

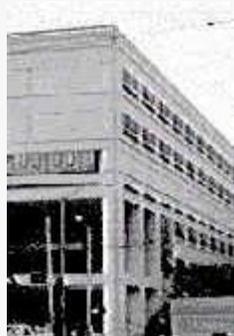
Reducing the Costs of Civil Litigation

Discovery Reform

by Peggy E. Bruggman

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Discovery Abuse: What is it? What Causes It?

While the majority of the legal profession believes that discovery abuse exists, most are equally convinced that it is their opponent who is engaging in it. Discovery abuse seems to be, to some extent, "in the eye of the beholder." [1] One commentator notes that despite changes to discovery rules over the last thirty years designed to curb abuse, the types of discovery abuse complained of have changed little over time. [2] The purpose of this section is to present an overview of attorney behavior that is considered to be abusive discovery practice, and suggest reasons why those practices exist.

Discovery abuse tends to fall into two broad categories. First, practitioners complain of excessive discovery. This technique of overly broad discovery is used as a tactical weapon to impose excessive costs on the opposing party in the hope that he or she will eventually settle rather than incur further costs. In a 1980 study of attorney's views on discovery abuse, Professor Wayne Brazil reported that 77% of those interviewed admitted that they had used discovery for just such a purpose. [3] Attorneys use this type of abuse to engage in fishing expeditions unlikely to reveal facts supporting anything but a marginal or sham claim. [4] Numerous and lengthy depositions and voluminous sets of written interrogatories are employed to exhaust the opponent; the hallmark of this type of discovery abuse is "not the legitimate pursuit of evidence, but an intentionally burdensome, costly, and frustrating experience which eventually exhausts the opponent and leads to his retirement from the field of battle." [5]

A second category of abuse has been defined as resistance to legitimate discovery in the hope of either avoiding disclosure or to simply buy time. Techniques in this second category include: refusing to provide or hiding information, raising frivolous claims of privilege, destroying documents, disingenuously construing discovery requests narrowly, assisting in perjury, coaching witnesses to avoid disclosing information, and providing deliberately evasive answers to discovery requests. [6] The root of this type of abuse is found in the philosophy that good lawyering entails getting as much information as possible while revealing as little as possible. [7]

The causes of abuse are multifaceted. Several general factors, however, can be identified. First, financial incentives play a role, as an hourly billing scheme encourages more discovery. "When fees are paid on the basis of time charges, discovery practice marries the lawyers' professional instinct to leave no stone unturned to the financial advantage of doing so." [8] Second, fear of malpractice claims may also encourage lawyers to be unnecessarily thorough, and force them to confirm through discovery what they already knew through less formal means. Third, the time required to craft narrowly tailored discovery requests may lead attorneys to the indiscriminate use of discovery as a substitute for advance preparation and research. In addition, the broad scope of discovery outlined in Federal Rule of Civil Procedure 26(b)(1), encompassing "all matters, not privileged, which are relevant to the subject matter involved in the pending action," lacks boundaries sufficient to prevent endless discovery. Finally, some practitioners believe that some portion of discovery abuse is conducted by newcomers to the

profession who may simply not know any better, suggesting that inadequate legal education in law school, coupled with insufficient training and supervision early in a lawyer's career, may contribute to the problem.

The judiciary also plays a role in facilitating discovery abuse through its failure to enforce the rules and impose sanctions. "Study after study has confirmed that judges are reluctant to impose meaningful sanctions on errant lawyers and, even when they are so disposed, the sanction is often untimely and amounts to little more than a slap on the wrist." [9] Professor Brazil reports that, depending on the kind of case, 50 to 90% of all lawyers interviewed reported dissatisfaction with the courts regarding the assistance received in resolving discovery problems and favored greater court involvement, while 70 to 90% favored more frequent use of sanctions. [10]

Why the judiciary is reluctant to impose sanctions is complex. The reasons for the courts' reluctance include: (1) application of unclean hands--since it's likely that both sides have engaged in abuse the judge feels that neither side should be punished; (2) lack of awareness of the extent of abuse; (3) fear that sanctions will increase acrimony between the parties; (4) concern that attorneys will penalize clients for sanctions; (5) insufficient knowledge of the parties and the issues for the judge to feel confident in issuing sanctions; (6) empathy with, or indoctrination in the adversarial system; and (7) the absence of clear guidelines for issuing sanctions. [11] This reluctance allows attorneys to engage in abusive discovery in the name of zealous advocacy with little fear of reprimand. Inherent in this behavior is the message that lawyers are unlikely to change their behavior unless they are forced to do so.

Perhaps the common denominator for most forms of discovery abuse is the adversarial process itself.

As long as we essentially ignore the fact that discovery has been engrafted onto a thoroughly adversarial process, no solution to its problems will materially succeed. A system that promotes adversarial resolution of disputes through the efforts of client-dedicated legal representatives cannot be expected to easily accommodate to a process that mandates disclosure of vital case-related information through the simple expediency of one party making a request of the other. [12]

The Supreme Court has recognized that a lawyer's job is not necessarily to secure the truth, and that "[w]ithin the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty." [13] The devotion to client that is inherent in our adversarial system makes it unlikely that the true goal of discovery--to make a trial "less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent" [14]--will be achieved. [15]

Discovery Abuse: Is it Real?

Most discussion regarding discovery reform proceeds from the premise that discovery abuse exists and that curbing it to reduce the cost of litigation is a legitimate goal. That discovery abuse exists as an integral cause of both delay and cost increase in litigation is supported by numerous studies that ask lawyers and judges what they perceive as problems in civil litigation. [16] Some commentators, however, argue that perceptions are not enough, and they disagree with the assertion that litigation and its attendant discovery

abuse have increased. They claim that there is little empirical evidence to support what has been labeled the "pervasive myth of pervasive discovery abuse," [17] and they criticize efforts at reform as being based solely on speculation, perceptions, and "myth."

[L]ittle empirical research has been done to objectify and quantify discovery abuse. . . . [C]laims of discovery abuse have rested largely on nonevidence and may well be generally exaggerated. Frequently the assertions of the extent of discovery abuse do not rest on evidence, but only cite to another writer making a similar claim or simply make a conclusory statement that drives its strength from the fact that it has been repeated so frequently. Indeed, taking on lives of their own, many of the claims that discovery abuse is the major cause of delay and expense in the federal system are these kinds of conclusory assertions. [18]

19] The purpose of this section is to review arguments suggesting that the belief in the prevalence of discovery abuse is based not on empirical evidence, but upon "perceptions" of abuse that have been exaggerated and perpetuated by politicians, the legal profession, interested parties such as insurance companies, and the media.

It has been suggested that the perception of discovery abuse is but one part of an exaggerated myth of American litigiousness and is based on inadequate and soft social science instead of empirical evidence. [20] Professor Mullenix asserts that interested parties, such as politicians, lawyers, judges, and insurance companies, have used the media to perpetuate the idea that American discovery abuse exists and that it must be eliminated. [21]

The media's constant repetition of the theme of American litigiousness has made discovery a prime target for reformers. . . . We believe American society has run amok because our fellow citizens have a shameless propensity to file frivolous lawsuits--again, not because this is true, but because our newspapers and television shows inundate our collective consciousness with examples of outrageous and ridiculous litigation. We believe American civil litigation is out of hand because notoriously greedy lawyers engage in serious discovery abuse--not because they do, but because litigiousness has become linked in our minds with discovery abuse. [22]

In support of her argument, she cites a survey conducted in 1988 by Louis Harris and Associates as both indicative of the problem and the source of much of the information used to substantiate assertions of abuse. [23] As is outlined below, the Harris survey was incorporated without question into the 1988 report of the Brookings-Biden taskforce on civil justice reform, [24] which in turn served as the basis for much of the discovery reform efforts undertaken by the civil justice advisory groups that were formed pursuant to the Civil Justice Reform Act. In this manner, Mullenix argues, the myth of discovery abuse was perpetuated.

25] and did not focus on actual problems, actual magnitudes, or actual causes. Mullenix criticizes the Harris study for assuming the question it was trying to answer, for being little more than a tally of attitudes and opinions rather than any statistical demonstration of abuse, for asking questions regarding changes in cost and delay without providing baseline figures for comparison, and for constructing a pool of respondents that may have been slanted in favor of corporate clients with a bias about discovery abuse. [26] In addition, the survey focused on "transactions costs" as the most important feature of discovery, phrasing the vast majority of questions in that context. In this manner, the survey encouraged discovery reform that was based on the "promotion of economic

values, corporate business interests, and global competitiveness, rather than [on] the truth-seeking and justice-furthering goals of discovery." [27]

The Brookings-Biden task force was convened to recommend to Congress suggestions for civil justice reform. The report from the task force also reflected the business orientation of the effort, noting that "corporate defendants and insurance companies . . . believe that rising costs of litigation are draining valuable resources from the essential function of American business." [28] The task force had commissioned the Harris study, and it "uncritically recycled" the Harris methodology and findings into its report. [29] The report claimed that "all who participate in the judicial system--litigants, judges, and attorneys" think that litigation costs too much and takes too long" [30] yet the report provided little hard evidence to support this claim, and it provided no empirical studies documenting the claim with valid statistics. [31]

From the beginning, the proponents of the Civil Justice Reform Act (CJRA) asserted the existence of discovery abuse and the belief that the abuse had risen to crisis proportions. Mullenix criticizes the CJRA primarily for its uncritical incorporation of the Harris study and the Brookings-Biden report without empirical evidence to support it. Moreover, Mullenix argues, what little empirical research was available suggested that a discovery crisis did not exist. "[T]he most stunning delinquency in CJRA's enactment was Congress' failure to authorize a sound empirical study of the cost and delay problems plaguing the federal courts, or a parallel empirical study of discovery." [32]

Mullenix also argues that the legislative history of the CJRA "reveals the probusiness, proinsurance, prodefendant bias of the civil justice reform movement." [33] These interests financed the survey research supporting the legislative history, served on the Brookings-Biden panel, and provided most of the witnesses testifying in support of the legislation. There was little input from public interest lawyers, and no survey or poll of proplaintiff interests was conducted. [34] CJRA supporters relied primarily on a survey of corporate legal departments, insurance industry data, and testimony from the general counsel of insurance companies. [35] "Although the CJRA's proponents attempted to present the bill as part of a consensus movement aimed at helping the average American," in reality the Act reflected a "probusiness, proinsurance, prodefendant bias." [36]

The financial incentives of these industries to reform the discovery process in ways that are beneficial to their interests certainly raises the question of bias. Perhaps more importantly, however, it raises the possibility that the reform efforts were misguided simply because a monochromatic picture of the problem was presented. Aside from financial incentives, it is possible that the kind of cases litigated by business entities and their insurance companies are more likely to entail more discovery and therefore more abuse. Studies documenting discovery procedures support this assertion: discovery problems or abuses are "substantially more prevalent in large, complex cases as opposed to smaller simpler, more routine cases." [37] In other words, discovery abuse, however defined, may in fact exist in the large and complex litigation that insurance companies are involved in, but may not be as prevalent outside that realm. For example, reform measures that include mandatory disclosure requirements may in fact increase the discovery burden on litigants who engage in little or no discovery. Surprisingly, in a 1978 study of federal courts, it was reported that 52% of the terminated cases involved no discovery requests at all, and fewer than 5% of the 3,114 cases involved more than ten discovery requests. Similar data was reported in a 1993 study of discovery in state

courts. [38] Discovery reform that is based on problems in corporate legal departments may therefore fix problems that do not exist elsewhere.

Other commentators share Mullenix's criticism that "crisis rhetoric" is too frequently based on anecdotal evidence unsupported by hard evidence. [39] Indeed, reviewing the data has led some commentators to conclude that "discovery normally works well, and that liberal discovery is on balance a functioning system used effectively in more than half the lawsuits filed." [40] For example, a study of Iowa state trial courts indicated that only 25% of all cases had any formal discovery and few of those involved extensive discovery. The study revealed that most judges and attorneys felt the discovery process was working quite well, and that abuse existed in a small minority of the cases. [41] While acknowledging that opinions and perceptions of abuse may accurately reflect some incidence of abuse, and may reflect recurring patterns of the kind of abuse, many commentators agree that further study is necessary to support additional reform.

There are two studies which Mullenix and others cite as methodologically sound and which suggest that discovery abuse, though perhaps real, may not be the crisis it is portrayed as. The first was conducted in 1978 by the Federal Judicial Center (FJC) and used a case-based methodology to examine discovery activity in 3,000 terminated cases in six United States district courts. The second was conducted between 1990 and 1993 by the National Center for State Courts (NCSC) and examined data from 2,190 cases. It used a case-based docket assessment of discovery activity designed to collect data on the incidence and volume of civil discovery in five state trial courts requiring litigants to file discovery requests. The NCSC study broadly reaffirms the finding of the FJC study that discovery abuse is not as prevalent as is otherwise assumed.

Federal Judicial Center Study

The purpose of the FJC study was to provide data about federal discovery practice. It did not attempt to assess the quality of the discovery, but rather sought to quantify discovery activity. Nonetheless, some of its findings are instructive because they suggest that, to the extent abuse exists, it must be found in the quality of the discovery and not in the quantity. [42] No discovery requests at all were filed in 52% of the cases, and fewer than 5% of the cases had more than ten discovery requests. [43] Depositions and interrogatories accounted for 78.5% of all discovery requests filed. [44] The next most frequently used discovery technique was document requests. While most motions for sanctions were granted, these motions were rarely filed. [45]

National Center for State Courts Study

The NCSC study focused on discovery activity in state trial courts in Boston, New Haven, Kansas City, Seattle, and Shelton (Wash.). Though some differences exist between the cities, the collective data provide important information on the frequency and kind of discovery. [46]

Incidence and Volume of Discovery Across Courts

No discovery was initiated in 42% of 2,190 cases sampled, as compared with 52% in the

1978 FJC study. Discovery was significantly higher in some courts than others. The total number of requests per case ranged from 1 to 88 with a mean of 6.4 and a median of 4. This suggests that most of the cases are clustered together in the lower range of discovery volume while the high discovery volume, case is the rare exception. Differences between the cities in incidence and volume of discovery activity are related to the greater use of informal discovery in those cities with lower discovery activity, and to the use of case management techniques required by local rules. [47]

Incidence and Volume of the Most Common Types of Discovery

In the cases where discovery was filed: interrogatories, the most common form of discovery, were used in 88% (mean volume of 2.7), requests for production were used in 69% (mean volume of 3.5), depositions in 59% (mean volume of 2.3), and requests for admission in 12% (mean volume of 1.6). The nature of discovery changes when the volume of requests rises. In cases employing more than ten discovery requests, depositions become the most prevalent form of discovery.

Cases Which Are More Likely to Have Discovery

The study supports anecdotal assertions that the type of case and number of parties retaining separate counsel affect discovery. Discovery was more frequent and higher in volume in tort cases, particularly malpractice and product liability, where there are commonly a greater number of defendants pursuing independent and conflicting interests. In contrast, a much lower proportion of contract and property cases involved discovery. The authors suggest that discovery volume can be effectively monitored, and perhaps reduced, by identifying those cases with two or three separately represented parties and applying early-case-management procedures. [48]

Impact of Discovery on the Court

Cases with higher discovery volume generate more motions, thus increasing the burden on the court system. Across the five courts, half of the cases employing formal discovery filed at least one discovery-related motion. In cases with three or fewer discovery requests, 38% included a discovery motion (mean number of motions is 1.4); in cases with four to ten requests for discovery, 62% of them involved motions (the average number of motions is 2.3); when the number of discovery requests reached eleven to twenty, 75% involved discovery motions (the average number of motions is 3.9); and when cases had more than twenty discovery requests there was an 83% likelihood that a discovery-related motion would be filed (mean number equal to 6.5). The median time to disposition of cases with discovery was 653 days, while for cases not utilizing formal discovery it was 266 days.

The authors suggest two methods of mitigating the impact on the courts. One approach is to require attorneys to certify that they have made a good-faith effort to resolve discovery disputes before bringing them to the court. The data collected in the study, however, found little difference between courts with a certification rule and those without, suggesting that such a rule alone does not reduce motions to compel discovery. [50]

Conclusion

Critics of the "myth" of discovery abuse may be right. Most of the information about the discovery process and its problems is based on opinions and perceptions of those in the legal profession. Nonetheless, even if statistically or empirically problematic, these sentiments suggest that something is wrong with the process. These pervasive sentiments alone may be enough to proceed with reform measures, but they do not provide the kind of information that is necessary to formulate effective solutions. Perhaps the lesson to be learned from these studies and their criticism is not whether discovery abuse is real, but that efforts at reform will only be effective if sufficient data is assembled to both identify the problem and evaluate the use of suggested reforms in other jurisdictions. As Professor Mullenix urges, a "[s]ound, persuasive empirical study ought to undergird every rule reform effort; in particular, there must be convincing evidence that a problem exists before any rulemaking group begins the process of rule revision." [51] The success of any reform effort will depend on an empirically sound evaluation of what the problems are and the application of carefully formulated reforms tailored to address a specific problem.

The California Civil Discovery Act of 1986

The Civil Discovery Act of 1986 (hereinafter the Act) was the first major revision of discovery procedures in California since the discovery rules were first codified in 1957. [52] The Act was the end product of a multiple-year study conducted by a joint commission created by the State Bar and the Judicial Council of California. [53] This commission had three goals for the Act: (1) to identify discovery abuses, and eliminate or at least reduce them; (2) to codify the large accumulation of common law that in the thirty years since the codification in 1957; and (3) to improve the organization and wording of the law. [54]

The commission included discovery reform among its goals in response to the perceived consensus in the legal community that widespread discovery abuse greatly increased both the financial and human cost of litigation, potentially preventing those with legitimate legal concerns from pursuing their case due to expense, and because the response of the judiciary to discovery abuse was "often timid, inconsistent, and unpredictable." [55] Though the commission conducted no studies to verify these perceptions, the chair of the commission said that the panel "found no reason to doubt the reports of widespread abuse[]." [56]

The Act aimed to accomplish its goal of eliminating discovery abuse by encouraging more cooperation between the sides in a lawsuit, and by enforcing that cooperation with tougher sanctions. [57] Though the Act contained numerous provisions, it attempted to accomplish the first of these goals primarily through: (1) a statutory definition of what constitutes abuse of the discovery process that also includes a meet and confer requirement; (2) limitations on interrogatories; (3) revisions to the rules governing document inspection; (4) limitations on depositions; and (4) increased sanctions to encourage compliance.

Statutory Definition of Discovery Abuse

California Code of Civil Procedure sections 2023(a)(1)-(9) now provide a nonexclusive list of what constitutes discovery abuse:

Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery.

Using a discovery method in a manner that does not comply with its specified procedures.

Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.

Failing to respond or to submit to an authorized method of discovery.

Making, without substantial justification, an unmeritorious objection to discovery.

Making an evasive response to discovery.

Disobeying a court order to provide discovery.

Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery.

Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular method of discovery requires the filing of a declaration stating facts showing that such an attempt has been made. *Notwithstanding the outcome of the particular discovery motion*, the court *shall* impose a monetary sanction [emphasis added] ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. [58]

Under these definitions, it is now essentially mandatory that attorneys make a good faith effort to resolve discovery-related disputes informally. [59] This requirement of meet and confer runs throughout the Act and, as is discussed below, failure to do so will result in monetary sanctions. [60] It is important to note that sanctions can be imposed for a failure to meet and confer, even if the party has not actually engaged in discovery abuse. It was thought that the enforcement of a meet and confer requirement would conserve judicial resources by limiting the court's involvement to the resolution of major disputes rather than refereeing minor differences between counsel. [61]

Limitations on Interrogatories

Under the old discovery rules, the number of interrogatories was not limited. The Act as originally proposed limited the propounding party to thirty-five interrogatories without provision for exceptions. In response to objections from attorneys, however, the Act as passed provided a considerable loophole. [62] More than thirty-five interrogatories is permitted: (1) when the parties agree to more; (2) when the court orders it; or (3) when the attorney writing the interrogatories certifies that he has read all of the questions and finds that they are all necessary and reasonable. [63] Many commentators have argued that this loophole means that there is effectively no limit, and that attorneys have simply developed boilerplate forms declaring the need for more interrogatories.

Document Inspection

In order to combat evasiveness in document production, to reduce stalling techniques designed to exhaust the opponent and buy time, and to eliminate the production of documents that had been intentionally disorganized to confuse the opposition and render the documents nearly impossible to use, the Act provided new rules for document inspection. A party may now demand that the opposing party produce the documents, or the party requesting inspection must be allowed to inspect and copy the documents that are in the other party's possession. [64] Any documents produced must either be "produced as they are kept in the usual course of business, or must be organized and labeled to correspond with the categories in the demand." [65]

Limitations on Depositions

Before the 1986 Act, it was not uncommon for the non-noticing party to conduct lengthy cross-examination of the deponent at great expense to the noticing party. Under the Act, the court upon motion for good cause shown, can order that the cost be "borne or shared by another party." [66] In addition, the Act limits the parties to one deposition per deponent. [67] Once a party has been deposed, neither side may take another deposition. If a party wishes to depose a witness more than once it must get either permission from the court or a stipulation permitting the subsequent deposition. [68] Some have expressed concern that attorneys may use the one-deposition limit to tactical advantage by deposing their own key people early in the litigation when the opposing side is unprepared to take an intelligent deposition. [69]

Sanctions

Though the use of sanctions for discovery abuse was permitted under the old rules, the emphasis placed on them in the Act is new. It was thought that this emphasis would reduce discovery abuse, and many commentators expressed the belief that the entire success of the Act depended on the willingness of the courts to enforce and impose the sanctions. [70] Many people argued that the success of the proposed reform would depend on uniform judicial enforcement of the sanctions provisions, and that without such enforcement attorneys would be unlikely to change their abusive behavior. [71] Others expressed concern that litigation costs and court congestion would be increased through increased motions for sanctions. [72]

Three major changes were enacted. First, the burden of proof has shifted to the non-moving party. Prior to the Act, the party seeking sanctions had the burden of establishing the abuse. Under the Act, sanctions will be imposed upon a non-moving party unless it can show good cause (substantial justification or other circumstances of unfairness) to avoid them. [73] This requirement that a party justify its discovery process was designed to make attorneys more thoughtful in their use of discovery. Second, most monetary sanctions are now mandatory. The court retains considerable discretion, however, to impose these sanctions because it is the court who determines whether the attorney's actions were substantially justified. Finally, section 2023(b)(1) permits anyone who has been injured through discovery abuse to seek recourse through sanctions. The person need not be a party to the lawsuit.

A trial court has essentially six types of sanctions available. [74] The most common sanctions include:

Discretionary monetary sanctions when the party has engaged in discovery abuse or unsuccessfully asserted that another has engaged in discovery abuse. These sanctions are imposed when the court determines that a party has engaged in discovery abuse not specifically mentioned in the statute. The amount of the sanction is equal to the reasonable expenses, including attorney's fees, that were incurred by anyone as a result of the abusive conduct.

Mandatory monetary sanctions when a statutory section governing a particular method of discovery authorizes a monetary sanction. The court may refrain from imposing the sanction only if it finds that the party subject to the sanction acted with "substantial justification or that other circumstances make the imposition of the sanction unjust." Among other abuses, monetary sanctions are mandatory for failure to confer in a good faith effort at informal resolution.

Less frequently, [75] the court may impose:

An issue sanction that orders that designated facts be taken as established in the action in accordance with the claim of the party who has been adversely affected by the abuse.

An evidence sanction that prohibits a party engaging in discovery abuse from introducing certain matters into evidence.

A terminating sanction that strikes all or part of pleadings, stays the proceedings until the order for discovery is obeyed, or dismisses the entire action.

A contempt sanction that treats the discovery abuse as a contempt of court.

Empirical Study on Sanctions

The imposition of pre-trial sanctions under the Act was a portion of an empirical study performed in the Central District of the Los Angeles County Superior Court. [76] The study examined, among other issues, motions for monetary sanctions brought under the Act in an attempt to determine the kind and frequency of motions for sanctions and the frequency with which these motions were granted. Though a comprehensive presentation of the information contained in that study is beyond the scope of this paper, several findings merit highlighting here.

Of the "studiable" sample of 516 motions for sanctions brought during the two-month study period, 473, or 91.7% were brought under the Act. [77] The author of the study calculates that this is the equivalent of 4,470 motions for sanctions per year. [78] The author noted three significant clusters of motions: [79]

Depositions

15.9% to 16.6% of the motions were related to abuse of the deposition process. Sanctions were granted in 67% of these motions. The most frequent complaint was failure of a witness to attend a deposition (58.5%), but motions were also made for unreasonably making or opposing a motion for a protective order (7.3% of motions with a

success rate of 16.7%) and motions for sanction involving a deponent's failure to answer a question or produce a document (9.7% of motions with a success rate of 87.5%). [80] The author noted that parties sought sanctions more times for disagreements over whether the deposition would actually take place than over the conduct of the deposition, [81] and that most motions had been filed only after repeated attempts to gain compliance were unsuccessful. [82]

Interrogatories

Sanctions based on abuses of the procedures for interrogatories represented the largest cluster of complaints. Approximately 35% of the motions for sanctions involved interrogatories, and the motions were successful 69% of the time. The most common abuse was failure to serve responses (61.5% of motions with a success rate of 67%). [83] Similar to depositions sanctions, most problems occurred with initial responses--once some answers were provided, motions to compel further answers were much fewer. [84] Most of the moving parties indicated that the respondents made "excuses, apologies, and promises" until the moving party indicated it was filing a motion for sanctions. [85]

Inspection of Documents, Places, and Things

Motions for sanctions involving a request for documents made up 27.9% of the total, and sanctions were granted 67% of the time. Nearly half of the motions were to compel an initial response, [86] and the majority of the motions involved multiple delays by the opposing party prior to a rapidly approaching trial date. In those situations, the opposing party would not comply at all or produce only limited documents. [87]

Noting that the Act was intended to authorize and encourage the courts to stop discovery abuse through sanctions, the author cited statistical information from the study to support the assertion that judges are still not using sanctions to the fullest extent possible in order to deter discovery abuse. In 23% of the cases, the substantive motion was granted but no sanction was given, and in 25% of the cases sanctions were awarded but the amount requested was reduced by the judge. In 48% of the cases, then, a discovery abuse occurred yet the court failed to impose the requested sanction. [88] The author suggests that part of the problem may be in the Act's failure to define "reasonable expenses" and suggests the imposition of a local rule requiring that the attorney "specify in their declarations the exact number of hours expended because of the alleged abuse and a detailed description of the work performed." [89] The judge would then examine the declaration to determine if the hours spent were reasonable. A second rule would establish the hourly rate to be awarded, [90] and the amount of the sanction would be determined by applying this hourly rate to the number of hours the judge determined were reasonable. [91]

Mandatory Disclosure

Among the numerous proposals for discovery reform, a system of mandatory discovery is perhaps the most controversial. Some variation of it, however, is being implemented in a limited number of federal and state courts across the country. The purpose of this section is to review the arguments in favor of a system of mandatory disclosure as well as those that are critical of its methods or skeptical of its benefits. To the extent the information is available, the effectiveness of mandatory disclosure in reducing the cost of litigation in

federal courts will be examined, as well as its implementation and success in state courts in Arizona and Alaska.

Arguments for Mandatory Disclosure

Proponents of mandatory discovery suggest that such a system would reduce both costs and delay to litigants by providing parties with relevant information at minimal cost early in the adversarial process. Parties would be spared not only the cost of requesting core information, but because discovery disputes will decline, the total cost of litigating them will be reduced. Access to the information early in the pre-trial phase of the suit will allow attorneys to effectively narrow the scope of the litigation, reducing its length and cost, and may promote early settlement. If combined with a standard for imposing disclosure that is narrower than the present relevance standard, the actual volume of discovery may also be reduced and, if the burden of persuasion is shifted from the party opposing discovery to the party seeking it, further savings can be achieved. Combined with judicial intervention, mandatory disclosure will produce more effective case management while reducing the volume of litigation and the overall burden on courts. Finally, by removing the present ambiguities surrounding lawyers' obligations to respond to discovery, it will raise the level of professionalism. Lawyers will not be required to disclose any more information than they would have without mandatory disclosure; they will, however, be required to relinquish some of it without the intervening discovery game. [92]

Criticism of Mandatory Disclosure

Criticism of mandatory discovery can be summarized into four broad categories. One, some fear that mandatory disclosure will actually increase the cost of litigation in many cases. Two, critics contend that the volume of litigation may actually increase through satellite litigation over compliance. Three, the adversarial system will suffer from cooperation that detracts from zealous representation. Finally, mandatory disclosure conflicts with the attorney-client privilege and the work product doctrine.

Those who predict that litigation costs will increase under a system of mandatory disclosure rely on the statistics showing that no discovery at all occurs in roughly half the cases filed in both state and federal court. [93] Mandatory disclosure in these cases would actually increase the cost of litigation, as these litigants are currently incurring no discovery costs. This increased cost may also reduce access to the civil justice system if it prevents litigants from bringing suits that are already almost too costly to pursue. Furthermore, there will be less money for settlement if costs are raised at the front end of the litigation. [94] Even in complex cases, where discovery is already occurring, critics argue that total discovery will increase because mandatory discovery will not replace the current discovery process, but rather "simply add[] a new layer of disclosure." [95] Finally, as is discussed below, satellite litigation over compliance with mandatory disclosure rules will increase the costs and delays of civil litigation and are likely to occur "without any counterbalancing reduction in those cost and delays that already burden the current discovery process." [96]

While motions to compel may be reduced in a system of mandatory disclosure, this savings could be eclipsed by an increase in satellite litigation over noncompliance and by disputes regarding what information is sufficiently related to the claims or defenses raised

in the pleadings so as to trigger the obligation to disclose. An obstinate litigator will have "fresh new sources of dilatory tactics through motions for clarification, objections and hearings to interpret every nuance of the new rules." [97] As one commentator explains, "[o]ne can scarcely imagine the extraordinary number of hearings that will be necessary to administer [Federal Rule of Civil Procedure 26(a)]." [98] Any standard for disclosure that is broad enough to cover all varieties of litigation will of necessity be somewhat vague and ambiguous. This universal standard may lead to motions to dismiss, for protective orders, and for sanctions. Additionally, litigants may need to file motions for a definite statement. Preventing this additional litigation would require the effective use of sanctions, attorney certification of the accuracy and relevancy of what is being disclosed, and judicial management and monitoring of the disclosure process through case management. The threat of sanctions and a certification requirement, however, have not proven particularly effective in increasing compliance and cooperation with the discovery process. [99]

The adversarial process itself seems to be at the root of most criticisms of mandatory disclosure. [100] Mandatory disclosure combines the adversary model of litigation with an initial period of cooperative exchange of relevant information. This combination is inherently incompatible, and may encourage lawyers to refrain from investigating facts and theories that will automatically be disclosed to the other side. Others argue that in deciding what documents to reveal, a litigant must first analyze their opponent's case, and in doing so is assisting them in making their case. Opponents of mandatory disclosure argue that this obligation to reveal damaging information to the opposition will undermine the attorney-client relationship because it may discourage clients from confiding fully in their attorney. [101] Furthermore, it compromises the principles behind the work product doctrine to require a party to divulge information they have uncovered through diligent investigation and research. [102] It would seem that the worst fears behind the work product doctrine--that of the lazy lawyer relying upon the efforts of the opposing party to make his or her case--would be realized under a system of mandatory disclosure. As several commentators point out, however, there is no indication that mandatory disclosure, at least under the Federal Rules, will have this effect. First of all, the Rules explicitly state that they were not intended to modify existing privileges or immunities. Second, federal courts have given little indication that they intend to reduce the coverage of the traditional privileges. Finally, the attorney-client privilege, work product doctrine, and confidentiality rules have always been subject to the exception for disclosure that is otherwise required by law. [103] It appears unlikely that carefully drafted rules for mandatory disclosure cannot preserve the benefits of the attorney-client privilege and work product doctrine.

Mandatory Disclosure Under the Federal Rules of Civil Procedure

In response to the widely held view that discovery was in need of reform, the Civil Rules Advisory Committee began considering a system of mandatory disclosure in 1990. The new rule was to "materially reduce the cost of discovery before trial" by shifting away from a system which relied on discovery devices to obtain information to a system in which less costly and informal methods are used to exchange information. The adoption of Rule 26 proved quite contentious. It was strongly opposed by numerous interest groups within the legal profession, including the ABA, the products liability bar, the Justice Department, public interest lawyers, and civil rights lawyers. [104] The Supreme Court approved the rule, over the strong dissent of Justice Scalia, [105] and the rule went to Congress for

approval. For a variety of procedural reasons, legislation which would have deleted the provision for mandatory disclosure never came to a vote in the Senate, and the rules automatically took effect on December 1, 1993.

As adopted, Rule 26 now provides for three stages of disclosure: initial, expert, and pretrial. Initial disclosure is based on information then reasonably available to the parties. [106] Its requirements must be complied with within ten days after the parties first meet and confer. [107] It requires that a party shall provide to the other parties, without awaiting a discovery request:

The name, address, and phone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings. [108]

Information regarding documents and other tangible things that are relevant to the disputed facts. [109]

A calculation of damages. [110]

Insurance information. [111]

An important component of the initial disclosure requirements is that it provides for an opting-out mechanism. Parties must comply with the disclosure requirements "except to the extent otherwise stipulated or directed by order or local rule." [112] This opt-out provision is the subject of considerable criticism by those who believe the lack of uniform enforcement has created significant difficulties. [113]

The Rule's provision for the disclosure of expert testimony requires that the information be exchanged in a sequence directed by the court, or at least ninety days before the trial date. [114] It requires disclosure of:

The identity of any expert witness to be used at trial. [115]

A report prepared and signed by the expert stating the opinions to which the expert will testify and the basis and reasons for those opinions. [116]

Background information on the expert's qualifications, publications, and other cases in which the expert has testified. [117]

Pretrial disclosure must be complied with at least thirty days before trial. [118] It requires disclosure of:

The name, address, and phone number of each witness the party expects to present and those whom the party will call if the need arises.

A designation of those witnesses whose testimony is expected to be introduced through a deposition.

The identity of documents to be introduced.

Arizona's Zlaket Rules

Prior to the adoption of the federal rules, Arizona implemented a set of discovery reforms

commonly referred to as the Zlaket Rules. These reforms were drafted by a committee appointed by the Arizona Supreme Court, in consultation with the State Bar, and the rules were instituted in Maricopa County as a pilot study before being adopted by the Arizona Supreme Court.

Aimed at addressing the "pervasive problems with the litigation system," [119]the drafters of the Zlaket Rules sought to "reduce discovery abuse, minimize the cost and time involved in getting a case through the system, and persuade attorneys to treat each other with professional courtesy." [120]

The Zlaket Rules provide for a system of mandatory disclosure in which the parties must exchange disclosure statements that disclose specific items of information within forty days of the filing of the answer. This information includes:

The factual basis of the claim.

The legal theories upon which the claim of defense is based.

The identification of witnesses and the subject matter to which they are expected to testify.

The names and addresses of all persons whom the party believes may have knowledge relevant to the action and the nature of that knowledge.

The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, together with the custodian of those statements.

The names and addresses of experts the party expects to call, limited to one per side per issue, and the substance of their testimony.

The computation of damages and support therefor.

A list of exhibits intended to be used at trial.

The documents "known by the party to exist" which the "party believes may be relevant" or which appear "reasonably calculated to lead to the discovery of admissible evidence" whether or not in the party's possession.

In addition, the duty of disclosure is continuing, and requires that the original disclosure statement be supplemented within thirty days of obtaining any new or different information. [121]

It is thought that most information will be exchanged in the disclosure statements, and therefore the following limits are placed on other methods of discovery.

Depositions are limited to four hours in length and to only parties, experts, and records custodians. [122]

Interrogatories are limited to forty. [123]

Requests for admission are limited to twenty-five [124]

Requests for production of documents is limited to ten [125]

The rules also allow parties to stipulate to some changes in the discovery rules and deadlines. [126]

Finally, pretrial conferences are now mandatory upon request of either counsel or the court. [127] There are seventeen different subjects that can be discussed in these conferences, including discovery, alternative dispute resolution, and setting dates for trials and settlement conferences. [128]

A significant change incorporated into the Zlaket Rules is the provision for sanctions to ensure compliance and increase professionalism. Perhaps the most striking is the requirement that the judge shall exclude evidence that is not disclosed in a timely manner, absent a showing of good cause. While the phrase "good cause" is inherently ambiguous, the Maricopa Guidelines attempt to clarify the standard by defining good cause as "reasons why the disclosure was not fully and timely made. In determining whether good cause has been shown, the court will weigh the willfulness of the non-disclosure and the prejudice to the opposing party." [129] Furthermore, sanctions may be imposed for disclosure that the attorney knew or should have known was misleading. [130] The Rules equate failure to disclose with a failure to obey a court order, and provide for a variety of sanctions: monetary sanctions, the refusal to allow the party to support or oppose designated claims or defenses, prohibiting a party from introducing matters into evidence, striking pleadings or portions thereof, rendering a default judgment, or treating the conduct as contempt of court. [131] Judges in the pilot study indicated that they intended to use their broad sanctioning power, even though they were criticized for not imposing sanctions under the old rules, and attorneys felt that the threat of sanctions alone was effective in encouraging cooperation in the discovery process. [132]

Results of the Pilot Study

Statistical results from the pilot study show some encouraging trends. Over the course of the eighteen months of the pilot study, 8,228 cases were assigned to the experiment. While there was insufficient funding to provide a more scientific analysis of the data, interviews with judges and attorneys, combined with some statistics from the Court Administrator's Office, provide the following information. [133]

Zlaket Rule cases were terminated almost two months earlier than non-Zlaket Rule cases.

In non-complex cases, parties following the Zlaket Rules took fewer depositions, made fewer requests for answers to interrogatories and admissions, and made fewer requests for production of documents. This trend, however, is not present in complex cases.

Zlaket cases completed discovery in a shorter period of time. Once the disclosure statement was received, discovery took place relatively quickly, completed well within the required nine-month time limit, and requests for trial dates were therefore much earlier. This time savings did not hold true for complex cases.

Parties filed discovery motions three times more frequently in non-Zlaket Rule cases than in Zlaket Rule cases, and judges rarely imposed sanctions in the Zlaket Rule cases.

In general, most attorneys felt that when the Rules were followed they spent less time on discovery, engaged in fewer discovery disputes, and completed discovery at significantly

less expense. In complex cases, however, little reduction in time and expense was found.

Criticism from the Defense Bar

While these statistics are encouraging, some remain unconvinced of the effectiveness and desirability of the mandatory disclosure system. Significantly, little advantage was found in complex cases. If, as some suggest, complex cases are causing all the problems in the first place, little will be gained from implementing reforms that are ineffective in complex cases. The defense bar in particular remains skeptical: "No significant benefits have been achieved through mandatory disclosure, and a myriad of other problems (including ethical considerations) have developed." [134] Critics of the rules point to conflicts with the attorney-client privilege and work product doctrine, the increase in front-end costs for defendants, the unfair information advantage afforded plaintiffs, and an anticipated increase in satellite litigation, to support their criticism. In addition, both supporters and critics of the reforms point to the disadvantages of detailed disclosure in matters of family law.

Concerns over the effect of the Zlaket Rules' requirement for mandatory disclosure on the attorney-client privilege and the work product doctrine echo those raised by critics of the federal rules. In essence, defense lawyers argue that the Rules create an ethical dilemma between zealous representation and the requirement to turn over adverse information to the opponent, and makes it less likely that clients will fully confide in their attorneys, thus compromising the attorney-client relationship. In fact, nearly 90% of defense lawyers responding to a survey [135] (137 out of 153) said that they felt the rules have a chilling effect on a client's willingness to level with their attorney. [136] It is argued that "diligent and ethical (under the new rules) counsel will be helping out those who are less diligent and less ethical. Not surprisingly, defense counsel will, in many instances, hesitate in the nature and extent of an investigation conducted." [137]

138] Critics argue that "countless hours" are spent preparing disclosure statements that ultimately reveal little more than would have been disclosed under the old rules. [139] When asked if the mandatory disclosure rules increase the cost of litigation, 63% of the 174 defense lawyers responding to the survey said yes, 5% said they decreased the cost, 15% said they had no effect, and 30% were undecided. [140] Proponents of mandatory disclosure argue that while costs may be increased up front, the savings overall through less prolonged litigation will compensate for these front-end expenses. This compensatory effect will have little impact, however, on cases where little or no discovery takes place. Given that some statistics indicate that roughly 42% of the cases submitted in state court engage in no discovery, there may well be an increase in costs for some defendants.

Critics also argue that the Zlaket Rules give an unfair information advantage to the plaintiff. While the plaintiff may spend years investigating its case before filing suit, the defense must disclose its entire case within forty days of receiving the complaint. [141] Proponents, however, respond that such an argument is spurious, because many defendants, such as insurance companies, are aware that litigation is a possibility prior to the filing of a complaint and spend considerable time investigating the cases well in advance of litigation. [142] Furthermore, the defendant need only "do the best it can in the time it has" and may subsequently supplement its answers as more information becomes available. [143]

Critics also contend that mandatory disclosure has not fostered cooperation and professionalism, but instead has "replaced the occasional motion to compel discovery with a routine motion for sanctions, either because of untimely or incomplete disclosure of information." [144] The Zlaket Rules themselves provide ample opportunity for litigation by employing ambiguous terms without clarification. For example, parties are required to disclose citations of legal authorities that are "necessary for a reasonable understanding of the claim or defense" without guidance as to what constitutes a "reasonable understanding." [145] Similarly, in cases with "voluminous documentary information" attorneys are allowed to list categories rather than names of documents. It seems likely that attorneys will disagree over exactly how much constitutes "voluminous." [146] While citing hypothetical scenarios of compulsory exclusion of evidence for minor infractions, critics raise the specter of motions for sanctions being used as a tactical weapon to gain an advantage. They argue that there is no room for an evaluation of whether the information was inadvertently omitted or whether the opposing party was actually prejudiced by the omission--sanctions are mandatory absent good cause. [147] The standard of good cause outlined by Maricopa County, however, should provide room for the discretion necessary to consider these factors.

Both sides of the bar express concern over the effect that mandatory disclosure will have on domestic relations practice. Domestic relations lawyers object to the level of detail that is required to be included in the disclosure statement. Release of these intimate details may "heighten[] tensions rather than resolve the cases" and any system of mandatory disclosure must make allowance for these concerns. [148]

Alaska Rule 26

In an effort to ensure the "just, speedy and inexpensive determination of every action and proceeding," [149] a special committee of the Alaska Bar Association was appointed to propose rule changes that would reduce discovery abuse and make the civil judicial system more efficient and less costly. [150] The committee focused its initial efforts on reviewing the Zlaket Rules adopted by Arizona. As a result, the committee initially proposed significant rule changes which would have implemented sweeping disclosure requirements. When these proposals were reviewed by the full Civil Rules Committee, the sweeping reforms were rejected in favor of changes modeled more closely on Federal Rule 26, and these changes contained only limited disclosure requirements. The reforms were adopted by the Alaska Supreme Court in June, 1994. [151]

One commentator has suggested that, similar to Federal Rule 26, Alaska Rule 26 does not go far enough in altering the discovery process. [152] Rather than eliminating the evils of the current discovery process, the author contends that Alaska Rule 26 attempts to refine a system that is inherently flawed. [153] He suggests instead a system of differentiated case management combined with disclosure, and cites four primary problems with the new rule. [154]

The disclosure requirement is limited to information "relevant to disputed facts alleged with particularity in the pleadings." This narrow requirement will mean that parties will inevitably need to engage in discovery to obtain necessary information. A broader requirement, similar to Arizona's, would eliminate the need for further discovery after disclosure.

Because disclosure is tied to that which is alleged with particularity in the pleadings, a party who is unable to make specific factual allegations because the relevant information lies in the hands of its opponent, will not be able to craft a pleading sufficiently precise to trigger meaningful disclosure. Again, this party will have to engage in discovery to obtain the necessary information.

The Rule requires only that a party describe documents by category and location, it need not furnish them. It is also limited to those documents relevant to disputed facts alleged with particularity in the pleadings. This allows parties to hide damaging documents by either burying them under broad categories or by avoiding disclosure altogether if there are insufficient facts in the pleadings to mandate disclosure.

The Rule does not require disclosure of the substance of a witness' testimony. Although the names of witnesses must be disclosed, and the opposing party can depose them, both the length and cost of depositions is reduced if counsel knows the substance of the testimony prior to the deposition.

Conclusion

Any reform of discovery procedures will require time before it is fully implemented and complied with, and perhaps even more time is required before results are known. This seems especially true for a system of mandatory disclosure, where the cooperative nature of the process may require lawyers to "unlearn" much of what they have learned throughout their professional career. Carefully drafted rules that target identified problems, however, may reduce the cost of litigation for some litigants, and ultimately reduce the burden on the courts as well.

Reducing the Costs of Civil Litigation

Discovery Reform

Bibliography

Discovery Abuse: What is It? What Causes It? Is it Real?

Brazil, Wayne D., Civil Discovery: How Bad Are the Problems?, 67 A.B.A. J. 450 (1981).

Brazil, Wayne D., Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am. B. Found. Res. J. 787 (1980).

Galanter, Marc, News from Nowhere: The Debased Debate on Civil Justice, 71 Denv. U. L. Rev. 77 (1993)

Keilitz, S., Hanson, R., & Daley, H., Is Civil Discovery in State Trial Courts Out of Control?, St. Ct. J., Spring 1993 at 8.

Keilitz, Susan, Attorneys' View of Civil Discovery, 32 No. 2 Judge's Journal (1993).

Levin, Leo and Colliers, Denise D., Containing the Cost of Litigation, 37 Rutgers L.J. 219 (1985).

Louis Harris & Assocs., Inc., Judges' Opinions on Procedural Issues: A Survey of State And Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases, 69 B.U. L. Rev. 731 (1989).

Mullenix, Linda S., Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking, 46 Stan. L. Rev. 1393 (1994).

Saks, Michael J., Do We Really Know Anything About the Behavior of the Tort Litigation System--and Why Not?, 140 U. Pa. L. Rev. 1147 (1992) Samborn, Randall, Little Discovery Abuse, Vol. 15 No. 39 Nat'l Law Journal, May 31, 1993.

Setear, John, Comments on Judges' Opinions on Procedural Issues, 69 B.U. L. Rev. 765 (1989).

Trubek, David M., et al., The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72 (1983).

The Civil Discovery Reform Act of 1986

Mares, Diane, The California Civil Discovery Act of 1986: Discovery the New-Fashioned Way!, 18 Sw U. L. Rev. 233 (1989).

Newman, G. & Epstein, L., Civil Discovery Act of 1986, 10 L.A. Law. 19 (Sept 1987).

Smith, Stephan E., Civil Guide to the New Civil Discovery Act: All You Need to Know and Do: Early Reflections on the Discovery Act of 1986, 1.2 (1986).

The Economic Litigation Act

Chapper, Limiting Discovery, Judges' Journal, Spring 1980, pg. 20.

Civil and Small Claims Standing Advisory Committee, Expansion of economic litigation to include superior court cases. (circulated for comment 2/95).

Epstein, Norman L., Civil Discovery Act of 1986, 10 L.A. Law. 19 (Sept. 1987).

Epstein, Michael, Reducing Litigation Costs for Small Cases, Judges' Journal, Spring 1981 pg. 9.

Freidreichs, Michael A., Fast Track: A Panacea For a Delayed and Cluttered Court System?, 1 San Diego Justice J. 443 (Summer 1993).

McDermott, Equal Justice at Reduced Rates, 20 Judges' Journal Spring 1981.

Overhaul Plan; Superior and Municipal Court Coordination; Funding, Fast Track, 13 Civil Litigation Reporter, Sept. 1991 at 268.

Seltzer, Cheryl E., California's Pilot Project in Economic Litigation, 53 So. Cal. L. Rev.

1497 (1980).

Stevens, Jan S., Economic Litigation Rules: Municipal Courts enter a New Era, 9 S.F. Atty. No. 3 p. 17. (1983).

Limitations on Discovery Tools

Chanen, Jill Schachner, States Considering Discovery Reform: Alaska Next State to Adopt Early, Automatic Disclosure; Illinois May Follow Suit, 81-APR A.B.A. J. 20 (1995).

Smith, Bruce C., Limiting the Number of Expert Witnesses Under Rule 26(b)(4)(D): An Analysis of the Meaning of the New Rule, 25 Ariz. St. Univ. L.J. 167 (1993).

Underwood, William D., Divergence In The Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform, 25 Tex. Tech. L. Rev. 261 (1994).

Sanctions

Baker, Thomas, The Inherent Power To Impose Sanctions How A Federal Judge is Like an 800-lb Gorilla, Review of Litigation vol. 14, no. 1 Winter 1994, pg. 195.

Donovan, Timothy M., The Sanction Provision of the New California Civil Discovery Act, Section 2023: Will it Make a Difference or is it Just Another "Paper Tiger"?, 15 Pepp. L. Rev. 401 (1988).

Roberts, Florrie Y., Pre-trial Sanctions: An Empirical Study, 23 Pac.L. J. 1 (1991).

Weissbrod, Margaret L., Sanctions under Amended Rule 26 -- Scalpel or Meat-Ax? The 1983 Amendments to the Federal Rules of Civil Procedure, 46 Ohio St. L.J. 183 (1985).

Early, Pre-Trial Discovery Plan/Conference

Edwards, David L., The First Amendment and Confidentiality Orders Since Seattle Times v. Rhinehart, 13 Am. J. Trial Advoc. 681 (Fall 1989).

Miller, Arthur., Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427 (Dec. 1991).

Tigar, Michael, Pretrial Case Management Under the Amended Rules: Too Many Words for a Good Idea, Review of Litigation, vol. 14, no. 1 Winter 1994, pg. 137.

Mandatory Disclosure

Bell, Griffin B. et al., Automatic Disclosure in Discovery -- The Rush to Reform, 27 Ga. L. Rev. 1 (1992).

Birmingham & Onofry, Mandatory Disclosure of Information: One State's Experience, For the Defense, July 1994 pg. 7

Brazil, Wayne D., Civil Discovery: How Bad Are the Problems?, 67 A.B.A. J. 450 (1981).

Brazil, Wayne D., The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295 (1978).

Brazil, Wayne, Views From the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 Am. B. Found. Res. J. 219.

Frankel, Lawrence, Disclosure in the Federal Courts: A Cure for Discovery Ills?, 25 Ariz. St. L.J. 249 (1993).

Hammond, Larry A., Call it What You Will, it is not Justice Reform, 25 Ariz. St. Univ. L.J. 285 (1993).

Harnetiauz, Bryan P., Harnessing Adversariness in Discovery Responses: A Proposal for Measuring the Duty to Disclose After Physicians Insurance Exchange & Ass'n v. Fisons Corporation, 29 Gonz. L. Rev. 499 (1993/1994).

Hench, Virginia, Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action, 67 Temp. L. Rev. 179 (1994)

Holmes, James, The Disruption of Mandatory Disclosure with the Work Product Doctrine An Analysis of a Potential Problem and a Proposed Solution, 73 Tex. La. Rev. 177 (1994).

Koski, John C., Mandatory Disclosure, 80-Feb A.B.A. J. 85 (1994).

Lang, Angela R. Mandatory Disclosure Can Improve the Discovery System, 70 Ind. L.J. 657 (Spring 1995).

Mayer, Jeffrey, Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of Civil Procedure, 12 Rev. Litig. 77 (Fall 1992).

Mitchell, Meade W., Discovery Abuse and a Proposed Reform: Mandatory Disclosure, 62 Miss. L.J. 743 (1993).

Mullenix, Linda S., Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules, 14 Rev. Litig. 13 (Winter 1994).

Mullenix, Linda, Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. Rev. 795 (April 1991).

Reske, Tinkering with Procedure: Federal Committee Backs Automatic Disclosure, Retained Rule 11, 78 Sept. A.B.A. J. 14 (1992).

Robel, Lauren K, Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules, 14 Rev. Litig. 49 (1994).

Rosenberg, Maurice and King, Warren R., Curbing Discovery Abuse in Civil Litigation: Enough is Enough, 1981 B.Y.U. L. Rev. 579.

Samborn, Randall, Districts' Discovery Rules Differ, Nat'l L.J., Nov. 14, 1994, at A1, A25.

Schwarzer, William W., Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?, 74 Judicature 178, 1991.

Schwarzer, William, In Defense of Automatic Disclosure in Discovery 27 Ga. L. Rev. 655 (1993).

Sorenson, Charles Jr., Disclosure Under Federal Rule of Civil Procedure 26(a) - 'Much Ado About Nothing?', 46 Hastings L.J. 679 (1995).

Stienstra, Donna, Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (March 24, 1995 report and memo updating March 1, 1995 initial memo).

Williams, Jackson, Implementation of Mandatory Disclosure in Federal Courts--A Hodgepodge, For the Defense, 14 (July 1994).

Wolfson, Michael, Addressing the Adversarial Dilemma of Civil Discovery, 36 Clev. St. L. Rev. 17 (1988).

Arizona's Zlaket Rules

Birmingham & Onofry, Mandatory Disclosure of Information: One State's Experience, For the Defense, July 1994 pg. 7

Burke, Francis J. and Potts, Karen A., Arizona's New Zlaket Rules and the Private Practitioner: Death of Rambo?, 25 Ariz. St. L.J. 99 (1993).

Cure, Carol Campbell, Practical Issues Concerning Arizona's New Rules Of Civil Procedure: A Defense Perspective, 25 Ariz. St. Univ. L.J. 55 (1993).

Myers, Robert D., MAD Track: An Experiment in Terror, 25 Ariz. St. L.J. 11-34 (1993).

Shartel, Stratton J., After One Year, Arizona Bar Cautiously Supports State's Discovery Reforms, Inside Litig., Sept. 1993, at 1.

Shartel, Stratton J., The Arizona Changes vs. Federal Rule 26: Comparing the Place of Reform, Inside Litig., Sept. 1993, at 32.

Yarnell, Michael, A Judicial View: Living With the New Civil Rules of Procedure, 25 Ariz. St. L.J. 35 (1993).

Zlaket, Thomas, Encouraging Litigators to Be Lawyers: Arizona's New Civil Rules, 25 Ariz. St. L.J. 1 (1993).

Mandatory Disclosure--Other States

Chanen, Jill Schachner, Alaska Next State to Adopt Early, Automatic Disclosure; Illinois May Follow Suit, A.B.A. J., April 1995

Collins, Jeffrey D., Alaska Rule 26: A Quixotic Venture into the World of Mandatory Disclosure, 11 Alaska L. Rev. 337 (1994).

Notes

[1] Charles W. Sorenson, Jr., Disclosure Under Federal Rule of Civil Procedure 26(a)-- "Much Ado About Nothing?", 46 Hastings L.J. 679 (1995). ([return to text](#))

[2] Id. at 701-02. ([return to text](#))

[3] Wayne D. Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 Am. B. Found. Res. J. 787, 857 (1980). ([return to text](#))

[4] Sorenson, supra note 1, at 699. ([return to text](#))

[5] Michael E. Wolfson, Addressing the Adversarial Dilemma of Civil Discovery, 36 Clev. St. L. Rev. 17, 42 (1988). ([return to text](#))

[6] Sorenson, supra note 1, at 699-700. ([return to text](#))

[7] Wolfson, supra note 5, at 42. ([return to text](#))

[8] Sorenson, supra note 1, at 696 (quoting Maurice Rosenberg, Federal Rules of Civil Procedure in Action: Assessing Their Impact, 137 U. Pa. L. Rev. 2197, 2200, 2204-05 (1988)). ([return to text](#))

[9] Wolfson, supra note 5, at 46 n.183. ([return to text](#))

[10] Id. at 48 n.192. (citing Brazil, supra note 3, at 862). ([return to text](#))

[11] Sorenson, supra note 1, at 712. ([return to text](#))

[12] Wolfson, supra note 5, at 19-20. See also Ron Coleman, Civil Disclosure, ABA Journal, vol. 81, Oct. 1995, at 76, 77 (stating that the consensual exchange of information required in mandatory disclosure is "antithetical to the adversary system"). ([return to text](#))

[13] Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 325 (1985) (citations omitted). ([return to text](#))

[14] United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958). ([return to text](#))

[15] Wolfson, supra note 5, at 53. The author suggests a system of mandatory disclosure. ([return to text](#))

[16] For a compilation of studies addressing discovery under the federal rules, see Sorenson, supra note 1, at 697 n.57. ([return to text](#))

[17] Linda S. Mullenix, Discovery in Disarray: The Pervasive Myth of Pervasive Discovery

Abuse and the Consequences for Unfounded Rulemaking, 46 Stan. L. Rev. 1393 (1994). ([return to text](#))

[18] Sorenson, supra note 1 at 703-04 (1995). ([return to text](#))

[19] Mullenix, supra note 17, at 1396. ([return to text](#))

[20] Mullenix, supra note 17. ([return to text](#))

[21] Id. at 1396. ([return to text](#))

[22] Id. at 1395-96. ([return to text](#))

[23] Id. at 1410. ([return to text](#))

[24] Task Force on Civil Justice Reform Brookings Institution, Justice for All: Reducing Costs and Delay in Civil Litigation (1989). ([return to text](#))

[25] Mullenix, supra note 17, at 1410 n.79 (citing Louis Harris and Associates, Inc., Procedural Reform of the Civil Justice System, Humphrey Taylor and Gary L. Schermund project directors, Project No. 881023, Mar. 1989). ([return to text](#))

[26] Id. at 1414-15. ([return to text](#))

[27] Id. at 1411. ([return to text](#))

[28] Id. at 1417 n.121 (citing the Brookings-Biden Report, supra note 24, at 5). ([return to text](#))

[29] Id. at 1415. ([return to text](#))

[30] Mullenix, supra note 17, at 1416 (citing the Brookings-Biden Report, supra note 24, at 1). Though the task force included litigants as sharing the same views as judges and attorneys, it is important to note that the Harris study on which the report was based did not include interviews with litigants. ([return to text](#))

[31] Id. at 1417. ([return to text](#))

[32] Id. at 1421. ([return to text](#))

[33] Id. at 1421. ([return to text](#))

[34] Id. at 1421. ([return to text](#))

[35] Mullenix, supra note 17, at 1419. ([return to text](#))

[36] Id. at 1421. ([return to text](#))

[37] Sorenson, supra note 1, at 708-09 (citing Wayne D. Brazil, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 Am. B. Found. Res. J. 217, 217, 219, 220 n.1, 222-24). Conventional wisdom, supported by empirical evidence, suggests that the frequency of discovery is linked to case complexity, with cases involving product liability and malpractice requiring more discovery. Discovery also increases with the number of parties involved and when divergent interests require

separate representation. Susan Keilitz, Roger A. Hanson, Henry K.W. Daley, Is Civil Discovery in State Trial Courts Out of Control?, 17 St. Ct. J. 8 (Spring 1993). A 1970 study by Professor Wayne Brazil found that although two-thirds of all attorneys surveyed found that discovery was working at least adequately, this perception did not hold true for large-case litigation. Brazil, supra note 10, at 870-71. ([return to text](#))

[38] Mullenix, supra note 17, at 1432-42. These studies are discussed in somewhat greater detail below. ([return to text](#))

[39] See, e.g., Sorenson, supra note 1, at 703-05; Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System--and Why Not?, 140 U. Pa. L. Rev. 1147, 1151-68 (1992) (asserting that there is an absence of evidence to accurately assess the litigation system, and that most claims are based on conclusory assertions unsupported by evidence); David M. Trubek, et al., The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72 (1983) (stating that an empirical study of the cost of litigation indicates that crisis rhetoric is not supported by reality, and emphasizing the need for more empirical research); Marc Galanter, News from Nowhere: The Debased Debate on Civil Justice, 71 Denv. U. L. Rev. 77 (1993) (asserting that the litigation explosion rhetoric is based on naive speculation rather than empirical evidence). ([return to text](#))

[40] Sorenson, supra note 1, at 706 (quoting Jeffrey J. Mayer, Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of Civil Procedure, 12 Rev. Litig. 77, 87 (1992)). ([return to text](#))

[41] Id. at 706 n.92 (citing David S. Walker, Professionalism and Procedure: Notes on an Empirical Study, 38 Drake L. Rev. 759, 781, 783-86 (1988-89)). ([return to text](#))

[42] Mullenix, supra note 17, at 1436 (quoting the FJC study at page xi). ([return to text](#))

[43] Id. at 1434-35 (citing the FJC study at page 28). ([return to text](#))

[44] Id. at 1435 n.222. ([return to text](#))

[45] Id. at 1435 n.225. The authors of the FJC report concluded that the infrequent resort to sanctions indicated that sanctions were not an incentive to prompt discovery response. Professor Sorenson suggests yet another reason. In looking at data from Professor Brazil's study (see Brazil, supra note 10, at 857), Sorenson notes that while attorneys identified incomplete or evasive responses in sixty percent of their cases, only fourteen percent were thought to involve bad faith or dishonesty by their opponents. Sorenson suggests that attorneys do not believe such behavior to be "wrong," but instead it is simply part of the "responsibilities of the adversarial advocate to use ambiguities and narrow construction techniques to the client's advantage." Sorenson, supra note 1, at 711. Combined with the fact that the same attorneys found that inadequate judicial management of discovery is the biggest problem, this suggests that "attorneys are compelled by the adversarial culture to engage in activities that they recognize are potentially counterproductive and to seek the assistance of the courts to save them from themselves." Id. ([return to text](#))

[46] The data summarized below is from Keilitz, et al., supra note 37. The results of the study are also reported in Susan Keilitz, Roger Hanson, Richard Semiatin, Attorney's View of Civil Discovery, 32 Judges' J. 2 (Spring 1993).

The NCSC study seems to support the findings of the FJC study suggesting that discovery is conducted less often than is generally assumed. Nonetheless, the authors did recommend and evaluate four reforms that parallel those suggested by the Brookings-Biden task force and the CJRA: mandatory disclosure, limits on the number of interrogatories and depositions, attorney certification, and differentiated case management. ([return to text](#))

[47] Keilitz, et al., supra note 37, at 11 n.23. ([return to text](#))

[48] Id. at 13. ([return to text](#))

[49] Id. at 13-14. ([return to text](#))

[50] Id. at 14. ([return to text](#))

[51] Mullenix, supra note 17, at 1396. ([return to text](#))

[52] Stephen E. Smith, A Guide to the New Civil Discovery Act: All You Need to Know and Do, 1.1, p. 2-3, Special Supplement to California Civil Discovery Practice, California Continuing Education of the Bar, December 1986. ([return to text](#))

[53] Chiang, Discovery Act to Bring Changes in Trial Practice, 99 L.A. Daily Journal, Nov. 19, 1986, at 1. ([return to text](#))

[54] Norman L. Epstein, Civil Discovery Act of 1986, 10 L.A. Law. 19 (Sept. 1987). ([return to text](#))

[55] Smith, supra note 52. ([return to text](#))

[56] Chiang, supra note 53. ([return to text](#))

[57] Id. ([return to text](#))

[58] Cal. Civ. Proc. Code 2023(a)(1)-(9). ([return to text](#))

[59] Smith, supra note 52, at 1.3, p.5. ([return to text](#))

[60] Cal. Civ. Proc. Code 2023(a)(9), 2023(b)(1). ([return to text](#))

[61] Timothy M. Donovan, The Sanction Provision of the New California Civil Discovery Act, Section 2023: Will it Make a Difference or is it Just Another "Paper Tiger"?, 15 Pepp. L. Rev. 401, 407 (1988). ([return to text](#))

[62] Chiang, supra note 53, at 20. ([return to text](#))

[63] Id. at 20. ([return to text](#))

[64] Cal. Civ. Proc. Code 2031(a)(1). ([return to text](#))

[65] Cal. Civ. Proc. Code 2031(f)(1). ([return to text](#))

[66] Cal. Civ. Proc. Code 2025(p). ([return to text](#))

[67] Cal. Civ. Proc. Code 2025(t). ([return to text](#))

[68] *Id.* ([return to text](#))

[69] Epstein, *supra* note 54, at 22. ([return to text](#))

[70] Donovan, *supra* note 61, at 413. ([return to text](#))

[71] Chiang, *supra* note 53, at 20. ([return to text](#))

[72] Diane Mares, The California Civil Discovery Act of 1986: Discovery the New-Fashioned Way!, 18 Sw. U. L. Rev. 233, 250 (1989). ([return to text](#))

[73] Epstein, *supra* note 54, at 21. ([return to text](#))

[74] Cal. Civ. Proc. Code 2023(b)(1)-(5). ([return to text](#))

[75] Smith, *supra* note 52, at 1.4 p. 6-7 (suggesting that the outcome determinative nature of these sanctions make it unlikely that these sanctions will be imposed unless there has been flagrant and persistent refusal to obey a prior discovery order); see also Donovan, *supra* note 61, at 420. ([return to text](#))

[76] Florrie Young Roberts, Pre-trial Sanctions: An Empirical Study, 23 Pac. L. J. 1 (1991). ([return to text](#))

[77] *Id.* at 49. ([return to text](#))

[78] *Id.* at 50. ([return to text](#))

[79] *Id.* at 57. ([return to text](#))

[80] *Id.* at 61. ([return to text](#))

[81] Roberts, *supra* note 76, at 61. ([return to text](#))

[82] *Id.* at 62. ([return to text](#))

[83] *Id.* ([return to text](#))

[84] *Id.* ([return to text](#))

[85] *Id.* at 63. ([return to text](#))

[86] Roberts, *supra* note 76, at 63. ([return to text](#))

[87] *Id.* at 64. ([return to text](#))

[88] *Id.* at 82-84. ([return to text](#))

[89] *Id.* at 91. ([return to text](#))

[90] *Id.* ([return to text](#))

[91] Roberts, *supra* note 76, at 91-92. ([return to text](#))

[92] The foregoing information was summarized from an article discussing the general

benefits of mandatory disclosure, William Schwarzer, Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?, 74 *Judicature* 178 (1991). ([return to text](#))

[93] Keilitz, et al., supra note 37, at 15. ([return to text](#))

[94] Id. ([return to text](#))

[95] Griffin B. Bell, Chilton Davis Varner, Hugh Q. Gottschalk, Automatic Disclosure in Discovery--The Rush to Reform, 27 *Ga. L. Rev.* 1, 40 (1992). ([return to text](#))

[96] Id. at 45. ([return to text](#))

[97] Virginia E. Hench, Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action, 67 *Temp. L. Rev.* 179, 207 (1994). ([return to text](#))

[98] Bell, supra note 95, at 5. ([return to text](#))

[99] See supra notes 9-11, 49 and accompanying text. But see infra note 132 and accompanying text. ([return to text](#))

[100] Sorenson, supra note 1, at 760-66. ([return to text](#))

[101] Id. at 766-72. ([return to text](#))

[102] Id. at 772-79. ([return to text](#))

[103] Linda S. Mullenix, Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules, 14 *Review of Litigation* 13, 29 (1994). ([return to text](#))

[104] Sorenson, supra note 1, at 697 n.57. There were over 300 written submissions received from individual practitioners, law firms, scholars, bar association, plaintiffs' and defense trial lawyer associations, insurers, public interest groups, federal district judges, and industry. Of them, all but approximately a dozen opposed the new rule. Bell, et al., supra note 95, at 28. ([return to text](#))

[105] Justice Scalia objected to the proposed rule on four grounds. First, he predicted that the new rule would increase rather than decrease litigants' discovery burden by adding an additional layer of discovery. Second, he expressed concern regarding the ethical tensions that would develop between the disclosure requirements and a lawyer's ethical duty to zealously represent his or her client. Third, Justice Scalia thought it imprudent to proceed with such a rule when there had been little testing of the rule's effectiveness on the local level. Finally, Justice Scalia questioned the wisdom of proceeding with revisions that were strongly criticized by the legal profession. Amendments to Federal Rules of Civil Procedure and Forms, 146 *F.R.D.* 401, 507, 510-12 (1983) (dissenting statement of Scalia, J.). ([return to text](#))

[106] Fed. R. Civ. P. 26(a)(1). ([return to text](#))

[107] Fed. R. Civ. P. 26(a)(1)(D). ([return to text](#))

[108] Fed. R. Civ. P. 26(a)(1)(A). ([return to text](#))

- [109] Fed. R. Civ. P. 26(a)(1)(B). ([return to text](#))
- [110] Fed. R. Civ. P. 26(a)(1)(C). ([return to text](#))
- [111] Fed. R. Civ. P. 26(a)(1)(D) ([return to text](#))
- [112] Fed. R. Civ. P. 26(a)(1). ([return to text](#))
- [113] Jackson Williams, Implementation of Mandatory Disclosure in Federal Courts--A Hodgepodge, For the Defense, 14 (July 1994). ([return to text](#))
- [114] Fed. R. Civ. P. 26(a)(2)(C). ([return to text](#))
- [115] Fed. R. Civ. P. 26(a)(2)(A). ([return to text](#))
- [116] Fed. R. Civ. P. 26(a)(2)(B). ([return to text](#))
- [117] Fed. R. Civ. P. 26(a)(2)(B). ([return to text](#))
- [118] Fed. R. Civ. P. 26(a)(3). ([return to text](#))
- [119] Hon. Robert D. Myers, MAD Track: An Experiment in Terror, 25 Ariz. St. L.J. 11, 13 (1993). ([return to text](#))
- [120] Id. ([return to text](#))
- [121] Summary taken from J. Stratton Shartel, After One Year, Arizona Bar Cautiously Supports State's Discovery Reforms, 7 No. 9 Inside Litigation 1 (September 1993) ([return to text](#))
- [122] Ariz. R. Civ. P. 30(a). ([return to text](#))
- [123] Ariz. R. Civ. P. 33.1(a). ([return to text](#))
- [124] Ariz. R. Civ. P. 36(b). ([return to text](#))
- [125] Ariz. R. Civ. P. 34(b). ([return to text](#))
- [126] Ariz. R. Civ. P. 29, 30(a) & cmt. 33.1(b). ([return to text](#))
- [127] Ariz. R. Civ. P. 16(b). ([return to text](#))
- [128] Ariz. R. Civ. P. 16(c). ([return to text](#))
- [129] Maricopa Guidelines 4(c) and cmt. ([return to text](#))
- [130] Ariz. R. Civ. P. 26.1(e). ([return to text](#))
- [131] Ariz. R. Civ. P. 37(b)2). ([return to text](#))
- [132] Myers, supra note 119, at 26. ([return to text](#))
- [133] Id. at 20-25. ([return to text](#))
- [134] William T. Birmingham & Charles D. Onofry, Mandatory Disclosure of Information:

One State's Experience, For the Defense, 7, 12 (July 1994). ([return to text](#))

[135] Partial results of this survey were published in Birmingham, supra note 134 at 12-13. The survey was conducted by the Arizona Association of Defense Counsel regarding critical aspects of mandatory disclosure. The complete results were published in the April 1993 issue of Maricopa Lawyer. ([return to text](#))

[136] Birmingham supra note 134, at 12. ([return to text](#))

[137] Id. at 10-11. ([return to text](#))

[138] Shartel, supra note 121. ([return to text](#))

[139] Id. ([return to text](#))

[140] Birmingham, supra note 134, at 13. ([return to text](#))

[141] Shartel, supra note 121. ([return to text](#))

[142] Id. ([return to text](#))

[143] Id. ([return to text](#))

[144] Birmingham, supra note 134, at 12. ([return to text](#))

Francis J. Burke, Jr. and Karen A. Potts, Arizona's New Zlaket Rules and the Private Practitioner: Death of Rambo?, 25 Ariz. St. L.J. 99, 110-11 (1993). ([return to text](#))

[146] Id. at 111. ([return to text](#))

[147] Birmingham, supra note 134, at 12. ([return to text](#))

[148] Shartel, supra note 121. ([return to text](#))

[149] Alaska R. Civ. P.1. ([return to text](#))

[150] Jeffrey D. Collins, Alaska Rule 26: A Quixotic Venture Into the World of Mandatory Disclosure, 11 Alaska L. Rev. 337, 337 (1994). ([return to text](#))

[151] Id. at 338. ([return to text](#))

[152] Id. ([return to text](#))

[153] Id. ([return to text](#))

[154] Id. at 343-44. ([return to text](#))