

**THE STATE OF DISCOVERY PRACTICE IN CIVIL
CASES: MUST THE RULES BE CHANGED TO REDUCE COSTS
AND BURDENS, OR CAN SIGNIFICANT IMPROVEMENTS
BE ACHIEVED WITHIN THE EXISTING RULES?**¹

2009 was a busy year for those who contend that the excessive cost of the American civil justice system discourages litigation and undermines the courts' public function. Perhaps the biggest contributing factor is the excessive cost of discovery in many cases in relation to the stakes at issue. Three important surveys of lawyers² emerged in 2009 that lend credence to these concerns: the American College of Trial Lawyers/Institute for Advancement of the American Legal System survey of the Fellows of the American College of Trial Lawyers ("ACTL/IAALS

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² Interestingly, there do not appear to have been any recent surveys of judges to learn their perceptions regarding any shortcomings in the civil litigation system; their views with respect to suggested changes that should be adopted; or their opinions regarding how well they fulfill their obligations to manage the pretrial process, including prompt resolution of discovery disputes. The most recent judicial survey conducted by the Federal Judicial Center containing questions regarding discovery in general was conducted in 1992 and published in 1994. See *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* (1994). A 2002 Federal Judicial Center study surveyed magistrate judges, but it was limited to their experience with computer-based discovery issues. See Molly Treadway Johnson, Kenneth J. Withers & Meghan A. Dunn, *A Qualitative Study of Issues Raised by the Discovery of Computer-Based Information in Civil Litigation* (Sept. 13, 2002), http://www.fjc.gov/public/home.nsf/autoframe?openform&url_1=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/196 (submitted to the Judicial Conference Advisory Committee on Civil Rules for its October 2002 meeting). Given the central importance that all the lawyer surveys and the advisory notes to the Rules of Civil Procedure place on active involvement of judges in and management of the pretrial process, it would be highly instructive to see what the judges are thinking on these issues. It certainly would assist in determining whether there are widespread judicial attitudes that conflict with those of the bar.

Survey”);³ the Federal Judicial Center survey of lawyers involved in all cases that were closed during the fourth quarter of 2008 (“FJC Survey”);⁴ and the American Bar Association Section of Litigation survey of its members (“ABA Survey”).⁵

The ACTL/IAALS Survey resulted in various recommendations for reforms to the civil justice system, and the IAALS has followed up with recommended changes, including significant changes to the Rules of Civil Procedure,⁶ as well as suggested case management strategies to be used by courts to improve the functionality (or at least reduce the cost) of the system.⁷ For example, the ACTL/IAALS Survey took the position that “[a]fter initial disclosures are made, only limited additional discovery should be permitted. Once that limited discovery is completed, no more should be allowed absent agreement or a court order, which should be made only upon a showing of good cause and proportionality.” The Survey

³ See FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 1-3 (2009), <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053> (“Final Report”) (outlining survey and proposing solutions to problems identified in survey); INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (2008), http://www.actl.com/AM/Template.cfm?Section>All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=3650 (detailing survey results).

⁴ EMERY G. LEE, III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

⁵ ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT (2009), <http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf>.

⁶ For expediency, reference to the “Rules of Civil Procedure,” a “Rule,” or “Rules” will be to the Federal Rules of Civil Procedure.

⁷ INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: PILOT PROJECT RULES (2009), http://www.du.edu/legalinstitute/pubs/pilot_project_rules.pdf (“IAALS Pilot Project Rules”); INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: CIVIL CASEFLOW MANAGEMENT GUIDELINES 5 (2009), http://www.du.edu/legalinstitute/pubs/civil_caseflow_management_guidelines.pdf (“IAALS Guidelines”).

acknowledged that this was “a radical proposal.”⁸ As possible areas for further consideration, the ACTL/IAALS Survey also suggested revisions to the Rules to include, *inter alia*, limiting the scope of discovery by changing the definition of relevance; limiting persons from whom discovery can be sought; limiting the types of discovery (e.g., eliminating interrogatories); increasing numerical limitations on discovery; eliminating depositions of experts whose testimony is limited to the contents of their written reports; limiting the time available for discovery; and imposing financial limits on the amount of money that can be spent—or that a party can require its opponent to spend—on discovery.⁹

Similarly, the IAALS Pilot Project Rules aim to “reverse the default” position of the existing Rules on the scope of discovery, by limiting the facts that are subject to discovery;¹⁰ changing the rules of pleading to require the party bearing the burden of proof on a claim or affirmative defense to “plead with particularity all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages;”¹¹ and limiting expert discovery to the contents of a written report stating the opinions and supporting reasons.¹²

The ABA Survey reported that 25% of the lawyers who responded believed that the

⁸ Final Report, *supra* note 3, at 9.

⁹ *Id.* at 10-11.

¹⁰ IAALS Pilot Project Rules, *supra* note 7, at Rules 1.2 cmt., 10.2 (“Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality . . . including the importance of the proposed discovery in resolving the issues, total costs and burdens of discovery compared to the amount in controversy, and the total costs and burdens of discovery compared to the resources of each party.”).

¹¹ *Id.* at Rule 2.1 (defining a “material fact” as “one that is essential to the claim or defense and without which it could not be supported”).

¹² The expert’s testimony at trial would also be “strictly limited” to those opinions and reasons, with no additional expert discovery allowed, unless permitted in the initial pretrial order. *Id.* at Rule 11.1.

Rules “should be reviewed in their entirety and rewritten to address today’s needs.” More than 38% of the respondents believed that “one set of rules cannot accommodate every type of case.”¹³

While all of these studies increase awareness of deficiencies in the civil litigation system, it does not follow that a new round of comprehensive changes is the best or quickest way to achieve desired change. The old saying “[t]hose who cannot remember the past are condemned to repeat it”¹⁴ comes to mind regarding today’s criticisms of the state of discovery practice in civil cases. One need only read the Advisory Committee Notes for Rules changes decades ago to see that the same criticisms were raised then. While it is possible to envision some changes to the Rules of Civil Procedure, it is worth asking whether that is the best route to improvement, or whether the real problem is the failure to adhere to the Rules in their current form. In fact, the existing Rules provide all of the necessary tools to achieve the changes in practice that have eluded us for decades. Without behavioral change in the key participants in the civil justice system, however, even sweeping modifications to the Rules will not foster achievement of the desired goal. We might wish first to change the Rulers (judges) and the Ruled (lawyers) before reverting to yet another effort to change the Rules.

After all, there are three players in this drama whose actions cause the litigation system to succeed or fail: the parties themselves, the lawyers who represent them, and the judges who preside over their cases. Each is responsible for the status quo, and each must change if the system’s shortcomings are to be improved. While it may be true that ours is a litigious society, in our litigation system the parties have choices, each of which bears a price tag. Moreover, where, as in the United States, the general rule is that each side bears the cost for its own

¹³ ABA Survey, *supra* note 5, at 2.

¹⁴ George Santayana, *Reason in Common Sense*, in THE LIFE OF REASON (1905).

litigation expenses (including counsel fees), absent any cost shifting statute, contractual agreement, or egregious conduct of an adversary that warrants shifting the costs as a sanction, the parties have the power to increase or decrease the cost of litigation.

Parties that seek discovery from an adversary because, not in spite, of the cost or burden it will impose, as well as parties who willingly pay their attorneys handsomely for filing motions designed to delay or prolong the discovery process as a tactic to exhaust their opponent, all contribute to the cost of the process without increasing its quality or value. If the credo is “win at any cost,” the costs are likely to be substantial.

Parties who select the most expensive options, and courts who give them *carte blanche* to do so without imposing limitations, should not complain about the resulting cost. And the most costly process may actually violate due process if the cost is disproportional to the value of the case or beyond the means of the opposing party.

Similarly, lawyers who profit from actions that increase the cost of civil litigation—notably, adopting a gratuitously confrontational approach to discovery—also contribute to the problem. Indeed, the most self-righteous critics of the discovery practices of plaintiffs’ lawyers often are the defense counsel who are rewarded handsomely for their time and effort spent to obstruct, delay, or minimize that discovery.

Finally, if a recurrent theme can be divined from all of the studies and the commentary to the myriad rule changes in the last thirty years, it is that the most effective way to control litigation costs is for a judge to take charge of the case from its inception and to manage it aggressively through the pretrial process by helping shape, limit, and enforce a reasonable discovery plan, resolve disputes that the parties cannot settle on their own, and keep the case on a tight schedule to ensure the most expeditious disposition of the case by motion, settlement, or

trial.¹⁵

All of this makes sense in the abstract, but in practice the problem is nuanced and complicated. There are judges who, disliking the acrimony of discovery disputes, avoid taking control of the process.¹⁶ Likewise, many judges recognize the need to take control, but cannot

¹⁵ ABA Survey, *supra* note 5, at 3 (“78% of respondents believe that early intervention by judges helps to narrow the issues, and 72% believe that early intervention helps to limit discovery 73% of all respondents believe that when a judicial officer gets involved early and stays involved, the results are more satisfactory to their clients.”); Final Report, *supra* note 3, at 2 (“Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial. Where abuses occur, judges are perceived not to enforce the rules effectively. According to one Fellow, ‘Judges need to actively manage each case from the outset to contain costs; nothing else will work.’”); IAALS Pilot Project Rules, *supra* note 7, at Rule 4.1 (“As soon as a complaint is filed, a judge will be assigned to the case for all purposes, and, absent unavoidable or extraordinary circumstances, that judge will remain assigned to the case through trial and post-trial proceedings.”); IAALS Guidelines, *supra* note 7, at Guideline Two (“Judicial involvement in the management of litigation should begin at an early state of the litigation and should be ongoing. A single judge should be assigned to each case at the beginning of litigation and should stay with the case through its disposition.”); Fed. R. Civ. P. 26(g) Advisory Committee Note to the 1983 Amendment (“Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. *ACF Industries, Inc. v. EEOC*, 439 U.S. 1081 (1979) (certiorari denied) (Powell, J., dissenting). Sanctions to deter discovery abuse would be more effective if they were diligently applied ‘not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.’ *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976). . . . Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule’s standards will significantly reduce abuse by imposing disadvantages therefor. Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, see Brazil, *Civil Discovery: Lawyers’ Views of its Effectiveness, Principal Problems and Abuses*, American Bar Foundation (1980); Ellington, *A Study of Sanctions for Discovery Abuse*, Department of Justice (1979), Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court’s inherent power. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Martin v. Bell Helicopter Co.*, 85 F.R.D. 654, 661-62 (D. Col. 1980). . . . The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances.”).

¹⁶ The results of the ABA Survey showed that 59% of the lawyers believed that district judges are not available to resolve discovery disputes on a timely basis (although 66% of plaintiffs’ lawyers, 66.8% of lawyers representing both plaintiffs and defendants, and 72% of defense lawyers believed that magistrate judges were available to resolve discovery disputes on a timely basis); 62.6% of plaintiffs’ lawyers, 79.1% of lawyers representing both plaintiffs and defendants, and 81.2% of defense lawyers believed that judges do not invoke Rule 26(b)(2)(C) to limit discovery on their own initiative; and 67.3% of defense lawyers and 62.6% of lawyers representing both plaintiffs and defendants (but 38.2% of plaintiffs’ lawyers) believed that judges do not enforce Rule 26(b)(2)(C) to limit discovery, even when asked to do so by a party.

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do so, given the time constraints imposed by heavy caseloads. Similarly, without providing specific tools to ameliorate the situation, it is unhelpful to admonish lawyers that the rules of professional responsibility, the adversary system, and the Rules of Civil Procedure all support the proposition that cooperation in discovery is the most effective way to represent a client well and achieve a good result. Finally, because the parties themselves so seldom are involved directly with the court during the pretrial stages, it is not surprising that their perceptions are affected by their self-interest, the quantum of resources they are prepared to spend on the litigation, and what their lawyers advise them will be allowed. Litigation by attrition, for those who can afford it, is endorsed if not actively encouraged. The inevitable result is disproportionality. While some judges involve the parties in developing a pretrial schedule and discovery plan to control costs and ensure proportionality, this practice is not sufficiently commonplace, for understandable reasons: Active and informed case management takes time, and time is the most precious and scarce judicial resource. Often, however, the investment of a few hours can avoid hundreds of hours, and thousands or millions of dollars, of the litigants'—and the courts'—time and money.

The remainder of this paper makes two points. First, the tools already exist to ensure that the civil litigation process is cost-effective, is proportional to what is at issue in the litigation, and affords both sides fair discovery to ensure that essential facts needed to adjudicate or resolve the case are discovered. Second, the real change that is needed is a change in existing, inappropriate attitudes and behaviors that have stymied efforts to reach the goal of widespread cost-effective, proportional pretrial proceedings, including discovery. The starting place for this discussion is the Rules themselves.

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ABA Survey, *supra* note 5, at 63-64, 77-78.

Rule 26(d)(1) prohibits a party from seeking discovery before the parties have conferred as required by Rule 26(f), which requires that the parties meet “as soon as practicable” to consider “the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case . . . [and] discuss any issues about preserving discoverable information; and develop a proposed discovery plan.”¹⁷ A failure to participate in good faith in developing such a plan is sanctionable under Rule 37(f). The discovery plan that the parties must develop and submit to the court for approval must be comprehensive and include the parties’ “views and proposals” with regard to: Rule 26(a) required disclosures (e.g., what disclosures have been or will be made, whether other disclosures are necessary, and whether the timing and form of disclosures is appropriate), Rule 26(f)(3)(A); the subjects of and timeline for discovery, as well as any limitations that should be imposed, Rule 26(f)(3)(B); electronic discovery (e.g., form of production), Rule 26(f)(3)(C); privilege or protection of trial-preparation materials, and whether the court should incorporate any agreement that the parties may have reached regarding post-production assertion of privileges, Rule 26(f)(3)(D); discovery limitations that should be lifted or imposed, Rule 26(f)(3)(E); and any relevant orders that the court may have issued, Rule 26(f)(3)(F). Though easy to overlook in this list, Rule 26(f)(3)(E) is especially instructive, as it allows the parties to discuss and provide the court with their views on any changes that should be made in the limitations on discovery imposed under the Rules, or any local rule of court, and what, if any, limitations should be imposed.

The provisions of Rule 26 allow a defendant, for example, to observe that given the

¹⁷ Rule 26(d)(1) provides some exceptions to this prohibition, namely when Rule 26(a)(1)(B) exempts a proceeding from initial disclosure or when the Rules, a court order, or a stipulation authorizes earlier discovery.

likelihood that the plaintiff will recover only a modest sum of money if he wins, discovery should be limited to no more than two depositions of not more than two hours each, interrogatories should be foregone, document production should be limited to a few key documents, and written expert reports should suffice, with no expert depositions allowed. The plaintiff would be free to agree or not, and the issue would be framed for a Rule 16(a) conference with the court. Rule 16(f) permits the court to sanction a party or attorney who is substantially unprepared to participate, or who fails to participate in good faith, in the conference. Rules 16 and 26 enable—indeed, require—the court to determine and enforce a proportional discovery plan even if one or both sides seems bent on unreasonable or excessive discovery.

Critics of the status quo who lament the Rules' apparent “one-size-fits-all” approach to discovery, and who argue that certain types of cases warrant special rules, overlook the utility of Rules 26(f) and 16(a). Why are special rules needed if an experienced judge can sit down with counsel to tailor a discovery plan for a particular case, unless it is because: (a) the parties or lawyers are not acting in good faith; (b) the parties or lawyers are taking generalized and doctrinaire positions unsupported by specific facts; (c) the court is not taking seriously its obligation to manage the case, or is unable to do so because of the crush of other business; (d) those involved are unfamiliar with or unappreciative of the flexibility and alternatives available under the existing Rules; or (e) a combination of the above?

Anecdotal evidence from the judges' perspective indicates that courts seldom receive proposed discovery plans from the parties that reflect meaningful efforts to drill down on the issues they are supposed to discuss at the Rule 26(f) conference. Why then adopt a slew of new discovery rules that make *a priori* determinations about the amount of discovery that should be allowed in particular classes of cases, when for each generalized assumption there may be valid

reasons for allowing different discovery than permitted by the Rules? It is inconceivable that any new rule limiting discovery for particular classes of cases or limiting particular types of discovery will not have “unless otherwise ordered by the court for good cause shown” or similar language tacked on. In that event, all that will be accomplished when the parties disagree is that there will be a new round of motions practice that, if not promptly resolved by the court, will delay the proceedings and add to the costs. Would it not be easier before adopting new rules, to address the reasons why parties, lawyers, and judges do not employ the existing Rules to achieve the same result on a case-by-case basis?

Rules 16(a) and 26(f) are not the only case management tools ignored or honored in the breach. Rule 16(c) prescribes the ground rules and provides a menu of procedures and innovations for consideration at one or a series of pretrial conferences. Rule 16(c)(2)(A)-(P) offers an array of discovery, case management, and trial alternatives that enable the cost and complexity of the procedures of every case to be custom-tailored to the nature and scope of the issues, and to the amount at stake. This is far from a “one-size-fits-all” system, and its manifest goal, as stated in Rule 16(c)(2)(P), is to facilitate “the just, speedy, and inexpensive determination of the action.” This is not a vague bromide. The Rule 16(c)(2) toolkit includes suggestions for limits on discovery, cumulative evidence, deposition and trial time, and pretrial motions, by using admissions, stipulations, amendments, periodic formal or informal status conferences, and creative uses of severance and consolidation under Rule 42, as well as summary adjudication under Rule 56. If a lawyer, party, or the court offers a good idea to streamline discovery or trial, or to advance the determination of a threshold or dispositive issue, the Rule 16(c)(2)(A)-(P) menu includes, allows, and encourages it.

Further, Rules 26(b)(2)(C) and 26(g) contain powerful language intended to ensure that

discovery in each case is tailored to that which is proportional to what is at issue in the case, taking into consideration a wide range of cost-benefit factors. Rule 26(g) provides that the signature of a lawyer or unrepresented party on a discovery request, response, or objection certifies that, *inter alia*, it is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake.” Similarly, Rule 26(b)(2)(C) states that the court, on its own or in response to a motion, *must* limit the frequency or extent of discovery otherwise allowed by these rules or by local rules if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.¹⁸

Any truth behind the “disproportionality” point made at the outset of this article is thus not expressive of a failure in the Rules themselves, but rather, must be viewed as an indictment of the parties, lawyers, and judges for allowing this to occur in the face of constraints that the Rules already provide. The problem is an absence of will.

Consider the following hypothetical, which exemplifies what is considered wrong in discovery today. The plaintiff, a woman, sues a large corporation alleging discriminatory employment practices that prevented her selection for a senior management position that went to an allegedly less-qualified man. Contemporaneously with filing suit, her lawyer sends a demand to the defendant to preserve electronic and hard-copy documents and data on the desktop

¹⁸ FED. R. CIV. P. 26(b)(2)(C) (emphasis added).

computers, laptops, PDAs, backup tapes, voicemail, and text messages of a long list of “key players” in the litigation. She threatens spoliation sanctions if these demands are not met. At the Rule 26(f) “meet and confer,” she says she intends to request production of voluminous documents going back fifteen years; depose more than ten fact witnesses; take a Rule 30(b)(6) deposition covering twenty-four subjects; and engage in expert witness discovery involving multiple experts.

The defendant objects, in generalized and non-specific terms, that the discovery sought is excessively burdensome and costly; that plaintiff seeks discovery from sources that are not reasonably accessible and would involve undue expense; that the assembly of the electronic data responsive to the discovery demand would involve countless hours to screen it for relevance and to withhold privileged or work-product protected information; and that all this is patently excessive because the plaintiff has little chance of prevailing, and that even if she did, her likely recovery would be paltry compared to the discovery cost that the defendant would bear.

What can be done to address the plaintiff’s legitimate discovery needs while ensuring that the cost of the pretrial process is not disproportionately expensive or burdensome? Must we change the discovery rules to prohibit interrogatories in this case, limit the number of depositions beyond the ten that are already allowed by the Rules, or prohibit discovery of electronically stored information (“ESI”), as some have proposed? Or can any “disproportionality” problem be solved simply by adherence to the present Rules? The answer is obvious. If the plaintiff’s attorney abides by the requirements of Rule 26(g), she cannot in good faith make the broad discovery demands that she has made until she makes a “reasonable inquiry” and concludes that her demands are “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of

the issues at stake in the action.”¹⁹

Similarly, the defense attorney is obligated to ask the same questions before objecting to the requested discovery (and considerable case law requires that objections based on burden or expense must be made with factual particularity, or else they are waived).²⁰ If both counsel comply with Rule 26(g), they are well prepared, at their Rule 26(f) discovery planning conference, to evaluate the factors in Rule 26(f)(3)(A)-(F) to reach an accommodation to the extent possible, and to agree to disagree on those issues that require judicial resolution.

In doing so, they are limited only by their own imagination and their willingness to cooperate in the process to obtain outcomes favorable to their clients, without sacrificing legitimate areas of disagreement. They surely are not limited by the Rules. The options available to them are staggering. They can agree to forego interrogatories, or limit them, or phase them, saving, for example, the more burdensome “contention interrogatories” until the end of discovery. They can phase the discovery to focus first on a limited sub-set of witnesses and documents that are most likely to yield the most evidentiary “bang-for-the-buck,” while reserving the right to seek additional discovery in the future if warranted by what the initial discovery has disclosed. If worried about the cost of reviewing limitless ESI for privilege or work product, they can agree to use electronic search and information retrieval techniques and

¹⁹ FED. R. Civ. P. 26(g)(1)(B)(iii).

²⁰ See, e.g., Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358-59 (D. Md. 2008); A. Farber & Partners, Inc. v. Garber, 234 F.R.D. 186, 188 (C.D. Cal. 2006); Hall v. Sullivan, 231 F.R.D. 468, 473-74 (D. Md. 2005); Wagner v. Dryvit Sys. Inc., 208 F.R.D. 606, 610 (D. Neb. 2001) (citing Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 296-97 (E.D. Pa. 1980)); Thompson v. Dep’t of Hous. & Urban Dev., 199 F.R.D. 168, 173 (D. Md. 2001); Marens v. Carrabba’s Italian Grill, Inc., 196 F.R.D. 35, 38 (D. Md. 2000) (citing Tucker v. Ohtsu Tire & Rubber Co., 191 F.R.D. 495, 498 (D. Md. 2000); Kelling v. Bridgestone/Firestone, Inc., 157 F.R.D. 496, 497 (D. Kan. 1994); Eureka Fin. Corp. v. Hartford Accident & Indem. Co., 136 F.R.D. 179, 182-83 (E.D. Cal. 1991); Willemijn Houdstermaatschaapij BV v. Apollo Computer, Inc., 707 F. Supp. 1429, 1439-40 (D. Del. 1989)); Momah v. Albert Einstein Med. Ctr., 164 F.R.D. 412, 417 (E.D. Pa. 1996); Obiajulu v. City of Rochester, Dep’t of Law, 166 F.R.D. 293, 295 (W.D.N.Y. 1996); Harding v. Dana Transp., Inc., 914 F. Supp. 1084, 1102 (D.N.J. 1996).

sampling,²¹ combined with a Fed. R. Evid. 502(e) non-waiver agreement, and ask the court to approve it under Fed. R. Evid. 502(d) so that it is binding on non-parties. They can agree to postpone expert discovery until after fact discovery is over, or simply to exchange expert reports that comply with Rule 26(a)(2)(B) and forego expert depositions. As for the issues on which they disagree, despite good faith efforts to reach an accord, parties can file a motion with the court requesting a prompt ruling.²² They can do all this and more to tailor the discovery to the legitimate needs of the parties while keeping it proportional, and yet they do not, in so many cases.

The existing Rules cannot work to deliver fair and proportional discovery unless the parties and their lawyers approach the process with genuine cooperation, instead of gamesmanship. While the word “cooperation” does not appear in the discovery rules themselves, the Rules cannot work without it, and trial and appellate courts long have held that cooperation during discovery is both essential and expected.²³ Moreover, the recent surveys

²¹ See Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 260-61 (D. Md. 2008) (discussing search and information retrieval techniques (such as individual key words, Boolean searches, identifying a “core” search, and “cluster” searching) and non-waiver agreements).

²² And, pursuant to Rule 26(b)(2)(C), the court has an obligation to resolve the dispute in a way that achieves the goals of fair and proportional discovery. In this process, the court also is limited only by its imagination and interest, and failure of will should be no excuse.

²³ See, e.g., Kemp v. Harris, No. WDQ-08-0793, 2009 WL 3030738, at *3-4 (D. Md. Sept. 22, 2009) (observing that “this entire dispute could, and should, have been avoided had counsel cooperated in the conduct of discovery, as they are obligated to do” and directing parties to “meet and confer regarding Harris’s contention”) (citing *Mancia*, 253 F.R.D. at 358; Rule 26(g)); Oracle USA, Inc. v. SAP AG, No. C-07-01658 PJH (EDL), 2009 WL 3009059, at *2 (N.D. Cal. Sept. 17, 2009) (noting that “the Court has repeatedly emphasized that the scope of this case required cooperation in prioritizing discovery and in being mindful of the proportionality requirement of Federal Rule of Civil Procedure 26” and that the “lack of prompt disclosure . . . and the failure to cooperate on defining the contours of appropriate discovery . . . threatens the fair and cost-effective exchange of relevant discovery”) (citing The Sedona Conference, *The Sedona Conference Cooperation Proclamation* (2008) (“SCCP”), available at http://www.thesedonaconference.org/content/tsc_cooperation_proclamation, as “promoting ‘open and forthright information sharing . . . to facilitate cooperative, collaborative, transparent discovery’”); Gipson v. Sw. Bell Tel. Co., No. 08-2017-EFM-DJW, 2009 WL 790203, at *21 (D. Kan. March 24, 2009) (advising counsel “to communicate and cooperate in the discovery

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process in an attempt to resolve their discovery disputes without judicial involvement” and remarking that “[a]ll parties will benefit if they can avoid the further costs of filing additional motions and voluminous briefs”), *aff’d in part, denied in part on other grounds*, No. 08-2017-EFM, 2009 WL 4157948 (D. Kan. Nov. 23, 2009); *Viacom Int’l, Inc. v. YouTube, Inc.*, No. C-08-80211 MISC. JF(PVT), 2009 WL 102808, at *7 (N.D. Cal. Jan. 14, 2009) (directing the parties to “meet and confer on the format of production” and stating that it “‘is in the interests of each of the parties to engage in this process cooperatively’”) (quoting *Mancia*, 253 F.R.D. at 365), *aff’d*, No. C-08-80211 MISC. JF(PVT), 2009 WL 1110818 (N.D. Cal. Apr. 24, 2009); *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414-15 (S.D.N.Y. 2009) (bringing to the parties’ attention the SCCP, and stating that it “urges parties to work in a cooperative rather than an adversarial manner to resolve discovery issues in order to stem the ‘rising monetary costs’ of discovery disputes” and the SCCP “notes that courts see the discovery rules ‘as a mandate for counsel to act cooperatively’”; directing counsel “to meet and confer forthwith and develop a workable search protocol that would reveal at least some of the information defendant seeks”); *Mancia*, 253 F.R.D. at 357-58 (“It cannot seriously be disputed that compliance with the ‘spirit and purposes’ of these discovery rules [i.e., Rules 26-37] requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation. Counsel cannot ‘behave responsively’ during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.”); *Bd. of Regents of the Univ. of Neb. v. BASF Corp.*, No. 4:04CV3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) (“The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable.”); *Network Computing Servs. Corp. v. CISCO Sys., Inc.*, 223 F.R.D. 392, 395-96 (D.S.C. 2004) (discussing problems caused by failures of counsel and parties to approach discovery more cooperatively and professionally); *see also Malot v. Dorado Beach Cottages Assocs.*, 478 F.3d 40, 44-45 (1st Cir. 2007) (sustaining certain sanctions imposed by district court for discovery violations and noting with disapproval the lack of cooperation and responsiveness of defendants to plaintiff’s attempts to comply with the discovery schedule); *Sweat v. Peabody Coal Co.*, 94 F.3d 301, 306 (7th Cir. 1996) (“This Court cannot determine where the fault in this latest breakdown of attempted discovery lies. The Court is therefore assuming that both attorneys have failed in this regard. This Court is not happy with the progress, or should say lack of progress, relating to getting this case ready for trial. It is apparent that the attorneys involved in this case do not like each other, do not get along, and will not cooperate in the discovery process. The people who suffer when this happens are the parties.”); *Buss v. W. Airlines, Inc.*, 738 F.2d 1053, 1053-54 (9th Cir. 1984) (“The voluminous file in this case reveals that a vast amount of lawyer time on both sides was expended in largely unnecessary paper shuffling as the parties battled over discovery and preliminary matters. . . . It is not the purpose of this decision to assess fault. The trial judge, however, was not at fault. A judge with a caseload to manage must depend upon counsel meeting each other and the court halfway in moving a case toward trial.”); *Flanagan v. Benicia Unified Sch. Dist.*, No. CIV S-07-0333, 2008 WL 2073952, at *10 (E.D. Cal. May 14, 2008) (“The abusiveness of plaintiff’s discovery responses indicate a lack of cooperative spirit. . . . [P]laintiff’s wilful disregard of the Federal Rules, and her lack of communication and cooperation with defense counsel in regard to all discovery, undermine the judicial process plaintiff herself has invoked.”); *Marion v. State Farm Fire & Cas. Co.*, No. 1:06cv969-LTS-RHW, 2008 WL 723976, at *3-4 (S.D. Miss. Mar. 17, 2008) (“[T]he gravest ‘error’ committed by the Magistrate [Judge] was thinking that ‘the parties [could] meet and confer to discuss any outstanding discovery requests,’ because after this ‘meet and confer’ it was ‘clear that the parties had done little to resolve their perceived differences on document production.’ . . . This Court demands the mutual cooperation of the parties. It hopes that some agreement can be reached. . . .

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reveal that lawyers themselves recognize that discovery costs are reduced, the case proceeds more smoothly, and advocacy is not adversely affected when the parties cooperate in discovery.²⁴ Why then, is such cooperation so often lacking in the discovery process?

The answer is not simple. At the outset, it is hard to measure the degree to which litigants cooperate because in those cases, judicial intervention is less likely to be required. Additionally, the notion that cooperation is required during discovery runs counter to imagined requirements of the adversary system persistently held by many lawyers. This perception, however, ignores the fundamental requirements of the adversary system itself.²⁵ The hallmarks of the adversary system were best stated by one of its most ardent proponents, Professor Lon L. Fuller,²⁶ as follows:

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Neither [the Magistrate Judge] nor this Court will hesitate to impose sanctions on any one—party or counsel or both—who engages in any conduct that causes unnecessary delay or needless increase in the costs of litigation.”) (citing Rule 26(g)); *In re Spoonemore*, 370 B.R. 833, 844 (Bankr. D. Kan. 2007) (“Discovery should not be a sporting contest or a test of wills, particularly in a bankruptcy case where the parties’ resources are limited and the dollar value of the stakes is often low. When a party and its counsel are as intransigent and uncooperative in discovery as [the parties] have been in this matter, the Court has no choice but to impose sanctions that, hopefully, emphasize that the conduct sanctioned is both unprofessional and unacceptable.”); *Azalea Garden Bd. & Care, Inc. v. Vanhoy*, No. 06 CVS 0948, 2009 WL 795287, at *6 (N.C. Super. Ct. Mar. 6, 2009) (“Judges and lawyers should resurrect the original intention of the discovery rules, which was to make discovery a more cooperative and less adversarial system designed to reduce, not increase, the cost of litigation. . . . Our system of civil justice cannot function effectively and economically unless lawyers and judges return to the original intention of the discovery rules and make cooperation, communication, and transparency the cornerstones of the discovery process.”).

²⁴ FJC Survey, *supra* note 4, at 63 (reporting that, with regard to the statement “Attorneys can cooperate in discovery while still being zealous advocates for their clients,” 63.7% of plaintiffs’ lawyers “agreed or strongly agreed,” 61.8% of lawyers representing both plaintiffs and defendants “agreed or strongly agreed,” and those primarily representing defendants “agreed or strongly agreed” 55.9% of the time); ABA Survey, *supra* note 5, at 3, 11 (“95% [of respondents] believe that collaboration and professionalism by attorneys can reduce client costs”).

²⁵ *Mancia*, 253 F.R.D. at 361 (“The central precept of the adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society.”).

²⁶ Professor Fuller “was a celebrated professor at Harvard Law School who wrote extensively on jurisprudence, including the importance of the adversary system.” *Mancia*, 253 F.R.D. at 361

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Thus, partisan advocacy is a form of public service so long as it aids the process of adjudication; it ceases to be when it hinders that process, when it misleads, distorts and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult.

....

The lawyer's highest loyalty is at the same time the most tangible. It is loyalty that runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.

. . . A lawyer recreant to his responsibilities can so disrupt the hearing of a cause as to undermine those rational foundations without which an adversary proceeding loses its meaning and its justification. Everywhere democratic and constitutional government is tragically dependant on voluntary and understanding co-operation in the maintenance of its fundamental processes and forms.

It is the lawyer's duty to preserve and advance this indispensable co-operation by keeping alive the willingness to engage in it and by imparting the understanding necessary to give it direction and effectiveness. . . .

. . . It is chiefly for the lawyer that the term "due process" takes on tangible meaning, for whom it indicates what is allowable and what is not, who realizes what a ruinous cost is incurred when its demands are disregarded. For the lawyer the insidious dangers contained in the notion that "the end justifies the means" [are] not a matter of abstract philosophic conviction, but of direct professional experience.²⁷

The adversary system can be justified as our society's preferred method for resolving disputes only to the extent it promotes efficient and reasonable procedures leading to the identification of the competing facts that support the "sharp clash of proofs" presented to the fact-finder for resolution. As Professor Fuller aptly noted, "partisan advocacy" is not a public service when it hinders, rather than aids, the process of adjudication, or makes the job of the

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n.4. One of his most influential publications was *The Forms and Limitations of Adjudication*, 92 HARV. L. REV. 353 (1978).

²⁷ Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162, 1216 (1958).

“deciding tribunal” more difficult.²⁸ While a lawyer owes a duty of advocacy to the client, this duty must co-exist with, not undermine, a concomitant duty to the court to ensure that the process of adjudication is fair, efficient, and cost-effective. As noted in *Mancia*²⁹:

A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is, as Professor Fuller observes, hindering the adjudication process, and making the task of the “deciding tribunal not easier, but more difficult,” and violating his or her duty of loyalty to the “procedures and institutions” the adversary system is intended to serve. Thus, rules of procedure, ethics and even statutes make clear that there are limits to how the adversary system may operate during discovery.

Most lawyers will agree in theory with the above discussion. Applying it in a specific case, however—where a client is hell-bent to crush its adversary and has the resources to find another, more aggressive and less scrupulous lawyer to do so, should its present lawyer be perceived as too timid—is another matter. The challenge is to convince clients that it is in their economic interest to cooperate with the adverse party to reduce costs so as to focus on what really matters. As long as skeptics dismiss the call to a cooperative approach to discovery as the unachievable, unrealistic, and idealistic aspiration of those who observe the process from afar, reform efforts are likely to fail. The difficult work is showing the skeptics why they are wrong.³⁰

²⁸ *Id.* (quoted in *Mancia*, 253 F.R.D. at 361-62).

²⁹ 253 F.R.D. 362-63 (footnotes omitted that cite, e.g., Fed. R. Civ. P. 26(c)(1), (f), (g), 37(a)(1); Model Rules of Prof'l Conduct R. 3.4(d) & cmt. [1] (2007); 28 U.S.C. § 1927 (2006)).

³⁰ Here is an especially thoughtful observation on this problem:

Cooperation, however, is in the interest of even an aggressive client, and an attorney who persuasively explains this to the client serves both the client and his or her own professional obligations. Such a client must first understand what cooperation is and is not. Cooperation in the discovery context does not mean giving up vigorous advocacy; it does not mean volunteering legal theories or suggesting paths along which discovery might take place; and it does not mean

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That work has begun in earnest, and it deserves and requires widespread and enthusiastic support. In 2008, The Sedona Conference (the “Conference”), long respected for its pioneering work in developing best practices in the area of discovery of ESI, published its “Cooperation Proclamation,” which launched “a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.”³¹ The Conference then went further,

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forsaking meritorious procedural or substantive issues. Cooperation does mean working with the opposing party and counsel in defining and focusing discovery requests and in selecting and implementing electronic searching protocols. It includes facilitating rather than obstructing the production and review of information being exchanged, interpreting and responding to discovery requests reasonably and in good faith, and being responsive to communications from the opposing party and counsel regarding discovery issues. It is characterized by communication rather than stonewalling, reciprocal candor rather than “hiding the ball,” and responsiveness rather than obscuration and delay.

...

Moreover, both counsel and clients should recognize that an obstructionist, overreaching, or simply non-cooperative approach to discovery invites adverse consequences for the non-cooperative party itself. This can take the form of non-cooperative conduct in return from the other side, leading the parties to conduct discovery “the hard way,” with each party incurring unnecessary expense as a result of the other side’s non-cooperative approach, but neither gaining a strategic or tactical upper hand. It can also take the form of an adverse decision or even sanctions on the discovery dispute in question. Non-cooperative conduct early in the discovery process can lead a court to view that party’s position less favorably when discovery disputes ripen and come before the court.

The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 359-60 (Supp. 2009), available at http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/caseforcooperation.pdf. A further way to overcome client skepticism regarding the need for and benefits of cooperation during discovery would be to involve the client or client representatives in the pretrial conference with the court. Anecdotal evidence from judges who have done so suggests that when the client hears directly from the court the advantages of cooperation and disadvantages of failing to cooperate, especially if expressed in economic terms, even clients who are hostile to their adversary can come to understand why it is to their own advantage to cooperate.

³¹ The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 331 (Supp. 2009) (“Cooperation Proclamation”), available at http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation_article.pdf (reprinting the Cooperation Proclamation).

proposing to develop “a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding,” including developing “toolkits” to train and support judges, professionals, and students in the techniques of cooperative and collaborative discovery.³² The Conference has published an article titled *The Case For Cooperation*, which comprehensively discusses the problems that exist due to the failures of cooperation during discovery; the requirement of cooperation that is implied in the Rules of Civil Procedure; the fact that the ethical and professional obligations of lawyers are consonant with cooperation; and perhaps most importantly, the fact that cooperation produces economic and strategic benefits to the client.³³

In an article titled *The Bulls-Eye View of Cooperation in Discovery*, Professor Stephen S. Gensler³⁴ described in pragmatic and clear terms a model that “identifies and justifies the different types of cooperation in a way that reinforces—rather than diminishes—the overall campaign” to achieve cooperation during discovery.³⁵ The Conference has now begun to draft the “toolkits” to be made available to lawyers, judges, court-appointed experts, volunteer mediators, law students, and alternative dispute resolution programs, which can be used to teach

³² *Mancia*, 252 F.R.D. at 363 (citing the Cooperation Proclamation).

³³ *The Case for Cooperation*, *supra* note 30, at 339. Justice Stephen G. Breyer of the United States Supreme Court authored the preface to the Volume 10 Supplement to *The Sedona Conference Journal*, in which he stated:

The Sedona Conference Cooperation Proclamation, and supporting document, The Case for Cooperation, suggest that if participants in the legal system act cooperatively in the fact-finding process, more cases will be able to be resolved on their merits more efficiently, and this will help ensure that the courts are not open only to the wealthy. I believe this to be a laudable goal, and hope that readers of this Journal will consider the articles carefully in connection with their efforts to try cases.

Stephen G. Breyer, *Preface*, 10 SEDONA CONF. J. i, i (Supp. 2009).

³⁴ Welcome D. & W. DeVier Pierson Professor, University of Oklahoma College of Law.

³⁵ Stephen S. Gensler, *A Bulls-Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363, 363 (Supp. 2009).

and facilitate cooperation during discovery.

While inaugurated by the Conference, the effort to achieve cooperation in discovery cannot succeed unless joined by others who want to change the way that discovery is practiced. The organizations and lawyer associations calling for change, educators who will produce the future litigators, and the courts themselves³⁶ must participate in this effort. This does not mean that the call for rule changes that might promote cost-effective, fair, and proportional discovery need be abandoned. But Rule changes are not enough. Attitudes and behaviors must change as well.

Logically, if a change in attitudes is to take hold, it should start in the law schools. Unfortunately, law schools generally do not focus on discovery practice, providing no more than a cursory examination of how discovery relates to the Rules of Civil Procedure. Rarely do curricula address the real-life challenges and demands of litigation practice in our stressful economic environment. At most, these issues are relegated to seminars taught by adjunct professors. Law school faculty should be enlisted to teach students the problems that discovery presents, and the procedural tools to solve them. The ethics and principles to which lawyers should adhere must be integrated with traditional civil procedure and litigation courses.

The remainder of this paper illustrates the kinds of steps that the key players in litigation can take to tailor discovery to the needs of specific cases, such that the discovery process is proportional to the claim. The list is intended to prompt imaginative counsel and judges to use the existing rules in a manner that achieves these goals, and is by no means exhaustive.

1. Develop a Discovery Budget, and Involve the Parties in the Process.

As suggested in *Mancia*, 253 F.R.D. at 364, when the parties meet and confer to develop

³⁶ As of October 2009, ninety-five federal and state trial and appellate judges, the author of this article included, have endorsed the Cooperation Proclamation. Cooperation Proclamation, *supra* note 31, at 334-38.

a discovery plan, they should attempt to develop a “discovery budget.” This should start with an exchange of estimates regarding the range of recovery that might be expected if the plaintiff prevails in the litigation. While this works best in cases where the primary goal is to recover money, it also can be used in cases for equitable relief. If counsel agree that the plaintiff, if successful, is likely to recover between \$750,000 and \$1,000,000 (and that, if the plaintiff does not prevail, recovery will be \$0), then they next attempt to agree on what percentage of that figure is reasonable to expend on the discovery process. Stated differently, they attempt to answer this question: “In a rational dispute resolution process, how much money should be expended to discover the facts needed to resolve a dispute worth at most \$1,000,000?” Lawyers know what discovery costs, whether it is per page, per hour, per expert, or per deposition. Even if the lawyers cannot fully agree, they usually are able to estimate a range, and generally, their estimates overlap considerably.³⁷ Reasonable minds can differ, but no one would say that the cost of resolving a dispute should equal the amount of the largest probable recovery. If the plaintiff says that the “transaction cost” for discovery should be up to 30% of the possible recovery, or \$300,000, and the defense attorney says only 15%, or \$150,000, an average of the two can produce a useful measure to use to try to develop a budget.

While lawyers know the cost of fact discovery and expert witnesses, many judges do not, which handicaps them in managing the process. How much do expert witnesses charge? How many hours are involved in preparing an expert report, and in preparing for, and taking and defending, an expert deposition? What do lawyers charge per hour, and how many lawyers, for

³⁷ The experience of most judges that have been involved in settlement negotiations with counsel is that even when the parties disagree on which side is likely to prevail, they usually agree substantially about the probable range of damages that may be recovered. Even if they do not, a useful range can be obtained for planning purposes by simply averaging the projections of counsel to come up with a useful yardstick.

how many hours, will be engaged in the discovery process? Judges who are charged by the Federal Rules to ensure proportionality need that information in order to do their jobs. Absent disclosure of those estimated costs, often an unbalanced equation exists in which plaintiffs' counsel, often prosecuting on a contingency basis, endeavor to limit the costs they advance and the time they spend, while defense counsel, working on an hourly basis, do the reverse. Judges can restore the balance, so that the only burden imposed is the burden of proof, not the burden to match the time and costs of the side that is prepared to spend more.

Under a budget system, counsel (with the assistance of their clients) discuss the discovery required to develop the facts reasonably needed to evaluate the case for settlement, dispositive motions, or trial. This entails estimating actual costs of document production, including ESI, and all its attendant costs (such as privilege review). Necessarily, rough estimates are assigned, but that exercise alone tends to open the eyes of both client and attorney as to what the real costs may be. If it becomes apparent, for example, that the documents that the plaintiff intends to request would impose excessive costs on the defendant to assemble, review, and produce, then the parties should discuss the plaintiff's priorities, focusing on the most important documents, and reserving for another day the right to demand more, if necessary.

Judges who have ordered phased discovery, focusing first on that which is most likely to reveal the most relevant information, permitting the parties to seek additional discovery later (albeit with the possibility of cost-shifting), have found that they seldom return for more. Rather, they cooperate in identifying key inquiries and information and the most efficient means to discover it. If the parties then find that they must seek additional discovery, that request is generally based on a far more accurate showing of need.

It is important to involve the principals in discussing the discovery budget, especially

when the discussion addresses the cost-benefit proportionality factors of Rule 26(b)(2)(C), and the procedural options of Rule 16(c)(2). When the costs are taken into account and subtracted from gross recovery, it is amazing how quickly attitudes can be reformed. The common experience of magistrate judges, who frequently supervise the discovery process, has been that when asking plaintiffs' counsel how much the plaintiff is willing to pay to cover the cost of the additional discovery that the plaintiff wants beyond what was allowed in the first phase of discovery, few have responded that their clients were willing to absorb, or even share, the additional expense.³⁸

Significantly, if cooperation is insufficient, or the parties simply cannot agree on a budget, that does not doom the effort to develop a realistic budget. The judge assigned to the case can resolve any disagreements to set the budget, or appoint a third party with the experience and knowledge to act as a mediator to recommend an initial budget.

Some argue that setting a discovery budget is more difficult in cases in which money damages are not the primary objective, or when the case is unique (e.g., a case of first impression, or one brought to establish important rights or obligations). Though this may be true, two observations are in order. First, the vast majority of cases in both state and federal court are filed exclusively, or at least primarily, to obtain money damages. Second, even for those that are not, it is still useful to develop a discovery budget by cooperatively discussing the amount and nature of discovery each party will require, and by evaluating the importance of the subject matter of the litigation and the resources of the parties.

A final note in this regard. As suggested above, if a judge must resolve greatly divergent

³⁸ This assumes, of course, that the first phase of discovery was indeed focused on the plaintiff's most important discovery needs, the amount of initial discovery was reasonable, and the defendant has responded diligently and in good faith to make a complete and responsive production. If not, then cost-shifting is unfair and inappropriate.

positions regarding the development of a discovery budget, a meeting with counsel and the parties may be in order. Each lawyer can be asked to state the discovery sought and to estimate the amount of time and cost that his or her client will have to bear to obtain it. When required to make such an estimate in the client's presence, a lawyer is less likely to give an artificially low estimate for fear that the client will be upset if the prediction is low, and the final bill is substantially larger. The judge can facilitate this candor by asking the lawyer: "Will you put that estimate in writing and agree that if you are wrong, you will not charge more?" A hesitant response will speak volumes regarding the bona fides of the estimate. Similarly, if a lawyer is on a contingency, the judge can ask, in the client's presence: "If the court orders this additional discovery that you say you must have, and which your adversary objects to as excessively burdensome and expensive, how much of it is your client willing to pay to require the defendant to produce it?" Few plaintiffs in contingency cases are prepared for *this* contingency. Suggesting it can help a great deal in readjusting unrealistic expectations or demands.

The purpose of a discovery budget will be thwarted if either side believes—or fears—that its opponent will run the meter, or run out the clock, consuming time and money budgeted for discovery with the production of non-essential or marginally relevant documents, while withholding "the good stuff." Often, the most important information is produced last, after all delaying or obfuscatory tactics have been exhausted and invocations of privilege have been challenged and denied. When the quantity of discovery is limited, its quality must be assured, or limitations will only benefit discovery resisters. Lawyers will abandon costly and time-consuming "bargaining" behavior (asking for more in discovery than they need, because they expect to obtain only a fraction of their request) only when they are confident that courts will enforce the prioritized production of essential and relevant information.

2. Courts Should Adopt Local Rules or Guidelines that Stress the Need for Cooperation in the Discovery Process as an Expectation of the Court, and the Willingness of the Court to Resolve Discovery Disputes Promptly When They Occur.

When the parties and lawyers know at the outset what the court expects, and that if they fail to behave accordingly, they will suffer meaningful adverse consequences, they are far more likely to fall into line. While this paper has noted the plethora of court decisions that insist that cooperation in discovery is essential,³⁹ actually memorializing this requirement in a Local Rule or guideline reinforces the uniformity of the requirement imposed by all the judges of that court. An example of a recently published guideline is Guideline 1 of the Discovery Guidelines for the United States District Court for the District of Maryland, which provides:

Fed. R. Civ. P. 26 requires that discovery be relevant to any party's claim or defense; proportional to what is at issue in a case; and not excessively burdensome or expensive as compared to the likely benefit of obtaining the discovery being sought.

The parties and counsel have an obligation to cooperate in planning and conducting discovery to tailor the discovery to ensure that it meets these objectives. Counsel have a duty to confer early and throughout the case as needed to ensure that discovery is planned and conducted consistent with these requirements and, where necessary, make adjustments and modifications in discovery as needed.

During the course of their consultation, counsel are encouraged to think creatively and to make proposals to one another about alternatives or modifications to the discovery otherwise permitted that would permit discovery to be completed in a more just, speedy, inexpensive way. By way of illustration only, such alternatives could include different or additional deadlines for the filing of motions or the completion of all or part of discovery; accelerated exchanges of disclosures, additional data or descriptions of the parties' claims and defenses; sampling techniques; and substantial limitations on, or even the elimination of, depositions, coupled with alternative methods of exchanging or obtaining factual information or the equivalent of deposition testimony.

....

³⁹ See *supra* note 23.

Attorneys are expected to behave professionally and with courtesy towards all involved in the discovery process, including but not limited to opposing counsel, parties and nonparties. This includes cooperation and civil conduct in an adversary system. Cooperation and civility include, at a minimum, being open to, and reasonably available for, discussion of legitimate differences in order to achieve the just, speedy, and inexpensive resolution of the action and every proceeding. Cooperation and communication can reduce the costs of discovery, and they are an obligation of counsel.⁴⁰

As noted above, a substantial number of the lawyers surveyed in the ABA Survey expressed the belief that judges were not willing enough to address and resolve discovery disputes promptly.⁴¹ That is a serious problem. Local Rules that impose a burden of cooperation on counsel and the parties should likewise express clearly the court's obligation to act promptly to resolve disputes, including imposition of innovative measures. There is an old lawyer's saying that makes this point: "I can live with a ruling that goes in favor of me, I can live with a ruling that goes against me, but I can't live with no ruling at all." Here is an example of language in one federal court's Discovery Guidelines that addresses this issue:

The parties and their counsel are encouraged to submit to the Court for approval their agreements to expand or limit discovery. If, however, counsel are unable to reach agreement on a discovery plan that substantially modifies the normal course of discovery, and either side believes that the Court's assistance would be helpful in framing or implementing such a plan, then the Court will make itself available with reasonable promptness, in response to a brief, written request for a discovery management conference that identifies the issues for consideration.

....

Upon being notified by the parties of the unresolved discovery dispute, the Court will promptly schedule a conference call with counsel, or initiate other expedited procedures, to consider and resolve the discovery dispute. If the Court determines that the issue is too complicated to resolve informally, it may set an

⁴⁰ D. Md. Loc. R. App. A, Discovery Guidelines for the United States District Court for the District of Maryland, Guideline 1.a, c (Dec. 1, 2009), <http://www.mdd.uscourts.gov/localrules/localrulesAugust09v3.pdf> ("Discovery Guidelines").

⁴¹ See *supra* note 16.

expedited briefing schedule to ensure that the dispute can be resolved promptly.⁴²

3. Seasoned Practitioners Have Developed Common-Sense Systems That Can Be Adapted and Adopted by Courts for Wider Use.

Veteran litigators know how to streamline discovery and pre-trial procedures by reaching agreements and accommodations with opposing counsel on many matters that otherwise would become the subject of discovery disputes and would consume judicial and financial resources. Within the context of active case management involvement (including ongoing access) by the judges, experienced lawyers will work things out among themselves, especially if they are encouraged and rewarded for doing so, and are given concrete templates to follow.

One system, which has proved workable in a wide array of cases, has been developed over time by prominent litigator Stephen D. Susman. The following list is adapted from an internal memo which Mr. Susman distributes to the lawyers in his firm, and which he presents to opposing counsel in his cases. It includes agreements for the conduct of depositions, service of papers, e-discovery protocols, protective orders, cost sharing, and trial logistics.

“Susman’s Checklist”

Here is a list of pretrial agreements to try to reach with the other side before discovery begins. These agreements will make life easier for both sides and do not advantage one side over the other. Waiting until you are in the heat of battle to try to reach these agreements, one side or the other will feel disadvantaged. Place a check mark next to all the agreements that are reached. Any modifications or additions should be noted.

1. As to any discovery dispute, the lead lawyers will try to resolve by phone and no one will write letters to the other: just e-mail and phone calls.

2. Depositions will be taken by agreement, with both sides alternating and trying in advance to agree upon the dates for depositions, even before the

⁴² Discovery Guidelines, *supra* note 40, at Guideline 1.a, f.

deponents are identified. In jurisdictions where there is no limit to the length or number of depositions, each side gets 10 lasting for 6 hours each.

3. The parties will use the same court reporter/videographer, who agrees to provide specified services at discounted prices for the right to transcribe all depositions.

4. All papers will be served on the opposing party by e-mail.

5. Documents will be produced on a rolling basis as soon as they have been located and numbered; if copies are produced, the originals will be made available for inspection upon request.

6. Each side must initially produce electronically stored information from the files of 5 custodians selected by the other side during an agreed period of time. Only documents which have a lawyer's name on them can be withheld from production and only if they are in fact privileged. Production does not waive any privilege and documents can be snapped back whenever the producing party recognizes they are privileged. After analyzing the initial production, each side can request electronic files from 5 other custodians. Beyond that, good cause must be demonstrated.

We will produce ESI in the native format kept by the producing party, or in a common interchange format, such as Outlook/PST, Concordance or Summation, so it can be searched by the other side. If any special software is required to conduct a search in native format and is regularly used by the producing party, it must be made available to the other side. We will produce a Bates numbered file listing of the file names and directory structure of what is on any CDs or DVDs exchanged. Either side may use an e-mail or an attachment to an e-mail that came from one of these previously produced disks by printing out the entire e-mail (and the attachment if they are using a file that came with an e-mail) and marking it at the deposition or trial, and either side may use application data (which was not an attachment to e-mail--so its standalone on a CD or DVD) as long as the footer on the pages or a cover sheet indicates (1) the CD or DVD from whence it came, (2) the directory or subdirectory where the file was located on the CD or DVD, and (3) the name of the file itself including the file extension.

7. If agreement cannot be reached on the form of a protective order within 48 hours of the time they are exchanged, both sides will write a letter to the Court including each other's preferred version and, without argument, ask Court to select one or the other ASAP.

8. All deposition exhibits will be numbered sequentially X-1, X-2, etc., regardless of the identity of the deponent or the side introducing the exhibit and the same numbers will be used in pretrial motions and at trial.

9. The parties will share the expense of imaging all deposition exhibits.

10. Neither side will be entitled to discovery of communications between counsel and expert witnesses or to drafts of experts' reports.

11. The production of a privileged document does not waive the privilege as to other privileged documents. Documents that the other side claims are privileged can be snapped back as soon as it is discovered they were produced without any need to show the production was inadvertent [note: this non-waiver principle is now embodied in Fed. R. Evid. 502].

12. Each side has the right to select 20 documents off the other's privilege list for submission to the court for in camera inspection.

13. Demonstrative exhibits need only be shown to the other side before shown to the jury and need not be listed in any pretrial order.

14. An agreed upon jury questionnaire.

15. An agreed upon juror notebook possibly containing a cast of characters, list of witnesses (and their photos), time-line, glossary, dispositive documents, etc.

Judge David Campbell, of the District of Arizona, has used the Susman Checklist in cases in his court, providing it to lawyers as a suggestion to foster practical case management agreements. He has also noted the barriers to the practice of common sense litigation that arise from lawyers' inexperience and mistrust. Judge Campbell observes:

Steve's list definitely should be discussed at the Conference. It also, however, is a "good lawyers'" list. My discovery difficulties arise from the large majority of lawyers who would never think of or agree to the items on the list. The civil rules must apply to the weakest of lawyers as well as the best, and I hope we'll be able to think of some system-wide changes that would reduce the cost of litigation in all cases, not just good-lawyer cases.

Something that Steve's list alludes to is very true in my court. There is a disconnect between what happens in discovery and what happens at trial. Of the 5% of civil cases that actually go to trial, I would guess that 95% of the discovery is never seen or heard by the jury. A few examples: lawyers often mark hundreds of trial exhibits, and yet rarely are more than a few dozen used in front of the jury; depositions are sometimes read or played, but they are rarely dispositive evidence in the case (lawyers manage to get the key witnesses to trial), and even when used for impeachment, depositions rarely affect the outcome of the case; interrogatory answers and requests for admission have never been used in 32 civil trials over which I've presided.

Part of the problem is that most lawyers don't try cases. They cannot tell

what will truly be relevant. They also are insecure—they feel compelled to turn over every stone for fear of missing some important fact. Experienced trial lawyers – especially criminal lawyers, in my experience—can see up front what will matter to the jury and they go get it.

Judge Campbell has additional suggestions, borne of his case management experience, and his familiarity with reforms introduced in the Arizona courts:

There are several system-wide changes that could be considered. We could consider requiring more affirmative disclosures. Andy Hurwitz's paper on the Arizona experience [to be made available on the 2010 Conference website] addresses this possibility. Although I think it has helped in Arizona, I did not see it significantly reduce discovery here when I was practicing – most lawyers still felt compelled to turn over every stone.

Given the general aversion of lawyers to turning over unfavorable evidence, and given the fact that many lawyers have little trial experience and therefore an insecurity about what they should seek in discovery, I suspect the only changes that will really reduce discovery—other than a fundamental revamping of the system to become more pleading-based and less discovery-based—are hard limits. For an example, what if the Rules (or a court tailoring discovery to a particular case) said (a) depositions may be taken only of parties and three other witnesses per side, (b) experts cannot be deposed (but neither can they testify unless they produce a sufficiently detailed report, and their testimony will be strictly limited to their report), (c) depositions shall not last more than 4 hours, (d) interrogatories are abolished, (e) requests for admissions and document production requests are sharply limited—say 20 per side, and (f) these limits can only be changed with the approval of the judge and upon a showing that manifest injustice will result if they were not changed (i.e., more than good cause). Granted, such an approach would not work in all cases, but that would be the point of allowing judge-approved increases when truly required. When combined with strict time limits for trial (I set significant time limits in all my civil trials, and they work fine), I suspect these limitations would work in the vast majority of cases.

Judge Campbell concludes:

I'm not sure these are good ideas for every case, but I think they are worth considering. I also recognize that it would be very hard to get such limits through the Civil Rules process. But the point of the 2010 Conference is to think about possible solutions to what everyone seems to agree is too much and too expensive discovery, and so I throw it out for consideration.

On the topic of discovery limits, experienced litigators tend to agree more often than judges might suppose. Steve Susman, for example, “agrees totally with limiting the length of

depositions to 4 hours.” As he notes, “[t]hat would cut discovery expenses by a third.”

Mr. Susman also supports limits on the number of depositions:

I would limit the number of depositions to 6 per side, but not distinguish between parties and non-parties. I also favor Judge Campbell’s rule on expert reports, but would allow expert depositions to be among the 6 a party chooses to take: if someone wants to waste their shots, fine.

On the topic of written discovery, Mr. Susman opines:

I find most interrogatories useless, but I also find it doesn’t cost a lot to answer them. The best discovery device is document production. What makes it so expensive is for the producing party to have to review first for relevance and privilege. If you could just turn over all files of 5 identified employees, without having to make that review, it wouldn’t cost much at all. The Rules could encourage that, by providing a no-fault, unlimited clawback.

With respect to “clawback,” recently-enacted Fed. R. Evid. 502 indeed now provides a non-waiver rule and a clawback system. As lawyers and judges become familiar and comfortable with Rule 502, it should reduce the volume of documents withheld on privilege grounds, and the frequency and scope of privilege disputes. The Rule should be deployed to foster disclosure of key documents within a safe harbor of confidentiality. That was certainly the intent of the drafters.

CONCLUSION

The existing Rules of Civil Procedure, augmented by Fed. R. Evid. 502, and illuminated by “best practices,” such as those mentioned in this article, the *Manual For Complex Litigation, Fourth* (Federal Judicial Center 2004), innovative Local Rules, and the ongoing work of The Sedona Conference, are a rich source of principled and cost-effective guidelines for improved case management, which have yet to be fully explored, appreciated, and utilized in civil litigation.

A renewed commitment by the legal profession, the judiciary, and the academy to teach,

learn, internalize, practice, and enforce the existing Rules can take us a long way toward true civil litigation reform. Without such a commitment, manifest in actual conduct, new Rules and Rule changes will flounder.