. This history strongly suggests that deficiencies in policing the discovery system are not attributable to the language, scope, and structure of the rules governing sanctions. The original provisions for sanctions in the federal rules were highly praised shortly after their adoption. One of the earliest studies of the operation of the new discovery rules concluded that "Rule 37 implements the various discovery devices with a truly amazing array of sanctions: costs and attorney's fees, orders dispensing with proof, orders forbidding the introduction of evidence, orders striking pleadings or staying proceedings or dismissing the action, judgments of default, contempt, and arrest. While the variety of the possible courses of action gives the court a wide range of discretion, a zealous judge could make discovery a word of terror." Immediately after so characterizing the sanctioning machinery, however, the same study declared that "[s]o far . . . the tendency is apparently in the opposite direction. The courts, exhibiting a generous attitude toward the recusant party, have deemed it better to withhold the thunderbolt on condition of future compliance than to foreclose a determination of the matter on the merits." Nonetheless, a review of the few reported cases dealing with sanction problems left the authors of this study confident that the use of these new powers by the courts indicated that "the teeth" of the sanctioning provisions remained firmly in place.

A decade later, after the very modest changes that accompanied the 1948 amendments to the federal rules, William Speck conducted one of the earliest quasi-empirical studies of discovery. The lawyers polled "generally agreed that where abuse was occur-

126. Id.
128. Id. at 327.
129. Id.
131. Speck, supra note 15.
ring relief could not be obtained from judges, either because judges could not learn enough about the case at the pretrial stage to rule effectively or because of trouble, expense, and delay in obtaining relief." 132 By 1958 Professor Maurice Rosenberg, who subsequently directed the Columbia University School of Law Project for Effective Justice and led the formative planning of its Field Survey, 133 had concluded that even though Rule 37 had been "well designed to meet the heavy responsibilities it bears in the federal procedural charter," the intervening "twenty years of use have exposed enough flaws in language, gaps in coverage, and anomalies in application to warrant its revision." 134 Professor Rosenberg felt that one of the major problems with the application of the rule was the persistent reluctance of the courts to apply sanctions vigorously to counsel who offended the spirit and the letter of the discovery rules. 135 The primary means Professor Rosenberg recommended for improving this problem was to reform the structure and language of Rule 37 so as to remove verbal barriers, such as the words "refusal" and "willfully," to aggressive and flexible enforcement of discovery obligations. 136 He also exhorted judges to display "determined self-discipline" in administering their sanctioning powers, to "grasp the rule firmly and apply it imaginatively." 137 He suggested, as an example, that judges "might insist on special supervision, by either a judge or master, of the discovery procedures in particular types of actions known to be troublesome in their pretrial stages." 138

Professor Rosenberg's call for reform went unheeded for another decade. In the meantime, however, more evidence and opinions were marshalled in support of the need for change. An extensive review of the law and literature of discovery appeared in the Harvard Law Review in 1961. 139 Its authors concluded that despite the availability under the rules of

a broad array of sanctions of differing severity [and] that courts are empowered to fit the penalty to the fault, it appears that on the whole they [both federal and state courts] have been rather lenient. Even where there has been

132. Id. at 1153.
133. Rosenberg, Preface to Field Survey, supra note 42 (background information about the research staff).
134. Rosenberg, supra note 91, at 486.
135. Id. at 495.
136. Id. at 497.
137. Id.
138. Id. As pointed out below, this idea is an embryonic version of the concept of a "discovery conference" to which the Special Committee, the Advisory Committee, and I are attracted.
139. Developments in the Law—Discovery, supra note 15.
clear noncompliance by failure to appear for the taking of a deposition, the recusant party is usually allowed at least one more opportunity to appear if there is any indication that the information may be forthcoming. It was Professor Rosenberg's own Field Survey, however, whose conclusions generally were so charitable to the practice of discovery, that produced the most damaging evidence of the anemic and ineffective use of the sanctioning power in discovery disputes. Interpreting the Field Survey data, Glaser concluded not only that sanctions were rarely imposed for violations of the discovery rules, but also that "the crudity of the sanctions and the caution of the judges has resulted in depressing the initiative of the lawyers, and the initiative of the lawyers is essential to set events in motion in an adversary system." The Field Survey's most graphic illustration of the dormancy of the sanctioning power was that despite the courts' authority under Rule 37(a) to impose costs on a recalcitrant adversary, "only one out of 527 docket sheets reported this potentially effective procedure." This statistic is particularly instructive because the sanction to which it refers is so mild. Judges who are reluctant to impose small economic penalties presumably are even less likely to apply the more severe sanctions that the rules clearly permit. The reforms for which Professor Rosenberg and other students of discovery had been lobbying finally occurred in 1970 through amendments to the Federal Rules of Civil Procedure. In its note to Rule 37, the Advisory Committee conceded that "experience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed." The Advisory Committee also acknowledged that the authority granted under Rule 37(a) to impose economic sanctions "in fact . . . has been little used." The drafters of the 1970 amendments incorporated many of the reform proposals that commentators like Professor Rosenberg had recommended. They eliminated from Rule 37, for example, the requirement of wilfulness in subdivision (d); they shifted the presumption under subdivision (a) in order to compel a losing party to justify conduct that resulted in an adverse order; they gave courts

140. Id. at 991.
141. W. GLASER, supra note 15, at 156; see also id. at 154-56, 210-11.
142. Id. at 155.
143. Glaser reports that "unconditional sanctions" were applied in only one of the 1232 cases studied through questionnaires and interviews in the Field Survey. Id.
145. Proposed Amendments, supra note 82, at 538.
146. Id. at 540.
greater flexibility in the selection of sanctions; and they clarified the courts' authority to resort to modest penalties when unconditional remedies seemed too severe. The Advisory Committee's discussion of its rationale regarding the shift of the presumption under subdivision (a)(4) is particularly noteworthy. According to the Committee, "the change in language [of this subdivision was] intended to encourage judges to be more alert to abuses occurring in the discovery process." The Committee obviously sought to use this change as a means to propel the federal judiciary into a more activist posture toward discovery abuse. The Committee clearly articulated that intention in another paragraph of the note, explaining this change by stating that the "amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices." These amendments were greeted with the same kind of enthusiasm and great expectations for change that greeted the original rules in 1938. Professor Rosenberg's response to the amendments is particularly interesting because of the important role he played in identifying the need for reform and in suggesting the shape the changes should take. His evaluation in 1972 of the amended provision was vigorously optimistic. The revised rule, he wrote,

tries to create a streamlined, updated, modernized apparatus for sanctions against obstructions or aggressions in the discovery process. Rule 37 provides sharper teeth, has more flexible jaws, and has quicker responsiveness to abuses in the discovery process than was available before.

Revised Rule 37 also corrects quite a few flaws in the sanctions mechanism that turned up prior to the adoption of the 1970 amendments.

If the ABA's current Special Committee for the Study of Discovery Abuse is correct in its strongly held view that the version of Rule 37 that emerged from the 1970 reforms "has not been effective in curbing discovery abuse" and "is insufficient to bring about the effective imposition of discovery sanctions," on what grounds can one be optimistic that yet another redrafting and streamlining of Rule 37 will result in significantly more effective enforcement of the discovery rules? History strongly suggests that the problems that

147. Id. at 539-42. Glaser, among others, had concluded that one reason courts so rarely invoked their sanctioning power was their belief that the most obviously available penalties seemed too drastic. See W. Glaser, supra note 15, at 154-55.
148. Proposed Amendments, supra note 82, at 539.
149. Id. at 540.
151. Report of the Special Committee, supra note 6, at 24.
continue to plague the sanctioning machinery are not primarily attributable to deficiencies in judicial power. Those problems appear to stem, rather, from more fundamental sources. One such source, ironically, may be the judiciary's laudable concern to see that disputes are resolved on the merits. As some commentators have pointed out, the courts have reluctantly imposed sanctions that foreclose opportunities to reach the merits. This reluctance is inspired by the same spirit that motivates most modern procedural reforms and is reinforced by the judiciary's conviction that it is unfair to penalize clients for their lawyers' misconduct. The infrequent manner in which the modest costs of motions are imposed, however, indicates that the courts' failure to enforce aggressively the rules of discovery cannot be attributed primarily to their interest in reaching the merits of a case or their concern about punishing clients for the transgressions of their attorneys.

Another perhaps more persuasive explanation of the courts' reticence might be traceable in large measure to the judges' understanding of how counsel must respond to the obligations and pressures of adversarial advocacy. As former lawyers, most judges probably know from experience that the high commandment of loyalty to the client and the intense adversary context in which that loyalty must be proven can make resisting disclosure of damaging evidence and using discovery devices to gain tactical advantages seem thoroughly consistent with the highest standards of the profession. Judges know that litigators are required to resolve doubts in favor of their clients and to pursue their clients' interests as zealously as the bounds of the law permit. It is hardly surprising, therefore, that judges who respect these rules, who were acculturated professionally under the adversary system, and who understand the pressures it generates, tend to err on the side of lenience when asked to sanction counsel who have fought perhaps too vigorously to protect their clients.

Refining the machinery for imposing sanctions is unlikely to produce a substantial increase in the use of sanctions if the judiciary's under-utilization of this sanctioning power is attributable to its concern about reaching the merits of controversies and its sympathy with the motives of counsel who resist disclosure. Nor is it likely, however, that even a substantial increase in the use of sanc-

152. See W. Glaser, supra note 15, at 154; Rosenberg, supra note 91, at 495; Developments in the Law—Discovery, supra note 15, at 990-91.
154. ABA Code, supra note 39, Canon 7, EC 7-1, 7-3.
tions would root out the most troublesome problems facing modern discovery. Since these problems are directly traceable to the adversary and economic pressures which currently dominate discovery, a high level of abuse will probably persist until some of these shaping pressures can be changed.

The proposal by the two committees that appears to offer the most promise for coping with the problems that plague discovery is the utilization of a discovery conference. Under this proposal, the court could hold such a conference if requested by either party and if certification has been presented to show that counsel have failed to resolve through private negotiations the matters set forth in the request for the conference. At the conference the court would have broad powers to define issues, establish plans and schedules for discovery, set limits on the discovery that is to take place, and allocate discovery expenses. After the request for the conference and the certification necessary to justify it are received, the court would have control over both the scheduling and the scope of the conference.

In its comments to this proposal, the Special Committee pointed out that the specific provisions of the proposed rule governing the discovery conference resulted from a compromise of conflicting opinions and considerations. The most fundamental of these conflicts apparently was over the extent to which control of discovery “should be left to the adversary lawyers” or relegated at an early stage to the judiciary. It appears that the proponents of the view that most of the control over discovery should remain in the hands of the adversary lawyers prevailed. While in its comments the “Committee urges strongly that at least the alternative of early judicial control should be available,” it also states that the new rule would continue “to impose principal responsibility upon the litigating Bar for the preparation of a case.” Moreover, the Committee contemplates that “the discovery conference should be the exception rather than the rule” and that “in the great majority of cases, opposing counsel should be able, without judicial intervention, to formulate an appropriate plan and schedule of discovery in relation

155. See Preliminary Draft, supra note 6, at 624-26; Report of the Special Committee, supra note 6, at 4. The proposals by the two committees for the discovery conference are in substance indistinguishable.
156. Report of the Special Committee, supra note 6, at 4.
157. Id.
158. Id. at 5.
159. Id.
160. Id. at 6.
to issues readily defined by agreement."

These expectations about the willingness and ability of opposing counsel to cooperate sufficiently to avoid the need for judicial intervention in discovery seem overly optimistic. None of the changes in the federal rules proposed by the committees purport to convert adversary attorneys into allies. Nor do they attempt to reduce the competitive and economic pressures which so largely shape conduct by litigating counsel. Without such changes in the conditioning context within which attorneys work, it is unreasonable to expect their basic instincts, objectives, and modes of behavior to change. They will remain competitive, secretive, suspicious, and cautious. They will aggressively pursue advantages for their clients and will seek to capitalize on the vulnerabilities of opposing counsel and parties. The Rules of Professional Responsibility, the fear of being sued for malpractice, the desire to maximize their own fees, and deeply ingrained adversarial habits will prevent them from cooperating with or trusting an opponent whenever doing so appears to jeopardize an interest of a client.

If the proposed discovery conference rule is adopted and if the framing of an appropriate discovery plan by agreement remains the exception rather than the rule, one of two developments would likely ensue. First, the discovery conference would go largely unused. There is nothing in the proposed rule that would make such conferences mandatory, that would empower a court to call a conference on its own initiative, or that would command opposing counsel to try to define issues and frame a comprehensive discovery plan. Litigators who presently enjoy the largely unregulated and unmonitored environment of discovery or who fear early judicial intervention, whether because it might be arbitrary, ill-informed, biased, or simply unpredictable, are unlikely to request a discovery conference. Moreover, if their opponents' behavior makes judicial help seem essential, counsel who are uncomfortable with the idea of early judicial interference will probably resort to the limited motions that currently are used in such circumstances. Even attorneys with more hospitable attitudes toward judicial intervention might be inclined to proceed with discovery without the optional conference, at least until a clear need for it arose. Such factors as the time and energy

161. *Id.* at 5. The Advisory Committee's note about the discovery conference expresses similar expectations that requests for these conferences will not be made routinely, that counsel should be able to resolve most discovery matters without judicial intervention, and that the discovery conference should take place only in the exceptional case. The Advisory Committee adds that it is "extremely reluctant even to appear to suggest additional burdens for the district courts." [Preliminary Draft, supra note 6, at 628.](#)
that would be consumed first by trying to reach a formal private agreement with opposing counsel and then by requesting, preparing for, and attending a discovery conference are likely to foster this reluctance.

Second, discovery conferences would produce a substantial increase in the cost of pretrial litigation. Under the committees' proposal, an attorney will be granted a discovery conference only after he has first attempted to reach an agreement with opposing counsel that would (1) identify the issues, (2) establish an overall discovery plan, (3) schedule its components, and (4) define any limitations that would be imposed on the use of individual discovery devices. The attempt to reach such a broadly scoped agreement would be very costly. That cost would result in part from the jockeying and precautionary measures that are spawned by adversary relationships and in part from the great complexity of the undertaking. For example, discovery can include numerous devices, its needs can change substantially over the course of a long pretrial period, those needs can be very difficult to predict in the early stages of a lawsuit, and counsel realize that their perception of what constitutes the issues in a given case can change dramatically as a result of discovery. Thus, the cost simply of trying to qualify for a discovery conference could be substantial.

The costs that would be generated by the discovery conference would not be confined, of course, to satisfying this first requirement. Substantial costs also would be generated in preparing the certification describing the failure of the private effort, drafting the request for the conference, which must include a statement of the issues, a proposed plan and schedule of discovery, and suggested limitations on the discovery proceedings, filing objections to the request for the conference and responding to those objections, preparing for and attending the conference itself, and protesting against or appealing objectionable portions of the resulting discovery order. Finally, since discovery needs and strategies can change greatly during the pretrial period, it would be unreasonable not to anticipate significant additional expenses arising as counsel attempt to make and to resist the showings of good cause that are required under the proposed rule in order to alter or amend an original discovery conference order.

Despite these serious reservations, the idea of a discovery conference represents a step in a constructive direction. A discovery conference that is not mandatory, however, and that takes place in the present adversarial environment cannot contribute significantly to solving the fundamental problems that plague modern discovery.
Unless implementation of the discovery conference were accompanied by major changes in the context within which discovery takes place, the primary purposes of the conference would be frustrated by the same adversarial and economic pressures that currently frustrate the purposes of the entire discovery apparatus.

While early and aggressive judicial intervention might prevent some of the more obvious forms of discovery abuse—the bad faith use of discovery demands to impose suffocating burdens on the economic and professional resources of less resourceful opponents—the discovery conference, by itself, would not enable the court either to control the trial preparation process or to assure that parties disclose all the significant evidentiary information that they control. The Special Committee's comments to the proposed rule suggest that the availability of a discovery conference would create "the alternative of early judicial control . . . ."162 This is a false promise. Without major changes in the adversary rules that shape the pretrial environment, there can be no effective judicial control of discovery. If the rules of the adversary game are left essentially intact, interjecting a judicial officer into the discovery process will simply add another adversary (the court) to the combat. Counsel and clients will continue to conceal material evidence until clearly compelled to divulge it, resist disclosure of damaging information, and seek ways to gain advantages over opponents through the use of discovery tools.

In order for judicial control to be effective, intelligent, and fair, this control would have to be based on a thorough knowledge of the matters in dispute. Under the current rules of litigation, however, it would be virtually impossible for a judge to have that kind of knowledge at an early discovery conference. Antagonistic lawyers, loyal to their clients, certainly would not serve as reliable sources of such knowledge. They would be willing to share with the court only information that appeared beneficial to their clients. Moreover, since the discovery conference would take place at an early point in the litigation process, neither opposing counsel nor the court would likely know enough to be able to uncover all the significant data from a wily adversary. Nor does the court have the time to read all the documents in all the files of all the parties. Without some assurance that it knew as much about the case as the lawyers, the court could never be confident that its discovery decisions would maximize the likelihood of uncovering all the relevant evidence, or that they would impose no unfair burden or handicap on any party.

162. Report of the Special Committee, supra note 6, at 5.
Because adversaries feel constrained to keep the court ignorant of facts whenever doing so would be helpful to their clients, the court's "control" would be rational and fair only fortuitously.

Nor would the proposed discovery conference give the court real control over the design and execution of the discovery it ordered. While in some cases a judge might be able to review interrogatories, requests for admissions, and document production demands without a great expansion of its resources, the court rarely would be able to examine all the produced documents, to attend depositions and physical examinations, to observe experiments and demonstrations, to visit the scene of events, or to participate in other discovery exercises. Because the court would be unable to monitor all these important discovery processes, its control would remain limited and incapable of assuring thorough, unbiased inquiries that would lead to complete disclosure of all key data.

VIII. TOWARD AN ALTERNATIVE

As the foregoing discussion makes clear, I believe that discovery cannot serve effectively its intended purposes unless substantial changes are made both in the environment in which it is conducted and in the extent and quality of judicial control over its processes. While I will venture some suggestions for such changes, I cannot pretend to offer a fully refined blueprint for an alternative discovery system. Nor have I been able to explore all the ramifications that might accompany the changes I propose. My hope, rather, is that these recommendations will provoke within the profession a spirited and constructive debate about the fundamental structure of civil discovery.

The concerns that provoked the suggestions that follow were eloquently articulated by Judge Frankel in his 1975 Cardozo Lecture:

[W]e may say that it is the rare case in which either side yearns to have the witnesses, or anyone, give the whole truth. And our techniques for developing evidence feature devices for blocking and limiting such unqualified revelations.

The devices are too familiar to warrant more than a fleeting reminder. To begin with, we leave most of the investigatory work to paid partisans, which is scarcely a guarantee of thorough and detached exploration. Our courts wait passively for what the parties will present, almost never knowing—often not suspecting—what the parties have chosen not to present. The ethical standards governing counsel command loyalty and zeal for the client, but no positive obligation at all to the truth. Counsel must not knowingly break the law or commit or countenance fraud. Within these unconfining limits, advocates
freely employ time-honored tricks and strategems to block or distort the truth.\(^{163}\)

The core of the changes I propose to combat these problems can be summarized as follows: shifting counsel's principal obligation during the investigation and discovery stage away from partisan pursuit of clients' interests and toward the court; imposing a duty on counsel to investigate thoroughly the factual background of disputes; imposing a duty on both counsel and client to disclose voluntarily, and at all stages of trial preparation, all potentially relevant evidence and information; narrowing the reach of the attorney-client privilege and the work product doctrine; making early discovery conferences mandatory; substantially expanding the role of the court in monitoring the execution of discovery; and requiring thorough judicial review of, or participation in, all settlements that exceed a specified dollar amount.

These reform proposals are logical derivatives of the basic premise of this essay—that because the pressures generated and the loyalties commanded by the adversary relationships currently dominating litigation are largely responsible for the frustration of the purposes of discovery, meaningful reform does not seem possible without changing these pressures and shifting these loyalties. Toward that end I recommend major changes in the Federal Rules of Civil Procedure and in the Code of Professional Responsibility, changes designed to reduce as much as possible the sway of adversary forces in the discovery process. The Code of Professional Responsibility, for example, currently treats litigation almost monolithically, making few significant distinctions between criminal and civil actions or between the various stages of lawsuits. A breakdown of this monolithic approach is required. Canons and disciplinary rules especially tailored to civil matters should be drafted. Moreover, ethical standards should be refined in order to distinguish between the different requirements of the investigative and discovery stages, on the one hand, and the trial and post-trial stages on the other.

In particular, new rules of professional responsibility and civil procedure should be fashioned for the investigative and discovery stages. During these stages, counsel should be directed to view themselves primarily as officers of the court rather than partisan advocates. As officers of the court, counsel should be commanded by new ethical directives and civil rules to search diligently for all data that might help resolve disputes fairly and to share voluntarily

\(^{163}\) Frankel, supra note 1, at 1038 (emphasis in original).
the results of their searches with both the court and the other parties to the action. Under this new system, the court would determine at discovery conferences how much investigation counsel would have to undertake in given cases to comply with this general obligation. In making this determination at the outset of the litigation and in refining it over the course of the pretrial period, the court would strive to balance the investigative burden equitably among all participating counsel. Under the changes proposed here, counsel's primary loyalties during the trial and post-trial stages would remain where they are today: to their clients.

The new ethical directives and civil rules also would make clear that the duty to disclose voluntarily all potentially relevant information is not confined to the fruits of formal investigations but extends to all material data, regardless of how it is acquired. As Judge Frankel has suggested, such rules not only should compel disclosure of material facts but should also explicitly forbid material omissions. To be effective these commands to disclose would have to be accompanied by several additional changes in current ethical and procedural rules. The provision of the Code of Professional Re-

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164. *Id.* at 1057. Judge Frankel was courageous enough to submit in his essay a draft of a new disciplinary rule which he hoped would compel full disclosure. His effort deserves reproduction here:

(1) In his representation of a client, unless prevented from doing so by a privilege reasonably believed to apply, a lawyer shall:

(a) Report to the court and opposing counsel the existence of relevant evidence or witnesses where the lawyer does not intend to offer such evidence or witnesses.

(b) Prevent, or when prevention has proved unsuccessful, report to the court and opposing counsel the making of any untrue statement by client or witness or any omission to state a material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading.

(c) Question witnesses with a purpose and design to elicit the whole truth, including particularly supplementary and qualifying matters that render evidence already given more accurate, intelligible, or fair than it otherwise would be.

(2) In the construction and application of the rules in subdivision (1), a lawyer will be held to possess knowledge he actually has or, in the exercise of reasonable diligence, should have.

Key words in the draft, namely, in (1)(b), have been plagiarized, of course, from the Securities and Exchange Commission's rule 10b-5. That should serve not only for respectability; it should also answer, at least to some extent, the complaint that the draft would impose impossibly stringent standards. The morals we have evolved for business clients cannot be deemed unattainable by the legal profession.

*Id.* at 1057-58 (footnote omitted). This draft obviously falls short of the comprehensive directive I envision. It is heavily trial oriented, for example, and fails to command counsel to disclose in advance of trial all the information that might be helpful in resolving the dispute. Moreover, its exclusion of arguably privileged material substantially circumscribes its scope and might provide counsel with a rationale for evading the duty it seeks to impose.
sponsibility that directs litigators to resolve all doubts in favor of their clients, for example, would have to be modified so as to apply only to legal arguments made during the trial and post-trial stages. A new ethical prescription would have to be added that would compel litigators during the investigative and discovery stages to resolve all doubts in favor of the broadest investigation and the fullest possible disclosure.

This comprehensive duty to disclose also would have to be integrated with the various privileges against disclosure and the work product doctrine. The specific character of that integration would be an extremely important and complex matter that is beyond the scope of this essay. It is important to note, however, that meaningful disclosure probably could not be accomplished without significantly narrowing the current reach of both the attorney-client privilege and the work product doctrine. An attorney’s work product, for example, could not be permitted to embrace the results of private interviews with witnesses. Indeed, work product probably would have to be confined very narrowly to legal research, legal theorizing, and tactical planning. Similarly, the attorney-client privilege in civil actions would have to be narrowed in order to prevent clients and counsel from using it to shield factual information from disclosure. Clients still might be permitted to prevent disclosure of specific feelings, opinions, and theories that relate to the litigation, but they would not be allowed to invoke the privilege as a means of denying access by the court and opposing parties to material evidence.

This proposed shift during the discovery stage of counsel’s primary obligation away from purely partisan advocacy and toward full disclosure has some potentially troublesome implications for the traditional relationship between counsel and client. For example, clients might feel more pressure not to divulge to their attorney evidence they fear could damage their case. Clients also might feel that it is unfair to ask them to pay an attorney whose loyalties are divided between serving a public interest in justice and the clients’ private interest in victory. While these problems could be significant, their dimensions are readily subject to exaggeration, and they probably are not insurmountable. Even under current rules, for example, clients frequently are reluctant to share clearly inculpating evidence with their attorneys. Such reluctance may stem from clients’ failure to understand the ways the rules of professional responsibility and evidence can work to protect them, from their fear of being morally condemned by their lawyer, or from cynical appre-

165. ABA Code, supra note 39, EC 7-3.
cation that if they share certain information with their attorney they lose full control over whether it will be disclosed. In short, it simply is not clear that the changes I propose would alter to a considerable extent the way most clients share information with their counsel. It seems reasonable to predict that clients who are predisposed to be honest with their attorneys probably would continue to be so, and that clients who are not so predisposed probably would not change their behavior in significant ways.

Nor does it seem likely that clients would mount a massive resistance to payment of fees to lawyers whose obligations during the discovery stage were more equally divided than they are today between advocacy and disclosure. While re-education of some clients’ expectations might be required, the percentage of clients who would be willing to insist publicly that they have a right to buy legal service for the purpose of securing unfair results is probably small. Nor is there any obvious reason for encouraging users of the legal system to believe they enjoy a right to pursue injustice by whatever means are not explicitly proscribed by the unusual ethical rules of the legal profession. The changes I propose, however, would not deprive clients of the vigorous representation of committed advocates. Litigators would continue to fight, even during the discovery stage, for exposure and interpretation of evidence favorable to their clients. The only substantial difference between the current system and the rules I propose would be that lawyers and clients would not be permitted to deliberately distort the decisionmaking process by failing to disclose relevant information.

This mandate to disclose would not be fully effective, however, without establishing the procedural machinery for making disclosures and for enforcing the duty to disclose. There probably are several different procedural forms that could be devised to act as the principal vehicle for disclosure. Certain minimum features, however, should be included. One is to reduce the disclosed information as completely as possible to some permanently recorded form. This requirement is essential in order to assure the reliable sharing of information between all parties and the court, to preserve the shared information, to establish the record necessary to control the presentation of evidence at trial, and to evaluate the propriety of imposing sanctions for breaching the duty to disclose. Another requirement that should be built into the disclosure procedure calls for periodic updating and supplementing of the information provided at the initial stages of the litigation process. There are two junctures at which some formal disclosure should be required in every civil action: (1) immediately after the issues have been joined
through the filing of pleadings; and (2) at the close of the first major investigative period. New rules also should make some provision, however, for subsequent periodic disclosures, the precise timing of which might best be left for determination by the judge presiding over the discovery conferences.

Since the duty to disclose is a central feature of the procedures I am proposing, devising a set of controls, encouragements, and sanctions that would maximize compliance with this duty is critically important. Candor compels acknowledgement, however, that designing a just and effective system of incentive and enforcement for this purpose would be a most difficult task. No such system could eliminate the possibility of abuse or thwart every evasive effort by the intentionally dishonest. There are, however, several measures whose implementation could reduce substantially the likelihood of certain repeated breaches of this duty to disclose that would jeopardize most seriously the fairness of the proposed procedures.

One such measure would be to require both counsel and client to swear under oath on every disclosure occasion and at the close of the pretrial period that they had searched diligently for and disclosed all information that arguably might be relevant to the dispute in question. Rules of court and of professional responsibility would make it clear that a disingenuous oath could expose counsel and client to a range of serious sanctions, including conviction of perjury, citation for contempt, dismissal of claims or defenses, entry of judgment against the offending party, and the full range of professional disciplinary actions, including permanent disbarment. New rules also could be framed that would prohibit a party from using for any purpose evidence that was subject to the duty to disclose, but was not disclosed, provided counsel or client knew or should have known of the evidence. In appropriate circumstances this prohibition could be extended to any additional information or evidence that the offending party or attorney would not have acquired without the information or evidence that was not disclosed.

Another device that might prove useful in enforcing the duty to disclose would be to require counsel and client to identify for the court and other parties all the sources from which information or evidence was sought. At a minimum this rule should compel attorneys and parties to provide sufficient information to enable the court or representatives of other parties to locate each consulted source. This information would equip other interested parties and the court to pursue the matter if they chose to do so. The scope of the information this rule would require from parties could be ex-
panded if experience proved such an expansion necessary. In the alternative, the rule could vest in judges monitoring discovery the power to fix the extent of this requirement in accordance with the needs of individual cases. Either in given cases or in all actions, for example, attorneys and parties could be required to provide sufficient information not only to identify and locate each possible source but also to ascertain the issues or subject matters about which the person who initially consulted the source thought it might offer information.

A series of mandatory discovery conferences would be essential, at least in the more complex cases, in order to achieve all the objectives of this alternative system for gathering and sharing data. Such conferences, over which judges or magistrates would preside, would equip courts to monitor discovery and disclosure in greater detail. The scope and number of such conferences could be tailored to the size of individual cases. In smaller and less complex suits, for example, the conferences could be brief and the extent of judicial intervention might be quite limited.

The first discovery conference should be held immediately after the issues have been established by the filing of responsive pleadings. This initial conference would have several purposes. First, it would define clearly the legal and factual matters that are relevant and actually in dispute. Second, this initial conference would determine what potentially relevant information might be within the control of, or most readily accessible to, each of the parties. As part of the process leading to this determination, the parties and their counsel would be required to identify all possible sources of relevant testimonial and tangible evidence. They would be asked not only to list prospective witnesses and types of potentially relevant documents, but also to describe the content of the information each possible source might be expected to yield. Such lists would be drafted and filed several days before the first discovery conference was to convene and would provide each party with an opportunity not only to state its version of the issues but also to tell the court what kinds of data other parties should be required to search for and produce. While requirements like these would impose potentially costly burdens on clients and counsel, the extent of those burdens would vary in direct proportion to the size and complexity of the case. Complying with these requirements in small or simple cases would not be a major or taxing undertaking. Moreover, the extra systematic work and expense at this early stage might result in an overall reduction in the cost of the litigation.

Based on the information presented prior to and during the
initial discovery conference, the court would issue its first investiga-
tive order. In addition to defining issues and identifying uncon-
tested legal and factual points, this order would specifically define
the scope and the components of the investigation each party was
to undertake. For example, the order might direct one party to
search for certain categories of documentary and other tangible evi-
dence, to arrange for medical or vocational examinations of parties,
to have specified photographs taken, or to obtain statements from
certain prospective witnesses.

Determining how to handle the acquisition of oral information
from witnesses and parties during this investigative stage would
require a thorough examination of alternatives and conflicting val-
ues that is beyond the scope of this essay. One conclusion to which
such an examination might well lead, however, is that all parties
and witnesses should be required to submit sworn statements in
which they detail all the factual information they have about the
issues in dispute. In some circumstances it might be preferable to
have a judge, magistrate, or clerk take these statements, especially
from key witnesses. To improve the likelihood that the statements
would contain all the essential background information and would
cover all the subject areas in dispute, the judiciary and state bars
could work together to develop forms to guide the interviewer.
Counsel and the court could adapt and amplify these forms during
discovery conferences to fit the needs of given lawsuits. Where the
circumstances warrant it, the statements of important witnesses
and of parties could be videotaped for subsequent study by the court
and counsel.

Such statements would serve several purposes. They would
equalize access to important information. They also would provide
a means of reducing surprise at trial and of deterring both perjury
and more subtle self-serving shifts in testimony. These purposes
could be further promoted by prohibiting testimony at trial, at least
in the absence of very compelling special showings, that went be-
yond or was inconsistent with information in the statements or in
other pretrial discovery documents. The existence of such state-
ments also could substantially reduce deposition costs. In many
instances the content of a statement might persuade counsel or the
court that deposing the witness was unnecessary. The likelihood
that counsel would be so satisfied probably would increase if the
statements were taken by a judicial officer and were videotaped.
Even when the statements did not eliminate the need for deposi-
tions, they could be used by the courts and the lawyers to sharpen
the focus and to limit the scope of deposition questioning. When a
statement appears to the court to be sufficiently comprehensive, the
court may require a showing of good cause before permitting the
deposition of the witness who gave it. Similarly, in appropriate cir-
cumstances the court could issue an order confining the questions
in the deposition to certain topics or purposes—cross-examination
to develop bases for impeachment, for example.

The court order resulting from the initial discovery conference
would fix the date for the first follow-up conference. It also would
direct counsel to complete their assigned investigative work and to
file the results far enough in advance of this second conference to
permit the court, other counsel, and parties to evaluate the submit-
ted materials and to frame questions, objections to the quality of the
investigation, or requests for additional probes. At the follow-up
conference the court would review the quality of compliance with its
first discovery order. During this review it would report its impres-
sions of the materials filed by counsel, hear arguments about com-
pliance problems, consider requests for additions to or modifications
of its initial order, and evaluate the propriety of imposing sanctions
for deficiencies in the investigative performances by the attorneys
or for failures by parties to cooperate in the disclosure process. Using
the data generated in the first investigative effort, the court might
undertake to refine the list of issues in dispute and to extend the
list of factual and legal points about which the parties agreed. In
some cases this follow-up conference also might be an appropriate
time to consider motions to dismiss or for summary judgment, or to
begin actively encouraging settlement.

If the court were unable to dispose of the matter by any of these
means, it would proceed to consider needs for additional investiga-
tion and requests from counsel to conduct limited adversary discov-
erly. In considering how best to advance the case toward trial and
to encourage settlement, the court would begin with presumptions
in favor of minimizing the amount of adversary discovery and max-
imizing the use of more straightforward investigative tools. Despite
these presumptions, however, the court would permit certain tradi-
tional forms of adversary discovery when convinced that they are
the most likely means to establish reliable evidence or are necessary
to assure parties of adequate trial preparation. Depositions of ex-
erts and of key party-witnesses probably would fall with some
frequency into this category. At this relatively mature stage in the
litigation, the court also might permit parties to serve limited num-
bers of specific requests for admissions or, less frequently, interroga-
tories.
This alternative system for gathering and organizing information obviously contemplates a much larger and more aggressive pretrial role for the judiciary. In addition to the functions described in the preceding paragraphs, this expanded role should include the power to participate directly in both the investigation and discovery stages of litigation. A court should be empowered, for example, to pose written or oral questions to parties, witnesses, or attorneys whenever the court is unsatisfied with the quality or comprehensiveness of questions propounded by counsel. Similarly, a court on its own initiative should be able to request admissions of fact and the production of documents from parties. It also should be permitted to participate in depositions directly or through a magistrate or clerk. While these kinds of powers should exist to improve the likelihood that neither the incompetence nor the adversary motives of counsel will leave major holes in the evidentiary record, judges should be directed to employ these tools sparingly and only when required to do so in the interests of justice.

Expansion of the judiciary's role in pretrial processes should include one additional dimension. Court approval should be required for all settlements that exceed a specified dollar value, such as $5000. Moreover, to make such approval meaningful, a judge, preferably the one who has monitored the investigation and discovery in the case, should either participate directly in the final settlement negotiations or thoroughly review the terms of the settlement agreement before it is signed. The purpose of such well-informed judicial involvement would be to decrease the likelihood that disparities in the resources of parties or the competence of counsel will result in an unjust settlement.

The changes I propose obviously would increase greatly the burdens on the judiciary and require a major expansion of its personnel and supportive resources. While implementing the proposals discussed here clearly would increase the direct dollar cost to the public of resolving civil disputes, such changes might well reduce the total consumption of social resources for which litigation currently is responsible. Substantial savings might be achieved by removing adversary jockeying as much as possible from the process of gathering and organizing the relevant factual information and by increasing the judiciary's capacity to rationalize and streamline the process of preparing cases for trial. Savings also might be realized

166. Careful cost analysis of the existing system and of all arguably feasible alternatives obviously would be necessary before launching any attempt to make major institutional changes of the kind I propose.
through the court's ability to encourage fair settlements during or at the close of the investigative stage, before adversary struggles begin their voracious consumption of clients' and society's resources. One of the hopes that inspires these proposals is that by increasing direct expenditures on the process of dispute resolution, we can decrease its indirect and overall social cost.

Nor can it be seriously disputed that this overall social cost is high. Presently, the cost of discovery even in cases of modest size can be sufficiently high to discourage all but the wealthiest clients from using the courts. The immense economic cost of discovery in larger and more complex litigation has been a subject of great concern for many years. Moreover, these massive expenditures on discovery are not confined to large private corporations. A governmental agency or other publicly supported entity is often a party to the most complicated and costly civil actions. One current example is the FTC's antitrust action against several major oil companies. In these proceedings, thousands of attorney hours already have been committed to discovery, even though only the tip of the evidentiary iceberg has been disclosed. The point here is that when the government is involved in litigation, taxpayers bear the cost. Even when the only parties to complex litigation are private corporations, the public generally absorbs much of the cost of resolving the dispute. Corporate parties pass along their litigation costs to consumers in the same way they pass along their other business costs.

These observations about the financing of major litigation are intended to dispel simplistic illusions that the great cost of civil discovery in complex cases is not a social problem because large corporate litigants bear the brunt of that cost. If it is true that only the users of the legal process pay for our costly system of dispute

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167. A dozen years ago an experienced Philadelphia trial attorney suggested one way of calculating part of the cost of discovery in smaller litigation. Griffin, supra note 40. Griffin estimated that a modest discovery schedule in a simple lawsuit could consume about 75 hours of an attorney's time. Id. at 15-16. At a $50 per hour fee, the cost of that attorney's time in discovery would be $3750. That figure, of course, does not include the cost of stenographic transcription of depositions, of document productions and duplications, of medical examinations, or of consultations by experts. From these figures it is clear that the investigation and discovery necessary to prepare for even a simple trial could cost well in excess of $5000—a sum that makes litigation by individuals of anything but major disputes economically infeasible.

168. Even the interpreters of the data produced by the Columbia University Field Survey conceded that in "the heavy-discovery case," discovery "can become expensive in both time and money, in comparison with the average case." W. GLASER, supra note 15, at 201. See also Kaufman, supra note 11, at 121-22.

resolution, then virtually all of us are its users. Indirectly, as taxpayers, consumers, and shareholders, most Americans foot some portion of the bill for most of the major litigation in this country. It follows, then, that the dollar cost of complex commercial litigation between private parties is a societal problem in whose solution virtually every citizen has a real economic interest.

The great economic cost of litigation, of which discovery is a major component, brings in its wake potentially damaging social costs. Low and moderate income individuals are effectively denied access to our principal system of dispute resolution. Litigants who can penetrate that system's entry barriers experience great financial pressure to settle disputes without regard to the merits of competing claims. Even large corporate litigants are increasingly concerned with the cost of litigation. Dispute resolution for these parties has become almost exclusively a matter of business judgment. The social fabric will be worn dangerously thin if the cost of litigation leaves too many people feeling either that they cannot afford to use the machinery of civil justice, or that the burdens imposed by that machinery force them to forsake legitimate goals.

As significant as these problems are, however, they do not represent the ultimate social cost of our present discovery system that institutionalizes pressures on adversaries to limit and to distort the flow of relevant information. This cost results instead from the failure of the system to provide assurance that disputes will be resolved fairly. Adversary discovery leaves the achievement of justice in large part to chance. A system in which fairness is fortuitous invites the alienation of the people it should serve and cynicism in the professionals who run it. Popular alienation from our system of justice has been notoriously widespread for generations and is the greatest single social cost of the adversary method of discovery.

The social and economic costs that result from the adversary nature of our discovery process are too high. This conclusion is compelled by the strong probability that the principal advantages that are attributed to the adversary character of this process could be preserved in large measure in an alternative system. According to Professor Rosenberg, Hickman v. Taylor and its progeny have sought to safeguard the “integrity of the adversarial process” in the pretrial stage for two main reasons: to protect lawyers’ “morale”

170. See W. GLASER, supra note 15, at 177-81; Rosenberg, supra note 91, at 480-81.
171. For what has come to be regarded as the seminal discussion of this problem by an American lawyer, see Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 40 AM. L. REV. 729 (1906).
and to "assure that both sides of the case will exert independent efforts in its preparation." That the "morale" of attorneys is so fragile, so dependent on opportunities to secure unfair advantages, or so important as to outweigh society's interest in justice is not obvious. Moreover, on closer examination it appears that the Supreme Court's interest in counsel's morale is indistinguishable from the Court's interest in bilateral preparation of cases. The Court's ultimate concern is to institutionalize assurances that the process of locating and interpreting evidence will benefit from the clash of competing minds.

It is by no means clear that preserving the extensive sway that adversarial forces enjoy under current discovery procedures is necessary to protect these concerns of the Court. The changes I propose would preserve counsel's motivation to push for full disclosure between adversaries and would leave ample room for the competitive examination and interpretation of evidence. Moreover, these changes would add, in the person of the court, a third informed perspective to the fray. This development would replace bilateral preparation with the even greater assurance of thoroughness and fairness that would result from a truly "trilateral" system.

Moreover, the suggestions offered here would leave the adversary character of civil trials fully intact. The greatest benefits of adversary litigation derive not from competitive efforts to limit and manipulate the flow of information but from dialectical evaluation of the relevant evidence. The drafters of the rules of discovery intended to leave dialectics in the courtroom; they did not expect it to play a major role in the process of collecting relevant information. It is arguable, in fact, that one of the primary goals of the proponents of the rules of discovery was to improve trial dialectics by substantially reducing the role of unfettered competition in the pretrial process. The drafters of these rules and their judicial allies seem to have realized that dialectics and Darwinism are not identical, and that the Darwinian character of trial preparation jeopardizes the attainment of dialectical truth at trial. It should be equally obvious today that the value of even the most vigorous dialectical process is necessarily limited by the data upon which that process operates. In short, the reliability of a system designed to ascertain the truth is a function of the quality of both the intellectual process employed and the information to which that process is applied. The goal of the changes I propose is to improve the scope and quality of

173. Rosenberg, supra note 15, at 492-93. Professor Rosenberg also refers to the latter factor as the courts' interest in "bilateral" preparation. Id. at 493.
that information. What I have tried to show is that the adversarial
character of civil discovery creates intense pressures which system-
atically militate against the production of all the information neces-
sary to resolve disputes fairly. If my thesis is correct, measures
designed to reduce the sway of adversary forces in the pretrial arena
offer the only real hope of making significant advances toward
achieving discovery's two primary purposes—the ascertainment of
truth and the encouragement of just settlements.

To imply that implementing the kinds of changes I propose
would involve neither risk nor cost would be both foolish and disingenu-
ous. I believe, however, that there is a strong possibility that
the risks and costs that would attend these changes would be greatly
outweighed by a substantial reduction in both the debilitating role
fortuity plays in civil litigation and in the social and economic
strains imposed by current discovery procedures. What is required
is a sophisticated empirical evaluation of the efficiency of the cur-
rent system and of the extent to which adversary and economic
pressures distort the informational package that reaches the parties
and the courts.\textsuperscript{174} If such a study demonstrates that the current
system of discovery is as inefficient and disfunctional as I believe it
is, then the legal community should make a major commitment to
designing alternatives and to analyzing fully their economic and
functional implications.

\textsuperscript{174} Professor Sherman Cohn of the Georgetown University Law Center has recently
completed (and not yet published) a survey of local discovery rules and practices in federal
district courts. While Professor Cohn's research does not address the fundamental issues
described here, it contributes useful foundation information for future studies.

A major effort to study discovery in practice is also presently taking place, under the
direction of William Eldridge, by the Federal Judicial Center. Thus far, the study has focused
on discovery practices in six United States district courts. The first stage of the study, which
was completed in June 1978, attempted to determine the extent to which discovery machinery
is used. The next stage of the study plans to identify the types of cases where discovery
problems are most pronounced.