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Elizabeth J. Cabraser & Katherine Lehe

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UNCOVERING DISCOVERY

Elizabeth J. Cabraser and Katherine Lehe*
Lieff Cabraser Heimann & Bernstein, LLP
San Francisco, CA

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* The authors are attorneys at Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, California. Lieff Cabraser represents public and private investment funds, small businesses, and individuals in investment fraud, anticompetitive and unfair business practices, tort, employment, and civil rights/human rights litigation. As a founding partner of the firm Ms. Cabraser has represented plaintiffs in complex civil litigation, mass torts, and class actions in the federal and state courts since 1978. She teaches as an adjunct professor/lecturer on these topics at Columbia Law School and University of California, Berkeley; and has been appointed to leadership positions in 40 multidistrict litigations, including the pending *Deepwater Horizon* (MDL No. 2179) and *Toyota Unintended Acceleration* (MDL No. 2151) litigations. She has served as chair or co-chair in a variety of complex litigation and discovery-related committees of the American Bar Association, the American Association for Justice, and Consumer Attorneys of California. She was a member on the Northern District of California's Civil Justice Reform Act ("CJRA") Committee, is Editor-In-Chief of CALIFORNIA CLASS ACTION LAW AND PROCEDURE (Lexis/Nexis), has participated in a number of The Sedona Conference® discovery and complex litigation projects, and was recently appointed to the Advisory Committee on Civil Rules of the Judicial Conference of the United States. Lieff Cabraser associate Katherine Lehe conducted the extensive Fed. R. Civ. P. 1 research and analysis featured in this article. An earlier version of this article was submitted to the 2010 Duke Conference on U.S. Civil Litigation. The opinions expressed in this article are those of the authors.

I. INTRODUCTION

For as long as anyone now practicing can remember, lawyers have complained of and judges have condemned the rising cost and increasing delay of civil litigation. As the process has gained in length and cost, it has lost in terms of respect and satisfaction. Every rule has been exploited for loopholes, and bent, broken, or honored in the breach. Civil litigation, it seems, has devolved into a miserable experience, and "civil procedure" has become an oxymoron. Civility marked a lost and longed-for golden age, while carping, sniping and carrying on are the (dis)order of our day.

Is the protraction and frustration of the discovery process a cause and/or effect of the unholy trinity of attrition, subversion and incivility? Is there a procedural vaccine to inoculate against these litigation diseases, or, failing prevention, can we hope at least a cure?

The key players in a civil litigation process marked by an ever-expanding pretrial "discovery" period view it with frustration. Plaintiffs' lawyers view discovery resistance as an unnecessary evil, an endless and costly prelude to the real event—the trial—and often have little patience (or aptitude) for nuances of discovery arts-and-crafts. Defense lawyers fear that abjuring attrition tactics, and actually producing relevant information, amounts to malpractice or may at least cost them key clients. Judicial officers have sparse patience for discovery disputes, tend to blame both parties equally (thereby inadvertently incentivizing the bad acts they condemn), and too often adopt the passive/aggressive stance of just wishing discovery abuse would go away.

As a result in the world of "complex" litigation at least, an escalating spiral of cost seems to have become embedded in the litigation process, evidenced by protracted discovery activity fed in turn by ever more elaborate pretrial proceedings, heightened pleading standards, an expert witness explosion, and added opportunities for interlocutory appellate review.[1] Most of these accretions were intended as improvements, and some were, ironically, designed specifically to reduce or avoid costs and delay. Discovery is not the sole offender in the process of turning civil litigation into a crime against due process, but it is a prime suspect.

None of this is news. The past forty years have been marked by ongoing, ambitious, and carefully designed civil procedure reform initiatives, many expressly focused on improving discovery. Yet, over the same period, despite the best efforts of many, the cost and delay of civil litigation seem to have steadily increased, imposing economic barriers to meritorious claims, rendering larger and larger claims cost-ineffective, reducing access to the courts and decreasing the incidence of justice and widening and deepening attitudes of frustration, dissatisfaction and cynicism with respect to the process itself.

Indeed, to the jaundiced eye, the very term "discovery" has taken on a decidedly Orwellian cast: it seems primarily to describe the hiding of relevant information. The process of obtaining "discovery," as currently practiced, would have amused Lewis Carroll. More and more activity masks less and less substance; the most important documents are produced last (if at all); and the more relevant a document is, the more likely it is to be sequestered by claims of privilege, or destroyed altogether.

1 By "complex" litigation, we mean, with inexcusable circularity, the stuff the MANUAL FOR COMPLEX LITIGATION, FOURTH (Federal Judicial Center 2004) treats of: multidistrict litigation under 28 U.S.C. Section 1407, class actions, "mass torts," securities fraud and antitrust litigation, and the state-law based, nationwide or multi-state consumer, contract, and tort class actions increasingly filed in or removed to the federal courts in the wake of the 2005 Class Action Fairness Act, 28 U.S.C. Sections 1332(d), 1453, and 1711-1715.

If justice delayed is justice denied, then our generation of lawyers and judges must answer the charge that we have practiced and presided over the legal profession in a manner that has failed to ameliorate the problem at the core of our civil justice system: it does not deliver, in a reasonably cost-effective, efficient, or fair manner, the civil justice that all Americans have the constitutional right to expect. Perversely, it exacerbates rather than rectifies the imbalance of resources between parties and rewards those willing and able to overspend on disproportionate process to block adjudication. That is a harsh assessment, but we must acknowledge it, and be heartened that we are committed to a system that has not stopped promising, and strives ever more intensely to deliver justice.

This article summarizes a number of the recent projects devoted to solving the discovery problem. The reports and data from these initiatives speak most completely and eloquently for themselves, and should be studied for the many promising recommendations they contain. In an earlier form, this article was one of many papers and proposals submitted to a momentous convention of judges, academics, and practitioners at Duke Law School on May 10-11, 2010. Those papers from the 2010 Civil Litigation Conference are available at http://civilconference.uscourts.gov and a number have been published in the Duke Law Journal.[2] We also explore, in somewhat greater depth, a growing trend: the recently redoubled efforts of the federal judiciary to identify discovery problems and stem discovery abuse by invoking and applying the venerable first principle of the Federal Rules of Civil Procedure: Fed. R. Civ. P. 1, which, in its current iteration, provides:

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 8.1, they should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

II. RETURN TO FIRST PRINCIPLES: FEDERAL COURTS AND THE PHILOSOPHY OF FED. R. CIV. P. 1

The courts have always enjoyed the inherent authority to govern all proceedings, and all who practice, before them. Rule 1 codifies this authority and defines its purpose: to safeguard the due process rights of all litigants, and the public interest in the accessibility and integrity of the litigation process itself, by ensuring that litigants are burdened primarily with the burden of proof on the substantive merits, not high costs or untenable delays that serve as arbitrary barriers, barring worthy claims. Rule 1 provides the "why" rationale of controlling discovery, while articulating three conclusory "hows": by making the discovery process "just, speedy, and inexpensive."

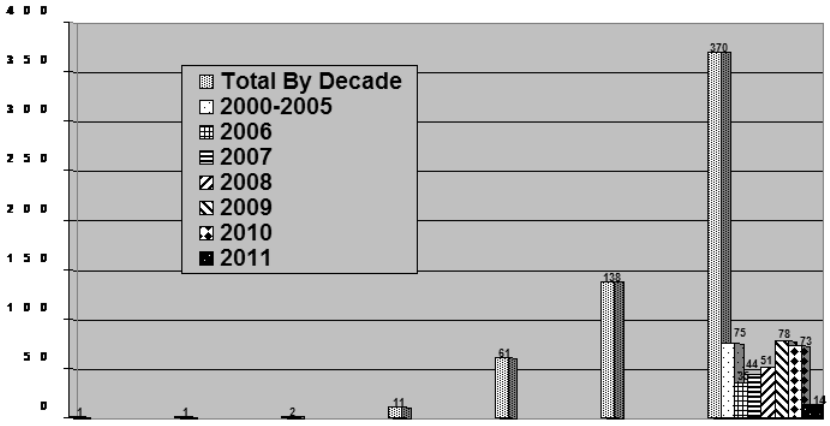
This article highlights a triple handful (15) of particular Rule 1-invoking decisions that arose from specific discovery disputes: problems that reached the point, in specific cases, of raising judicial ire, or at least concern. The Appendix[3] summarizes over 70 such decisions, spanning the past four decades but emphasizing the period of most intensive activity (2006-2011), to provide additional examples. An attempt at empirical research into trends in the invocation and application of Rule 1 by the federal courts from the 1970s

2 *See* Special Symposium Issue, 2010 Civil Litigation Review Conference, 60 DUKE L.J. (Dec. 2010). The Introduction to the issue, "Progress in the Spirit of Rule 1," was written by Hon. John G. Koeltl, a judge of the United States District Court for the Southern District of New York, and a member of the Advisory Committee on Civil Rules of the Judicial Conference of the United States and provides an enlightening summary of the proceedings. Judge Koeltl chaired the Planning Committee for the 2010 Civil Litigation Review Conference.

3 The Appendix to this paper can be found at www.thesedonaconference.org/content/miscfiles/publications_html.

through the present, summarized in the chart below, yielded 465 instances of Rule 1 analysis, and confirms the perceived trend toward increased judicial recognition and use of this Rule.

Instances of Federal Court Citation to Fed. R. Civ. P. 1 to Limit Cost and Delay in Civil Litigation, by Decade and Year[4]



Based on the sharp increase in Rule 1 citation from 2000 onward, and its intensive citation (at least 216 instances) in the 2008-2011 (as of March 1, 2011) timeframe, Rule 1 is either enjoying a distinct revival, or has finally been discovered as a working component of the Federal Rules, rather than a mere precatory or aspirational preface to the "real" Rules. Indeed, what Judge Koeltl has dubbed "the Spirit of Rule 1" infused the discussions and proposals at the 2010 Civil Litigation Conference.

What is most noteworthy about this discovery (or revival) of Rule 1 is the judicial insight that "just, speedy, and inexpensive" are inextricably intertwined, or at least interdependent, concepts. Prior to this synthesis, courts concerned with due process in a vacuum, that is, solely with the "just" variable of this equation (as if it must, or even could, be delivered in isolation) may have actually diminished the net amount of due process delivered by the system, as they ignored, or actively aided and abetted, practices that have deteriorated into tactics of attrition designed to fend off claims by making them too costly to pursue, or prolonging the procedural defense long past the point of utility.[5] The perspective, contradicted by the express terms of Rule 1, that each party should have all the process it can or chooses to afford, instead illustrates an observation all too familiar to experienced judges and lawyers alike: just as the best is the enemy of the good, perfection in process has been the enemy of due process.

We are all the victims of our experiences, and litigators' perspectives are influenced by the anecdotes they survive, and their positions on either side of the "v.". As plaintiffs' advocates, we have experienced most viscerally frustration and disappointment in the imperfections of the civil justice system when these manifest as judicial innocence of, apathy toward, or even collusion in, discovery abuses and stonewalling by defendants. In

4 This graph displays the combined results of Lexis and Westlaw searches. Results are current through March 1, 2011.
5 Section IV of this article highlights a few such past examples, notably from the *Tobacco* litigation, in which attrition ascended into art form.

our discovery system, the party who begins the game in possession of the crucial information (usually the defendant) has a distinct and usually game-winning advantage. The scales are not balanced at the outset, and too often the implementation of the discovery rules is distorted by the misapprehension that they are. But plaintiffs' counsel, who are generally compensated on a contingent basis, not by the hour, frequently forgive the time-consuming tasks of honing or enforcing their discovery requests. We rarely get the discovery we ask for, but we may get some of what we insist upon—at a cost that often discourages the process that has become necessary.

As the Rule 1 examples highlighted below demonstrate, however, plaintiffs' counsel are not blameless, and their lack of preparation or focus can also result in discovery failures, greater costs, and more delay. In searching for the culprits behind the failure of our existing discovery procedures to promote informed adjudications and reasonable settlements (in a way that is proportional to the matters at stake, the resources of the parties, and the interest of the public), legal professionals must, with chagrin, accept mutual and reciprocal responsibility. It is not always the "other guy." In the war on discovery resistance and discovery abuse, "we have met the enemy, and he is us."[6]

III. FEDERAL COURT DECISIONS DISCUSSING KEY ASPECTS OF THE PHILOSOPHY OF RULE 1

The following 15 decisions, from the 1970s through the Spring of 2011, illustrate, anecdotally, a range of instances in which courts have imposed, or at least threatened, consequences for discovery practices or failures that frustrate Rule 1 ideals.

- *Mixing Equipment Co. v. Innova-Tech, Inc.*, No. 85-0535, 1987 WL 14511 (E.D. Pa. July 24, 1987).

In a succinct memorandum and order, the court in *Mixing Equipment Co. v. Innova-Tech, Inc*. emphasized Fed. R. Civ. P. 1's role in promoting the serious administration of justice and basic fairness of the legal system.[7] *Mixing Equipment Co. v. Innova-Tech, Inc*. was before the court on parties' cross-motions for sanctions after the case had "regressed into a seemingly endless volley of discovery disputes."[8] After noting that these disputes had forced the parties to incur the costs of fifteen separate filings, the court referred counsel to Judge John J. Parker's admonition that litigation "is not a children's game, but a serious effort on the part of adult human beings to administer justice."[9] The court then stated that Fed. R. Civ. P. 1 requires practitioners on both sides to "strive for 'the just, speedy and inexpensive determination of every action.'"[10] Quoting Justice Louis Powell, the court emphasized that the "burgeoning costs of civil litigation" cast "a lengthening shadow over the basic fairness of our legal system,"[11] and instructed "all those associated with the practice of law" to conduct litigation "with [Fed. R. Civ. P. 1] as their goal" in order to contain costs.[12] After repeating Judge Parker's admonition to take seriously the administration of justice, the court denied both parties' motions for sanctions.[13]

6 This most famous observation of Walt Kelly's un-possumlike "Pogo" is quoted, *inter alia*, in *Johnson v. United States*, 208 F.R.D. 148, 152 (W.D. Tex. 2001).
7 *Mixing Equipment Co. v. Innova-Tech, Inc.*, No. 85-0535, 1987 WL 14511 (E.D. Pa. July 24, 1987).
8 *Id.* at *1.
9 *Id.* at *2 (quoting *United States v. A. H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947)).
10 *Id.* at *2 (quoting FED. R. CIV. P. 1).
11 *Id.* (quoting AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting)).
12 *Id.* at *2.
13 *Id.*

- *Foxley Cattle Co. v. Grain Dealers Mut. Ins. Co.*, 142 F.R.D. 677 (S.D. Iowa 1992).

In *Foxley Cattle Co. v. Grain Dealers Mut. Ins. Co.*, the district court addressed the role Fed. R. Civ. P. 1 plays in ensuring access to justice.[14] *Foxley Cattle* was before the court on defendant's request for costs and fees following its successful motion to compel discovery.[15] In reversing this application, the court held that defense counsel spent more time on certain tasks than was reasonably necessary and that certain claimed time was not compensable.[16] To support its holding, the court elaborated upon concerns that the "escalating cost of civil litigation runs the grave risk of placing redress in the federal courts beyond the reach of all but the most affluent."[17] The court then quoted *Anthony v. Abbott Lab* for the proposition that the "effective administration of justice" depends on "maintenance and enforcement of a reasoned cost/benefit vigil by the judiciary."[18] Congress's concern over rising litigation costs was evident, the court stated, from the Civil Justice Reform Act of 1990 ("CJRA") requirement that federal district courts "implement a plan to reduce the expense and delay in civil litigation" by "providing for just, speedy and inexpensive resolution of civil disputes."[19] The court indicated that these concerns provided further justification for limiting compensation for fees defendant incurred in preparing its Fed. R. Civ. P. 37 motion. After expounding upon the importance of keeping federal court redress within public reach, the court stated that "the Federal Rules of Civil Procedure, including Rule 37(a)(4), 'shall be construed to secure the just, speedy, and *inexpensive* determination of every action.'"[20] In conclusion, the court stated that "these judicial and legislative concerns regarding the escalating costs of civil litigation in federal courts should not be ignored here" and limited defendant's fees to less than half the amount requested.[21]

- *Scheetz v. Bridgestone/Firestone, Inc.*, 152 F.R.D. 628 (D. Mont. 1993).

In the context of an individual products liability suit, the district court in *Scheetz By and Through Handeland v. Bridgestone/Firestone, Inc.* discussed the role that Fed. R. Civ. P. 1 plays in ensuring access to the federal courts.[22] *Scheetz* was before the court on plaintiff's motion to compel a pre-discovery disclosure statement required by a local rule adopted to implement the CJRA. Defendant argued that further disclosure was unnecessary because plaintiff's counsel already possessed the requested information, by virtue of having litigated prior cases against defendant regarding the same product.[23] The court held that plaintiff's counsel's involvement in prior litigation did not relieve defendant of the obligation to comply with the local rule, noting that the District of Montana adopted the disclosure requirement in furtherance of the principles reflected in the CJRA: the "[e]ncouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."[24] The CJRA, in turn, was enacted "to formulate proposals that would effectively bridge the growing distance between the promise of Fed. R. Civ. P. 1—'the just, speedy, and inexpensive determination of every action'—and the reality of a system becoming

14 *Foxley Cattle Co. v. Grain Dealers Mut. Ins. Co.*, 142 F.R.D. 677, 682 (S.D. Iowa 1992).
15 *Id.* at 682.
16 *Id.* at 681.
17 *Id.*
18 *Id.* (*citing Anthony v. Abbott Lab*, 106 F.R.D. 461, 465 (D.R.I. 1985)).
19 *Id.* (*citing* 28 U.S.C. Section 471).
20 *Id.* (*citing* FED. R. CIV. P. 1) (emphasis in original).
21 *Id.* at 682.
22 *Scheetz By and Through Handeland v. Bridgestone/Firestone, Inc.*, 152 F.R.D. 628 (D. Mont. 1993).
23 *Id.* at 630.
24 *Id.* at 630.

increasingly inaccessible to the average citizen."[25] Interpreting the Montana local rule in light of these goals of Fed. R. Civ. P. 1 and the CJRA, the court granted plaintiff's motion to compel.[26]

- *Boe v. Lane & Co.*, 428 F. Supp. 1179 (E.D. La. 1977).

The insight that due process must also reflect the public interest in fairly allocating limited institutional and judicial resources has been remarked upon rarely, but perceptively in federal published decisions. The court in *Boe v. Lane* discussed the complementary nature of each of Fed. R. Civ. P. 1's mandates, underscoring that providing "just" resolution for some litigants often comes at the expense of a speedy resolution for others. *Boe v. Lane* was a personal injury suit before the court on plaintiff's motion for new trial after a jury verdict in his favor. Plaintiff's motion was based on defendant's mention at trial of workers compensation. The court held that plaintiff was not entitled to a new trial, relying primarily on case law that required "more than a passing mention" of workers compensation to warrant a new trial.[27] Additionally, the court noted that plaintiff's attorney refused a proposed jury instruction to disregard the comment and instead moved for a new trial.[28] Given plaintiff's counsel's trial strategy, the court cited Rule 1 to bolster its decision to deny plaintiff's motion. The court explained that "granting a new trial in response to every minor flaw in a proceeding may be 'just' to the litigants involved, if they can bear the additional expense," but "imposes delay on litigants queuing for federal trial time."[29] After noting that these attributes of Fed. R. Civ. P. 1—just, speedy, and inexpensive determination—are complementary, the court emphasized that "each litigant is entitled only to a fair, not a perfect trial."[30]

- *Frederick v. UNUM Life Ins. Co. of Am.*, 180 F.R.D. 384; 1998 U.S. Dist. LEXIS 11272 (D. Mont. 1998).

In *Frederick v. UNUM Life Ins. Co. of Am.*, the court relied almost exclusively on Fed. R. Civ. P. 1's goals of limiting cost and delay to deny defendant's motion for a trial continuance.[31] Defendant submitted (and plaintiff joined) a motion to continue trial for at least six months to resolve discovery delays. The court found that defendant itself had caused the delays, by implementing a business plan for litigation designed to limit its payments to retained counsel.[32] Given that defendant caused the delays, the court considered its motion in light of the "one salutary purpose" served by the rules of discovery and the rules of procedure: "to secure the just, speedy, and inexpensive determination of every action."[33] After expounding upon Rule 1's purpose, the court stated that "the 1993 amendments to Rule 1 emphasized the District Court's affirmative duty to exercise the procedural authority granted under the rules so as to ensure that civil

25 *Id.* at 630 n.2.
26 Nowadays, information obtained via disclosure or discovery would be shared more efficiently across similar cases via document depositories (once paper, now increasingly electronic) to which all plaintiffs' counsel would have access under a mechanism, often in an MDL court's case management order, that spreads the cost of obtaining, maintaining, and analyzing such information for the common benefit via an assessment (either an "up front" payment of actual costs, or a contingent, "back end" payment of a modest percentage of any recovery) of any and all cases. This frees defendants from the expense and logistical burden of re-disclosing or producing relevant information in multiple cases. For examples of such orders, *see* In re *Prempro Prod. Liab. Litig.* (MDL 1507), 2010 U.S. Dist. LEXIS 135152 (E.D. Ark. 2010); *Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig)* (MDL 1203), 2010 U.S. Dist. LEXIS 85523 (E.D. Pa. 2010).
27 *Boe v. Lane & Co.*, 428 F. Supp. 1179, 1180-1181 (E.D. La. 1977).
28 *Id.*
29 *Id.* at 1183.
30 *Id.*
31 *Frederick v. UNUM Life Ins. Co. of Am.*, 180 F.R.D. 384 (D. Mont. 1998).
32 *Id.* at 385-86.
33 *Id.* at 386 (*citing* FED. R. CIV. P. 1).

litigation in the federal courts is resolved fairly and without undue cost or delay."[34] Because defendant's "corporate policies antagonistic to retained counsel" caused the discovery delays, the court exercised its authority under Fed. R. Civ. P. 1 to deny defendant's motion to for continuance.[35]

- *In re: Phenylpropanolamine (PPA) Litigation*, 460 F.3d 1217 (9th Cir. 2006).

Although *In re: PPA Litigation* did not explicitly apply Fed. R. Civ. P. 1 to its holdings, the Ninth Circuit's language in citing the rule is noteworthy because it acknowledged the non-monetary costs of delay in civil litigation and emphasized that Fed. R. Civ. P. 1 reflects the public interest in efficient litigation. Further, this language is significant because it has been quoted in numerous federal court decisions to limit cost and delay. In this Multidistrict Litigation (MDL) case alleging injuries from ingesting phenylpropanolamine (PPA), *In re PPA* was before the court on thirteen consolidated appeals from the district court's dismissal for plaintiffs' failure to comply with case management orders (CMOs). The court cited Fed. R. Civ. P. 1 in articulating the first of five *Malone* factors used to determine whether to dismiss a case for failure to comply with court orders: the expeditious resolution of litigation.[36] The court discussed the relevance of Fed. R. Civ. P. 1 to the first *Malone* factor:

> As the first of the Federal Rules of Civil Procedure reflects, the public has an overriding interest in securing "the just, speedy, and inexpensive determination of every action." (citation omitted) Orderly and expeditious resolution of disputes is of great importance to the rule of law. By the same token, delay in reaching the merits, whether by way of settlement or adjudication, is costly in money, memory, manageability, and confidence in the process.[37]

The court then declared its deference to the district court's judgment regarding the point at which delay becomes unreasonable.[38] It determined that the expeditious resolution of litigation weighed in favor of dismissing eleven cases, where plaintiffs' failure timely to provide fact sheets and other documents caused many cases to remain "pending for close to, or over, a year without forward movement."[39] Ultimately, the court held that the district court had not abused its discretion in dismissing the eleven cases.[40]

- *Avnet, Inc. v. Gulf Ins. Co.*, No. 05-cv-1953-PHX-LOA, 2006 U.S. Dist. LEXIS 2377 (D. Ariz. Jan. 23, 2006).

Avnet, Inc. v. Gulf Ins. Co. discussed the time-saving goals of Rule 1 as expressed through the Civil Justice Reform Act (CJRA), and cited Rule 1 to admonish plaintiffs for

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34 *Id.*
35 *Id.*
36 *In re: Phenylpropanolamine (PPA) Litigation*, 460 F.3d 1217, 1227 (9th Cir. 2006) (*citing Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987) (internal citations omitted)).
37 *Id.* at 1227.
38 *Id.*
39 *Id.* at 1234.
40 *Id.* The use of "fact sheets" to streamline discovery by replacing formal interrogatories with supposedly less onerous, more fact-oriented formats is now a common practice in mass tort multidistrict litigation. "Fact sheets" can range in length and complexity from a few pages to 20 pages or more, and the fact sheet's obligation may be reciprocal: both plaintiffs and defendants may be ordered to provide case-specific information by this means. In some cases, however, it appears to plaintiffs that the "fact sheet" process does not save them time or money, as defendants have seized and developed fact sheets as a weapon of attrition, using shotgun "deficiencies" (including typographical errors, failure to provide information as to questions marked "N/A," missing middle initials, etc.) to prolong the process and, as in PPA, to set up motions for dismissal as the ultimate sanction.

filing an unnecessary document. *Avnet* was before the court on plaintiff's Notice and Motion To Maintain the Action, and on the parties' motion to continue a scheduling conference. The court first cited Fed. R. Civ. P. 1 in stating that it was unnecessary for plaintiff's counsel to file a Notice in addition to its Motion.[41] Addressing the motion to continue, the court reasoned that ongoing settlement negotiations did not constitute "good cause" for a Fed. R. Civ. P. 16 continuance because "the docket reflects that little, in anything, has been done to prosecute this case to a reasonably expeditious conclusion consistent with the Civil Justice Reform Act."[42] Explaining the purposes and requirements of the CJRA, the court noted in particular that each federal district court must "implement techniques and strategies designed to dispose of cases in an efficient and inexpensive manner."[43] The CJRA was enacted, the court explained, "to formulate proposals that would effectively bridge the growing distance between the promise of [Rule 1]—the just, speedy, and inexpensive determination of every action—and the reality of a system becoming increasingly inaccessible to the average citizen."[44] Further, the court stated that the discovery provisions of Arizona's CJRA Plan, like the Federal Rules, "are subject to the injunction of Rule 1 that they be construed to secure the just, speedy and inexpensive determination of every action."[45] The court commended the parties for engaging in "less-expensive, voluntary mediation," but concluded that a two month delay was unacceptable in light of the goals of the CJRA and, by implication, those of Fed. R. Civ. P. 1.[46]

- *Dondi Properties Corp. v. Commerce Savings and Loan Assoc.*, 121 F.R.D. 284 (N.D. Tex. 1988).

In *Dondi Properties Corp. v. Commerce Savings and Loan Assoc.*, the Northern District of Texas, *en banc*, adopted standards for attorney conduct in civil litigation to satisfy Fed. R. Civ. P. 1's goals of reducing litigation costs and expediting resolution of civil actions.[47] The court was prompted to take this unusual action by alleged attorney misconduct in two consolidated cases: *Dondi* and *Knight*. The court began by stating that the judicial branch, "in the spirit of Fed. R. Civ. P. 1," attempts "to carry out [its] responsibilities in the most prompt and efficient manner, recognizing that justice delayed, and justice obtained at excessive cost, is often justice denied."[48] In furtherance of these principles, the court addressed the growing problems of "unnecessary contention and sharp practices between lawyers" that "threaten[] to delay administration of justice and to place litigation beyond the financial reach of litigants."[49] Emphasizing that scarce judicial resources should not be devoted to supervising such matters, the court adopted the Dallas Bar Association's "Guidelines of Professional Courtesy" and "Lawyer's Creed" for the Northern District of Texas.[50] Applying these principles to the cases before it, the court denied *Dondi* defendant's motion for sanctions because discovery disputes could be resolved with further communication; denied *Dondi* defendants' separate motion for sanctions because alleged misconduct was properly left to grievance committees; denied *Knight* plaintiff's motion to strike a reply brief that defendant filed without permission, because the reply would not interfere with the court's decisional process; and declined to permit plaintiffs to file further responses.[51]

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41 *Avnet, Inc. v. Gulf Ins. Co.*, No. CV-05-1953-PHX-LOA, 2006 U.S. Dist. LEXIS 2377, at *1 n.1 (D. Ariz. Jan. 23, 2006).
42 *Id.* at *2.
43 *Id.* at *2 n.2 (*citing Schwarzkopf Technologies Corp. v. Ingersoll Cutting Tool Co.*, 142 F.R.D. 420, 423 (D. Del. 1992)).
44 *Id.* at *2 n.2 (*quoting Equal, Accessible, Affordable Justice Under Law: The Civil Justice reform Act of 1990*, Joseph R. Biden, Jr., CORNELL JOURNAL OF LAW AND PUBLIC POLICY, Vol. 1, pg. 1 (1992); *Scheetz v. Bridgestone/Firestone, Inc.*, 152 F.R.D. 628, 630 n.2 (D. Mont. 1993) (internal quotation marks omitted)).
45 *Id.* at *3 n.2 (*citing Herbert v. Lando*, 441 U.S. 153, 177 (1979).
46 *Id.* at *4.
47 *Dondi Properties Corp. v. Commerce Savings and Loan Assoc.*, 121 F.R.D. 284, 291 (N.D. Tex. 1988).
48 *Id.* at 286.
49 *Id.*
50 *Id.*
51 *Id.* at 290-291.

- *City of Aurora v. P.S. Systems, Inc.*, No. 07-cv-02371-WYD-BNB, 2008 U.S. Dist. LEXIS 5944 (D. Colo. Jan. 14, 2008).

In *City of Aurora v. P.S. Systems, Inc.*, the court based its ruling primarily on concerns over a substantial delay in litigation, and discussed both the practical and social impacts of delay. The issue in this non-securities case was before the court on defendant's motion to stay discovery pending resolution of its motion to dismiss. The court began its analysis by stating that the Federal Rules of Civil Procedure do not provide for a stay while a motion to dismiss is pending.[52] Rather, Fed. R. Civ. P. 1 requires the rules to "be construed and administered to secure the just, speedy, and inexpensive determination of every action."[53] Noting the five factors[54] courts apply when considering a stay, the *Aurora* court concluded that a stay was not warranted.[55] The court reasoned that because the average time required to resolve a dispositive motion in this district was 7.5 months, a stay "could substantially delay the ultimate resolution of the matter, with injurious consequences."[56] Quoting a law review article on the topic of delay in civil litigation, the court emphasized both the social costs and practical concerns caused by delay:

> Delay is an element indigenous to many systems, and one that can have significant implications unless recognized and accounted for … In the litigation context, delay is not only of practical concern, as it results in a decrease in evidentiary quality and witness availability, but also of social concern, as it is cost prohibitive and threatens the credibility of the justice system.[57]

After noting that there was "no special burden on defendants in this case," the court denied the motion to stay in order to avoid delaying the proceedings.[58]

- *In re FLSA Cases*, No. 6:08-mc-49-Orl-31GJK, slip op., 2009 WL 129599 (M.D. Fla. Jan. 20, 2009).

In *In re FLSA Cases*, the court relied on the expediting purpose of Fed. R. Civ. P. 1 to affirm sanctions on plaintiffs' attorneys for failure to abide by scheduling orders. The case was before the court on objections to the Magistrate's recommended sanctions after plaintiffs' law firms were issued over one hundred show cause orders in a little over one year.[59] The court found that attorneys' conduct violated Rule 1's direction to "counsel to avoid delay and facilitate an expeditious resolution of disputes."[60] After reciting Fed. R. Civ. P. 1, the court emphasized that "the principle function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts."[61] Although the court found that noncompliance was "largely attributable to the high volume nature of an FLSA practice," it emphasized that attorneys'

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52 *City of Aurora v. P.S. Systems, Inc.*, No. 07-cv-02371-WYD-BNB, 2008 U.S. Dist. LEXIS 5944, at *3 (D. Colo. Jan. 14, 2008).
53 *Id.*
54 These factors are: "(1) the interests of the plaintiff in proceeding expeditiously with the civil action and the potential prejudice to plaintiffs of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." *Id.* at *3 (*citing Federal Deposit Ins. Corp. v. Renda*, 1987 WL 348635 at *2 (D. Kan. Aug. 6, 1987).
55 *Id.* at *3-4.
56 *Id.* at *3.
57 *Id.* at *3-4 (*quoting* Mariel Rodak, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 528 (2006)).
58 *Id.* at *3-4.
59 *In re FLSA Cases*, No. 6:08-mc-49-Orl-31GJK, slip op., 2009 WL 129599, at *5 (M.D. Fla. Jan. 20, 2009).
60 *Id.* at *6.
61 *Id.* (*quoting Schiavone v. Fortune,* 477 U.S. 21, 27 (1986)).

duty "to abide by pretrial orders that are designed to promote the fair and efficient administration of justice" is not diminished by having a voluminous clientele.[62] Given attorneys' "inexcusable pattern of noncompliance," the court exercised its discretion under Fed. R. Civ. P. 16(f) to sanction counsel for failure to abide by scheduling orders.[63]

- *Mezu v. Morgan State Univ.*, 269 F.R.D. 565 (D. Md. 2010).

Mezu v. Morgan State University emphasized the cooperative spirit and purpose of discovery under Fed. R. Civ. P. 1 in the context of a hostile discovery battle.[64] *Mezu* was before the court on a "flurry of discovery motions" filed by both parties in an FMLA and Title VII action."[65] The court first emphasized the affirmative duty to cooperate in discovery, and continued to admonish both parties for their numerous discovery violations and disregard for the governing Federal Rules of Civil Procedure and Local Rules.[66] Based on the frequency and nature of the discovery disputes to date, the court concluded the case had become a "'grudge match,' with discovery being interposed as much to cause burden, delay and expense as to obtain information."[67] The court denied all of the parties' motions without prejudice and referred counsel specifically to Fed. R. Civ. P. 1 to guide future discovery. The court stated that counsel for plaintiff and defendant had "demonstrated deficient knowledge of fundamental rules of procedure, local rules, discovery guidelines, and decisional authority," which "unambiguously establish the Court's expectation about how discovery is to be conducted to achieve the aspirations of Fed. R. Civ. P. 1 (a 'just, speedy, and inexpensive determination' of the claims and defenses)."[68]

To reform the parties' discovery practices, the court ordered counsel to submit within ten days a written verification "that they carefully have read (1) Federal Rules of Civil Procedure 1, 26-37, and 45; (2) the Local Rules of this Court; (3) the Discovery Guidelines of this Court;" and (4) a District of Maryland case[69] emphasizing the cooperative spirit and purpose of the discovery rules.[70] The court further ordered counsel to meet and confer in a recorded session; ordered in-court, bi-weekly discovery status conferences until "counsel and the parties can demonstrate that they are approaching discovery in the proper manner;" prohibited both parties from filing further discovery motions without advance court permission; and threatened case-dispositive sanctions for further discovery abuse.[71]

- *Function Media, LLC v. Google, Inc.*, No. 2:07-CV-279-CE, 2010 WL 276093 (E.D. Tex. Jan. 15, 2010).

Function Media, LLC v. Google, Inc. relied upon the cost-saving directive of Fed. R. Civ. P. 1 to exclude expert testimony on facts that defendants improperly failed to provide in discovery.[72] Pending before the court in this patent infringement case was plaintiff's

62 *Id.* at *7.
63 *Id.*
64 *Mezu v. Morgan State Univ.*, 269 F.R.D. 565 (D. Md. 2010).
65 *Id.* at 570.
66 *Id.* at 571.
67 *Id.*
68 *Id.* at 585 (also citing the aspirations of Rules 26(b)(2)(C) and 26(g)).
69 *Id.* at 585-586 (*citing Mancia v. Mayflower Textile Servs. Co.,* 253 F.R.D. 354, 357-58 (D. Md. 2008) ("the 'spirit and purposes' of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionally 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")).
70 *Id.* at 585-586.
71 *Id.* at 586, 569.
72 *Function Media, LLC v. Google, Inc.*, No. 2:07-CV-279-CE, 2010 WL 276093, *3 (E.D. Tex. Jan. 15, 2010).

motion to exclude expert opinions that were contrary to Google's Fed. R. Civ. P. 30(b)(6) corporate deposition testimony.[73] Plaintiff argued that Google should be precluded from offering testimony on the execution of licensing agreements because Google failed to prepare its 30(b)(6) witness on the topic for deposition.[74] The court noted that "Google is represented by sophisticated counsel who must have understood the materiality" of licensing agreement execution, but that its 30(b)(6) witness nonetheless was unprepared.[75]

The court rejected Google's argument that plaintiff should have requested additional discovery if it was unsatisfied with its 30(b)(6) deposition testimony.[76] Invoking Fed. R. Civ. P. 1, the court reasoned that plaintiff "properly invoked the discovery procedures of the court—rules that are designed to promote the 'just, speedy, and *inexpensive* determination' of a civil case—by providing reasonable notice to Google of the subjects on which examination was sought."[77] Requiring plaintiff to take multiple depositions to learn these facts would "unnecessarily increase the cost of litigation and reward Google for its failure to comply with the rules."[78] As such, the court held that Google's experts could not rely upon information that plaintiff had sought through the deposition.[79]

- *Eagle Well Serv., Inc. d/b/a Bronco Energy Servs. v. Central Power Sys. & Servs., Inc.*, No. 08-2184-CM, 2010 WL 2134311 (D. Kan. May 27, 2010).

Federal courts addressing discovery disputes have not applied Fed. R. Civ. P. 1's cost-saving mandate exclusively to limit the scope and span of discovery. Explicitly relying on Fed. R. Civ. P. 1, the court in *Eagle Well Serv., Inc. d/b/a Bronco Energy Servs. v. Central Power Sys. & Servs.* reopened general discovery shortly before trial to resolve a discovery dispute.[80] *Eagle Well* considered, *inter alia*, plaintiff's motion for leave to amend a final pretrial order to address issues raised by defendant's four new affirmative defenses.[81] Plaintiff asserted that the limited court-ordered discovery on defendant's late-filed defenses was insufficient and revealed the need for further discovery.[82]

The court opened its opinion by stating that "[i]n ruling on these Motions the Court keeps in mind the directive of Fed. R. Civ. P. 1."[83] Applying the four factors[84] courts use to decide whether to modify final pretrial orders, the court vacated the order and concluded that any potential prejudice to defendant could be overcome by reopening general discovery.[85] In reaching this conclusion, "the court relie[d] on the mandate of Fed. R. Civ. P. 1 that the Federal Rules of Civil Procedure 'be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding.'"[86] Under the specific circumstances of *Eagle Wells*, reopening general discovery was "the most efficient and cost effective solution" to the parties' ongoing "fight over exactly what discovery [was] permitted" and the resulting "slew of motions" the court was called upon to referee.[87]

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73 *Id.*
74 *Id.* at *2.
75 *Id.* at *2-3.
76 *Id.* at *3.
77 *Id.* at *3 (*citing* Fed. R. Civ. P. 1) (emphasis in original).
78 *Id.*
79 *Id.*
80 *Eagle Well Serv., Inc. d/b/a Bronco Energy Servs. v. Central Power Sys. & Servs., Inc.*, No. 08-2184-CM, 2010 WL 2134311, *3 (D. Kan. May 27, 2010).
81 *Id.* at *1.
82 *Id.* at *3.
83 *Id.* at *1.
84 These factors are: "(1) prejudice or surprise to the party opposing trial of the issue; (2) the ability of that party to cure any prejudice; (3) disruption to the orderly and efficient trial of the case by inclusion of the new issue; and (4) bad faith by the party seeking to modify the order." *Id.* at *3 (*citing Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1222 (10th Cir. 2000)).
85 *Id.* at *3.
86 *Id.* (*citing* Fed. R. Civ. P. 1).
87 *Id.* at *3.

- *Murray v. Geithner*, No. M8-85 (LAK), 2010 WL 1257324 (S.D.N.Y. Mar. 25, 2010).

The Southern District of New York in *Murray v. Geithner* principally relied on Fed. R. Civ. P. 1 to deny overbroad discovery requests.[88] *Murray* was before the court on plaintiff's motion to compel a Fed. R. Civ. P. 30(b)(6) deposition and document production from non-party Federal Reserve Board of New York ("FRBNY").[89] Although the FRBNY's conclusory objections to plaintiff's subpoena might otherwise have resulted in their waiver, the court granted its motion to quash because the subpoena was "obviously improper."[90] The court first pointed to the subpoena's lack of a time limitation, which would require FRBNY to produce every responsive document and witness with respect to its entire history, and to its dramatic overbreadth in requiring a non-party to provide a 30(b)(6) deposition.[91] The court then stated:

> Other points could be made. But the pivotal consideration is simply this. The Federal Rules of Civil Procedure are to be applied so as to achieve "the just, speedy and inexpensive determination of every action." Parties seeking discovery have a responsibility to frame discovery requests with that in mind. This plaintiff did not do so. It is not the Court's task to do his job for him by redrafting his manifestly overbroad discovery requests.[92]

Applying Fed. R. Civ. P. 1's mandate, the court denied plaintiff's motion to compel discovery and granted FRBNY's motion to quash, without prejudice.[93]

- *Grider v. Keystone Health Plan Cent., Inc., et al.*, 580 F.3d 119 (3d Cir. 2009).

Although *Grider v. Keystone Health Plan Cent., Inc., et al.* vacated the trial court's discovery sanctions, it relied on Fed. R. Civ. P. 1 to reproach all counsel for five years of discovery obstruction.[94] The Third Circuit considered defendants' appeal of sanctions imposed for their repeated use of boilerplate objections; unreasonable multiplication of discovery proceedings, including last minute and late document production; and violation of a protective order.[95] In sanctioning defendants following a nine-day sanctions hearing, the lower court had viewed defendants' violations within the "larger context of their other obstructionist tactics" and "contempt of the discovery obligations."[96]

Notably, the Third Circuit began its opinion by admonishing both parties:

> The promulgation of the Federal Rules of Civil Procedure ushered in a new era of federal litigation, directed to the goal of securing "the just, speedy, and inexpensive determination of every action and proceeding." It would be reasonable to expect, in light of all the applicable rules and governing precedents, that experienced attorneys, especially those who

88 *Murray v. Geithner*, No. M8-85 (LAK), 2010 WL 1257324, *3 (S.D.N.Y. Mar. 25, 2010).
89 *Id.*
90 *Id.* at *2.
91 *Id.* at *2-3.
92 *Id.* at *3 (citing Fed. R. Civ. P. 1).
93 *Id.* at *3.
94 *Grider v. Keystone Health Plan Cent., Inc., et al.*, 580 F.3d 119, 123 (3d Cir. 2009).
95 *Id.* at 128-129.
96 *Id.* at 128-129, 135.

> have handled major litigation, would be able to proceed through the discovery and pretrial stages with a conciliatory attitude and a minimum of obstruction, and that, under the guiding hand of the district court, the path to ultimate disposition would be a relatively smooth one. The record of the case before us shows exactly the opposite. The parties were unable to reach agreement on even minor matters and the discovery was noncompliant, delayed, or protracted, leading to the District Court's entry of the sanction orders that are the subject of these appeals. We conclude, without enthusiasm, that none of the players is without responsibility for the unfortunate state of affairs that developed, but we view with particular concern the lawyers' attitude and conduct toward the district judge who, if given more cooperation, would undoubtedly have been able to preside more effectively.[97]

The Third Circuit vacated the sanctions for lack of an individualized analysis under applicable legal standards, but left intact the trial judge's factual findings and noted that frustration with defendants' conduct was warranted.[98]

Courts frustrated by delay, makework, incompetence, gamesmanship, or sheer cluelessness have thus invoked Rule 1, with increasing frequency, to bring litigation practice into line with due process and public policy. The hope seems to be that lawyers sanctioned, or at least scolded, for wasting litigant and public time and resources will be sufficiently chastened to repent and reform. Certainly, judicial displeasure—engraved for all time in a published decision—is an effective punishment and deterrent for those unfortunate attorneys within the zone of danger. For those innocent (or at least uncaught) regarding the specific transgression for which punishment is threatened or imposed, *schadenfreude* may—or may not—translate into best practice. Were the foregoing examples of judicial discipline sufficient, reform would have happened by now. Yet, concurrently with these decisions describing, decrying, and disciplining isolated discovery infractions, discovery abuse was proving successful—and hence irresistible—in high stakes complex litigation, exemplified by the "tobacco litigation." It is difficult to forego a litigation strategy that works.

IV. FEDERAL COURT DECISIONS INVOKING RULE 1 IN THE EPICENTER OF LITIGATION BY ATTRITION: TOBACCO LITIGATION

The tobacco litigation of the early 1980s through the mid 1990s is a disturbing demonstration of the evolution and effectiveness of the strategy of attrition in discouraging civil suits by rendering them cost-ineffective regardless of merit. The window that the tobacco litigation provides into the attrition strategy at work is illuminating, yet incomplete, as the published decisions both identifying and attempting to proscribe or disincentivize it, are remarkably few. Instead, most courts that diagnosed the problem bemoaned it, but did not publish their critiques or impose effective sanctions. As a result, the strategy of attrition continued to flourish, because it worked.

The cigarette industry's successful litigation history derives from an early decision to fight all lawsuits at any cost. The industry considered that if any case were settled, the

97 *Id.* at 123 (*citing* Fed. R. Civ. P. 1) (internal citations omitted).
98 *Id.* at 139, 141, 145.

news of settlement would generate an endless stream of potential claimants as to whom payment – no matter how small in each case – could be cumulatively prohibitive.[99] The industry thus demanded that its lawyers "[v]igorously defend any case; look upon each as being capable of establishing dangerous precedent and refuse to settle any case for any amount."[100] This strategy was no secret. Its efficacy depended, in part, on the fact that it was widely publicized in the media and entered the popular culture, but also on its consistent deployment to exhaust plaintiffs before the point of trial. A "never surrender" strategy that insists on trial, not settlement, is legitimate and may even be noble. Exploiting the system to render such trials unreachable or unaffordable through discovery abuse is neither.[101] As the federal court presiding over the Department of Justice ("DOJ") tobacco litigation recently found, the industry engaged in a 50-year scheme in violation of racketeering laws – "with little, if any, regard for individual illness and suffering . . . *or the integrity of the legal system*" – and further found that such "racketeering" (including fraud on the legal system itself) continues to this day.[102]

- *Thayer v. Liggett & Myers Tobacco Co.*, 1970 U.S. Dist. LEXIS 12796 (D. Mich. 1970).

The strategy of attrition via discovery abuse surfaced early in tobacco litigation. In 1970, the *Thayer* case, brought by an individual smoker, ended in a jury verdict for defendant Liggett & Myers. Afterwards, the trial court – disturbed by the defendant's "overwhelming superiority in resources" and "insatiable appetite for procedural advantage" – detailed abuses that, in its view, rendered the trial a mockery.[103] Among other things, the court noted that the defendant was evasive in discovery;[104] "confidently risk[ed] tactics" knowing that the plaintiff "could not afford the luxury of a mistrial,"[105] and obtained a sweeping protective order, "on grounds which later proved largely illusory," to isolate plaintiff's counsel.[106] Meanwhile, defense counsel freely engaged in extensive cooperation with other industry attorneys.[107]

As the *Thayer* court concluded:

> The court is convinced that the magnitude of the impact of the disparity in resources between these parties, plus the sophisticated and calculated exploitation of the situation by the defendant, approaches a denial of due process which would compel the granting of a new trial.

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99 *See, e.g.*, E.J. Jacob & Jacob Medinger, *Report Prepared by RJR Outside Legal Counsel Transmitted to RJR Executives for the Purpose of Rendering Legal Advice Concerning Smoking and Health Issues and Litigation*, http://tobaccodocuments.org/bliley_rjr/5046819872023.html, at 504681997 (June 27, 1980).

100 J.F. Hind, *Report Concerning Smoking and Health Prepared by RJR Employee Providing Confidential Information to RJR In-House Legal Counsel, to Assist in the Rendering of Legal Advice, and Transmitted to RJR Managerial Employee*, http://tobaccodocuments.org/bliley_rjr/505574976-4977.html, at 50557-4977 (June 29, 1977).

101 Hill & Knowlton, *Background Material on the Cigarette Industry Client* (Dec. 15, 1953), http://legacy.library.ucsf.edu/tid/wvc34c00. A central strategy for the cigarette industry's approach to litigation "is a lavishly financed and brutally aggressive defense that scares off or exhausts many plaintiffs long before their cases get to trial." Patricia Bellew Gray, *Legal Warfare: Tobacco Firms Defend Smoker Liability Suits With Heavy Artillery*, WALL ST. J., Apr. 29, 1987, at 25. Those plaintiffs who proceed with their cases "are vastly outgunned," encountering the tobacco industry's "overwhelming strength and prowess at every turn." *Id.*

102 *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 852 (D.D.C. 2006) (emphasis supplied).

103 *Id.* at 18, 19.

104 *Id.* at 5-6, 9-10

105 *Id.* at 18.

106 *Id.* at 16; *see also id.* at 10-14.

107 *Id.* at 15 & n.8, 16, 17 n.10, 101-02.

> This question, unfortunately, is now moot because plaintiff cannot afford further proceedings.

Id. at 59.

- *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573 (D.N.J. 1985).

In *Cipollone v. Liggett Group, Inc.*, the court relied in part on the time- and cost-saving purposes of Fed. R. Civ. P. 1 to hold that plaintiffs' counsel could use discovered information in subsequent cases. *Cipollone* was before the court on plaintiffs' appeal of a protective order that prohibited them from making public, or using in other litigation, any information obtained through discovery in that case. The court first held that this order was not justified by "good cause" under Fed. R. Civ. P. 26(c) and therefore violated the First Amendment.[108] Noting that "the public has a right to know about the risks of cigarette smoking," the court modified the order to require defendants to show good cause for designation of confidential materials.[109] The court went on to hold that plaintiffs' counsel could use even confidential materials in other cases in which counsel participate.[110] In so holding, the court cited several cases that permitted use of discovered information in related litigation. The court quoted extensively from one such case that stated: "[i]n this era of ever expanding litigation expense, any means on minimizing discovery costs improves the accessibility and economy of justice."[111] Given such precedent, the court found that permitting counsel to utilize discovered materials in other cases "prevent[s] the kind of duplication that would undermine the purpose of the Federal Rules of Civil Procedure 'to secure the just, speedy, and inexpensive determination of every action.'"[112] These rulings augered well for counteracting litigation by attrition. Yet the strategy was not defeated.

- *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414 (D. N.J. 1993).

Despite an imbalance of resources, plaintiffs did not *always* lose on the merits. The *Cipollone* case survived pretrial costs and delays, and reached trial. The result was the first verdict for a plaintiff in a smoker's case. The judgment survived, in part, on review by the Supreme Court, and was remanded for further proceedings. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

In *Haines v. Liggett Group,* the *Cipollone* case on remand from its victory in the Supreme Court, the district court again discussed the cost-saving purpose of Fed. R. Civ. P. 1, this time in the context of a motion by plaintiff's counsel to withdraw after 8 years of litigation, due to the unreasonable financial burden caused by litigating on a contingency fee/advanced costs basis.[113] Plaintiffs' counsel (a well-respected and experienced firm) cited exhaustion by interminable delays and mounting expenses, including $1.2 million in out-of-pocket expenses, $5 million in lawyer and paralegal time, and $500,000 in deposition transcript costs alone.[114] Plaintiff opposed the motion, suggesting that the court instead "[limit] defendants' discovery and use of expert witnesses pursuant to Fed. R. Civ. P. 1, 26 and 83."[115] To focus judicial attention on the cause of the problem, plaintiff introduced defense counsel's outside statement boasting of its strategy of attrition:

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108 *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573, 587 (D.N.J. 1985).
109 *Id.* at 587.
110 *Id.* at 586.
111 *Id.* (*citing Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982)).
112 *Id.* at 586.
113 *Id.* at 418.
114 *Id.*
115 *Id.* at 422.

> The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR Tobacco's]'s money, but by making that other son of a bitch spend all of his.[116]

The *Haines* court stated that to the extent this statement reflected defendants' attitude, "it is at odds with the purposes of the Federal Rules of Civil Procedure and is intolerable."[117] After emphasizing "the design of the Federal Rules to ensure the 'just, speedy, and *inexpensive* determination' of this action,"[118] the court quoted the U.S. Supreme Court:

> Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part … from abuse of the discovery procedures … [A]ll too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of the weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants…Litigation costs have become intolerable, and they cast a threatening shadow over the basic fairness of our legal system.[119]

In spite of these concerns and its previous recognition of the imbalance caused by defendants' attrition tactics, the *Haines* court did not explicitly address plaintiff's proposals to streamline litigation, and did not restrict defendants' litigation conduct: instead, it denied the motion to withdraw because plaintiff's counsel had not demonstrated that it expended significant resources in this case particularly, because plaintiff was unable to find substitute counsel, and because it found the contingency fee agreement binding on both client and counsel.[120]

Thus, following a Supreme Court decision which vindicated their claims, the *Cipollone* plaintiffs, after a decade of litigation, faced a dismissal with prejudice.[121] Their attorneys—recognized at the time as "the leading law firm" in tobacco litigation—also moved to withdraw from other tobacco cases, citing the "unreasonable financial burden."[122] In 10 years, not a single of the firm's tobacco cases had been resolved on the merits.[123] Given this record, no lawyer was willing to take over these cases.[124]

The decade-long odyssey of *Cipollone*/*Haines* describes a familiar journey. As two other attorneys from this era wrote:

> The reality for most cigarette disease victims and their families is that they cannot find a lawyer to handle their case, no matter how hard they look … [B]y making the cost of litigation so high, the cigarette manufacturers have closed the courthouse doors to most people who have gotten sick or died from using their products.

116 *Id.* at 421 (*citing* Opposition Brief at 8, *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414 (D.N.J. 1993).
117 *Haines v. Liggett Group, Inc.*, 814 F. Supp. at 423.
118 *Id.* at 423 (emphasis in original).
119 *Id.* at 423 (*quoting* Order Amending Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Stewart, J., dissenting)).
120 *Haines v. Liggett Group, Inc.*, 814 F. Supp. at 424, 425, 427.
121 *See Haines*, 814 F. Supp. at 417 n.4.
122 *Id.* at 418, 425.
123 *Id.* at 421 n.14.
124 *Id.* at 425.

> They have done this by resisting all discovery aimed at them. … They have done it by getting confidentiality orders attached to the discovery materials they finally produce, … forcing each plaintiff to reinvent the wheel. They have done it by taking exceedingly lengthy oral depositions of plaintiffs and by gathering … every scrap of paper ever generated about a plaintiff, from cradle to grave. And they have done it by taking endless depositions of plaintiffs, expert witnesses, and by naming multiple experts of their own for each specialty, such as pathology, thereby putting plaintiffs' counsel in the position of taking numerous expensive depositions or else not knowing what the witness intends to testify at trial. And they have done it by taking dozens and dozens of oral depositions, all across the country, of trivial fact witnesses, particularly in the final days before trial.[125]

Other plaintiffs' lawyers described similar tactics: "[T]he Defendants then began noticing depositions and subpoenaing witnesses for depositions virtually all over the United States. Defendants deposed anyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses, former spouses of family members, neighbors and store owners in the neighborhood where Plaintiff lived," "[T]he cigarette company defendants took 107 depositions, many of out-of-state persons, and used only two of them at trial," "Elementary school records from the 1930s from a small town in Kentucky were obtained. When an objection was made, the explanation was that he might have had a health course in the elementary grades."[126]

In the end, this era of individual smokers' litigation concluded with the tobacco industry's undefeated record intact. After almost 40 years of litigation, and 300 cases filed since the 1950s, there still had not been a single judgment – or penny paid – to plaintiffs.[127] A "no defeat" record is impressive, and such a record achieved through skilled advocacy at communicating a meritorious defense is admirable. But such a result obtained by insisting on trial and ensuring the other side cannot afford one offends due process and devolves advocacy.

- *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198 (E.D.N.Y. 2001).

Some courts did take bold initiatives to counteract the prohibitive costs of discovery in tobacco litigation, often by invoking other rules or procedures to counteract discovery cost by introducing savings (or at least economies of scale) elsewhere. For example, in *Blue Cross & Blue Shield of New Jersey v. Philip Morris*, the court cited Fed. R. Civ. P. 1 to support its holding that aggregated statistical and sampling evidence was a proper alternative to individualized proof of smokers' injuries.[128] *Blue Cross and Blue Shield* was before Judge Jack Weinstein on defendant's motion for judgment as a matter of law following a jury verdict for plaintiff insurer on claims that tobacco companies deceived its insureds concerning the hazards of smoking. Defendants argued that the use of aggregated proof to determine the insurer's economic losses violated their Constitutional rights and was contrary to New York law.[129] The court began its analysis by citing Fed. R. Civ. P. 1, and

125 William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W. L. REV. 275, 276-77 (1989).
126 *Id* at 297-299.
127 *Haines,* 814 F. Supp. at 428 n.31.
128 *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198 (E.D.N.Y. 2001).
129 *Id.* at 247.

stating that the Federal Rules of Civil Procedure grant district court judges "flexibility to shape the type and scope of information available before and during a complex trial."[130] In order to expeditiously resolve mass cases, the court noted, "some discovery necessarily must be foregone."[131]

The *Blue Cross* court concluded that scientific evidence such as the sampling and statistical extrapolations admitted at trial were "well suited to mass tort actions" and warned that resolving mass tort disputes on a case-by-case basis "may create a systemic bias against plaintiffs."[132] The court held that use of aggregated evidence did not violate defendants' due process rights, because the expense of litigating individual claims was not in the financial interest of defendants, plaintiff, or insureds; because the statistical procedures were accurate; and because aggregated proof promoted efficient use of judicial resources.[133] Defendants' jury trial right was not violated because use of aggregated proof enhanced rather than limited the jury's role as fact-finder.[134] Finally, the court held that New York state substantive law did not prohibit use of aggregation forensic tools to support an action under the state consumer protections statute.[135]

- *Falise v. Am. Tobacco Co.*, No. CV-99-7392 (JBW), 2000 U.S. Dist. LEXIS 19574 (E.D.N.Y. Dec. 27, 2000).

In *Falise v. Am. Tobacco Co.*, the court applied the time- and cost-saving mandates of Fed. R. Civ. P. 1 in the context plaintiffs' motion to exclude defendants' depositions. The court reasoned that Fed. R. Civ. P. 1 supported a decision to exclude depositions from defendant's six experts, where the court had previously "directed both sides to reduce the number of experts in order to limit the scope and complexity of a trial scheduled to take over two months."[136] In furtherance of Fed. R. Civ. P. 1's mandate to "limit the cost and time necessary to complete the trial," the court excluded the depositions as an exercise of its "inherent power to control the litigation in the interest of fair and prompt disposition on the merits."[137]

- *Simon v. Philip Morris, Inc.* (*In re Simon II Litigation*), 200 F.R.D. 21 (E.D.N.Y. 2001).

In *Simon II*, Judge Weinstein looked beyond discovery to its historical goal—trial—to determine whether and how to determine important issues without the cost, delay and inconsistency of multiple repetitive trials of the same conduct of the same actors, with respect to the determination of a permissible level of punitive damages liability, in the challenging context of the tobacco "mass tort." The court found that Fed. R. Civ. 1 supported a conclusion that severance of issues and trials before the same and separate juries was appropriate. In this class action seeking classwide determination of punitive damages for the conduct of the tobacco industry, the court considered whether severance of the punitive damages issues would violate the Seventh Amendment right to jury trial.[138] The court began by discussing trial judges' broad discretion to sever issues for trial. Relying

130 *Id.* at 249 (*citing* MANUAL FOR COMPLEX LITIGATION, 3d ed. Section 21.422 (2000), FED. R. CIV. P. 1, FED. R. CIV. P. 16(b), FED. R. CIV. P. 26(b)(2), FED. R. CIV. P. 30(a), FED. R. CIV. P. 33).
131 *Id.* at 249.
132 *Id.* at 248.
133 *Id.* at 254-255.
134 *Id.* at 258.
135 *Id.* at 260.
136 *Falise v. Am. Tobacco Co.*, No. CV-99-7392(JBW), 2000 U.S. Dist. LEXIS 19574, at *2 (E.D.N.Y. Dec. 27, 2000).
137 *Id.*
138 *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 24 (E.D.N.Y. 2001).

heavily on the language of Fed. R. Civ. P. 1, the court stated that "the language and spirit of the Federal Rules of Civil Procedure provide trial judges with the authority to structure trials efficiently and fairly."[139] The court concluded that severance of issues is "one of the trial judge's most useful trial management devices to ensure the just and efficient determination of civil actions as required by Rule 1."[140]

Additionally, the district court in *Simon* reasoned that severance was supported by the "public policy favoring the efficient and fair determination of mass torts on the merits, utilizing flexible class actions where they are appropriate,"[141] explaining that modern adjudicatory tools such as severance "must be adopted to achieve the original framers' goal of 'securing the just, speedy, and inexpensive determination of every action.'"[142] After citing several secondary sources that encourage adjudicatory innovation, the court stated that "adjudicating mass torts as class actions instead of on a case-by-case basis helps fulfill the dictates of Rule 1."[143] In turn, the court reasoned, mass tort class actions lend themselves to severance because "the very nature of injuries arising from mass production and mass marketing efforts makes trial judges' discretion to sever issues for trial one of the most necessary and natural" tools for efficient adjudication.[144] After examining the Seventh Amendment's history and case law, the court held that it did not substantially inhibit severance of these issues and trials because the amendment is only implicated where a severed issue is presented to a subsequent jury in a confusing or uncertain manner.[145]

Simon II was a counterpoint to another smokers' class action, the *Engle* litigation.[146] The *Engle* jury verdict of $146 billion in punitive damages was widely viewed as excessive under U.S. Supreme Court standards, was beyond even the tobacco industry's ability to pay, and would have benefited the citizens of only a single state. The *Simon* action sought a nationwide class to determine the maximum punitive damages award (if any) that could constitutionally be imposed against the industry for its conduct. Injured smokers within the *Simon* class definition would share equitably in any such award, if and when they proved their own actual damages. The *Simon* class certification decision was reversed by the Second Circuit.[147] The *Engle* punitive damages verdict was likewise reversed, as was class certification, but with a pragmatic difference which at least partially erased the attrition advantage of the tobacco defendants: In *Engle* the Florida Supreme Court granted *res judicata* to eight key liability findings of the trial jury, enabling members of the defined class who timely filed individual suits carried these findings with them, and proceed to proof of individual medical causation and damages, without re-trying (or re-discovering) these classwide findings.[148] Approximately 7,000 Floridians within the *Engle* class definition thereafter filed individual damage suits, which are pending in Florida state and federal courts. A handful have already gone to trial, with victories for both smokers and tobacco companies.[149]

- *Woods v. R.J. Reynolds Tobacco Co.*, No. 5:07-cv-130(DCB) (JMR), 2009 U.S. Dist. LEXIS 51565 (S.D. Miss. June 18, 2009).

139 *Id.* at 26.
140 *Id.*
141 *Id.* at 24.
142 *Id.* (*citing* FED. R. CIV. P. 1).
143 *Id.* at 44 (*citing* Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 168 (1998)).
144 *Id.* at 44.
145 *Id.* at 51.
146 The *Engle* litigation history is summarized in *Engle v. Liggett Group, Inc.,* 945 So.2d 1246 (Fla. 2006).
147 *Simon II Litig. v. Philip Morris USA, Inc.* (*In re Simon II Litig.*), 407 F.3d 125 (2005).
148 945 So.2d at 1257, n.4, and 1277-78.
149 One federal district court rejected the *Engle* Supreme Court *res judicata* ruling. *See Brown v. R.J. Reynolds v. Tobacco Co.*, 576 F. Supp. 2d 1328 (M.D. Fla. 2008). The *Brown* decision is on appeal to the Eleventh Circuit.

Tobacco defendants have sometimes been seen as victims of litigation costs and delay. In *Woods*, an individual suit regarding defendant tobacco companies' cigarette marketing, the court stated that Fed. R. Civ. P. 1 reflects the primary goals of the judiciary. Defendants moved for summary judgment on plaintiffs' claims for deceptive advertising, fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and negligent concealment, while plaintiffs moved for voluntarily dismissal of two claims under Rule 41. Defendants argued for dismissal with prejudice because plaintiff filed her dismissal motion only after the case had progressed substantially.[150] After listing the four factors that the Eighth Circuit applies when considering a motion for voluntary dismissal, the court stated that "adherence to progression order deadlines is critical to achieving the primary goal of the judiciary: 'to serve the just, speedy, and inexpensive determination of every action.'"[151] The court found that plaintiff had diligently prosecuted her case, but concluded that all other factors weighed in favor of denying plaintiff's motion "in order to prevent plain legal prejudice to the defendant."[152] The court then turned to the merits of plaintiffs' claims and granted summary judgment for defendant on each.[153]

- *In re Tobacco Litigation (Personal Injury Cases)*, 218 W. Va. 3016 (2005).

Procedural innovations have come, belatedly, to tobacco litigation. As Justice Starcher of the West Virginia Supreme Court noted in applying his state's adoption of Rule 1 to affirm as constitutional a bifurcated trial process that included a mandatory determination of punitive damages liability, no court is "constitutionally mandated to deny the plaintiffs a just, speedy and inexpensive resolution of their claims in order that the defendants' property rights may be fully protected."[154] In a judicial system of finite resources, the due process rights of any litigant cannot be absolute, lest opponents or others be shortchanged of their due process. Like it or not, due process is allocated on a "sliding scale." Each side must get its due, each is due something, and what process is due must be decided – carefully – as the circumstances and nature of each case.[155]

As the most recent developments in tobacco mass tort litigation demonstrate, courts have finally determined to apply time and cost saving procedures to render these cases feasible for plaintiffs to prosecute, defendants to defend, and courts to manage, consistent with proportional due process. The tobacco industry's record of attrition is neither an isolated example of discovery abuse, nor merely a matter of historical interest. The attorneys who learned how to litigate during this era, in cases large and small, learned negative lessons about appropriate discovery behavior and internalized a cynical and paranoid attitude toward the process. These lessons were incentivized and encouraged by success, and they were passed on to, and inculcated in, the current generation of litigators. Most lawyers did not participate in smokers' litigation, and most of those who did were not affirmative proponents of discovery abuse, even when they practiced it. Like those affected by "second-hand smoke," lawyers who grew up as litigators during the past three decades were harmed, surely yet imperceptibly, by proximity to, and acceptance of, the tactics of those tobacco litigators who, as true believers, acted upon the principle that the ends justify the means. The reward for such conduct was palpable: to the most ruthless warriors went the spoils of repeat business.

150 *Woods v. R.J. Reynolds Tobacco Co.*, No. 5:07-cv-130(DCB)(JMR), 2009 U.S. Dist. LEXIS 51565 at *5 (S.D. Miss. June 18, 2009).
151 *Id.* at *5 (citing *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006) (quoting FED. R. CIV. P. 1)).
152 *Id.* at *6.
153 *Id.* at *10-19.
154 *In re Tobacco Litig.* (*Personal Injury Cases),* 218 W. Va. 301, 624 S.E.2d 738, 744 (W. Va. 2005) (Starcher, J., concurring).
155 *Id.* at 748.

Our litigation system has, to date, not fully succeeded in providing incentives for the reforms thoughtful and committed jurists and commentators continue to urge. To the contrary, cooperation is disincentivized in the litigation marketplace. Defense lawyers and law firms are punished with fewer billings and lost clients if they litigate in the spirit of Rule 1. Plaintiffs' lawyers like to believe that they are superior avatars of Rule 1, but it is simply far easier for them to litigate economically in accord with Rule 1. Indeed, if they are to earn a living, they have no choice: the contingent fee system rewards results achieved over hours spent. For plaintiffs' lawyers who must advance the costs of suit, as well as await the uncertain prospect of recovery for their time, every discovery procedure and every discovery dispute has a price tag. A cost-benefit analysis must thus be conducted for every plaintiffs' discovery initiative. Plaintiffs' lawyers have no choice, however, as to the level of discovery cost, once discovery resistance becomes entrenched on the defense side. Discovery procedures have thus been used, with extremely effectiveness, as an offensive weapon, not simply a defensive shield, by defendants, who can financially exhaust their opponents in the initial discovery stages of a complex case long before ever reaching the point at which discovery of key material information becomes imminent and inevitable.

The most frustrating aspect of judicial decision making—especially at the appellate levels—for those who labor in the trenches is an amazing ability to disregard cost and delay in the due process analysis. It is assumed that litigants possess an infinite level of financial resources, and enjoy eternal life, such that justice long delayed and insensibly priced could still deserve the name. Some cases do deserve, and require, more time, and more resources, than others, to adjudicate fairly, and no one would suggest an elimination of reasonable appellate review. We have, as in other aspects of our government, "a check and balance" system in litigation where mistakes and oversights can be corrected, and the initial adjudication is not the final one. But, despite this system, discovery abuse has gone unchecked, and discovery costs have gone unbalanced, threatening to diminish civil litigation into a game for the rich. The interest of the public in due process has been under acknowledged, and under-served. This interest exists not only because members of the public deserve cost-effective access to the courts as litigants themselves, but because the public as a whole has a right to expect that the system will expend its own resources wisely, and allocate them fairly.

V. CAN WE WIN THE CIVILITY WARS?

Courts have long identified unnecessary contentiousness, bickering, nastiness, and nit-picking as direct causes or indirect sources of costs and delay. Of course, it is quite possible to conduct a devastating (and Rule 1-violative) scorched earth campaign with utmost civility, and we have all seen it done. Nonetheless, there is truth to the observation that incivility, rudeness, even the frustrating behavior we label "passive-aggressive" is inimical to the process, and, over time, leads to the professional fatigue and burn-out that diminish procedural efficiency. Civility is indisputably preferable to not-niceness of any degree, and the battle for civility has been waged incessantly for decades.[156] The campaign has recently intensified.

The *Recorder's* Autumn 2009 *Litigation* Supplement included an article entitled *Let's Play Nice: Lawyers Are Urged To Cooperate More Closely During Discovery*.[157] What's new

156 Of course, every era of our profession has bemoaned an increasing lack of civility, and none has spoken out for less. What brings this civility deficit to the level of a due process denial is, arguably, the sheer volume of information potentially available via e-discovery, coupled with the ability (soon converted into a necessity) to litigate, via phone, fax, and email, on a "24/7" basis. The sleep-deprived are not infrequently uncivil.

157 The author, Jason Krause, likewise carries this article on Law.com.

here is the promotion of a major initiative of The Sedona Conference®, its *Cooperation Proclamation*,[158] which challenges lawyers to "work more collaboratively during the discovery phase so that greater time and attention (and money) can be spent on litigating the merits of the underlying dispute."[159] In three pages of text, the *Cooperation Proclamation* declares war on the "costs associated with adversarial conduct in pre-trial discovery" as detrimental to the focus on "substantive resolution of legal disputes." The *Proclamation* revives the neglected duty of lawyers toward the court and the public, by printing out that:

> Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests—it enhances it. Only when lawyers confuse advocacy with adversarial conduct are these twin duties in conflict.[160]

The *Cooperation Proclamation* does not shrink from high-mindedness, but is likewise grounded in a practical dollars-and-sense argument that our system can no longer afford and should no longer tolerate hardball tactics:

> Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI [electronically stored information] and the data deluge. It is not in anyone's interest to waste resources on unnecessary disputes, and the legal system is strained by "gamesmanship" or "hiding the ball," to no practical effect.
>
> The effort to change the culture of discovery from adversarial conduct to cooperation is not utopian.[161] It is, instead, an exercise in economy and logic. Establishing a culture of cooperation will channel valuable advocacy skills toward interpreting the facts and arguing the appropriate application of law.[162]

The *Cooperation Proclamation* knows it is calling for new behavior and new attitudes in the service of venerable principles that have long been honored in the bench: it admits its goal is a "paradigm shift for the discovery process."[163] To implement this shift, the *Proclamation* sketches a three part process (Part I: Awareness / Part II: Commitment / Part III: Tools) that will require simultaneous (or at least reciprocal) leaps of faith by adversaries and courts; leaps to be taken to fulfill our "'officer of the court' duties" to effectuate the mandate of Rule 1, and "the fundamental ethical principles governing our profession."[164] Everyone would wish this leap to succeed, no one who deserves to be a

158 Copyright © 2008, The Sedona Conference®.
159 Krause, *id.*, *citing* The Sedona Conference®, *The Sedona Conference® Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp.). The full text of the *Proclamation* can be found at http://www.thesedonaconference.org/content/tsc_cooperation_proclamation. The Sedona Conference® expressly grants royalty-free reprint rights to the *Cooperation Proclamation* to encourage its adoption and use by courts and litigants.
160 *Cooperation Proclamation*, at 1.
161 Cartner RAS Core Research Note G00148170, *Cost of eDiscovery Threatens to Skew Justice System*, 1D#G00148170, (Apr. 20, 2007), at http://www.h5technologies.com/ pdf/gartner0607.pdf. (While noting that "several . . . disagreed with the suggestion [to collaborate in the discovery process] . . . calling it 'utopian,'" one of the "take-away's" from the program identified in the Gartner Report was to "[s]trive for a collaborative environment when it comes to eDiscovery, seeking to cooperate with adversaries as effectively as possible to share the value and reduce costs.").
162 *Id.*
163 *Id.*
164 *Id.*

lawyer or judge would wish to be seen subverting it, and everyone would volunteer to be the second to jump. What holds us back from the willingness to jump first?[165] In a word (or two), internalized wimpophobia. It's difficult to put aside the macho attitude, and even harder to put down the weapons of attrition that have been condoned—and thus incentivized—for so long.

However, "[t]his is not about holding hands and signing Kumbaya or being a wimp," says Jason Baron, director of litigation for the U.S. National Archives and Records Administration. "It's not about helping the other side. That's crazy. It's about fighting over the substantive matters of law and not spending all of the client's money on discovery."[166] The point is thus made that cooperation and civility to not disarm advocates, but simply refocus that advocacy on the issues that matter—the merits.

The Sedona Conference® founder Richard G. Braman, a procedural visionary, has acknowledged the magnitude of the challenge, while rejecting the "utopian" label critics have placed on the effort. As to rejection of the proposal that lawyers be taught active cooperation in the discovery process, Braman has said "I really didn't think I was being utopian or unrealistic but I understand that's not the way most lawyers view the way things work." He adds, "That experience stuck with me, and I decided it was time to put a stake in the ground and say that unless we find a way to solve the dispute over discovery the legal system will in fact break."[167] Braman also offers some metrics for this goal. "If in 10 years 50 percent of lawyers pursue discovery in a cooperative way, this will be a smashing success. I am not Pollyannish. This will require a generational shift to come about."[168]

The necessity for cooperation, especially in complex litigation, is not a novel concept. It has been recognized as the touchstone of successful case management in successive editions of the Federal Judicial Center's influential benchbook, *The Manual for Complex Litigation*, now in its Fourth Edition. Indeed, the *Manual* has taken on the prestige of a procedural sacred text, although it does not have the force of statute or Rule, and the Federal Judicial Center modestly disclaims "authoritative" statutes.[169] The *Manual*'s "General Principles" make it perfectly clear:

> Fair and efficient resolution of complex litigation requires at least that (1) the court exercise early and effective supervision (and, where necessary, control); (2) counsel act cooperatively and professionally; and (3) the judge and counsel collaborate to develop and carry out a comprehensive plan for the conduct of pretrial and trial proceedings.[170]

On the margins, techniques short of Rule changes can prod lawyers to experiment with cooperation in discovery. Some very practical approaches to fostering

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165 There is, indeed, a formidable coalition of the willing. As The Sedona Conference® website notes, as of September 30, 2010, the *Cooperation Proclamation* had garnered judicial endorsements from over 100 federal and state judges in 30 states, including some of the most influential judges and jurisdictions. The most recent Judicial Endorsement list is at http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf.

166 "*Let's Play Nice*," *supra*.

167 *Id.*

168 *Id.*

169 Introduction, MANUAL FOR COMPLEX LITIGATION, FOURTH (Federal Judicial Center 2004) at p. 1. Like the *Cooperation Proclamation*, the MANUAL has been placed in the public domain. It is available in .pdf format for download from the Federal Judicial Center at http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublication!openform&parentunid=5420134DE13A58AD85256E58006ED0BC.

170 *Id.* at p. 7.

cooperation and redressing disputes have proved effective on a local level.[171] The threat of proportional sanctions, swiftly and severely imposed, and the disincentive of judicial ire works wonders—so long as counsel are more concerned about avoiding judicial displeasure, damage to their professional reputations or credibility, than they are about losing a lucrative client. It is a disturbing fact that large corporate defendants are not overly impressed or attentive to judicial authority, because the consequences of adverse rulings can be ignored or delayed, and the sting, when belatedly delivered, does not outweigh the benefit of the misconduct.

Lawyers thus fear, not without evidence, that if they do not conceal or delay the production of relevant yet unfavorable information by gaming the system, they will be fired and replaced by lawyers who will. Only courts can counteract this perception by making it clear that lawyers cannot aid their clients in lying or cheating, and that discovery abuse is precisely that. This lesson must be taught, if all else fails, by imposing consequences upon the client: dismissing a defense, entering summary judgment, or other real-world sanctions.

Monetary sanctions mean little to a client who has already calculated that it can afford protracted litigation, and prefers to invest in a scorched earth defense rather than paying claims. Increasing transaction costs through the imposition of a less-than-disabling monetary sanction can backfire in this situation, further incentivizing the very conduct it aims to punish. The loss of a defense; the inadmissibility, in the hider's case, of documents or information hidden from an opponent; the inference that concealed or destroyed evidence is inculpatory; and the admissibility of discovery abuse as a reprehensibility factor in assessing punitive damages, are harsher – and more effective – than all but the most onerous monetary sanctions. Each of these remedies is available under Rule 1, and each, embodied in a published decision, would serve as a high profile, widely disseminated, object lesson in what lawyers cannot do to "protect" clients, and the consequences to clients of such conduct when it is caught.

VI. A HIGH ROAD NOT TAKEN, AND A DISTRACTING DETOUR

The American Law Institute's 1993 Report, *Complex Litigation: Statutory Recommendations and Analysis* (Arthur B. Miller and Mary Kay Kane, Reporters; with the assistance of a stellar roster of judicial, academic, and practitioner advisors), a *tour de force* of procedural innovation, approached the cost-and-delay problem by systematizing the consolidation of multiple similar suits across state lines and across the federal/state court divides, even proposing a choice-of-law selection system that addressed the problem still bedeviling federal courts struggling with multistate mass torts and class actions today. If these recommendations had been implemented by Congress, they could have delivered massive savings by eliminating repetitive litigations (and much of the attendant repetitive discovery). The ALI's *Complex Litigation* project was, regrettably, both before and after its time; it arrived 3 years after the CJRA, and 12 years before the Class Action Fairness Act. At the very least, the project's completion missed a point of convergence (perhaps never to arrive) with a Congressional felt need for procedural reform.

171 "In the U.S. District Court for the Eastern District of Texas, lawyers were given a hotline to call judges directly to settle procedural disputes, Judges there initially worried that it would be a nuisance, but it seems that just the threat that a judge could be called in at any moment has made parties more willing to hash out details on their own. Judges 'thought it would open them up to hours of whining on every little disagreement,' says Ken Withers, director of Judicial Education and Content at The Sedona Conference®. 'But the last time I talked to them, they were down to three calls a month. It seems to help to have active adult supervision.'" *Let's Play Nice, supra.*

Part of the project's vision has been realized. In the most massive of mass torts, *ad hoc* informal coordination between federal MDL courts and state courts is now considered a best practice, and many judges make the effort to accomplish it, with some notable successes.[172] As a byproduct, discovery savings are delivered because discovery product is shared, depositions are utilized in multiple cases, and document depositories (now usually in e-depository form) are developed. Yet redundancy, and resulting waste in the process, remain, and the level of transaction costs (discovery costs, expert costs, and attending fees) remains too high to be consistent with current expectations of efficiency and economy in other public institutions.

Two non-specific yet pervasive trends accelerated during the 1990s to mask the need for discovery reform and cost reduction. Each was a reaction to rising cost and an attempt to counteract defendants' strategy of attrition, not by reducing cost or disabling the attrition tactic, but by consolidating plaintiffs' resources attempt to match those of defendants. The first was the rise of the "entrepreneurial" plaintiffs' lawyer or firm—a phenomenon remarked upon by judges and academics.[173] Recognition of the lawyer-as-entrepreneur is now reflected in the Federal Rules themselves: for example, the most recent anecdote to Rule 23, the Rule 23(g) factors a court "must consider" in appointing class counsel, include "the resources that counsel will commit to representing the class."[174] Adequate resources to perform the task at hand are essential, of course, but attorneys sometimes competed for class counsel by demonstrating the ability to throw more resources at the prosecutor of class claims, than of working to assure that such prosecution was cost-effective. In short, plaintiffs' counsel sometimes responded to the defense attrition tactic by aping, rather than attacking it. Infatuation with the notion of "lawyers as entrepreneurs" has, most recently, played a role in landing some prominent plaintiffs' lawyers in prison.

A second response to attrition is more constructive and benign. Lawyers banded together as consortia or committees, acting essentially as *ad hoc* law firms, to prosecute a particular piece of complex litigation. This occurred in the tobacco litigation itself: the *Castano* plaintiffs' lawyers committee is a notable example. By banding together, plaintiffs' lawyers overcame the limitations of the contingent fee economic model (small firm size/litigation underfunding) to achieve economies of scale, and amass a sizeable costs fund with which to counteract attrition tactics. This model persists in complete litigation as an essential tool to counteract litigant resource imbalance, as well as assist the court in case management, and is reflected in the *Manual for Complex Litigation*'s prescription for the appointment of lead counsel, liaison counsel, steering committees and other plaintiffs' leadership structures.[175] The battle for designation as court-appointed Lead Counsel and Steering Committee members has often dominated the initial stage of many MDL litigations, and courts have been urged to control this process by not simply acceding to the leadership structure proposed by plaintiffs counsel (which would be too reflective of coercion or influence by dominant "entrepreneurs," or by "pay to play" requirements) but

172 For example, the *Vioxx* (MDL 1657) and *Bextra/Celebrex* (MDL 1699) pharmaceutical products liability MDLs were marked by a high degree of communication, coordination, and cooperation among the federal and state judges, at every stage of the litigation. The joint work of MDL Transferee Judge Eldon Fallon and New Jersey mass tort judge Carol Higbee in the effective co-management of discovery, trials, and finally settlement is now legendary. In *Bextra/Celebrex*, MDL Transferee Judge Charles Breyer and New York state Justice Judith Kornreich created a formal nexus of federal/state coordination by jointly appointing retired federal judge (and former Federal Judicial Center Director) Fern M. Smith as Special Master for both federal and state proceedings. She managed federal and state discovery, made recommendations on pretrial and Bellwether trial selection matters, and participated in the mediation of comprehensive settlements of federal and state personal injury and economic loss claims.

173 *See, e.g., White v. Sundstrand Corp.*, 265 F.3d 580, 586 (7th Cir. 2001) (Easterbrook, J.); Stephen B. Burbank and Lindon J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675 (Fall 1997); Jack B. Weinstein, *Some Reflections on United States Group Actions*, 45 AM. J. COMP. L. 833 (Fall 1997).

174 FED. R. CIV. P. 23(g)(1)(A)(iv).

175 *See* MANUAL FOR COMPLEX LITIGATION, FOURTH (Federal Judicial Center 2004) ("*MCL 4th*"), Sections 10.22; 10.223; 14.215.

by borrowing Rule 23(g) criteria and other factors to assure a functional structure that reflects and is responsive to the judge's case management style and preferences.[176]

Designated counsel structures increase organization and concentrate resources, and are thus essential for the fair and efficient progress of complex litigation, even were such cases currently functioning on a cost-proportional basis. Reliance on such structures has, however, masked the steady spiraling of discovery costs (by spreading it among the major players), and deferred recognition of the costs crisis. In short, plaintiffs' counsel and courts inadvertently cooperated in a process that responded to rising costs by enabling plaintiffs to afford (apparently or temporarily) rising costs, rather than by controlling or reducing the costs themselves. The very system that could reasonably be expected and predicted to reduce per-transaction costs through economies of scale has actually increased such costs, and condoned the strategy of attrition.

VII. OTHER COMPLICATING ACCRETIONS IN CIVIL LITIGATION HAVE INCREASED COST AND HEIGHTENED THE NEED FOR DISCOVERY REFORM

The early 1990s saw ambitious initiatives aimed at reducing costs, delay and repetition, and increasing coordination, consistency and predictability in complex litigation, including the above-noted CJRA and the ALI Complex Litigation project. However, the mid-1990s to the present have been punctuated by a series of judicial decisions, legislation and rule changes that have, inadvertently yet demonstrably, increased cost, delay, repetition and confusion in both complex litigation (notably class actions and mass torts, although settled conventions in securities litigation were disrupted by the 1995 Private Securities Litigation Reform Act, antitrust litigation was complicated by the recent *Twombly* decision, and *Iqbal* extended *Twombly*'s new and less than crystalline pleading standards to all civil litigation arenas)[177] nearly all individual tort cases (any cases requiring experts or seeking punitive damages).

These consequential events included, in class action litigation, a series of decisions to heighten pleading and proof burdens; increase the delay of and impose appellate review upon the class certification process; push the determination of class certification from the pleading to the trial stage; engage extensive formal discovery and experts in the class certification process; consider the merits in the context of a formerly purely procedural motion; delay the class certification decision to the point of trial; create the need for a class certification hearing that costs as much, and consumes as much time and resources, as many bench trials; and provide an opportunity for immediate appellate review of all class certification orders. The significant milestones along this path, the *Amchem*[178] and *Ortiz*[179] decisions, the addition of Rule 23(f) interlocutory appeal, and the ongoing convergence of class certification criteria and merits determination exemplified by the *Szabo*[180] and "*IPO*"[181] decisions, all have both supporters and detractors. The need for improvements in class action practice is widely acknowledged, but specific changes as well as the overall direction of change remain controversial. The plaintiffs' community has perceived many of these events as hostile activity. Regardless of intent, it is undeniable that the judicial trends of

176 *MCL 4th*, Section 10.224.
177 *Bell Atlantic Corp. v. Twombly*, 554 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *but see Matrixx Initiatives, Inc. v. Siracusano*, 131 S.Ct. 1309 (2011) for the latest on pleading standards and inferences, in the securities litigation context.
178 *Amchem Prods. Corp. v. Windsor*, 521 U.S. 591 (1997).
179 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).
180 *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).
181 *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006).

this most recent era have gifted defendants with procedures and standards that are deployed to render class action efforts, regardless of merit, social import, or amount at stake, cost-prohibitive to prosecute.

The 2005 Class Action Fairness Act[182] presented the federal judiciary with the opportunity to implement true reform by vesting federal courts with original or removal jurisdiction over most class actions, recognizing that goods, services and conduct that gave rise to nationwide injuries and damages could and should most fairly and effectively be litigated in a national system. The explicit goal of the CAFA was not only to rid class action practice of perceived abuses, but to promote the prompt compensation of legitimate claims—to finally achieve the economies of scale in delivering justice that is the animating purpose and procedural potential of the class mechanism.[183] Congress' failure to include an express choice of law rule in CAFA has hampered the courts, at least to date, in the process of organizing masses of state-law-based claims into coherent classes.[184]

The Supreme Court's 1995 *Daubert* decision cuts across all substantive and procedural boundaries to multiply the cost of presenting expert testimony in virtually every tort, financial, and commercial case.[185] Regardless of the Supreme Court's intent, *Daubert* in practice has added motions, depositions, and evidentiary hearings to the pre-trial phase of countless cases, has created a cottage industry of expert discovery (and a new world of discovery disputes) and may have done little or nothing to improve the real quality of expert testimony. The "junk science" campaign that led to the elaborate *Daubert*-based expert discovery and motions system that now seems entrenched in federal practice has, ironically, been at least partially revealed as partisan propaganda that would not itself pass *Daubert* muster. Judges, many no more qualified that the average juror to evaluate scientific or technical qualifications or arguments, have conflated expertise with orthodoxy and morphed from "gatekeepers"[186] to censors. Politically and ideologically flavored "junk science" turned out not to be the exclusive province of the plaintiffs' bar, but, as exemplified by heated debate in the global warming controversy, the purported policy of an entire administration.[187]

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182 Codified as, *inter alia*, 28 U.S.C. Section 1332(d).

183 Section 2 of CAFA states that:
"[t]he purposes of this Act are to (1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices."
28 U.S.C. Section 1711 note, *as quoted in Morgan v. Gay*, 471 F.3d 469, 473 n.3 (3d Cir. 2006). *See also Grimsdale v. Kash n' Karry Food Stores, Inc.*, 564 F.3d 75, 80 (9th Cir. 2009) *quoting Amoche v. Guar. Trust Life Ins. Co.,* 556 F.3d 41, 47 (1st Cir. 2009):
In enacting CAFA, Congress was responding to what it perceived as abusive practices by plaintiffs and their attorneys in litigating major interstate class actions in state courts, which had "harmed class members with legitimate claims and defendants that had acted responsibly," "adversely affected interstate commerce," and "undermined public respect for our judicial system."

184 For purposes of satisfying Constitutional due process concerns in cases potentially involving multiple states' laws, the choice-of-law standard articulated for class actions in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and reaffirmed generally in *Franchise Tax Board v. Hyatt*, 538 U.S. 488 (2003) continue to suffice, although courts seem reluctant to deploy them. This may be changing, at least in economic injury tort cases. *See, e.g.*, *In re Mercedes-Benz Tele Aid Contract Litigation* (MDL No. 1914) 257 F.R.D. 46 (D.N.J. 2009) (applying *Shutts* choice-of-law analysis to certify nationwide class); Rule 23(f) review denied, 2009 U.S. App. LEXIS 12478 (3d Cir. 2009).

185 *Daubert v. Merrell Dow Pharmaceuticals*, 516 U.S. 869 (1995).

186 *See, e.g.*, *Daubert*, 516 U.S. at 597.

187 *See, e.g.*, *Battle Over Climate Change Legislation Heats Up*, THE OREGONIAN (Portland, Or.) July 2, 2009; *Attorney General Brown Announces Victory Against Weak Bush-Era Air Pollution Standards*, U.S. FED. NEWS, Mar. 3, 2009 ("'Yet the Bush Administration callously ignored the facts and put forward a standard justified by nothing more than junk science', Attorney Brown said.") If science is partisan, and "junk science" is that invoked by one's potential opponent, than judges applying the *Daubert* (or *Frye*) tests must be doubly vigilant not to inject personal political philosophy—or a predilection for particular theories, much less a predetermination of the merits—into the process. Orthodoxy (which may be quickly discredited as knowledge accrues or political fashions change) is not proof of reliability.

The elaborate *Daubert*-derived expert discovery and hearing superstructure should arguably be scaled back to the level of judicial common sense that *Daubert* itself intended. It is no exaggeration to state that *Daubert* has contracted federal jurisdiction even more dramatically than CAFA expanded it. Despite the statutory promise of federal diversity jurisdiction for claims of $75,000 or more, *Daubert*-justified expert discovery costs have effectively pushed all claims in the $1 million-or-less range, regardless of merit, out of court. The expert costs themselves in even the simplest one plaintiff/one defendant tort case can exceed this amount, transforming every winnable case for which provable damages are $2 million or less into a sure financial loser that will not be bought.

The Supreme Court has contributed to increased cost and delay in two additional areas: pleadings and punitive damages. The recent *Twombly* and *Iqbal* decisions are causing widespread judicial and practitioner consternation.[188] Whether the pleading standards somewhat murkily expounded in these decisions will improve defendants' ability to prepare their defenses and enhance judges' ability to understand, narrow and adjudicate the complex cases before them is unclear. What is evident is that these decisions increase the number, complexity and cost of pleadings, motions, and hearings involving challenges to the pleadings, and the amendment of pleadings.

The Supreme Courts' 2001 *Leatherman Tool*[189] decision, which provides for appeal of right, on a *de novo* review standard, of all punitive judgment verdicts, has exponentially increased the delay of finality of punitive damages decisions, and increased the number and costs of appeals. High profile examples include the *Exxon Valdez*[190] class action litigation, in which the repetitive appeals cycle made possible by *Leatherman Tool* caused a 15-year delay between trial verdict and full judgment, and the *Philip Morris v. Williams* individual smoker's wrongful death case, which spanned a decade and involved two trips each, to the Oregon and United States Supreme Court, until the jury's punitive damages verdict achieved finality.

These decisions and trends have overloaded litigation with additional motions, appeals, hearings, and complications. Each adds cost and delay, and each has been attended by its own additional discovery issues and disputes, in a seemingly unending feedback loop. Discovery reform will not, of itself, eliminate the added protraction of these additional procedures, but their proliferation does place discovery reform at an absolute premium. If expert challenges are inevitable after *Daubert*, then expert discovery must be conducted in a focused manner, and in the spirit of scientific inquiry. If the merits now matter in the class certification context, then the parties, and the court, are entitled to a discovery process that cost-effectively and efficiently reveals the facts that most matter to the merits. If seemingly endless appeals are the rewards of parties who seek and obtain punitive damages, with an inevitable alteration of the awards' deterrent impact as time passes without imposition, then expediting the pretrial and trial processes—which courts can do—may partially restore the balance.

In short, because of these non-discovery developments, meaningful discovery reforms, designed to reveal all important information more quickly, and less expensively, may be the last and best platform from which to launch comprehensive civil procedures reform that will realize the promise of Rule 1.

188 *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).
189 *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 924 (2001).
190 *See, e.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S.Ct. 2605 (2008); *In re Exxon Valdez*, 490 F.3d 1066 (9th Cir. 2007).

VIII. THE IAALS/ACTL DISCOVERY PROJECT: A TRIAL-CENTRIC MODEL

On March 11, 2009, the Institute for the Advancement of the American Legal System ("IAALS") Task Force on Discovery and the American College of Trial Lawyers ("ACTL") issued the *Final Report* on their joint project to explore problems associated with discovery, and to propose practical reforms ("Joint Project").[191] Drafts of pattern Rules and Case Management Protocols to implement these proposals are currently in progress. The project's discovery reform recommendations are informed by an exploration of the discovery experience and recommendations of ACTL's fellows, obtained via a detailed, 50-question *Civil Litigation Survey*. The survey generated a broad response. As the *Final Report* recounts:

> The survey was conducted over a four-week period beginning April 23, 2008. It was sent electronically to the 3,812 Fellows of ACTL, excluding judicial, emeritus and Canadian Fellows, who could be reached electronically. Of those, 1,494 responded. Responses of 112 not currently engaged in civil litigation were not considered. The response rate was a remarkably high 42 percent.
>
> On average, the respondents had practiced law for 38 years. Twenty-four percent represent plaintiffs exclusively, 31 percent represent defendants exclusively and 44 percent represent both, but primarily defendants. About 40 percent of the respondents litigate complex commercial disputes, but fewer than 20 percent of them litigate primarily in federal court (although nearly a third split their time equally between federal and state courts).[192]

The survey attempted to study discovery problems in the larger context of the civil litigation experience. As the *Interim Report* explained:

> The survey consisted of 13 sections and asked questions about most aspects of the civil justice system. The Task Force and the Institute had decided that if the survey were to be limited only to questions relating to discovery, it might miss the context in which discovery abuse occurs and risk missing the true source of any problems that might be identified. Thus, the survey included questions about the Federal Rules of Civil Procedure in general and about pleadings, dispositive motions, the role of judges in litigation, costs and alternative dispute resolution.[193]

The survey, resulting *Interim Report* and *Final Report*, and proposed discovery rules and judicial protocol now in progress, grew from the pervasive concerns of civil litigants:

> The joint study grew out of a concern that discovery is increasingly expensive and that the expense and burden of discovery are having substantial adverse effects on the civil justice system. There is a serious concern that the costs and burdens of discovery are driving litigation

191 On September 8, 2008, the Task Force and IAALS published a joint *Interim Report*, describing the results of the survey in much greater detail. Both *Reports* can be found on the websites of both the American College of Trial Lawyers, www.actl.com, and IAALS, www.du.edu/legalinstitute.
192 *Final Report*, at 2.
193 *Interim Report*, at 3.

> away from the court system and forcing settlements based on the costs, as opposed to the merits, of cases. Recalling that one of the original purposes of the discovery rules was to avoid surprises and to streamline trials, many are now concerned that extensive and burdensome discovery jeopardizes the goal of Rule 1 of the Federal Rules of Civil Procedure and of the rules in those jurisdictions that have adopted similar procedures: a "just, speedy, and inexpensive determination of every action and proceeding.[194]

The results regarding considerable cost and delay were not surprising: 81% of the respondents said the civil justice system was too expensive and 69% said it took too long to resolve cases.[195]

As summarized in the *Final Report*, three major themes emerged from the survey of seasoned litigators and trial lawyers:

1. Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test, while some cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.

2. The existing rules structure does not always lead to early identification of the contested issues to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself. As one respondent noted: "The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else." Electronic discovery, in particular, needs a serious overhaul. It was described by one respondent as a "morass." Another respondent stated: The new rules are a nightmare. The bigger the case the more the abuse and the bigger the nightmare."

3. 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."[196]

194 *Interim Report*, at 9.
195 *Id.*
196 *Id.* at 2-3.

As the *Final Report* summarized:

> In short, the survey revealed widely-held opinions that are serious problems in the civil justice system generally and that the discovery system, though not broken, is badly in need of attention. Judges increasingly must serve as referees in acrimonious discovery disputes, rather than deciding cases on their merits. From the outside, the system is often perceived as cumbersome and inefficient. The emergence of various forms of alternative dispute resolution emphasizes the point.[197]

The perspective of the survey participants as trial lawyers is reflected in the *Interim Report*'s statement that "the system works best when experienced lawyers are involved (they use discovery less or work out disputes themselves), when collegiality is encouraged and when competent, experienced judges play an active supervising role."[198] The *Final Report* is more explicit in its call for the renewed centrality of trial:

> "*Trials, especially jury trials, are vital to fostering the respect of the public in the civil justice system. Trials do not represent a failure of the system. They are the cornerstone of the civil justice system.* Unfortunately, because of expense and delay, both civil bench trials and civil jury trials are disappearing."[199]

Despite the ability to make the present system work, at a level of marginal functionality, by dint of civility and application of common sense, the *Interim Report* acknowledges that the respondents desired "major changes made with respect to discovery," and that "the 'tinkering around the edges' approach to changes to discovery rules in the past have been a failure,"[200] and that "more radical changes are required."[201]

The *Final Report* sets forth a series of "principles" and corresponding practical prescriptions. These are:

> *The Purpose of Procedural Rules: Procedural rules should be designed to achieve the just resolution of every civil action. The concept of just resolution should include procedures proportionate to the nature, scope and magnitude of the case that will produce a reasonably prompt, reasonably efficient, reasonably affordable resolution.*
>
> - **The "one size fits all" approach of the current federal and most state rules is useful in many cases but rulemakers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently.**
>
> *The Purpose of Pleadings: Pleadings should notify the opposing party and the court of the factual and legal basis of the pleader's claims or defenses in order*

197 *Id.*
198 *Id.* at 5.
199 *Final Report* at 3 (emphasis in original).
200 *Id.* 53% of respondents declared that the cumulative effect of discovery rule changes since 1967 have not reduced discovery abuse. As to electronic discovery, 87% agreed it is too costly and 76% agreed that judges do not understand it well. *Id.*
201 *Id.*

to define the issues of fact and law to be adjudicated. They should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should set practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the case to trial or other resolution.

- **Notice pleading should be replaced by fact-based pleading. Pleadings should set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses.**[202]

As the *Final Report* explains:

This Principle replaces notice pleading with fact-based pleading. We would require the parties to plead, at least in complaints, counterclaims and affirmative defenses, all material facts that are known to the pleading party to support the elements of a claim for relief or an affirmative defense.[203]

The Purpose of Discovery: Discovery should enable a party to procure in admissible form through the most efficient, nonredundant, cost-effective method reasonably available, evidence directly relevant to the claims and defenses asserted in the pleadings. Discovery should not be an end in itself; it should be merely a means of facilitating a just, efficient and inexpensive resolution of disputes.

- **Proportionality should be the most important principle applied to all discovery.**

- **Shortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party's claims, counterclaims or defenses.**

- **Discovery in general and document discovery in particular should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.**

- **There should be early disclosure of prospective trial witnesses.**

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202 The *Report*'s call for "fact-based" pleading is not limited to complaints:
Fact-based pleading must be accompanied by rules for responsive pleading that require a party defending a claim to admit that which should be admitted. Although it is not always possible to understand complex fact situations in detail at an early stage, an answer that generally denies all facts in the complaint simply puts everything at issue and does nothing to identify and eliminate uncontested matters from further litigation. Discovery cannot be framed to address the facts in controversy if the system of pleading fails to identify them.

203 *Final Report*, at 6.

- **After the 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.**[204]

The *Final Report* suggests the following possible areas of discovery limitation for further consideration:

1. limitations on scope of discovery (*i.e.*, changes in the definition of relevance);

2. limitations on persons from whom discovery can be sought;

3. limitations on the types of discovery (*e.g.*, only document discovery, not interrogatories);

4. numerical limitations (*e.g.*, only 20 interrogatories or requests for admissions; only 50 hours of deposition time);

5. elimination of depositions of experts where their testimony is strictly limited to the contents of their written report;

6. limitations on the time available for discovery;

7. cost shifting/co-pay rules;

8. financial limitations (*i.e.*, limits on the amount of money that can be spent—or that one party can require its opponent to spend—on discovery); and

9. discovery budgets that are approved by the clients and the court.[205]

The *Final Report* makes these proposals in a context that presumes—and urges—good faith in exchanging relevant information:

> We hasten to note again that this Principle should be read together with the Principles requiring fact-based pleading and that each party forthwith should produce at the beginning of litigation documents that may be used to support that party's claims or defenses. We expect that the limited discovery contemplated by this Principle and the initial-disclosure Principle would be swift, useful and virtually automatic.

204 *Final Report* at 7-9.
205 *Final Report* at 10.

> We reiterate that there should be a continuing duty to supplement disclosures and discovery responses.[206]

The *Final Report* continues with a series of bullet points that echo, and seek to implement, Rule 1 principles, and emphasize cost-proportionality:

- **All facts are not necessarily subject to discovery.**
- **Courts should consider staying discovery in appropriate cases until after a motion to dismiss is decided.**
- **Discovery relating to damages should be treated differently.**
- **Promptly after litigation is commenced, the parties should discuss the preservation of electronic documents and attempt to reach agreement about preservation. The parties should discuss the manner in which electronic documents are stored and preserved. If the parties cannot agree, the court should make an order governing electronic discovery as soon as possible. That order should specify which electronic information should be preserved and should address the scope of allowable proportional electronic discovery and the allocation of its cost among the parties.**
- **Electronic discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens.**
- **The obligation to preserve electronically-stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation; however, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.**
- **Absent a showing of need and relevance, a party should not be required to restore deleted or residual electronically-stored information, including backup tapes.**

206 *Id.* at 11.

- **Sanctions should be imposed for failure to make electronic discovery only upon a showing of intent to destroy evidence or recklessness.**

- **The cost of preserving, collecting and reviewing electronically-stored material should generally be borne by the party producing it but courts should not hesitate to arrive at a different allocation of expenses in appropriate cases.**

- **In order to contain the expense of electronic discovery and to carry out the Principle of Proportionality, judges should have access to, and attorneys practicing civil litigation should be encouraged to attend, technical workshops where they can obtain a full understanding of the complexity of the electronic storage and retrieval of documents.**

- **Requests for admissions and contention interrogatories should be limited by the Principle of proportionality. They should be used sparingly, if at all.**

- **Experts should be required to furnish a written report setting forth their opinions, and the reasons for them, and their trial testimony should be strictly limited to the contents of their report. Except in extraordinary cases, only one expert witness per party should be permitted for any given issue.**

The *Final Report*'s prescriptions acknowledge that active judicial supervision will be essential in making them work:

- **A single judicial officer should be assigned to each case at the beginning of a lawsuit and should stay with the case through its termination.**

- **Initial pretrial conferences should be held as soon as possible in all cases and subsequent status conferences should be held when necessary, either on the request of a party or on the court's own initiative.**

- **At the first pretrial conference, the court should set a realistic date for completion of discovery and a realistic trial date and should stick to them, absent extraordinary circumstances.**

- **Parties should be required to confer early and often about discovery and, especially in complex cases, to make periodic reports of those conferences to the court.**

- **Courts are encouraged to raise the possibility of mediation or other form of alternative dispute resolution early in appropriate cases. Courts should have the power to order it in appropriate cases at the appropriate time, unless all parties agree otherwise. Mediation of issues (as opposed to the entire case) may also be appropriate.**

- **The parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution.**

- **All issues to be tried should be identified early.**

- **These Principles call for greater involvement by judges. Where judicial resources are in short supply, they should be increased.**

- **Trial judges should be familiar with trial practice by experience, judicial education or training and more training programs should be made available to judges.**[207]

Holistically, the *Final Report* program seems balanced, with a potential to improve the quality, and reduce the cost, of civil litigation. It is the product of extensive study, thoughtful reflection, discussion and compromise among those with opposing viewpoints, and it reflects the practicality gained through the litigation experience of seasoned practitioners on both sides of the "v." But it depends absolutely upon the integrity, goodwill, and cooperation of counsel on both sides. This requires courage and may cost much in lost engagements—on the part of defense counsel to abjure spoliation, attrition, and stonewalling.

The primary danger is that the project's recommendations will be implemented piecemeal. The "easy pieces" will be implemented, and the hard part—responsive discovery—might not. Discovery limitations on their own spell disaster for the process of fact-finding. In any discovery limitation program, the defense has the clear advantage: it has the information, and it can hide or destroy the information, without plaintiffs being the wiser. Punishment depends on detection, and discovery limitations make concealment easier and detection less likely. An honor system depends upon the honor of the participants—and this is the crux of the problem, perceived or real.

The *Final Report*'s call for a return to "fact-based" pleading is intriguing, but would depend upon a universal understanding and fair application of that term. In reality,

207 *Final Report*, at 12-23.

good pleadings are theory-based, not fact-based. A plaintiff in possession of the material facts necessary to establish a claim has proved her case, not simply pleaded it. Even after *Twombly*, a viable complaint articulates a plausible theory, not admissible facts. As an unanimous Supreme Court repeated several times in its March 22, 2011 decision in *Matrixx Initiatives, Inc. v. Siracusano*,[208] a complaint's allegations are to be taken as true in the context of a motion to dismiss, even post-*Twombly* and *Iqbal*—and need simply "raise a reasonable expectation that discovery will reveal evidence" that could prove them.[209] Facts are found by the jury at trial, as it sifts contested evidence and makes inferences therefrom. This requires consideration of source, content, and context that go beyond what can or should be required of a pleading.[210] The facts to support a "facially plausible" theory[211] must continue to be adducible through discovery.

IX. RETURNING TO THE CENTRALITY OF TRIALS AND THWARTING THE THREAT OF SUBVERSION

Many of the IIALS/ACTL *Final Report* proposals invoke quantitative limits (number, times) on discovery, and pivot around a renewed emphasis on trial. From the standpoint of trial lawyers, such proposals make obvious good sense.

The call for restoration of trials as the centerpiece of civil litigation could serve as the cornerstone for real discovery reform. All trial lawyers respect juries. A healthy fear of juries is essential to honing disjointed ideas into a coherent theory, and a compelling theme, at trial. Juries cannot be co-opted. They are not partisans, they are not loyal to clients' interests, and, because they are not repeat players, they have no institutional interests. They are unpredictable. These independence characteristics are precisely why the jury trial is essential: it alone can guarantee the ongoing integrity of the civil litigation process, and in turn its vitality in enforcing the social contract. Our Declaration of Independence demands trial by jury, not by lawyers, and our Constitution guarantees it. As lawyers, we advocate and intercede for our clients with juries, but juries decide our cases, and are entitled to the facts.

Yet litigators' essential respect for the jury's role appears to have curdled into a fear and loathing of juries, that in turn may drive, and justify, discovery abuse. The goal of the discovery process sometimes appears to be anti-discovery: to successfully withhold facts from the trier of fact in an effort to influence the fact-finding outcome. It is the one way in which, we seem to believe, juries can be "controlled." But fear of juries does not translate into a civil right or professional obligation to fool jurors by withholding facts from them. The jury is the trier of fact, but more accurately it is the *ad hoc* body, convened from the community, that makes policy-inflected, community-reflective judgments regarding fault, responsibility, and the penalties therefore. This judgment, in turn, is based on the law, applied to the relevant facts, viewed (the lawyers hope) through the unsightful perspective supplied by skilled advocacy. If any material facts are missing, the judgment of the jury will be skewed, and the system will have been subverted.

The facts surrounding products sold to the public (especially by publicly traded companies) belong, with the narrow exceptions of trade secrets and privileged communications—to the public. In what aspect of advocacy does misrepresenting or

208 No. 09-1156.
209 *Id.*
210 *See Matrixx*, slip. op. at 8, 15.
211 *Iqbal*, 129 S.Ct. at 1948; *Twombly*, 550 U.S. at 555.

concealing such facts reside? Ideally, litigation is a contest of persuasive skills, in which each party holds the same cards: the facts. It is, in some respects, still a game, but not of hide-and-seek.

Plaintiffs' lawyers dread that all discovery limitations will incentivize the concealment of crucial information—potential evidence—and will serve not to save costs and reduce delay, but which will subvert the process by fostering injustice when such tactics are successfully concealed, and by exponentially increasing costs and delay in the effort to expose them. An extreme and current example from the product liability field demonstrates that such fears have some basis in reality. As an August 31, 2009 news item reported that one of Toyota's former lawyers filed a federal racketeering suit against it on July 24, 2004. The lawyer worked for Toyota from 2003 through 2007 defending it against rollover lawsuits that blamed injuries and deaths on the alleged instability and weak roof structures of the company's SUVs and pickups. The suit alleges that Toyota withheld electronic evidence (including emails) in over 300 rollover cases, and that evidence was destroyed by the company in spite of his efforts to secure the data. The suit also alleges that Toyota withheld design and test data for vehicle roofs. The disgruntled lawyer-plaintiff claims that he was forced to resign in 2007 after lodging several complaints to his supervisors, and claims that conflicts resulting from his complaints ultimately led to his mental breakdown (along with a $3.7 million severance payout from Toyota). Toyota has worked to seal the complaint due to what it calls privileged and confidential information. As the news story reports:

> The legal skirmish has, rather predictably, caught the eye of lawyers around the country. If the lawsuit gains traction and has a favorable outcome for Biller, dozens of Toyota legal victories could be called into question. Denver lawyer Stuart Ollanik of Gilbert, Ollanik and Komyatte has reportedly settled dozens of cases against Toyota and he told CBS News that he wondered if the cases "were resolved based on honest information or not." San Jose lawyer James McManis, who lost a case involving a plaintiff who became a quadriplegic after rolling over in a Toyota 4Runner, told CBS News that everything "was a big fight – and I mean everything," and he wonders if he ever got all the information he was entitled to receive.[212]

X. THE POTENTIAL OF FED. R. EVID. 502 TO REDUCE COST AND COUNTERACT CONCEALMENT

The game of withholding information was inadvertently assisted by the Rule requirement of a "discovery log," produced with objections to discovery requests, that identified documents withheld on grounds of privilege or work product protection, sufficient to enable opponents to challenge, and judges to rule on, the protected status of such documents. Privilege logs became discovery sanctuaries, in which vast troves of vaguely described documents hid, the production of discovery logs itself delayed, judges burdened with the task of reviewing thousands of withheld documents *in camera* turned over the task to magistrate judges or special masters (thus further increasing the delay, and

212 Chris Shunk, *REPORT: Toyota Accused Of 'Ruthless Conspiracy' To Conceal, Destroy Evidence By Former Attorney,* ASSOCIATED PRESS Aug. 31, 2009. Federal lawsuits by "a slew" of 4Runner accident "victims," accusing Toyota (and its in-house counsel) of "deliberately covering up evidence in prior rollover litigation" have now materialized. *See* "Victims Accuse Toyota of Hiding Rollover Evidence," Law 360, New York (Sept. 11, 2009).

often the cost, of the process)[213] and the entire system was fueled by a system in which privilege was the default: when in doubt, leave it out of the production, and place it (months later) on a privilege log.

Newly-enacted Federal Rule of Evidence 502 (signed into law on September 19, 2008) may cut the Gordian knot of withholding-for-privilege. Rule 502 adopts a national standard that an inadvertent disclosure of privileged information does not waive the privilege if the holder of the privilege took reasonable steps to prevent the disclosure, and to rectify the error.[214]

The Rule provides:

> **Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**
>
> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> **(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver**
>
> When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
>
> 1. the waiver is intentional;
>
> 2. the disclosed and undisclosed communications or information concern the same subject matter; and
>
> 3. they ought in fairness to be considered together.

213 *See, e.g.*, *In re Vioxx Prods. Liab. Litig.*, 235 F.R.D. 334 (E.D. La. 2006); *In re Vioxx Products Liability Litigation Steering Committee v. Merck & Co.*, 2006 U.S. App. LEXIS 27587 (5th Cir. 2006). In an ongoing dispute over 30,000 documents comprising nearly 500,000 pages withheld on privilege, the Fifth Circuit ordered the district court or its designee to conduct a statistically random *in camera* review of at least 2,000 documents to inform its privilege rulings. On remand, the *Vioxx* MDL transferee court appointed law professor Paul R. Rice as Special Master (at the parties' joint expense) to review the 2000 document sample. The Special Master issued an exhaustive report and recommendations on privilege, essentially adopted by the court. Most of the documents were determined not to be privileged. The court commented that the process had delayed discovery of these documents for more than a year. The process is detailed in *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007).

214 *See Rhoads Indus. v. Bldg. Materials Corp. of America*, 254 F.R.D. 216 (E.D. Pa. 2008). In *Rhoads*, Judge Baylson, a liaison from the Advisory Committee on Civil Rules to the Advisory Committee on Rules of Evidence that produced Fed. R. Evid. 502, employed a balancing test in a dispute over more than 800 privileged documents produced by plaintiffs, finding non-waivers as to all except those as to which notification on a privilege log had been unduly delayed. At the time of production, Rule 502 had not been enacted, and it was not retroactive. However, the court concluded "it would be just and practicable to apply Rule 502 … because it sets a well defined standard, consistent with existing mainstream legal principles on the topic of inadvertent waiver." 254 F.R.D. at 218.

(b) Inadvertent disclosure.

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

1. the disclosure is inadvertent;

2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and

3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding

When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

1. would not be a waiver under this rule if it had been made in a Federal proceeding; or

2. is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling Effect of Court Orders

A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling Effect of a Party Agreement

An agreement or the effect of a disclosure in a Federal Proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule

Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions

In this rule:

1. "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

2. "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Rule 502 solves the problem of nonenforcement of waiver rules between federal and state courts, or any states, by enabling federal courts to grant waiver protection that "applies to State proceedings."[215]

It is too early to determine whether Fed. R. Evid. 502 will substantially reduce the volume of documents withheld from discovery on privilege grounds, the size of privilege logs and the delays in compiling them, or the number and frequency of discovery disputes. The notion of Rule 502 as a safe haven from inadvertent waiver - indeed, as protection from any waiver of a truly privileged document – is still unfamiliar to most practitioners, and the incorporation of Rule 502(d) provisions into case management orders is still a novelty.

XI. IMMODEST PROPOSALS: NEW RULES FOR THE REVOLUTION

You say you want a revolution? When it comes to civil litigation, we all want to change the world. Initiatives like the IAALS/ACTL proposals could change the discovery paradigm, but will work only if we all transform our attitudes toward our professional duties and goals. We need, first and last, to change our heads, as the *Cooperation Proclamation* recognizes. A little "Revolution" is indeed in order:

> You say you'll change the constitution
> Well, you know,
> We all want to change your head.
> You tell me it's the institution
> Well, you know,
> You better free your mind instead.[216]

Perhaps to accompany the Rule change proposals described above, we could use some Federal Rules of Civil Demeanor to accompany the Rules of Civil Procedure, and to enforce, in particular, Rule 1, as our daily practice.

215 *See* FED. R. EVID. 502(d), (f).
216 *Revolution* (Lennon/McCartney, copyright 1969). Thank you, John Lennon.

Herewith some suggestions:

- The courts belong to the people. All of them—not just the rich, powerful or corporate ones. Use your share of this limited public resource wisely.

- *No posturing*: Litigators, unlike supermodels, do not excel at pout-and-strut. Posturing is unattractive and off putting in each instance, and cumulatively exhausting and alienating. If posturing were to disappear from the litigators' inventory, no one would miss it.[217]

- Lawyers are officers of the court—without cool uniforms but with an iron code of professional conduct.

- Yes, the law is a profession. Not a business. Love it or leave it.

- *No lying*. Not to the judge, not to opposing counsel, not to the client, and not to yourself.

- Follow the Golden Rule.[218]

- There are at least two sides to every story. You are entitled and obligated to tell your client's side, as perceptively and persuasively as you can. The other side gets a chance, too—and each side is entitled to discovery to help tell it.

- You must promptly produce all non-privileged or protected potentially relevant facts.

- You must promptly identify documents withheld from production and explain why, so the judge can decide the issue during the discovery period—not after discovery is closed or trial is underway.

- There is a duty of candor toward the court. This mean, *inter alia*, disclosing related litigation and relevant rulings promptly. It means supplementing discovery. It does not mean "don't ask, don't tell."

- No yelling. No swearing.[219]

- Neither a snob, a racist, nor a sexist be.

217 One may take a strong and effective position without posturing. Position is substance; posturing is theater.
218 No, not "Them That's Got The Gold, Makes The Rules." The "Do Unto Others" one.
219 George Carlin was, of course, an advocate for transcendant sanity—but no, you still cannot use those seven words in court (or in briefs). These are a matter of record, however. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

- A sense of humor is essential.[220]
- Respect the time and resources of the court.[221]
- Courtesy will not kill you.[222]
- Don't worry that following these rules will ruin your career. The best lawyers obey all of them.

Don't, don't, don't. Is there anything lawyers *can* do? Yes. Be curious, be bold, be daring. Prosecute your claim, or defend your client, to the limit of the law. Where the law falls short, call for its improvement, correction, or extension. We have a common law system. You can argue to change the law. Be honest about what you are asking the Court to do. You can't hide or change the facts. What you make of them is the province of the advocate: your turf. The facts may be constants, but the equation of a verdict or judgment depends as much on the variables: which facts matter most, which least, and why. So here is a "Rule 1" for advocates: The law belongs to the Court, the facts belong to the jury, and what they make of them depends on you.

XII. CONCLUDING REFLECTIONS

We live with the problem of discovery cost and delay every day. The professional frustration that is its frequent byproduct corrodes our spirits, diminishes our effectiveness as advocates, and depletes the energy of judges. We have identified the enemy. Now, what to do? The Federal Rules themselves have undergone a continuing process of evolution, and, for the most part, improvement. Judges pay increasing attention to discovery abuse, and judicial officers (including magistrate judges and special masters) spend increasing chunks of time and energy in adjudicating discovery disputes, and devising case-specific discovery systems and procedures. They are currently considering whether additional quantitative limits on discovery, stricter sanctions, and/or even more active judicial control, more active judicial supervision, are either necessary or useful.

This article has offered a few suggestions, and repeats this self-evident proposition: We need to change. To call the past generation of attempted discovery reforms "tinkering around the edges" demeans the efforts and the dedication of those engaged in them. They have done, and continue to do, heroic work. But all such work is in vain, so long as our legal culture resists the necessary transformation of attitude. We need to accept the inevitability of discovery of material fact, as essential for the delivery of due process, both to those who seek, and those who hold, such facts. The trier of fact must have such material information in order to discharge its duty and deliver justice at trial. The fact that most cases are not tried does not reduce the need for essential discovery. Settlement is rightly seen as oftentimes less costly, more attractive to the litigants, and more creative in fashioning effective remedies than a trial could be. But no fair and reasonable settlement can be fashioned without an informed appreciation of the facts.

A generation of lawyers has practiced under the assumption, mostly wrong, that it is a professional duty to defend information against discovery, and that cooperation in the discovery process is tantamount to malpractice. While this has never been the case, the

220 A gentle, self-deprecating sense of humor is preferred. Think Bob Newhart, not Don Rickles.
221 Do as I say, not as I do. This article, like most summary judgment motions and many "briefs," is way too long.
222 As your parental unit(s) (and The Sedona Conference®) would remind you: "Be nice. It couldn't hurt."

current generation of plaintiffs' lawyers at believes and fears it to be so, rendering any efforts to limit the quantum of discovery suspect and likely to fail. We do not yet act as if we understand the truth: it is neither ethically mandatory or permissible to withhold relevant information from discovery, or to evade, or delay, the disclosure of evidence.

If the present generation of lawyers cannot make this profound and necessary change, then our goal must be to look ahead and to change, now, the values and ethics taught to our future generation of lawyers: those presently in law school, and those just starting their practices. Because we have not yet done so, the calls for discovery reform of the 1970s, 1980s, 1990s, and early 21st century may become increasingly desperate, and remain in vain.

The reduction of discovery abuse requires, at least in the near term, increased and sustained levels of judicial supervision. A party, or its law firm, that decides that a strategy of attrition is in its best interests, and that discovery resistance and exploitation of the complexities of the discovery process are the most efficacious means to deploy this strategy, must see the prospect of immediate deterrence as a looming dis-incentive. Otherwise, the strategy of attrition will continue to flourish, as those attorneys and law firms who decline to deploy it, will simply be fired, or not retained, in favor of those who do and will. This is the story of litigation in the 1990s and 2000s, at least at the gut level of many who have been involved in it. It must be condemned, or it will not stop. Many plaintiffs' advocates will not support or implement discovery reforms that set additional limits on the quantum of data, the number of depositions, or the time allowed within which to complete discovery, if they do not first see that judges are serious about punishing the withholding, hiding, or destruction of material information that such limitations can allow.

This presents a quandary. All of us must change, and most of us acknowledge the need or desirability of this change, but each of us (plaintiffs' lawyers, defense lawyers, and judges) would prefer to see the others change first. Because neither plaintiffs' lawyers nor defendants' lawyers are eager, as a matter of reality or even perception to risk sacrificing their clients' interests on the altar of professional transformation and discovery reform, there may be few to lead the charge in the discovery and demeanor revolutions that are needed. The burden of "firstness" falls upon the judiciary, and the duty of obedience, responsiveness and candor upon counsel.