# CIVIL DISCOVERY AND CORPORATE DEFENDANTS: WHY SOME OF THE LATTER WOULD DO AWAY WITH THE FORMER

**By James E. Butler, Jr. and Keith A. Pittman**[1]

Justice in an adversarial system necessarily means justice for both parties. Where one party is right, and the other wrong, justice for the party in the wrong means a 'loss.' At times, justice may require that the loss be devastating. In the civil arena, this places plaintiffs at a great disadvantage. Since much of a plaintiff's proof is generally obtained from the defendant, defendants can be expected to resist revealing that evidence in order to avoid the 'big loss.'

This economic disincentive to providing discovery is a primary motivation for corporate parties defending products liability, antitrust, securities or other lawsuits involving allegations of misconduct; thus, it is not surprising that these types of cases result in the majority of discovery disputes.[2] Such defendants' success at resisting, delaying and otherwise controverting civil discovery[3] has in fact fostered the perception that the discovery system is not working properly. Judicial reluctance to address discovery disputes and issues has only compounded the problem.

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[1] James E. Butler, Jr., a 1977 graduate of the University of Georgia School of Law, is a partner in the Columbus/Atlanta, Georgia firm of Butler, Wooten, Overby, Fryhofer, Daughtery & Sullivan. Mr. Butler has tried over 125 cases to verdict as a plaintiffs' lawyer and has been lead counsel in suits wherein corporate discovery misconduct resulted in severe sanctions. *See, e.g., Malautea v. Suzuki Motor Co.*, 148 F.R.D. 362 (S.D.Ga. 1991); *aff'd*, 987 F.2d 1536 (11th Cir.); *cert. denied* 510 U.S. 863, 114 S.Ct. 181 (1993) (Suzuki defaulted for discovery abuse).

Keith A. Pittman, a 1993 graduate of the University of Georgia School of Law, also practices with the Butler, Wooten law firm.

[2] *See, e.g.*, Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 240, 243 (Winter 1999).

[3] The abusive discovery strategy of corporate defendants has been much chronicled. *See especially* James E. Butler, Jr., and Patrick A. Dawson, *The Bench as Battleground: The Discovery Process is Broke and Only Judges Can Fix It*, THE VERDICT, 11 (May/June 1992). *See also* David Halperin, *Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence*, PUBLIC CITIZEN CONGRESS WATCH (July 1997).

Rather than permit this problem to be resolved, some corporate defendants -- who stand to profit from less civil discovery -- would just do away with the system.

This examination of the discovery process and the current Federal discovery rules' 'reforms' discusses why corporate defendants continue to push this 'solution.' To do so requires consideration of corporate pattern abuse, including how it's encouraged by judicial tolerance of discovery misconduct, what 'acceptance' of such discovery misconduct means for the American civil justice system, and how corporate interests have tipped the scales of justice in their favor.

## "Ignorance never settles a question"[4]

Fairness and justice dictate that full disclosure remain the cornerstone of civil discovery. When a plaintiff has to accept less discovery than that to which he or she is entitled, the above precept can be turned on its head. A deserving plaintiff may have to settle the lawsuit for less than a dime on the dollar -- or even receive a defense verdict -- when he or she cannot get the facts about the defendant's wrongdoing which full and complete discovery would have allowed. "Ignorance" then has "settled" the question, though not fairly.

Discovery should always "allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case."[5] The system is fair only when a jury, the usual factfinder in a civil dispute, hears the complete story before

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[4] Benjamin Disraeli, *Speech to House of Commons* (May 14, 1866).

[5] Fed. R. Civ. P. 26 advisory committee's note (1946 Amendment).

deciding the case. United States Supreme Court Justice Murphy's comments in *Hickman v. Taylor* embody the rationale for full discovery:

> Discovery ... is not a one-way proposition. It is available in all types of case at the behest of any party, individual or corporate, plaintiff or defendant. ... [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.[6]

The belief that a group of citizens can render justice if they know the facts underlying a controversy is the very foundation of our civil justice system. United States Supreme Court Justice Kennedy's 1997 speech to the American Bar Association lauded this preeminent concept:

> The commitment to rationality is a sweeping principle underpinning a free society. It no doubt implicates other essential values such as neutrality and detachment and, most important, honesty. The whole idea of rationality is that a group of citizens united in law can examine a problem with adequate information and come to a reasoned, common conclusion. That is how we must proceed in the formal legal system, for instance in jury trials. The jury is one of the great institutions of the American constitutional system....[7]

In the end, civil justice demands that an honest search for the 'full story' -- and not a one-sided version imposed by one party on its opponent (and the court) -- form the basis for a final judgment.

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[6] 329 U.S. 495, 507, 67 S.Ct. 385, 391-92 (1947). *See also* 329 U.S. at 515, 67 S.Ct. at 396 (Jackson, J., concurring) (discovery should provide access to all evidence).

[7] Anthony M. Kennedy, *Law and Belief*, TRIAL, 23, 24 (July 1998). *See also Parklane & Hosiery Co. v. Shore*, 439 U.S. 322, 343-44, 99 S.Ct. 645, 658 (1979) (Rehnquist, J., dissenting) ("Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represented the layman's common sense.... Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.").

### "A falsehood is an attempt to withhold the truth from those who have a right to know"[8]

Defendants who conceal factual information or documents commit a pernicious falsehood, aimed at depriving plaintiff of his or her right to "every man's evidence."[9] To begin with, discovery by its very nature is likely to be easier for defendants. Corporate defendants in particular are not generally confronted with the same disadvantage as plaintiffs in seeking the 'full story.' Not only is the information which a defendant may seek and obtain from the plaintiff frequently apparent from the face of plaintiff's claims, but also the information and documents under a plaintiff's custody and control are usually substantially less than that under the defendant's. Thus, controversy does not often arise regarding the information or documents to which a defendant is entitled. Instead, most discovery disputes involve what a plaintiff contends the defendant should disclose.

Discovery disputes often result from corporate defendants' pattern discovery practice. Evidence sought by a plaintiff from a defendant such as a product manufacturer is both essential and highly relevant to plaintiff's claims. Such evidence may be of enough complexity that it is not readily apparent (except to defense counsel bent on concealment) what is relevant.[10] The

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[8] *Fritter v. Dafina, Inc.*, 176 F.R.D. 60, 66, n.18 (N.D.N.Y. 1997) (defendant defaulted due to "repeated falsehoods and evasions [which] exhibit a disdain for the discovery process").

[9] "'For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man's evidence.'" *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 1928 (1996) (citation omitted).

[10] Corporate interests have succeeding in eviscerating the previous standard for relevance as stated in Fed. R. Civ. P. 26(b)(1) (whatever was included in the "subject matter" of the "pending action"). *See* discussion accompanying notes 72-80.

'discovery wars' -- recognizing that calling them such denigrates the importance of the process and litigation in which these 'battles' play out -- may result from defendants' efforts to capitalize on such complexity by confusing issues and otherwise hiding evidence.

Pattern discovery abuse -- a calculated strategy of obfuscation and delay -- has long been a problem in "high stakes" litigation involving corporate defendants.[11] Regrettably, such misconduct appears to be on the increase.[12] As discussed *infra*, it is especially disturbing that -- contrary to the discovery problems which courts are most often asked to resolve -- the proposed Federal rules amendments (effective December 1, 2000) fail to address such "abusive resistance to discovery" but, instead, will lead to further limiting of a plaintiff's right to full discovery.[13]

Corporate defendants' 'justification' for concealment varies from case to case.[14] As part of their resistance to providing discovery, such defendants may:

- make frivolous objections;
- 'rewrite' plaintiff's requests or otherwise unilaterally restrict the scope of discovery;
- improperly invoke privilege;

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[11] *See Bollard v. Volkswagen of America, Inc.*, 56 F.R.D. 569 (W.D. Mo. 1971) (noting that automakers "have been unusually evasive and loath to make discovery").

[12] *See* Mike France, *Corporate Litigation: Playing Hardball Is One Thing...*, BUSINESS WEEK, 32, 32 (July 1, 1996) ("Corporate foul play in high-stakes cases appears to be increasing.... Of course, destroying evidence, striking secret deals, and stonewalling opponents aren't new tactics in the world of bardball corporate litigation").

[13] *See* discussion accompanying notes 67-88; Thornburg, *supra* note 2, at 243-253.

[14] "Feigned necessities ... make pretenses to break known rules by." Oliver Cromwell, *Speech To Parliament* (Sept. 12, 1654).

- seek overly broad and nonsharing protective orders;
- 'dump' quantities of documents or require plaintiff to go to a 'reading room,' without a meaningful index or arrangement to the documents;
- produce documents in a computerized form not readily accessible to plaintiff's counsel; or
- engage in other obstructive or dilatory tactics.

Documents are often the source of the problem in litigation involving corporate defendants.[15] This reflects the truism voiced by Supreme Court of Georgia Justice Lumpkin: "I would sooner trust the smallest slip of paper for truth, than the strongest and most retentive memory ever bestowed on mortal man."[16] Defendants conceal documents because they can't hide from what's in print. The desire to hide documents forms the basis for the 'privilege'[17] and

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[15] *See Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases*, FEDERAL JUDICIAL CENTER (1997) (reporting that "[d]ocument production generated the highest rate of reported problems"). *See also* Donna Stienstra, *Investigating Discovery: Findings from an FJC Study*, THE JUDGES' JOURNAL, 10, 10-11 (Spring 1998) ("When attorneys reported problems in one discovery activity ... they often reported problems in other discovery activities, particularly document production").

[16] *Miller v. Cotten*, 5 Ga. 341, 349 (1848).

[17] A 'privilege' claim is the last resort, and favored tactic, of a party bent on withholding discoverable evidence. More often than not, mere invocation of the word 'privilege' suffices to accomplish the concealment, as few judges are willing to require that the supposedly privileged information or documents be given to the court, supported by proof of the claims rather than mere iteration of the privilege, so that the court -- and not counsel for the withholding party -- can decide the privilege claims. This occurs despite the fact that the requirements of Fed. R. Civ. P. 26(b)(5) are mandatory: "the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." *See also* Fed. R. Civ. P. 26 advisory committee's note (1993 Amendment) ("the court ultimately decides whether, if this claim is challenged, the privilege or protection applies").

'protective order'[18] dodges -- as well as other objections to, or restrictions on, discovery -- which infect a great deal of corporate litigation.

Of course, "[j]ustice delayed is justice denied."[19] If such abusive tactics are successful -- whether in concealing relevant information or just by allowing such defendants to put off final judgment -- the search for truth which should underlie our civil justice system is at risk.

## "Too many judges have the same fear of a discovery dispute that a goat does of a butcher knife"[20]

Plaintiffs are especially prejudiced by pattern discovery abuse when a trial court avoids immersing itself in a discovery dispute. There can be insufficient regard for the requirements of

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[18] A protective order motion is another calculated defense strategy. Defendants arbitrarily stop discovery until they decide to file such a motion governing document production. Yet, production should generally take place within 30 or 45 days, absent a motion or agreement for extension, or a protective order motion. Plaintiffs face the dilemma of having to agree to onerous and meritless limitations in a protective order to get documents due plaintiffs or else accept delay while the matter is litigated. *See, e.g.*, Kerry A. Kearney and Tracey G. Benson, *Preventing Non-Party Access to Discovery Materials in Products Liability Actions: A Defendant's Primer*, DRI CURRENT ISSUES IN LAW AND MEDICINE 36, 37, 41 (No. 4, 1987) ("The purpose of the article is to suggest ways to minimize the chance that documents and other materials produced during discovery will be distributed to or shared with non-parties such as plaintiff's counsel in other jurisdictions or the mass media. ... First, no discovery should be permitted until the issues of protection are resolved. Second, the issue of a protective agreement or order should be forced early in the case *to capitalize on plaintiff's eagerness to get started*; plaintiff's counsel is likely to be more *cooperative* at the early stages of the litigation"; emphasis supplied).

[19] *See Leader Nat'l Ins. Co. v. Smith*, 177 Ga. App. 267, 339 S.E.2d 321 (1985) (Deen, J., concurring specially) (addressing the laudable goal of "improving the administration of justice in civil cases. All will agree: 'Justice delayed is justice denied .'").

[20] "Too many judges have the same fear of a discovery dispute that a goat does of a butcher knife – they don't want to go near them." United States District Court Judge William R. Wilson, Jr., (Ark.), quoted in John Gibeaut, *Was Rand Right*, ABA JOURNAL, 98, 99 (May 1997).

justice when courts think it their duty merely to resolve discovery disputes in the manner least harmful to parties, or where the dominant imperative of the courts is docket control.[21] Plaintiffs are not treated fairly and defendants benefit from their affirmative misconduct.

In practice, this 'prejudice' against discovery disputes tends to favor defendants. For example, courts may have little patience with a plaintiff's failure to disclose information to a defendant. A court may even forego a decision on the merits and dismiss an action for such failure, even when the failure is not the fault of the injured party seeking relief; yet, the converse may not hold true for a defendant's concealment of information from a plaintiff.[22]

Further, any judicial tendency to favor defendants can be exacerbated by the ways the rules inure to the benefit of those who would bedevil the process. Defendants dedicated to avoiding discovery and obstructing the process find ample opportunities in the rules' rhythms and artificial deadlines. For example, it is commonplace for a defendant to assert boilerplate

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[21] The latter trend is most unfair since it is generally not the civil justice system which is the source of the burdens many courts face. *See* Gibeaut, *supra* note 20, at 99 (though recognizing that the federal civil system runs relatively smoothly, United States District Court Judge Thomas J. Griesa, Chief Judge for the Southern District of New York, noted that "the federal courts are clogged primarily because of heavy criminal dockets and accumulating vacancies on the bench"). *See also* Lawrence A. Salibra II, *Debunking the Civil Justice Reform Myth: If No Litigation Crisis Exists, How Can We Fix It?*, THE JUDGES' JOURNAL, 19, 20 (Summer 1998) (noting Rand Institute's conclusion that, despite rhetoric about alleged delay and backlog in federal courts, "the aggregate performance of the federal district courts was remarkably stable during the 1970s and 1980s despite a substantial increase in the caseload").

[22] *See Harmon v. CSX Transp.*, 110 F.3d 364 (6th Cir. 1997) (affirming sanction of dismissal with prejudice for plaintiff's counsel's failure to provide discovery on a timely basis, despite lower court's failure to consider lesser sanctions). *Compare Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36 (4th Cir. 1995) (reversing sanction of default for defendants' concealment of information and defense counsel's "deliberate and wilful deception;" "we have also encouraged trial courts initially to consider imposing sanctions less severe than default").

objections which force the filing of a lengthy motion to compel by plaintiff. Plaintiff hopes the trial court will at least compel defendant to divulge the information sought since the courts rarely sanction defendants making unsustainable objections. But, a 'busy' court which does not want to be burdened with such discovery disputes may be opposed to addressing all the issues raised by such a motion. Either the court 'blames' the movant for so burdening the court, or, the process tries the court's patience and it cries "a plague o' both your houses!"[23] This reaction is just what an obstreperous defendant wants. It spells victory as plaintiff doesn't get the evidence sought.

### "Judges hold the key to making discovery work"[24]

Justice thus becomes wholly dependent on the courts. The answer to pattern discovery abuse has always been judicial intolerance of such gamesmanship. The system begins to work when courts consistently and appropriately sanction defendants who refuse to provide discovery. It is beyond fair that an aggrieved plaintiff obtain relief because a defendant will not disclose information which is relevant, if not crucial, to a plaintiff meeting his or her burden of proof. Yet, defendants often escape judicial wrath for discovery abuse aimed at concealment of the facts.[25]

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[23] William Shakespeare, *Romeo and Juliet*, III, i, 112.

[24] Butler and Dawson, *supra* note 3, at 15.

[25] Trial courts may refuse to sanction a defendant caught hiding evidence simply out of concern that the court will have to retry the case if its sanction order is not upheld on appeal. *See, e.g., Baker v. General Motors Corp.*, 159 F.R.D. 519 (W.D. Mo. 1994) (finding of defect as sanction for disobeying discovery orders); *aff'd in part, rev'd in part*. 86 F.3d 811 (8th Cir. 1996)

Most disturbing is the proclivity of some to consider discovery gamesmanship as acceptable litigation tactics. This aura of 'acceptance' has even been picked up by Hollywood. A central scene of the film *Class Action* is where defense counsel hits upon the strategy of mislabeling the "smoking gun" document and then burying it in an "avalanche" of documents dumped on the plaintiffs. Lead defense counsel voices the archetypal justification, stating that their misconduct "is within the letter of the law." Meanwhile, junior defense counsel recognizes that their conduct is not legally proper -- they call their "defense" to the act of concealment (if they're caught) "plausible deniability" – and still they go forward with the document dumping.[26]

The above-described fictional scene mirrors how some defendants have elevated feigned compliance into an art form. Whether evidence is hidden by document dumping or by dribbling out material which fails to reach the issues, such defendants usually follow a 'scripted' pattern of discovery abuse. Plaintiff receives initial responses which 'stonewall' plaintiff's discovery requests. Defense counsel then make a great show of corresponding or otherwise conferring on the issues, not only because plaintiff has to initiate such 'meet-and-confers' under the rules,[27] but also so defendants can go into court protesting about plaintiff's 'unreasonable' discovery

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(sanction too harsh); *rev'd on other grounds*, 522 U.S. 222, 118 S.Ct. 657 (1998).

[26] CLASS ACTION (Twentieth Century Fox, 1990).

[27] *See, e.g.*, Fed. R. Civ. P. 37(a)(2)(A),(B); Mass. Super. Ct. R. 9C.

posture.[28] Plaintiff ultimately has to file a motion to compel because such defendants habitually will not disgorge any important discovery until directed by a court to do so.

Discovery disputes can sometimes be reduced to a contest of plaintiff's word against defendant's, especially at the motion hearing. Plaintiff urges the trial court to recognize that defendant seeks limitations on discovery in order to prevent the production of evidence which enables plaintiff to meet his or her burden of proof. Defendant protests that it has 'willingly' done all that is required of it. The issue may even contort to that intended by defense counsel, who hope that the trial judge -- if he or she responds at all to plaintiff's claims -- will presume that evasion will not happen in his or her court. At best, plaintiff's 'relief' then may be an order which 'splits the baby' and thus requires defendant to produce only some of the material which plaintiff sought.

The rebuttal to the 'evasion won't happen in my courtroom' mindset of some courts is given by the number of instances where, despite the hurdles which a plaintiff faces in combating pattern abuse, the 'discovery war' is fought to its bitter end:

- A pattern abuser is first ordered *not* to do as plaintiff predicts/knows it will;
- Defendant then risks sanctions by playing fast and loose with court directives;
- Defendant is sanctioned for not complying and takes the order up on appeal; and
- All this is done rather than obey the court's dictates and disgorge the discovery.

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[28] *Cf.*, Kearney and Benson, *supra* note 18, at 41 (plaintiff should be "approached" on protective order issues as, if agreement is not reached, defense counsel can "argue to the court that plaintiff's counsel is being obstinate and not acting in good faith with regard to discovery").

For example, General Motors has set the 'standard' for how automakers respond to discovery in product liability suits, with pattern abuse which borders on the habitual. One trial court's recent characterization of the basis for sanctions against GM reads like a 'primer' on what such defendants will attempt rather than comply with their discovery obligations:

> Due to the passage of time, GM's defiance and willful disregard, GM's flaccid excuses for non-compliance, the unnecessary costs incurred in forcing GM's compliance, prior warnings from this Court regarding discovery misconduct and sanctions, and GM's refusal to comply with this Court's orders, the Court finds that the appropriate sanction for GM's misconduct is found in O.C.G.A. § 9-11-37(b)(2)(A) and (B) ....[29]

Sanctions such as those imposed against GM result from the knowing election of such defendants to risk sanctions (which judicial reporters prove is a minimal risk) rather than producing evidence in discovery. Many defendants are motivated in this regard not just by the risk confronting them in the one subject case from production of damaging evidence, but the far

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[29] *Bampoe-Parry v. General Motors Corp.*, Nos. 98V50138297J, 98V50138298J (Fulton County State Ct., Ga., October 8, 1998) (vehicle found defective as sanction for discovery abuse). *See also Oswalt v. General Motors Corp.*, No. 95VS0099662 (Fulton County State Ct., Ga., January 7, 1997) (experts struck because of discovery abuses); *Baker*, *supra* note 25 (vehicle found defective for disobedience of discovery orders); *Coleman v. General Motors Corp.*, No. 88-53419-02 (Cir. Ct. Dade County, Fla., April 12, 1993) (sanctioned for discovery abuse; vacated pursuant to stipulation); *Stump v. General Motors Corp.*, No. 91-C-09 (Dist. Ct. Republic County, Kan., Aug. 17, 1992, May 25, 1993) (sanctioned with court likening GM's conduct to Suzuki's in *Malautea*, *supra* n.1); *Klitsch v. General Motors Corp.*, 1990 WL 192037 (E.D. Pa. 1990) (sanctioned for failure to produce documents); *Noone v. Oldsmobile Div. of General Motors Corp.*, No. 85-68704 (Dist. Ct. Harris Co., Tex., Nov. 21, 1988) (defaulted for discovery abuse); *Sellon v. Smith*, 112 F.R.D. 9 (D. Del. 1986) (sanctioned for narrowly construing requests and improperly invoking privilege); *Sellers v. General Motors Corp.*, 40 Fed. R. Serv.2d 590 (E.D. Pa. 1984) (sanctioned for abuse; new trial granted on defense verdict).

more worrisome risk that such evidence may then become available to plaintiffs in other cases.[30] A sanction against such a defendant in one case is a small price to pay for containing the damage which may be caused in that case, plus other cases. Sanctions are therefore invited as the result of an objective, economics-driven, business decision.

### "Put not your trust in princes"[31]

Corporate defendants go so far as to assert the 'business nature' of their conduct as the 'explanation' for their (abusive) practices.[32] Reflective of these 'we do what we're supposed to do' defenses to claims of discovery abuse is the oft-encountered 'we're responsible corporate citizens' pose.[33] Included in pronouncements of responsibility made by the defendants (and of professionalism by defense counsel) accompanying discovery presentations is the argument that

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[30] *See* Stephen G. Morrison, *Truth and Consequences: Surviving Discovery in the Age of "Full Disclosure"*, FOR THE DEFENSE 11, 12 (Sept. 1996) (defendant "must assume that any document it has ever produced can and will find its way to the hands of the opposing attorney").

[31] *Psalms* 146:3.

[32] *See, e.g.*, Richard A. Bowman and Timothy J. Mattson, *The Corporate Executive at Deposition and Trial*, THE PRODUCTS LIABILITY INSTITUTE FOR CORPORATE COUNSEL SEMINAR (October 3-4, 1996) (strategies to avoid corporate executive depositions are justified in part because "[t]he critical function which executives play in the management of corporations make *any time* spent in depositions particularly harmful to the corporation"; emphasis supplied).

[33] This "character evidence" distraction is not only a 'defense' which defendants hope the trial court will embrace in ruling on discovery issues, but also one which such defendants seek to assert as part of their defense on the merits. *See, e.g.*, Douglas A. Wilson, *Understanding and Defending Against Plaintiff's Design Process Attack*, D2, D2-6, DRI DEFENSE PRACTICE SEMINAR, PRODUCTS LIABILITY SEMINAR (Feb. 9-10, 1995) (Kawasaki Motors Corp.'s Senior Legal Counsel asserts that product liability defendants should "[f]ocus the defense efforts on the work the defendant corporation actually does in developing its products. ... [T]he goal here is to portray the defendant corporation as a responsible company").

discovery should be informal and plaintiffs should 'trust' their adversary (and opposing counsel) 'to do the right thing.' However, the 'respectability' or 'trustworthiness' of the opposition should not be part of discovery.[34] The rules heretofore did not contemplate such informality, nor have they required that plaintiffs (or the court) 'trust' the unilateral representations of defendants (and defense counsel) as the end of the discovery inquiry.

Plaintiffs do *not* assume that defense counsel are untrustworthy as the basis for declaring that a party should not be forced to trust either their adversary or its paid counsel. Rather, defense counsel -- no matter how respected a member of the bar -- and the courts alike should not require that any plaintiff decide that question at all.

For one thing, the defense lawyer is not the defendant. The defense lawyer may not know everything the defendant has, especially where the defendant is a large corporation with its own legal staff and organization established specifically to deal with complex lawsuits. The ethical codes allow defense counsel great latitude in resisting discovery, for the code equates zealous advocacy for the client with the lawyer's obligations to the court and public.[35] Thus,

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[34] *See* France, *supra* note 12 ("it is difficult to recall a time when so may *respectable* companies have been hit with court sanctions"; emphasis supplied).

[35] "The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law." Ga. State Bar Rule 3-107, EC 7-19 (based upon Model Code of Professional Responsibility). *Cf.*, Mass. Sup. J. Ct. R. 3:07: Mass. R. of Professional Conduct Preamble, Rule 3.3 Comment ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. ... The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal"; based upon Model Rules of Professional Conduct). *See also* Morrison, *supra* note 30 at 11 ("every lawyer has a professional duty to zealously and effectively represent the client *and* a duty of candor to the court *and* a duty of fairness to the other side. It is the balancing of these different, though rarely conflicting, duties that is the essence of the true professional"; emphasis in

when the corporate client tells the lawyer that "this information and documents are all that is relevant" or "this is all that we have," the defense lawyer need not do anything more than parrot that response.

Also, the defense lawyer's relationship with defendant makes the exercise of independent professional judgment difficult at best. "[M]any [corporate defense] attorneys no longer have the courage to say no [to large companies tempted to break the rules], afraid of losing key clients in the face of unprecedented competitive pressure."[36] The tension between defense counsel's duties to client and to the legal system may be unbearable.[37] How these conflicting duties play out can result in discovery misconduct deserving of the ultimate sanction, default.[38] It may well be an intentional strategy of discovery abuse with which a court is confronted:

> [T]he defendants and their attorneys engaged in an unrelenting campaign to obfuscate the truth. They improperly objected to interrogatories in order to avoid revealing information; the answers they did give were incomplete and unreasonably narrow; they delayed (either deliberately or carelessly) complying with the Magistrate Judge's orders to produce deposition transcripts; and they never produced the General Motors documents as ordered. As the judge concluded, sanctions less harsh that a default judgment would not have changed the defendants' behavior.[39]

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[36] *See* France, *supra* note 12.

[37] *See Wash St. Physicians Ins. v. Fisons Corp.*, 122 Wash. 2d 299, 858 P.2d 1054, 1084 (1993) ("the ... attorneys claim that they were just doing their job, that is, they were vigorously representing their client. The conflict here is between the attorney's duty to represent the client's interest and the ... duty as an officer of the court to use, but not abuse the judicial process").

[38] *See, e.g.*, *Malautea v. Suzuki Motor Co*, *supra*, note 1.

[39] *Id.*, 987 F.2d at 1544.

The misconduct of the party resisting discovery, and not the behavior of lawyers acting at its behest, must remain the focus of the court's inquiry. Sanctioning lawyers, instead of the party responsible for their conduct, would 'reward' those lawyers who do as they're told, hoping to insinuate themselves between the client and the court to take advantage of the natural and well-known reticence of judges to sanction lawyers whose client is caught engaging in misconduct.[40]

Certainly national counsel working with corporate defendants prefer having to fight the unlikely prospect of personal sanctions rather than the threat of sanctions directed against their client. The pattern responses to sanctions motions seek this very outcome. Defendant first asks the court to believe that it 'substantially' complied with the discovery order (as it asked the court to 'trust' that it had complied with its discovery obligations), or that defendant 'misunderstood' what was required by the subject order (or even both).[41] If the court won't accept these excuses, defense counsel may even assert their own 'ignorance' of whether the complained-of abuse did in fact take place; counsel then will seek to delay the imposition of sanctions with their promises to get an 'answer' for the court (after 'speaking' with their client).[42] Such delay is intended to

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[40] *See Wash St. Physicians*, *supra* note 37, 858 P.2d at 1084 ("While we recognize that the issue of imposition of sanctions upon attorneys is a difficult and disagreeable task for a trial judge, it is a necessary one if our system is to remain accessible and responsible.")

[41] *See Baker*, *supra* note 25, 159 F.R.D. at 523-24 (held that GM's failure to produce documents arose because GM "constructs a narrow view of where it must look to find discoverable material" even in response to court orders; also noted GM's insupportable argument "that it was not required to produce [certain documents] under any order of the Court").

[42] When national counsel aren't admitted in the trial court (*pro hac vice* or otherwise) or, at least, don't make an appearance in the pending case, they will often rely on 'local counsel' -- usually well-respected members of the local bar who may not be fully informed -- to plead this 'defense.'

blunt the judicial anger, if nothing else. Finally, counsel, knowing the judicial reluctance to sanctioning counsel personally, try to shift the court's attention away from the abusive defendant with the straw man argument that it is counsel's conduct -- not defendant's -- which is the target of plaintiff's sanctions motion. Counsel thus hope to 'take the bullet' for the abusive defendant.

This strategy results from defendants' (and their counsel's) belief that the national counsel are above the dictates of any one court. Such defendants (and their counsel) are not overly concerned about what a local court does because (a) the national counsel don't expect to be back in front of that court and therefore don't worry too much about their reputation in one locale, and (b) they expect, almost always correctly, that the defendant itself will bail them out if they get in trouble, by settling the case before an order damaging to national counsel is entered.[43] The latter reflects the corporate defense strategy of preventing plaintiffs from having 'proof' of the defendant's pattern abuses, as no order castigating defendant becomes a part of the record.[44]

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[43] Also, national counsel may assume the trial court will not seek to assert jurisdiction over them if they are not before the court. *See, e.g., McGuire v. Sigma Coatings, Inc.*, 48 F.3d 902 (5th Cir. 1995) (vacating for lack of jurisdiction sanctions against in-house counsel who admitted destroying documents responsive to plaintiffs' discovery requests).

[44] Corporate defendants also rely upon the fact that sanctions orders obtained against a corporate party may be difficult to locate as such orders are often not reported at either the trial or appellate levels. Unless a sanctions order has precedential value, it is not likely to be reported. State trial court orders are virtually never reported. State appellate courts, when they even provide a written opinion -- *see, e.g.*, Ga. Sup. Ct. R. 59 ("Affirmance Without Opinion") -- do not publish all of their opinions. *See, e.g.*, Tex. R. App. P. 77.2 ("A majority of the judges will determine ... whether the opinion (or a portion of the opinion) will be published"). Similarly, most federal district court opinions go unpublished and the federal circuit courts generally provide for affirmance without opinion or other abbreviated, non-published decisions -- *see* Fed. Cir. R. 36; D.C. Cir. R. 36(b); 1st Cir. R. 36.1; 4th Cir. IOP 36.3; 9th Cir. R. 36-1, 36-3; 10th Cir. 36.1, 36.3; 11th Cir. R. 36-1 -- and/or for unpublished opinions. *See* D.C. Cir. R. 36; 1st Cir. R. 36.1, 36.2; 4th Cir. R. 36(c); 9th Cir. R. 36-1, 36-2; 10th Cir. R. 36.1, 36.3; 11th Cir. R. 36-2.

Defendants are emboldened when they feel that the trial court won't know the full extent of their (or their counsel's) checkered past. Such defendants expect that either their discovery representation are more likely to be considered 'trustworthy' or, if they do happen to be caught hiding evidence, a court not fully informed as to their pattern abuse will impose lesser sanctions.

### "Punishment tames man"[45]

Whatever underlies a court's failure to hold parties -- particularly pattern abusers -- fully accountable for intransigent behavior, that failure results in defendants continuing to ignore their discovery obligations without fear of reprisal. Courts must not overlook or condone defendants' attempts try to hide information or documents, much less accept that concealment and other restrictive discovery abuses are part of the process. Defendants decide to withhold information or documents subject to discovery in order to prejudice the plaintiff. Sanctions fairly acknowledge the justice in prejudicing the party which itself sought to cause prejudice. When a party knows that violations of the law will result in sanctions, all parties become less likely to

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[45] "The broad effects which can be obtained by punishment in man and beast are the increase of fear, the sharpening of the sense of cunning, the mastery of the desires; so it is that punishment tames man, but does not make him 'better.'" Friedrich Nietzsche, *Genealogy of Morals*, Essay No. 2, Aphorism 15.

engage in such misconduct.[46] Sanctions which reflect judicial intolerance with pattern abuse therefore help fix the system.[47]

Discovery sanctions which seem to offer some measure of punishment (and hopefully deterrence) include:

- default,[48]
- issue establishment or preclusion,[49]
- striking experts,[50]

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[46] "[T]he most severe in the spectrum of sanctions ... must be available to the district court ... not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to *deter* those who might be tempted to such conduct in the absence of such a deterrent." *Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781 (1976) (emphasis supplied).

[47] David F. Levi and Richard L. Marcus, *Once More into the Breach: More Reforms for the Federal Discovery Rules*, THE JUDGES' JOURNAL, 8, 58-59 (Spring 1998) (noting that certain "bad faith failures to make discovery cannot be addressed by rule language but can only be resolved by individual judges exercising supervision over the discovery process in particular cases"). *See also* Fed. R. Civ. P. 26 advisory committee's note, 1980 amendment ("In the judgment of the Committee abuse can best be prevented by intervention of the court as soon as abuse is threatened").

[48] *See Shahrdar v. Global Housing, Inc.*, 983 S.W.2d 230 (Tenn. App. 1998) (default where corporate abuse included ignoring requests and boilerplate objections); *Figgie Int'l, Inc. v. Alderman*, 698 So.2d 563 (Fla. App. 3 Dist. 1997) (default where manufacturer destroyed relevant documents, presented false testimony and obstructed discovery); *Malautea*, *supra* note1.

[49] *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099 (1982) (establishment of facts permitting jurisdiction where defendant prevented discovery of such facts). *Cf.*, *Chilcutt v. United States*, 4 F.3d 1313 (5th Cir. 1993) (establishing Government's liability for failure to produce documents).

[50] *See Melendez v. Illinois Bell Telephone Co.*, 79 F.3d 661 (7th Cir. 1996) (barring defense expert for corporate defendant's failure to disclose evidence).

- monetary sanctions,[51] and
- other appropriate penalties.[52]

For sanctions to be effective, courts should focus on the nature of the misconduct and not choose a lesser sanction than that warranted, even if the sanction's legal consequences are great.[53] Though defendants complain that plaintiffs' attacks on pattern discovery abuse have caused an undesirable 'criminalization' of discovery,[54] it is indeed criminal to obstruct justice by misleading courts (and plaintiffs).[55] Courts must participate in policing the ethical breaches

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[51] *See Gonzales v. Surgidev Corp.*, 120 N.M. 151, 899 P.2d 594 (1995) (sanction of $151,000 where manufacturer provided false responses and intentionally withheld documents).

[52] *See Wash St. Physicians*, *supra* note 37 (remanding for imposition of "appropriate sanctions" for manufacturer hiding "smoking gun" documents by relying on improper scope restrictions and narrow construction of plaintiffs' discovery requests).

[53] *See Insurance Corp.*, *supra* note 49, 456 U.S. at 709, 102 S.Ct. at 2107-08 ("That a particular legal consequence ... follows from this [sanction] does not in any way affect the appropriateness of the sanction"). *See also Melendez*, *supra* note 50, at 672 ("we do not require district courts to select the 'least drastic' or 'most reasonable' sanction").

[54] *See, e.g.*, Stephen G. Morrison, *The Criminalization of Pre-Trial Discovery: Dealing with the Hostile Judge Strategically and Ethically*, G-1, G-4-7, DRI DEFENSE PRACTICE SEMINAR, PRODUCTS LIABILITY SEMINAR (Feb. 9-10, 1995) (criticizing plaintiffs' attorneys for "enthusiastically" promoting the application of "criminal doctrines to deter discovery abuse").

[55] Both federal and state criminal statutes may be violated by particular discovery abuses, including such prohibitions as those against:

- Perjury (*see, e.g.*, 18 U.S.C. § 1621; O.C.G.A. § 16-10-70);
- Subornation of perjury (*see, e.g.*, 18 U.S.C. § 1622; O.C.G.A. § 16-10-72);
- Conspiracy to commit or suborn perjury (*see, e.g.*, 18 U.S.C. § 371; O.C.G.A. § 16-4-8);
- Obstruction of justice (*see, e.g.*, 18 U.S.C. § 1503);
- Mail and wire fraud (*see, e.g.*, 18 U.S.C. §§ 1341, 1343); and
- RICO violations (*see, e.g.*, 18 U.S.C. §§ 1961 *et seq.*; O.C.G.A. §§ 16-14-1 *et seq.*).

which are at the heart of pattern discovery abuse.[56] It is of the utmost importance to justice, the public, and the legal profession, that effective sanctions begin to have a ripple effect throughout the civil justice system. Courts need to make the sanctions process work as intended -- to both punish and deter -- when faced with abusive and pattern misconduct, often haunted by virtual criminal misbehavior.[57] Trial judges who sanction wrongdoers with meaningful punishments, and appellate courts who affirm such exercise of trial court discretion, go a long way towards making the discovery system work as intended.

**"But a lie which is part a truth is a harder matter to fight"[58]**

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[56] *See, e.g.*, Georgia State Bar Rule 4-102, Standards 4, 45, 46, 56 ("A lawyer shall not engage in professional conduct involving dishonesty, fraud, deceit, or willful misrepresentation"; "In his representation of a client, a lawyer shall not: (a) knowingly use perjured testimony or false evidence; (b) knowingly make a false statement of law or fact; (c) participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false; (d) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent; (e) knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule"; "In his representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal"; "A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce").

[57] *See, e.g.*, *Bampoe-Parry v. General Motors Corp.*, Nos. 98V50138297J, 98V50138298J, 11-12, 16 (Fulton County State Ct., Ga., September 9, 1999) (order on crime-fraud hearing stripped GM of certain of its privileges; "[i]n certain instances GM, by and through its counsel, toyed with and ignored court orders, ethical constraints and legal barriers.... GM, by and through its lawyers, covertly defied court orders as to the existence of many of the documents at issue. ... GM endeavored to and did obstruct and impede the due administration of justice, such conduct rising to the level of obstruction of justice").

[58] "He said likewise
That a lie which is half a truth is ever the blackest of lies,
That a lie which is all a lie may be met and fought with outright,
But a lie which is part a truth is a harder matter to fight."
Alfred, Lord Tennyson, *The Grandmother*, st. 8 (1864)

The continuing assault on the discovery process stems in part from plaintiffs' lawyers' intermittent success in exposing corporate discovery misconduct to judicial reprimand. A response to the 'source' of discovery sanctions -- defendants being caught hiding evidence -- has been various proposals to 'reform' discovery and reign in what is falsely portrayed as a system out of control. The true *raison d'etre* for the various proposals: *defendants aren't concealing evidence, and hence subject to sanctions, if plaintiffs aren't entitled to the information or documents*. In other words, the 'reformers' want change because plaintiffs have been catching their clients (or them) in discovery abuse and some trial courts have started doing something about it. In recent years, there has been a growing awareness among judges that they are the authors of the discovery system's misfortunes, because they have been too tolerant of deliberate discovery abuse. It is fear of the consequences of that growing awareness among the judges which drives the malfeasors to advocate supposed 'reform.'

Thus, the half-truth that discovery does not always work as the rules envision -- *i.e.*, parties obligated to disclose information do so -- is the rallying cry for those who claim we need less discovery. The misinformation accompanying 'civil justice discovery reform' efforts seems to have convinced some courts that the problem is the process, and not those who seek to subvert it. At the least, the 'belief' that we'd be better off without broad and liberal discovery may be compromising some plaintiffs' ability to get full and complete discovery.[59]

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[59] "Discovery should be streamlined. Costly and vexatious pre-trial motion practices should be reformed." Marvin E. Aspen, *It's How You Play the Game*, TRIAL, 28, 31 (July 1998) (United States District Court Judge, Northern District of Illinois). *See also* D. Brock Hornsby, *Recent Judicial Conference Recommendations for Achieving Cost and Delay Reduction in the Federal Courts*, THE JUDGES' JOURNAL, 12, 13 (Spring 1998) (Article by Chief Judge of the United States District Court for Maine, setting forth current "recommendations" for judiciary,

It flies in the face of logic to conclude that because some parties fail to comply with their discovery obligations we should throw out the discovery process. Of course, this is not the first time that this particular 'reform' battle has been fought. At the end of the '70s, a move was afoot to 'reform' discovery in much the same manner as those 'reforms' which are a part of the current amendments to the Federal Rules of Civil Procedure.[60] Yet, the 1980 Advisory Committee admitted, in rejecting for the most part the contemplated 'reforms,' that "abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases."[61]

Just last year Judge Levi[62] reported that "the advice the Advisory Committee has received indicates that discovery is functioning well in most cases."[63] According to the Federal Justice Center's recent survey report, particular types of cases are the source of discovery problems:

> High levels of discovery problems and high expenses were more likely to occur in cases with high stakes, high levels of contentiousness, high levels of discovery activity, or high volumes of discovery activity. Problems ... were not limited to a particular procedural area ... but occurred in most or all aspects of discovery.[64]

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including setting early/firm trial dates and shortening discovery periods in complex civil cases).

[60] *See* Levi and Marcus, *supra* note 47, at 9. *See also* discussion accompanying notes 67-88.

[61] Fed. R. Civ. P. 26 advisory committee's note, 1980 amendment.

[62] The Honorable David F. Levi, U.S. District Judge for the Eastern District of California and Chair of the Discovery Subcommittee of the Advisory Committee on Civil Rules.

[63] Levi and Marcus, *supra* note 47, at 59. Co-author Hastings College of Law Professor Marcus is a Special Reporter to tbe Civil Rules Advisory Committee.

[64] *Discovery and Disclosure Practice*, *supra* note 15, at 2.

That report thus confirms that corporate parties are the likely source of discovery problems, and that such abuses are calculated to prevent access to evidence.[65] Yet, the federal reform effort has focused not on such problems but, instead, has resulted in rules' changes rewarding tbe abusers.[66]

> **"Written laws are like spiders' webs, and will like them only entangle the poor and weak, while the rich and powerful will easily break through them"[67]**

The current proposed amendments to the Federal discovery rules include rule changes designed to insulate corporate defendants from sanctions, as well as prevent deserving plaintiffs from recovering damages for their injuries. Professor Thornburg's recent summary of this turn of events is instructive:

> [T]he harsher reality is that procedural rules allocate power and advantage. ... It is not surprising that organized forces have united to argue in favor of cutbacks in discovery. ... [T]heir efforts to limit discovery are intimately tied to efforts to circumscribe enforcement of disliked substantive law. "Court reform" becomes part of the package with "tort reform." ... Taken together, [the proposed rule changes] would create new problems in the vast majority of cases in which there

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[65] The latter is indicated by tbe fact that discovery problems in any one case usually occur throughout the range of discovery devices.

[66] The Memorandum accompanying the Report of the Advisory Committee on the Civil Rules -- from Advisory Committee Chair, Judge Paul V. Niemeyer of the United States Court of Appeals for the Fourth Circuit, to Committee on Rules of Practice and Procedure Chair, Judge Anthony J. Scirica, United States Court of Appeals for the Third Circuit -- explicitly recognized that the Federal rule 'reforms' fail to address discovery abuse. *See Memorandum Re: Report of the Advisory Committee on Civil Rules*, 1, 3 (May 11, 1999) ("The Committee determined expressly not to review the question of discovery abuse, a matter that had been the subject of repeated rules activity over the years"; emphasis in original).

[67] Attributed to Anacharsis.

> are currently no problems. They would create one-sided advantage, tending to favor defendants over plaintiffs. And they would not eliminate "abuse' in the small percentage of problematic cases that tend to generate concern about discovery; the causes of those discovery disputes stem from the incentive structure within the adversary system and the current role of attorneys in litigation.[68]

That the intent of these 'reforms' is to create unfair procedural advantages in favor of defendants is established by the source for these disturbing changes: a virtual 'who's who' of the corporate product liability defense bar.[69] For example, the *Summary of Public Comments, Preliminary Draft of Proposed Amendments, Civil Rules Regarding Discovery, 1998-99*[70] reveals that the proponents of further limiting the scope of discovery -- the most insidious of the 'reforms' -- include corporate counsel for not only groups such as the Chemical Manufacturers Association and National Association of Manufacturers, but also for numerous individual product manufacturers, including:

- Vehicle manufacturers Ford and Nissan;
- Truck manufacturer Navistar;
- Heavy equipment manufacturer Caterpillar;
- Pharmaceutical manufacturer Roche;
- Pharmaceutical and medical device manufacturers Pfizer and Bristol-Myer Squibb;
- Consumer products manufacturer Proctor & Gamble; and

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[68] Thornburg, *supra* note 2, at 230-31 (footnotes omitted).

[69] *See also* Thornburg, *supra* note 2, at 230 (recognizing that the calls for "discovery cutbacks" has come for the most part from "repeat corporate defendants and their insurers").

[70] As published by the Federal Judicial Center.

- Chemical and plastics manufacturers Dow Chemical and Eastman Chemical.

Corporate counsel for Shell Oil, insurance companies State Farm and The Hartford, and department store giant Walmart, corporate defense organizations such as the Defense Research Institute, International Association of Defense Counsel, and Federation of Insurance and Corporate Counsel, and members of many individual defense firms, also espoused the 'need' for discovery rule changes.[71]

The most troublesome rule change is the limitation of the scope of discovery in Rule 26. Rule 26(b)(1) previously defined the scope of discovery to include "any matter, not privileged, which is relevant to the subject matter involved in the pending action." The recent amendment to Rule 26(b)(1): restrict the "presumptive scope" of discovery -- that to which a litigant is entitled without court involvement -- to any "matter relevant to the claim or defense of any party."[72]

This 'reform' is contrary to the longstanding doctrine of notice pleading as plaintiffs will have to anticipate defendants' discovery objections by pleading with more particularity. Further, now layered onto discovery is the additional requirement that plaintiffs must move the court, for good cause shown, to 'expand' discovery to its former scope.[73] The problematic nature of these 'reforms' was foreshadowed in the discussions of this rule change by the Advisory Committee. The Committee voted down a motion to abandon this proposal. In pertinent part, that motion

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[71] Proponents for limiting discovery included attorneys from over twenty-five nationally known corporate defense firms.

[72] *Memorandum*, *supra* note 66 at 5.

[73] *Id.*

recognized that substituting one general term for another would invite "satellite litigation" and would lead to "stonewall resistance" and "overpleading."[74] Similarly, the only comments on the rule changes from judicial sources recognized that the end result will be more motions. For example, the Eastern District of New York Committee on Civil Litigation noted that "[j]udges [will] indeed be involved in discovery disputes, but not in a way that would expedite litigation but rather in a way that would be tedious, time-consuming, and inefficient."[75] Individual judges also recognized that the scope amendments will only generate more disputes and motions.[76]

That this 'reform" will undeniably invite yet further resistance to discovery by corporate defendants and the concomitant -- and necessary -- increase in discovery motion practice hy plaintiffs is but one specific outcome of this 'reform.' This rule change also shifts the burden of proof regarding the scope of discovery from defendants to plaintiffs. Previously it was the general burden of the party opposing discovery -- usually defendants -- to show that the requested information was not relevant to the subject matter of the action.[77] This placement of

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[74] *Memorandum*, *supra* note 66 at 5-6.

[75] *Summary*, *supra* note 70, at 110.

[76] *Summary*, *supra* note 70, at 83, 112 (reflecting comments of Judges Stanwood R. Duval, Jr., and Carl J. Barbier, both from the Eastern District of Louisiana).

[77] *See, e.g.*, *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482,1485 (5th Cir. 1990) (standard of *Josephs v. Harris Corp.*, 677 F.2d 985 (3rd Cir. 1992) -- that "party resisting discovery 'must show specifically how ... each interrogatory is not relevant'" -- also applies to document requests). *See also Finley v. Trent*, 955 F.Supp. 642 (N.D.W.Va. 1997) (burden is on objector to show discovery should not be allowed); *Teichgraeber v. Mem. Union Corp. of Emporia State Univ.*, 932 F.Supp. 1263 (D.Kan. 1996) (party opposing discovery has burden of proving lack of relevance); *In re Harcourt Brace Jovanovich, Inc. Securities Litigation*, 838 F.Supp. 109 (S.D.N.Y. 1993) (burden upon party opposing discovery to show discovery should not be permitted).

the burden of proof reflects the purpose of discovery: "Modern instruments of discovery serve a useful purpose.... They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest."[78]

Under the new scheme, the opportunities for mischief by corporate defendants are legion. Every plaintiff's request for discovery will likely be met with the general objection that the discovery sought is not relevant to the issues as plead in the complaint. Because plaintiffs will then bear the burden of demonstrating that 'additional' discovery is justified, plaintiff -- faced with the initial problem of not knowing what information defendant has which is responsive to any of plaintiff's discovery requests -- will now have to convince the court that there is some justification for requiring defendant to produce further discovery than that which was already provided. The "Catch 22" nature of this problem is irrefutable: when plaintiff does not know what defendant has, it's difficult for plaintiff to make a reasoned judgment about whether he or she should insist on the discovery, at the risk of the additional discovery being found to be cumulative, etc. Moreover, plaintiff's counsel has to be concerned that the federal trial court's "plague o' both your houses" reaction may well result from defense counsel's inevitable cry of 'overreaching' by plaintiff.

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[78] *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682-83, 78 S.Ct. 983, 986-87 (1958). *Cf.*, *Bishop v. General Motors Corp.*, No. 94-286-B (E.D.Okla., Sept. 6, 1995) (granting plaintiff's motion for sanctions and striking GM's exhibits for use at trial, for GM's failure to comply with court's orders regarding full and proper pre-trial disclosure of GM's exhibits to plaintiff).

Significant in their absence were comments favoring the scope and similar amendments from Federal trial judges.[79] The lack of judicial comment on the pro-defense discovery rule amendments reflects an implicit recognition that such changes are just that, pro-defense. It simply cannot be disputed that "[a]ll of the proposed changes have the potential to limit the total amount of information available to litigants [read plaintiffs] through the disclosure and discovery process."[80] The other pro-defense rule changes include Rule 26(a)'s deletion of the provision that defendants most hated, the requirement that they disclose information contrary to their defenses. Yet, provisions of strategic value to defendants, such as that requiring plaintiff to disclose pre-suit information obtained in support of his or her claims, were retained.

Rule 30 now contains a presumptive limit of seven hours for the examination of any one witness. Not only will this amendment "create perverse incentives to be uncooperative"[81] and invite yet more discovery motions,[82] this change again shifts the burden. The party seeking additional time must approach the court. As with the scope amendment, defendants have transformed the former requirement that defendants file a motion for protective order seeking to block discovery into forcing plaintiffs to file an affirmative motion to obtain discovery. Again, *the intent is to force the plaintiff to be the party always having to approach the court.*

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[79] Yet, comments were proffered in favor of national uniformity for the Rule 26(a) initial disclosure rules from almost 60 individual Federal judges.

[80] Thornburg, *supra* note 2, at 249.

[81] *Summary*, *supra* note 70, at 132. *See also* Levi and Marcus, *supra* note 47, at 58 ("time limits could provide incentives for various kinds of misbehavior").

[82] *Summary*, *supra* note 70, at 136 (comment from Judge Barbier).

Consistent with the burden shifting contemplated by the 'reform' of Rules 26(b)(1) and Rule 30 was the cost-shifting proposal for Rule 26. However, the Judicial Conference of the United States, in approving the proposed rule changes for submission to the United States Supreme Court, voted down this proposed rule change.[83] Rule 26(b)(2) would have provided that the trial court must require the discovering party to pay the responding party's "reasonable expenses" if either (i) the discovery sought is "unreasonably" cumulative, duplicative, or more easily obtained elsewhere; (ii) the party had ample opportunity to obtain the information before, or (iii) the "burden or expense of the proposed discovery outweighs its likely benefit." That the defense bar hoped to encourage such cost-shifting was established by the cross-reference to this provision in the scope rule (26(b)(1)) and the document production rule (34) amendments.[84] The advisory committee's notes foretold how this would have played out:

> The responding party may raise the limits of Rule 26(b)(2) in its objection to the discovery request or in a Rule 26(c) motion, or in response to a request under subdivision (b)(1) that the court authorize discovery beyond matters relevant to the claims or defenses.[85]

With the rule changes adopted by the Judicial Conference, courts can now look forward to addressing, along with other frivolous boilerplate objections which routinely accompany

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[83] *See Judicial Conference Adopts Rules Changes – Confronts Projected Budget Shortfalls*, 31 THE THIRD BRANCH, No. 10 (October, 1999). If the Supreme Court approves the rules changes before May 1, 2000, they will become effective December 1, 2000, unless congress takes action with respect to the proposed rule changes.

[84] *See also Memorandum*, *supra* note 57, Rules App. A-92 (Fed. R. Civ. P. 26 advisory committee's note: "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery").

[85] *Memorandum*, *supra* note 57, Rules App. A-100.

defendants' discovery responses, the objection that 'plaintiffs' requested discovery exceeds the permissible scope of Rule 26(b)(1). The chicanery here is that the rules will now require what they formerly prevented, a thorough examination of discovery requests and responses which is calculated to burden the courts to the detriment of the discovering party, the plaintiff. Previously, unsupported objections were patently insufficient under the discovery rules:

> Finally, GAF objects generally to this interrogatory as 'overly broad, burdensome, oppressive and irrelevant' a complaint which GAF echoes with virtually every other interrogatory. To voice a successful objection to an interrogatory, GAF cannot simply intone this familiar litany. Rather, GAF must show specifically how, despite the broad and liberal construction afforded the federal discovery rules, each interrogatory is not relevant or how each question is overly broad, burdensome, or oppressive, by submitted affidavits or offering evidence revealing the nature of the burden. . . . The court is not required to 'sift each interrogatory to determine the usefulness of the answer sought.' [86]

Under the new Federal scheme, trial courts will now be called upon to do just that -- "sift" through every request -- in response to plaintiffs' motion to compel. The endgame is obvious: corporate defendants will hope to engender judicial 'fatigue' and thereby prejudice plaintiff, while engaging in conduct not likely to be considered sanctionable. The very real risk is that plaintiffs will be forced to 'try the court's patience' to obtain discovery to which they may be entitled, which entitlement could only be confirmed by plaintiffs actually knowing what defendants have, a scenario which is rarely the case.

Judge Avern Cohn's general observations about the discovery rules amendments are well taken.[87] After noting his 19 years as a trial judge and that there is no need for changes if

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[86] *Roesberg v. Johns Manville Corp.*, 85 F.R.D. 292, 296-97 (E.D. Pa. 1980) (citations omitted).

[87] United States District Court for the Eastern District of Michigan.

discovery works fine in most cases, he stated that "[m]ore aggressive judging and less aggressive lawyering in a small number of cases is what is needed."[88] Unfortunately, the opposite is likely to result from the recent Federal discovery rules amendments.

### "That which is unjust can really profit no one; that which is just can really harm no one"[89]

This precept, though commendable in its idealism, is not being followed by certain actors in the civil justice system. There is an undeniable and concerted effort afoot, seeking to deprive injured parties of their right to full and complete disclosure of corporate notice and knowledge directly relevant to the injured parties' claims, as part of the greater effort to limit injured parties' right of recovery against corporate actors.[90] The politicization of the Federal discovery rules' amending process -- whereby special interest groups have often succeeded in appropriating the process for their own agenda -- is part of that greater effort:

> Despite empirical research, the advice of committee alumni, and their own misgivings, the Advisory Committee has proposed global changes to the discovery rules. Part of the answer may be the judicial branch's well-founded desire to hang on to control of rulemaking. Political forces seeking changes in the procedure rules have already demonstrated their willingness to go to Congress when they find the rules committee insufficiently responsive. And Congress has

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[88] *Summary*, *supra* note 70, at 178-79.

[89] Henry George, *The Land Question*.

[90] *See, e.g.*, Marc Galanter, *Contemporary legends about the civil justice system*, TRIAL, 60, 60-61 (July 1999) ("law is [increasingly] shaped by and for large organizational actors -- artificial persons rather than natural ones. ... [C]orporate actors ... are ... effective players of the legal game and enjoy enduring and cumulative advantages over individuals").

> already demonstrated its willingness to oblige. ... The proposed amendments go part of the way toward giving the business lobby what it asked for.[91]

Procedural 'reform' is simply another battleground for those who seek 'tort reform.' The recent comments of the Supreme Court of Ohio -- in finding unconstitutional that state's 'tort reform' bill, "the latest effort at civil justice reform, and, to be sure, the most comprehensive and multifarious legislative measure thus far"[92] -- apply here: such efforts "change[] the complexion of the reform debate into a challenge to the judiciary as a coordinate branch of government."[93]

Corporate interests seek to strip from the judiciary its ability to render justice or, at least, to create procedural hurdles which make meaningful recovery for injured parties unlikely, all in furtherance of the bottom line. Corporate defendants must not be allowed to appropriate the civil justice system and prevent discovery by invoking rules they injected into the process. Civil justice is only obtained if courts make the system work fairly for plaintiffs and defendants alike.

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[91] Thornburg, *supra* note 2, at 260, 262.

[92] *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 458, 715 N.E.2d 1062, 1073 (1999) (bill overturned amended, enacted or repealed over 100 sections of the Ohio Revised Code "relative to changes in the laws pertaining to torts and other civil actions").

[93] *Id.*, 86 Ohio St.3d at 459, 715 N.E.2d at 1073